UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

IN RE: NEW INDY EMISSIONS LITIGATION	)	
	)	
	)	No. 0:21-cv-1480-SAL
	)	No. 0:21-cv-1704-SAL
	)	
	)	**ORAL ARGUMENT**
	)	**REQUESTED**
	)	
	)	

DEFENDANT NEW-INDY CATAWBA, LLC's MOTION TO DISMISS CONSOLIDATED AMENDED CLASS ACTION COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS

Scott T. Schutte (admitted *pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
110 North Wacker Drive, Suite 2800
Chicago, IL 60606-1511
Phone: 312.324.1000/Fax: 312.324.1001
scott.schutte@morganlewis.com

John McGahren (admitted *pro hac vice*)
Sean Radomski (admitted *pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540-6241
Phone: 609.919.6600/Fax: 609.919.6701
john.mcgahren@morganlewis.com
sean.radomski@morganlewis.com

Brady Edwards (*pro hac vice* forthcoming)
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, Texas 77002
Phone: 713.890.5000/Fax: 713.890.5001
brady.edwards@morganlewis.com

Peter M. McCoy, Jr.
MCCOY LAW GROUP LLC
15 Piroleau Street
Charleston, South Carolina 29401
Phone: 843.459.8835
Fax: 843.459.8834
peter@mccoylawgrp.com
Federal ID Number: 9896

Counsel for Defendant New-Indy Catawba LLC

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Pursuant to Federal Rules of Civil Procedure 8(a), 12(b)(1), 12(b)(6), 12(f), and 23(d)(1)(D), Defendant New-Indy Catawba, LLC ("New-Indy Catawba") submits this Motion to Dismiss Plaintiffs' Consolidated Amended Class Action Complaint ("CAC")[1] or, in the Alternative, to Strike Plaintiffs' Class Allegations.[2]

I. INTRODUCTION

The amendments Plaintiffs have made to their CAC – the sixth complaint filed by the same group of Plaintiffs' lawyers – highlight why Plaintiffs have not stated any viable claims, and even more clearly why it is impossible to certify the 1,250-square-mile class of homeowners that Plaintiffs propose.

Despite the opportunity to see, analyze, and respond to the prior motion to dismiss arguments made by New-Indy Catawba and co-defendant New-Indy Containerboard, LLC[3] ("New-Indy Containerboard"), the CAC does not remedy the pleading shortcomings previously identified with regard to the only three substantive claims that Plaintiffs now assert. As set forth below, the CAC fails in whole or in part under Federal Rule of Civil Procedure Rule 12(b) for several separate and independent reasons:

- Plaintiffs' private nuisance claim (Count 1) fails because (i) they have not pled facts that give rise to an actionable injury; and (ii) such claims are barred by South Carolina statutory and regulatory law.

[1] The CAC's paragraphs are numbered from 1-171. However, after ¶ 134, the numbering reverts back to 124. Thus, there are multiple ¶¶ 124-34.

[2] The plaintiffs are Kenny N. White, Tracie Nickell, Amanda Swagger, and John Hollis (the "*White* Plaintiffs"), and Terri Kennedy, Enrique Lizano, Melda Gain, Krista Manus-Cook, Jean Hivanec, and Kathleen Moran (the "*Kennedy* Plaintiffs") (collectively, "Plaintiffs"). Plaintiffs have filed identical CACs on the *White v. New-Indy Catawba*, No. 0:21-cv-1480-SAL and *Kennedy v. New-Indy Catawba*, No. 0:21-cv-1704-SAL dockets. Based on direction from this Court's chambers, citations to the CAC will refer to the CAC filed on the 1480 docket (Dkt. 49).

[3] New-Indy Containerboard is filing a separate motion to dismiss to raise jurisdictional arguments not available to New-Indy Catawba, but is joining in all the arguments made herein. New-Indy Catawba and New-Indy Containerboard may be referred to herein as "Defendants."

- Plaintiffs' claim for "negligence, gross negligence, recklessness, and willful conduct" (Count 2) must be dismissed because Plaintiffs have not pled facts that give rise to a duty of care.
- Plaintiffs' claim for negligence per se (Count 3) fails because Plaintiffs do not identify any statute for their benefit as private parties.
- To the extent Plaintiffs' claims are based on purported discharges of wastewater to the Catawba River, Plaintiffs lack standing to bring such claims as they allege no harm that they claim to have suffered.

Even if any of Plaintiffs' claims were to survive these Rule 12(b) arguments (which they should not), Plaintiffs' request to certify an absurdly overbroad class should be stricken. Although Plaintiffs have narrowed the class definition from a 30-mile radius circle to one with a 20-mile radius, they have incorporated numerous "odor complaint maps" into their CAC that confirm Defendants' prior arguments that purported emissions *did not* uniformly disperse from its mill *in all directions*. Because there are no facts plausibly showing emissions uniformly dispersed in all directions, Plaintiffs' incorporation of these odor complaint maps, thus, renders their proposed class uncertifiable based on the pleadings alone. As Defendants have previously noted, all named Plaintiffs live within 14.3 miles to the north, northwest, northeast, and east of the paper mill owned and operated by New-Indy Catawba (the "Mill"). Despite this, Plaintiffs ask this Court to certify a class encompassing every person who "owned, leased, resided on property, or had a beneficial interest in property, up to 20 miles from the Mill." The maps Plaintiffs incorporate demonstrate that this arbitrary and inexplicably perfectly circular area of more than 1,250 square miles cannot be certified, as there have been very few complaints to the Mill's south. Instead, the vast majority of complaints are largely clustered to the Mill's north – the same area in which Plaintiffs purportedly reside. Defendants advanced this argument in three previous motions, and the Court should see Plaintiffs' latest allegations for what they are: an admission that a putative class with a perfectly circular area can never be certified. Nor, based on the allegations in the CAC, can

Plaintiffs satisfy Rule 23's certification requirements of commonality, typicality, and predominance.

II. STATEMENT OF FACTS & PROCEDURAL HISTORY[4]

In late 2018, New-Indy Catawba purchased the Mill, which is located in Catawba, South Carolina.[5] *See* CAC ¶¶ 2-3; Dkt. 49-3 at ECF p. 6. New-Indy Catawba operates the Mill under a Title V Operating Permit for air emissions. *See* CAC ¶ 62; Dkt. 49-1 at ECF p. 3, ¶ 1. New-Indy Catawba converted the Mill "from producing bleached paper to producing brown paper for containerboard." *See* CAC ¶ 3. To that end, on July 23, 2019, New-Indy Catawba received a state construction permit authorizing manufacturing conversions. *Id.* ¶ 63. Prior to the conversion, New-Indy Catawba "sent more than half of the volume of its foul condensate steam, which contained hydrogen sulfide, methyl mercaptan, methanol, and other pollutants, to [a] steam stripper," which it was using to remove "hydrogen sulfide and other pollutants and contaminants from the Mill's air emissions." *Id.* ¶ 65. The Mill piped "the remainder of its foul condensate to [an] Aeration Stabilization Basin ('ASB')," which passively strips hydrogen sulfide. *Id.* ¶¶ 65-66. After New-Indy Catawba converted the Mill and resumed operations, "it began sending all of its foul condensate steam to the ASB in the wastewater treatment facility." *Id.* ¶ 66.

Plaintiffs allege that, after the Mill began "high volume production" in February 2021, "people living and working within a 30-mile radius of the Mill experienced and complained of strong, foul odors and physical reactions to exposure to excessive amounts of hydrogen sulfide

[4] The Statement of Facts is taken from the CAC's allegations and exhibits and the documents referenced in and incorporated into the CAC. *See* Dkt. 49. New-Indy Catawba accepts the facts alleged in the CAC as true solely for the purpose of this Motion.

[5] The CAC alleges that both New-Indy Catawba and New-Indy Containerboard "purchased the Mill." *See* CAC ¶ 3. That is incorrect. *See* Dkt. 49-3 at ECF p. 6 (defining New-Indy Catawba as the Mill's "**Purchaser**"). The CAC correctly alleges that New-Indy Catawba "is the operator of the Mill." *See* CAC ¶ 36.

and other pollutants and contaminants." *Id.* ¶¶ 7, 10. While Plaintiffs have (apparently strategically) deleted these allegations from the CAC, and as discussed in Section IV.B(i) below, the Named Plaintiffs claim to have started experiencing symptoms at different times. According to Plaintiffs, hydrogen sulfide smells like rotten eggs and, if inhaled, allegedly can "cause various adverse health effects," including "irritation to the eyes, nose, or throat, difficulty breathing for some asthmatics, and headaches, poor memory, tiredness, and balance problems." *Id.* ¶¶ 68-69. In March 2021, the South Carolina Department of Health and Environmental Control ("DHEC") and U.S. Environmental Protection Agency ("EPA") began investigating the odors. *Id.* ¶¶ 11, 76-77. On May 7, DHEC ordered New-Indy Catawba to take actions to remedy air pollution purportedly being released from the Mill ("DHEC Order"). *Id.* ¶ 12; Dkt. 49-1. On May 13, EPA also ordered New-Indy Catawba to take actions to remedy the Mill's purported air pollution ("EPA Order"). CAC ¶ 13; Dkt. 49-2.[6]

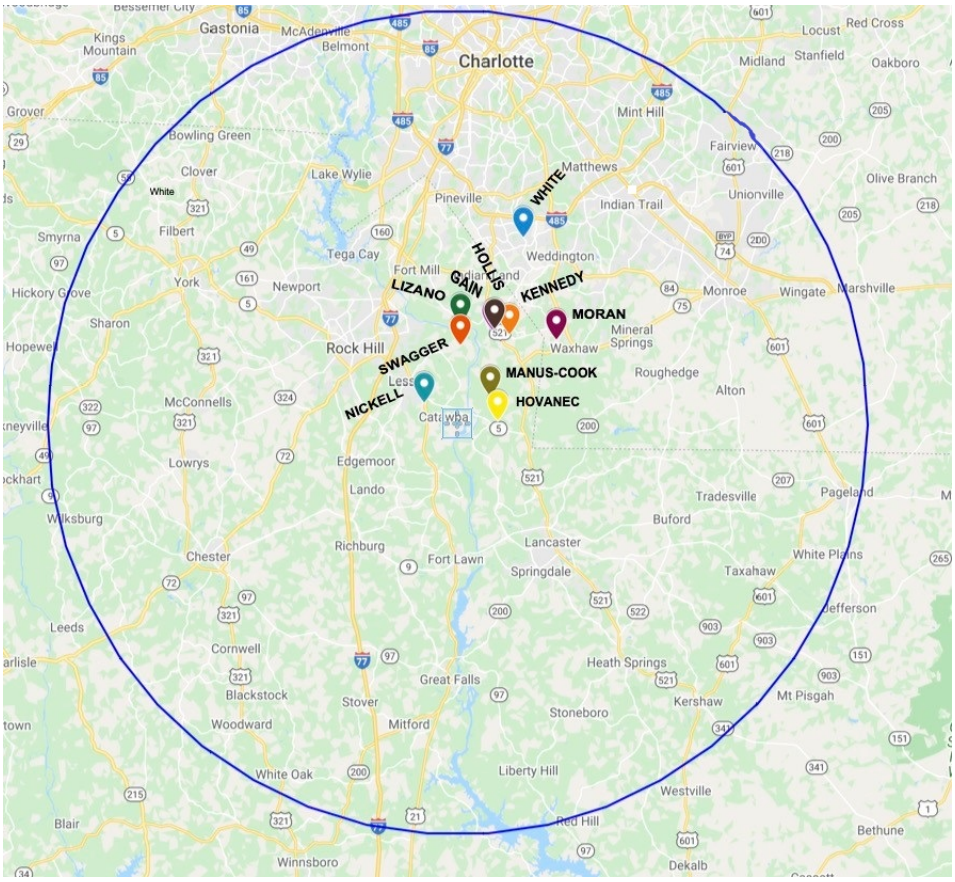
Plaintiffs also allege that New-Indy Catawba "discharge[s] up to twenty-five million gallons of wastewater per day in the Catawba River, which includes tens of thousands of pounds of ammonia and nitrate. The Catawba Riverkeeper has reported the presence of 'chunky foam' in areas downstream of the Mill's wastewater discharge since the fall of 2020." CAC ¶ 14. These

[6] On July 12, the United States filed a complaint against New-Indy Catawba "seeking injunctive relief under Section 303 requiring continuing compliance with the EPA Order." *See United States v. New Indy Catawba, LLC*, No. 0:21-cv-2053-SAL at Dkt. 1 ¶ 3 (D.S.C.) (hereinafter the "*EPA Action*"). That same day, New-Indy Catawba jointly moved with the United States for entry of a consent order (the "Consent Order") that would extend the EPA Order past its scheduled expiration of July 26, 2021, which this Court granted on July 13. *See id.* at Dkt. 5, Dkt. 6. On September 29, Plaintiffs filed a motion to intervene in the *EPA Action*, which is now fully briefed. *See id.* at Dkts. 7, 18-19, 21, 26. On December 29, the United States filed a proposed Consent Decree intended to settle the *EPA Action*. *See id.* at Dkt. 27, Dkt. 27-1 (the "Consent Decree"). That same day, to allow the United States to receive and consider public comments on the Consent Decree, the Court extended the Consent Order during the pendency of the comment period. *See id.* at Dkt. 28.

discharges are "under National Pollutant Discharge Elimination System (NPDES) Permit No. SC0001015, a wastewater discharge permit issued by DHEC." *Id.* ¶ 62.

On May 18, 2021, Plaintiff Kenny White filed the first class action against New-Indy Catawba, and, on May 25, the *White* Plaintiffs filed an amended complaint against both New-Indy Catawba and New-Indy Containerboard. *White* Dkt. 1, 6. On May 27, Shirley Landsdown and Ethel Piercey (the "*Landsdown* Plaintiffs") filed their class action against both New-Indy Catawba and New-Indy Containerboard. *Landsdown v. New-Indy Catawba LLC*, No. 0:21-cv-1586-SAL at Dkt. 1 (D.S.C.). On June 8, Plaintiff Terri Kennedy filed her class action complaint, and, on August 11, the *Kennedy* Plaintiffs filed their amended complaint. *See Kennedy* Dkt. 1, 27. On August 24, the *Landsdown* Plaintiffs dismissed their matter without prejudice. *Landsdown* Dkt. 22. On September 23, Plaintiffs moved to consolidate *White* and *Kennedy*, appoint interim counsel, and for leave to file a consolidated amended complaint. *See White* Dkt. 39; *Kennedy* Dkt. 35. On December 8, the Court granted Plaintiffs' motion, *White* Dkt. 46; *Kennedy* Dkt. 42, and Plaintiffs filed their CAC on December 15. *White* Dkt. 49; *Kennedy* Dkt. 46.

Plaintiffs seek to represent a class of all "persons who, from November 1, 2020 to the present, owned, leased, resided on property, or had a beneficial interest in property, up to 20 miles from the Mill." CAC ¶ 101. Plaintiffs do not provide any explanation for the putative class being shaped in a twenty-mile-radius perfect circle or how it relates to Defendants' alleged conduct. In fact, all named Plaintiffs live within 14.3 miles to the north, northwest, northeast, and east of the Mill. *Id.* ¶¶ 25-34. For the Court's convenience, New-Indy Catawba has created the map below that shows the putative class's boundaries, the Mill's location, and the locations of Plaintiffs' residences:



Although in their amended complaint, the *Kennedy* Plaintiffs alleged they "started noticing strong and frequent odors" at varying times in November 2020 (Manus-Cook and Hovanec), January 2021 (Kennedy), February 2021 (Lizano and Gain), and March 2021 (Moran), *see Kennedy* Dkt. 27 ¶¶ 24-29, they have – without any explanation – deleted these allegations from the CAC. Each alleges in a conclusory fashion that he/she "has suffered injuries and damages as a result of the hydrogen sulfide and other pollutants and contaminants wrongfully emitted by Defendants." CAC ¶¶ 25-34. Without identifying which plaintiff has suffered which injury, Plaintiffs collectively allege "Plaintiffs suffered health effects including, among other things, headaches, bloody noses, sinus issues, and persistent nausea." *Id.* ¶ 35. Although the CAC generally alleges that Defendants are "discharging inadequately treated wastewater to the Catawba

River," *id.* ¶ 15, Plaintiffs plead no facts indicating this wastewater has injured them. *See generally id.*

For their alleged personal injuries, Plaintiffs bring claims of private nuisance, *id.* ¶¶ 114-25, negligence, gross negligence, recklessness, and willful conduct, *id.* ¶¶ 126-35, and negligence per se. *Id.* ¶¶ 136-48.

III. THIS COURT SHOULD DISMISS PLAINTIFFS' CLAIMS UNDER RULE 12(b)[7] FOR FAILURE TO STATE A CLAIM AND LACK OF STANDING

A. Plaintiffs Fail to State a Private Nuisance Claim

(i) Plaintiffs Fail to Plead an Actionable Nuisance Injury

Plaintiffs' private nuisance claim (Count 1) fails because they have not pled facts that would establish an actionable injury. "[T]he traditional concept of private nuisance requires the landowners to demonstrate that the respondents unreasonably interfered with their ownership or possession of the land." *Ravan v. Greenville Cty.*, 315 S.C. 447, 464 (S.C. Ct. App. 1993). Answering a certified question from this Court, the South Carolina Supreme Court made clear that private nuisance actions are "limited to one's interest in property, rather than providing any protection to one's person." *Babb v. Lee Cty. Landfill SC, LLC*, 405 S.C. 129, 137 (2013); *see id.*

[7] A motion to dismiss under Rule 12(b)(6) should be granted where the complaint fails to allege facts sufficient to establish each element of the claims. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). To survive a motion to dismiss, the complaint's allegations must rise above the "speculative," "conceivable," or "possible," and instead must "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 545, 547, 555, 563, 570; *see also Iqbal*, 556 U.S. at 678 (explaining that the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully"). A complaint must include "'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582, 585 (4th Cir. 2015) (quoting *Twombly*, 550 U.S. at 555); *see Martineau v. Wier*, 485 F. Supp. 3d 637, 643 (D.S.C. 2020) (noting that a "Court need not, however, accept the Plaintiff's legal conclusions" and that a "formulaic recitation of the elements of a cause of action will not do" (citations omitted)) (Lydon, J.). Thus, although well-pleaded allegations of fact are accepted as true, legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not. *Iqbal*, 556 U.S. at 678.

at 141 ("From their earliest inception through the present day, the actions of trespass and nuisance have been limited to one's interest in property, rather than providing any protection to one's person."). There may be no "recovery for personal annoyance and discomfort under the guise of trespass and nuisance." *Id.* at 141. Given this limitation on nuisance actions, Plaintiffs' nuisance claim fails because they have alleged only personal injury, annoyance, and discomfort.

Plaintiffs collectively allege that they "suffered health effects including, among other things, headaches, bloody noses, sinus issues, and persistent nausea." CAC ¶ 35. Headaches, bloody noses, sinus issues, and persistent nausea are harm to one's person. These injuries, however, are not recoverable through nuisance, as allowing recovery "under the guise of . . . nuisance would be the stealth recognition of an entirely new tort." *Babb*, 405 S.C. at 141; *see also Sanders v. Norfolk S. Ry. Co.*, 400 F. App'x 726, 729 (4th Cir. 2010) (affirming dismissal of public nuisance claim because "Appellants did not allege in district court that their real or personal property was damaged"); *Chestnut v. AVX Corp.*, 413 S.C. 224, 230 (2015) (Toal, C.J., concurring) ("I agree with the majority's decision to affirm the dismissal of Appellants' nuisance claim, because Appellants failed to allege actual injury which interfered with the ownership of their properties." (footnote omitted) (citing *Babb*, 405 S.C. at 153)). Although the ten paragraphs specific to the ten named plaintiffs allege that each "owns and lives on" certain property, none of these paragraphs allege any facts indicating that odors have interfered with their interest in said property. *See* CAC ¶¶ 25-34. Absent well-pled facts alleging unreasonable interference "with their ownership or possession of the land" *Ravan*, 315 S.C. at 464, Plaintiffs' nuisance claim fails.

(ii) Plaintiffs' Private Nuisance Claim Is Barred by South Carolina Statutory and Regulatory Law

In addition, South Carolina statutory and regulatory law pertaining to air permits bars Plaintiffs' nuisance claim. DHEC has promulgated regulations for its Title V Operating Permit

Program, *see* S.C. Code Ann. Regs. 61-62.70, and, as Plaintiffs acknowledge, "[t]he Mill operates under Title V Operating Permit #2440-0005." CAC ¶ 62; *see also* Dkt. 49-1 at ECF p. 3, ¶ 1 ("The Facility operates under Title V Operating Permit #2440-0005 that was issued on May 7, 2019, became effective on July 1, 2019, and expires on June 30, 2024."). These regulations allow DHEC to "expressly include in a Part 70 permit" a "permit shield," which is a "provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance." S.C. Code Ann. Regs. 61-62.70.6(f). New-Indy Catawba's permit (the "Title V Permit") contains a permit shield. *See* Ex. A, Declaration of Peter McCoy ("McCoy Decl.") ¶ 3; Ex. B, Title V Operating Permit, at pp. 114-15. Because Plaintiffs have not alleged that New-Indy Catawba is violating any terms or conditions of the Title V Permit, and publicly available documents indicate DHEC has never issued a notice of violation to New-Indy Catawba, *see* Ex. A, McCoy Decl., ¶¶ 4-15; Exs. C-N, Board of Health and Environmental Control Enforcement Reports,[8] this permit shield bars Plaintiffs' nuisance claim. *See S. Appalachian Mountain Stewards v. Red River Coal Co.*, 992 F.3d 306, 309 (4th Cir. 2021) (holding that Clean Water Act permit shield barred suits by EPA and citizen groups); *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 300, 310 (4th Cir. 2010) (noting that each Clean Air Act "permit is intended to be a 'source-specific bible for Clean Air Act compliance'" and holding that plants cannot be public nuisances where they are "in compliance with EPA NAAQS, the corresponding state SIPs, and the permits that implement them").

[8] For the reasons discussed in footnote 9 *infra*, the Court can consider these documents without converting this motion into one for summary judgment.

As a separate but related basis for dismissal, Plaintiffs' nuisance claim is barred by South Carolina's nuisance statute, which grants protection to manufacturers in compliance with permits. This statute provides:

> (A) A manufacturing or industrial facility, or expansion of such a facility, may not be found to be a public or private nuisance by reason of the operation of that facility if the manufacturing or industrial facility:
>
> (1) is operating pursuant to and in compliance with the requisite licenses, permits, certifications, or authorizations under the applicable federal and state environmental laws and county and municipal zoning and nuisance ordinances; and
>
> (2) commenced operations before the landowner alleging the nuisance acquired, moved onto, or improved the affected property.

S.C. Code Ann. § 31-24-120(A)(1)-(2). As discussed above, publicly available documents show that New-Indy Catawba is not violating its Title V Permit.

Indeed, rather than pleading that New-Indy Catawba violated a permit, Plaintiffs *expressly plead* that all conduct about which they complain was authorized by a July 23, 2019 "state construction permit from DHEC authorizing manufacturing conversions (Construction Permit #2440-0005-DF)." CAC ¶ 63. Per the DHEC Order that Plaintiffs incorporate by reference, the Construction Permit was issued "*in accordance with state and federal air quality regulations and standards*, to allow the Facility to modify its processes to convert from bleached paper production to brown paper production." Dkt. 49-1 at ECF p. 3, ¶ 1 (emphasis added); *see also* Ex. A, McCoy Decl. ¶ 16; Ex. O, Construction Permit. Although Plaintiffs complain that Defendants' decision to send "all foul condensate to its open-air lagoons . . . resulted in an eight to ninefold increase [of] the amount of foul condensate piped to the open-air lagoons," CAC ¶ 7, they ignore that the Construction Permit's purpose was "to allow the Facility to hard pipe its condensates to the wastewater treatment plant." Dkt. 49-1 at ECF p. 3, ¶ 1. Moreover, DHEC expressly recognized that "40 CFR 63, Subpart S, allows this hard piping as a compliance option." *Id.* Because both

the CAC and DHEC Order acknowledge that New-Indy Catawba's actions were pursuant to state authorizations and federal regulations, there can be no common law liability. *See* Restatement (Second) of Torts § 821B cmt. f ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability.") (public nuisance). Additional public documents show that Plaintiffs acquired their properties after 1957, *see* Ex. A, McCoy Decl. ¶¶ 17-26; Exs. P-Y, Plaintiff Deeds,[9] which is when Plaintiffs allege the Mill commenced operations. *See* CAC ¶ 2. Thus, the requirements for subsection 2 of the nuisance statute are met. *See* S.C. Code Ann. § 31-24-120(A)(2) (providing protection to facilities that "commenced operations before the landowner alleging the nuisance acquired, moved onto, or improved the affected property").

Although Defendants have raised this argument in every motion to dismiss they filed in *White* (Dkt. 21 at 10-13), *Landsdown* (Dkt. 17 at 14-17), and *Kennedy* (Dkt. 30 at 18-21), Plaintiffs still have not alleged a permit violation. ***Nor could they***, as the United States recently confirmed that "[t]here is no appliable federal ambient air quality standard for H_2S." *See EPA Action* Dkt. 27-1 at 3. The United States further clarified that the EPA Order and the United States' complaint against New-Indy Catawba do "not allege that New Indy violated any specific emission standard or limitation under any statute, regulation, or permit condition." *Id.* at Dkt. 18 at 2; *see also id.* at 4 ("Here, the complaint does not allege that [New-Indy Catawba] has 'violated' any regulation or

[9] When "analyzing a Rule 12(b)(6) motion to dismiss, a court may consider 'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Belton v. W. Marine, Inc.*, No. 0:15-cv-167, 2015 WL 7180519, at *2 (D.S.C. Nov. 13, 2015) (citation omitted). This Court may consider New-Indy Catawba's Title V Permit and Construction Permit because they are incorporated into the CAC by reference. *See* CAC ¶¶ 62-63; Dkt. 49-1 at ECF p. 3, ¶ 1. This Court may consider the monthly DHEC notices of violation and Plaintiffs' property deeds because they are facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

permit . . . ."); *id.* at 7 ("In this case, EPA did not base its administrative order under Section 303 on any particular emission standard or limitation, regulation, rule, or permit condition . . . ."); *id.* at 8 (stating "this case is about neither a 'violation' nor an 'emission standard or limitation'"); *id.* (stating "there is no applicable federal H_2S standard"). For these reasons, too, Plaintiffs' nuisance claim is barred and should be dismissed with prejudice.

B. Plaintiffs' Negligence Per Se Claim Fails Because They Do Not Identify Any Statute Enacted for Their Benefit as Private Parties

Plaintiffs' negligence per se claim (Count 3) fails under Rule 12(b)(6) because the statutes Plaintiffs claim Defendants violated concern only protection of the public and were not enacted for their special benefit as private parties.

"In order to state a claim for negligence per se under South Carolina law, a Plaintiff must establish facts showing two elements: (1) that the defendant owes the Plaintiff a duty of care deriving from a statute and (2) that the defendant violated the statute and therefore failed to exercise due care." *Winley v. Int'l Paper Co.*, No. 2:09-cv-2030, 2012 WL 13047989, at *10 (D.S.C. Oct. 23, 2012) (citing *Whitlaw v. Kroger Co.*, 410 S.E.2d 251, 252-53 (S.C. 1991); *Rayfield v. S.C. Dep't of Corrs.*, 374 S.E.2d 910, 914-15 (S.C. Ct. App. 1988)). To prove the first element, a plaintiff must show both "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Rayfield*, 374 S.E.2d at 914. "In South Carolina, however, for a statute to support a claim for negligence per se, a plaintiff must show that the statute was 'enacted for the special benefit of a private party.'" *Winley*, 2012 WL 13047989, at *10 (quoting *Doe v. Marion*, 645 S.E.2d 245, 249 (S.C. 2007)). "In contrast, 'if a statute is concerned with the protection of the public and not with the protection of an individual's private right, it cannot support a private cause of action for negligence per se.'" *J.R. v. Walgreens Boots Alliance, Inc.*,

470 F. Supp. 3d 534, 553 (D.S.C. 2020) (quoting *Winley*, 2012 WL 13047989, at *10) (granting motion to dismiss negligence per se claim), *aff'd*, 2021 WL 4859603 (4th Cir. Oct. 19, 2021).

Although Plaintiffs allege Defendants violated the federal Clean Air Act ("CAA"), federal Clean Water Act ("CWA"), and federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), CAC ¶ 137,[10] their claim fails because these statutes were designed to protect the general public and were not enacted for the special benefit of a private party. First, the CAA was enacted "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). Congress passed this law because "urbanization, industrial development, and the increasing use of motor vehicles, ha[d] resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation." *Id.* § 7401(a)(2). Second, "[t]he objective of" the CWA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Third, "one of RCRA's goals is to "'promote the protection of health and the environment and to conserve valuable material and energy resources.'" *Winley*, 2012 WL 13047989, at *10 (quoting 42 U.S.C. § 6902(a)). As this review shows, "[t]hese statutes, all enacted to protect the general public, do not support a cause of action for negligence per se brought by an individual to vindicate a private right." *Id.*

[10] Plaintiffs' conclusory allegation that Defendants also violated "related federal and state regulations," CAC ¶ 137, cannot support a negligence per se claim because "[t]his type of generalization is precisely the type of pleading that fails under *Twombly* and *Iqbal*." *Winley*, 2012 WL 13047989, at *10 (granting motion to dismiss because "the complaint does not provide any specificity as to which section or sections of each statute or regulation is at issue with respect to the claim of negligence per se").

Winley is instructive because there the plaintiffs brought a negligence per se claim concerning "certain noxious odors" the defendant purportedly released, "in violation of state and federal laws, into the Georgetown, South Carolina community as a result of the defendant's operation of a paper manufacturing mill located in downtown Georgetown." *Id.* at *1, *3. The plaintiffs argued the defendant violated the Emergency Planning and Community Right to Know Act, RCRA, and Comprehensive Environmental Response Compensation and Liability Act. *Id.* at *10. After finding that these laws were enacted to "raise[] community awareness of chemical hazards," "promote the protection of health and the environment," and "protect public health and the environment," respectively, this Court dismissed the claim with prejudice because none of these laws sought "to vindicate a private right." *Id.*

Indeed, Plaintiffs' amendment of this claim is especially weak. In their amended complaint, the *Kennedy* Plaintiffs alleged Defendants violated South Carolina's Pollution Control Act ("PCA"), the CAA, and the CWA. *Kennedy* Dkt. 27 ¶ 105. Plaintiffs have dropped the PCA and replaced it with RCRA. CAC ¶ 137. This is a frivolous amendment, as *Winley* already held that RCRA does "not support a cause of action for negligence per se." *Winley*, 2012 WL 13047989, at *10. Just as in *Winley*, the Court should dismiss Plaintiffs' claim with prejudice.

C. Plaintiffs' Negligence, Gross Negligence, Recklessness, & Willful Conduct Claim Fails

The Court should dismiss Plaintiffs' negligence, gross negligence, recklessness, and willful conduct claim (Count 2) pursuant to Rule 12(b)(6) because the CAC lacks facts from which the Court could infer that New-Indy Catawba owed Plaintiffs a duty of care. "In order to establish a claim for negligence, a plaintiff must prove the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by negligent act or omission; and (3) damage proximately caused by the breach." *Williams v. Preiss-Wal Pat III*, 17 F. Supp. 3d 528, 535

(D.S.C. 2014) (citation omitted). "To establish a gross negligence claim, a plaintiff must show that: (1) the defendant owed him a duty; (2) the defendant breached that duty by failing to exercise a slight degree of care; (3) the plaintiff was injured; and (4) the defendant's breach of duty proximately caused the injury." *Booker v. S.C. Dep't of Soc. Servs.*, No. 8:12-cv-985, 2012 WL 3962746, at *7 (D.S.C. Aug. 22, 2012), *report and recommendation adopted by*, 2012 WL 3962706 (D.S.C. Sept. 11, 2012). A "legal duty of care" is an "essential element" that exists only when the parties "have 'a relationship recognized by law as providing the foundation for a duty to prevent an injury.'" *Id.* (citation omitted). If plaintiffs "have not clearly identified the source and nature of any duty, i.e., statutory or contractual relationship," then "the defendant is entitled to judgment as a matter of law." *Williams*, 17 Supp. 3d at 535-36 (citation omitted) (granting motion to dismiss negligence claim for lack of duty); *see also Booker*, 2012 WL 3962746, at *7 (recommending that gross negligence claim be dismissed for lack of duty); *Fair v. Murphy's Oil Corp.*, No. 2:09-cv-2752, 2010 WL 11534464, at *2 (D.S.C. July 13, 2010) (granting motion to dismiss because "plaintiff does not plead that [defendant] owed her a duty of care"). "This ensures that the concept of duty in tort liability is not extended beyond reasonable limits." *Williams*, 17 F. Supp. 3d at 535 (citation omitted).[11]

[11] Although negligence and gross negligence are distinct causes of action, recklessness and willful conduct are not. The terms "reckless or willful and wanton, all . . . have the same meaning—the conscious failure to exercise due care." *Berberich v. Jack*, 392 S.C. 278, 287 (2011) (citations omitted). "The terms 'willful' and 'wanton' when pled in a negligence case are synonymous with 'reckless,' and import a greater degree of culpability than mere negligence." *Id.* at 288 (citation omitted). These terms are "not a separate cause of action in South Carolina," rather, they are "element[s] of punitive damages." *Winley*, 2012 WL 13047989, at *10 (granting motion to dismiss "wantonness" claim because it is "not a separate cause of action" and noting that "[i]n South Carolina, a plaintiff cannot 'harass a defendant with a multiplicity of suits by making of each element of damages a separate cause of action'" (citation omitted)). Because recklessness and willful conduct are merely elements of a negligence claim that would allow for punitive damages, the Court should dismiss Count 2 in full. If New-Indy never owed Plaintiffs a duty and their

An analogous South Carolina environmental tort case shows why dismissal is warranted for lack of duty. In *Sanders v. Norfolk Southern Railway Co.*, the defendant's train collided with another, "causing a tank car carrying chlorine gas to rupture." 400 F. App'x at 727. The plaintiffs brought a negligence and nuisance putative class action, seeking to represent "individuals who live[d] between two and five miles of the accident site," alleging injuries "from having to evacuate or seal themselves inside their homes." *Id.* This Court granted the defendant's motion to dismiss all claims, and the U.S. Court of Appeals for the Fourth Circuit affirmed. *Id.* at 730. Noting that South Carolina negligence law recognizes reasonable limitations on tort liability where the plaintiffs "have no direct relationship with the tortfeasor," the Fourth Circuit found that the plaintiffs "cannot establish a legal duty owed to them by Norfolk Southern." *Id.* at 728 (citations omitted). Importantly, the Fourth Circuit found that although the plaintiffs "may have properly pled that their injuries were foreseeable, foreseeability alone may not give rise to a duty under South Carolina law." *Id.* (citation omitted). Applying this standard, Plaintiffs' negligence, gross negligence, recklessness, and willful conduct claim fails because their allegation that Defendants' conduct "would likely cause the foreseeable and resulting injuries and damages," *see* CAC ¶ 125, is not enough to establish a duty. *Sanders*, 400 F. App'x at 728; *Williams*, 17 F. Supp. 3d at 535 ("It is the relationship between the parties, not the potential 'foreseeability of injury,' that determines whether the law will recognize a duty in a given context." (citation omitted)). Nor should this Court credit Plaintiffs' conclusory assertion that "each Defendant was "under a duty to act with due and reasonable care as imposed by law." *See* CAC ¶ 131.

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negligence and gross negligence claims fail, there is no basis to find reckless or willful conduct entitling them to punitive damages.

As with their amendments to the negligence per se count, Plaintiffs' negligence/gross negligence amendments are especially weak. In their *Kennedy* motion to dismiss, Defendants argued the negligence/gross negligence claim failed for lack of duty. *See Kennedy* Dkt. 30 at 14-16. In response, Plaintiffs attempt to cure this deficiency by alleging "each Defendant also owed duties to Plaintiffs and the proposed Class Members through, *inter alia*, [certain] statutes, regulations, standards and permits." CAC ¶ 134. But this is nothing more than an attempt to double down on their attempt to allege duty through their negligence per se claim. As discussed in Section III.B *supra*, that claim fails, and, thus, their negligence/gross negligence claim fails too.

Because Plaintiffs have failed to plead facts that plausibly establish the parties "have a relationship recognized by law," their alleged harms "are too remote to warrant a finding of legal duty." *Sanders*, 400 F. App'x at 728-29; *see also Walgreens Boots*, 2021 WL 4859603, at *6 (affirming 12(b)(6) dismissal of negligence claim for failure to plead "any facts plausibly demonstrating the precise duty Walgreens is alleged to have breached"). Thus, Plaintiffs' negligence, gross negligence, recklessness, and willful conduct claim fails and should be dismissed with prejudice.

D. Plaintiffs Lack Standing to Bring Any Claims Arising Out of Discharges of Wastewater to the Catawba River[12]

To the extent that any of Plaintiffs' claims concern New-Indy Catawba's purported discharges of wastewater to the Catawba River, those claims fail because Plaintiffs have not alleged facts that would give them standing to make such a claim.

[12] For a case to proceed as a justiciable controversy, Plaintiffs must establish Article III standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Plaintiffs must satisfy three elements to establish standing: (1) injury in fact; (2) traceability; and (3) redressability. *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). The "injury in fact" element requires a Plaintiff to show injury to a legally protected interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).

All allegations specific to Plaintiffs concern purported harms caused solely by odors. *See* CAC ¶¶ 25-35. Plaintiffs do not allege that wastewater discharges to the Catawba River have injured their persons or property. *Id.* Thus, they have not demonstrated their "'personal stake' in" claims concerning wastewater discharges to the river. *See TransUnion*, 141 S. Ct. at 2203 (citation omitted). Because they have not pled facts that plausibly establish their "injury in fact," they lack standing. *See S. Walk*, 713 F.3d at 183 (affirming dismissal for lack of standing because plaintiff "failed to plead facts sufficient to support standing in its own right").

Any contention that Plaintiffs' claims survive because the CAC generally alleges in a conclusory fashion that class properties have been "physically invaded by noxious odors and polluted wastewater from the Mill," *see* CAC ¶ 96, fails because "courts do not give deference to 'generalized allegations concerning unnamed Plaintiffs or putative class members,' and instead look 'whether the named Plaintiffs alleged sufficient facts' regarding themselves." *Gentry v. Hyundai Motors Am., Inc.*, No. 3:13-cv-30, 2017 WL 1289050, at *3 (W.D. Va. Apr. 6, 2017) (denying motion for reconsideration of an order that granted motion to dismiss); *see also TransUnion*, 141 S. Ct. at 2208 ("'Article III does not give federal courts the power to order relief to any uninjured Plaintiff, class action or not.'" (citation omitted)); *Warth v. Seldin*, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that

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This injury must be "concrete and particularized" and "actual or imminent." *Id.* (citations omitted). The "traceability" element requires a Plaintiff to show a "causal connection between the injury and the conduct complained of." *Id.* (citations omitted). Finally, the "redressability" element requires a Plaintiff to show that it is "likely," not merely "speculative," that a favorable decision will redress the injury. *Id.* (citations omitted). "[E]ach element must be supported in the same way as any other matter on which the Plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561 (citations omitted). "Plaintiffs bear the burden of establishing standing," and courts "need not accept factual allegations that 'constitute nothing more than legal conclusions or naked assertions,'" as courts "are 'powerless to create [their] own jurisdiction by embellishing otherwise deficient allegations of standing.'" *S. Walk*, 713 F.3d at 181-82 (citations omitted).

injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."); *McCants v. NCAA*, 201 F. Supp. 3d 732, 740 (M.D.N.C. 2016) ("Moreover, the Court cannot consider generalized allegations to determine whether the named Plaintiffs alleged sufficient facts to state a claim upon which relief can be granted." (citation omitted)).[13]

IV. IN THE ALTERNATIVE, THE COURT SHOULD STRIKE PLAINTIFFS' CLASS ALLEGATIONS

In the alternative, if the Court does not grant New-Indy Catawba's motion to dismiss, it still should strike Plaintiffs' overbroad class allegations pursuant to Rules 12(f) and 23(d)(1)(D) because Plaintiffs have not proposed a class definition that is plausible on its face.

Courts may "strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Courts also may "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D). A motion to strike class allegations is judged "'solely on the basis of what is alleged in the complaint.'" *Cty. of Dorchester v. AT & T Corp.*, 407 F. Supp. 3d 561, 565 (D.S.C. 2019) (quoting *Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1495 (D.S.C. 1991)) (granting motion to strike class allegations under Rule 12(f)). The "'defendants have the burden of demonstrating from the face of the plaintiffs' complaint that it will be impossible to certify the classes alleged by the plaintiffs regardless of the facts the plaintiffs

[13] Should the Court enter the Consent Decree the United States has lodged, *see EPA Action* Dkt. 27-1, the Consent Decree will preempt Plaintiffs' demand for injunctive relief, *see* CAC ¶¶ 165-71, to the extent Plaintiffs' demand is inconsistent with what the Consent Decree requires. *See Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1415-16 (4th Cir. 1994) (finding injunctive relief sought through nuisance claim was preempted by consent decree with EPA). Because the Court has not yet entered the Consent Decree, New-Indy Catawba recognizes this argument is premature but reserve all rights to assert it if the Court enters the Consent Decree.

may be able to prove, analogous to the standard of review for motions brought pursuant to Rule 12(b)(6).'" *Whitt v. Seterus, Inc.*, No. 3:16-cv-2422, 2017 WL 1020883, at *2 (D.S.C. Mar. 16, 2017) (citation omitted) (discussing standard under Rule 12(f) and 23(d)(1)(D)); *see also Dorchester*, 407 F. Supp. 3d at 565 (citation omitted) (This standard is "analogous to the standard of review for motions [to dismiss] pursuant to Rule 12(b)(6)."). As the standard is analogous to the Rule 12(b)(6) standard, this means a plaintiff must propose a class definition "that is plausible on its face," *see Twombly*, 550 U.S. at 570, and that there is "more than a sheer possibility that" the class can be certified. *See Iqbal*, 556 U.S. at 678. Class certification requires that Rule 23(a)'s numerosity, commonality, typicality, and adequate representation factors be met, as well as "at least one of the three requirements listed in Rule 23(b)." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). As a threshold matter, the court must also determine that the class is "'sufficiently definite.'" *See Alasin v. Westinghouse Savannah River Co.*, No. 1:05-cv-1045, 2008 WL 2169427, at *2 (D.S.C. May 23, 2008) (quoting 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1760) (denying class certification); *see also Rosedale v. CarChex, LLC*, No. 19-cv-2780, 2020 WL 998740, at *4 (D. Md. Mar. 2, 2020) (denying motion to certify "grossly overbroad" class)

A. Plaintiffs' Proposed Geographic Class Area Is Facially Overbroad

Plaintiffs propose a class of all "persons who, from November 1, 2020 to the present, owned, leased, resided on property, or had a beneficial interest in property, up to 20 miles from the Mill." CAC ¶ 101; *see also* Class Map, *supra* p. 6. Plaintiffs do not explain why this putative class encompassing more than 1,250 square miles is shaped in a perfect circle or how it corresponds to New-Indy Catawba's allegedly tortious conduct. Accordingly, they have not plausibly shown their class can be certified, as the proposed class is grossly overbroad and

arbitrary. *See* 7A Wright & Miller, § 1760 ("Further, the class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated . . . .").

In environmental tort cases, courts routinely find such definitions to be overbroad. For example, in *Kemblesville HHMO Center, LLC v. Landhope Realty Co.*, the plaintiffs sought to represent a class of "all owners and residents of real property within a 2,500 foot radius of" a gas station that purportedly caused methyl tertiary butyl ether ("MTBE") contamination. No. 08-cv-2405, 2011 WL 3240779, at *3 (E.D. Pa. July 28, 2011). Before examining the Rule 23 factors, the court noted that it "first must determine whether a precisely and appropriately defined class exists," as "[o]verbroad class descriptions violate the definiteness requirement because they 'include individuals who are without standing to maintain the action on their own behalf.'" *Id.* at *4 (quoting *Oshana v. Coca–Cola Bottling Co.*, 225 F.R.D. 575, 580 (N.D. Ill. 2005)). This analysis requires "a reasonable relationship between Plaintiffs' proposed geographical boundary and the Defendants' allegedly harmful activities." *Id.* at *5 (citations omitted). Applying this standard, the court found that "Plaintiffs' proposed class is, on its face, unrelated to the detection of MTBE in properties' water." *Id.* This was because the proposed class included "properties simply because they exist, irrespective of any actual connection to Defendants' activities." *Id.* (footnote omitted). The court rejected the proposed class because it was "simply far too broad," "arbitrary," and "likely that the vast majority of putative class members would be property owners who have never encountered any exposure whatsoever to MTBE." *Id.* at *6.

Likewise, in *Duffin v. Exelon Corp.*, the court found a class area defined by reference to three roads and a river to be overbroad because it was not "defined by the defendants' activities" and "unrelated to evidence of actual tritium contamination." No. 06-cv-1382, 2007 WL 845336, at *2-3 (N.D. Ill. Mar. 19, 2007) (citation omitted). The court found the class overbroad because

there was "no correlation between plaintiffs' evidence concerning the location of contaminated air and groundwater, and the 'arbitrarily drawn lines on a map.'" *Id.* at *4 (citation omitted).

Further, in *Daigle v. Shell Oil Co.*, the plaintiffs sought certification of a class defined by reference to four roads. 133 F.R.D. 600, 602 (D. Colo. 1990). The court rejected plaintiffs' class boundaries, finding that they "arbitrarily have drawn lines on a map." *Id.* at 603. As in *Duffin*, the court denied certification because "Plaintiffs have failed to identify any logical reason relating to the defendants' activities at [a toxic waste disposal pond] for drawing the boundaries where they did." *Id.* With these cases in mind, Plaintiffs' class of all property owners, lessees, and residents within twenty miles of the Mill – which they acknowledge could total 625,000 people – is overbroad because it "includes properties simply because they exist, irrespective of any actual connection to Defendants' activities." *Kemblesville*, 2011 WL 3240779, at *5; CAC ¶¶ 60, 101.

Although these three cases were decided at the class certification stage, here, the Court can strike the class at this stage because Plaintiffs have not pled facts that plausibly establish odors spread from the Mill *in all directions* for twenty miles. *See Dorchester*, 407 F. Supp. 3d at 565 (noting that the Rule 12(b)(6) plausibility standard applies). Instead, four facts indicate that odors *did not* spread from the Mill in all directions. ***First***, Plaintiffs live between 2.5 and 14.3 miles north, northwest, northeast, and east from the Mill. CAC ¶¶ 25-34; *see also* Class Map, *supra* p. 6. In other words, Plaintiffs seek to extend the class radius *by approximately 40%* from the plaintiff living furthest from the Mill, and in directions having no correlation to where the Plaintiffs live in relation to the Mill (indeed largely in the opposite direction from where Plaintiffs live in relation to the Mill). ***Second***, the maps that Plaintiffs include in the CAC and attach as exhibits thereto indicate that the overwhelming majority of complaints were from less than twenty miles north, northwest, and northeast of the Mill. *See* CAC ¶ 100; Dkt. 49-5; Dkt. 49-6. Tellingly, the heaviest

clusters of complaints on Plaintiffs' maps coincide with the locations of Plaintiffs' residences, underscoring that the odors spread to only a certain area and *not* in a 20-mile perfect circle. *Compare* CAC ¶ 100, *with* Class Map, *supra* p. 6. ***Third***, Plaintiffs' "Supplement in Support of Motion to Intervene and Lift Stay" filed in the *EPA Action* includes a new map that *again* shows complaints were clustered to the Mill's north. *See EPA Action* Dkt. 26 at 3. Rather than supporting a 20-mile radius, 1250 square-mile class area, this map identifies a "Primary Odor Complaint Area" of only 223 square-miles and an "Odor Complaint Area" of 740 square-miles – neither of which are a perfect circle. *See id.* ***Fourth***, the EPA Order indicates hydrogen sulfide was detected .38 to 3.56 miles north, northeast, and southeast of the Mill. Dkt. 49-2 at ECF pp. 10-11.

This absence of class member exposure south and west of the Mill is likely explained by the common-sense notion that the wind in any particular location comes from a prevailing direction. Indeed, the EPA Order indicates that EPA inspectors detected hydrogen sulfide at "nearby locations *downwind* of the facility." *See* Dkt. 49-2 ¶ 21 (emphasis added). Further, in their proposed Intervention Complaint in the *EPA Action*, Plaintiffs alleged that New-Indy Catawba's "emissions [were] released to the *downwind* communities." *EPA Action* Dkt. 7-1 ¶ 21 (emphasis added). Also, their purported "expert" acknowledges that only "*downwind* local residents" experienced "[s]ubsequent severe reactions." *See id.* at Dkt. 26-1 at 3 (emphasis added). Plaintiffs cannot admit in one action that emissions were released only to downwind communities but then allege here that emissions spread uniformly in all directions.

In an analogous case involving sulphuric acid emissions from a manufacturing plant, the U.S. District Court for the District of Kansas denied class certification where the plaintiffs sought to represent real property and vehicle owners "located within a 1000 meter radius of the Delphi plant." *Vickers v. Gen. Motors Corp.*, 204 F.R.D. 476, 477 (D. Kan. 2001). The court denied

certification because there were "only two reports of vehicle damage east of the plant" and "[a]ll other reports were of damage located west of the plant." *Id.* at 479. Thus, the class was overbroad because the "reported vehicle damage seem[ed] to suggest that sulphuric acid emissions did not disperse in a perfect circle." *Id.*; *see also Burkhead v. Louisville Gas & Elec. Co.*, 250 F.R.D. 287, 292 (W.D. Ky. 2008) (denying class certification because plaintiffs "offer no evidence whatsoever that the airborne contaminants might have spread in all directions from LG & E's facility for a distance of up to two miles") Likewise, in a similar case involving hydrogen sulfide odors, the Georgia Supreme Court – drawing on U.S. Supreme Court precedent – reversed class certification because the locations at which the plaintiffs had encountered hydrogen sulfide "do not seem to coincide with the full extent of the class area." *Georgia-Pacific Consumer Prods., LP v. Ratner*, 295 Ga. 524, 530 (2014).

Finally, Plaintiffs' attempt to represent this overbroad class undercuts their ability to plead the "duty" element of negligence. As discussed *supra* Section III.C, to bring a negligence claim, alleged harms cannot be "too remote to warrant a finding of legal duty." *Sanders*, 400 F. App'x at 729. In *Sanders*, purported harms suffered by those living two to five miles from an accident site were found too remote to give rise to a legal duty. *Id.* at 727. If those living two to five miles were not owed a duty, it necessarily follows that those living twenty miles from the Mill are not owed a duty. Thus, Plaintiffs' definition is "grossly overbroad," *Rosedale*, 2020 WL 998740, at *4, and the Court should strike the class allegations for this reason, in addition to that fact that the CAC fails Rule 23 on its face.

B. Plaintiffs' Proposed Class Cannot Be Certified Under Rule 23

Regardless, Plaintiffs' proposed class fails under Rule 23 for lack of typicality, commonality, and predominance.

(i) Plaintiffs' Claims Are Not Typical of the Putative Class's Claims

For multiple reasons, Plaintiffs have not plausibly alleged their claims are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). To establish typicality, "'a class representative must be a part of the class and possess the same interest and suffer the same injury as the class members.'" *Waters v. Electrolux Home Prods., Inc.*, No. 5:13-cv-151, 2016 WL 3926431, at *5 (N.D. W. Va. July 18, 2016) (quoting *Leinhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001)). "'The fact that the named plaintiffs have the same general complaint against the defendant does not render their claims typical.'" *Id.* (quoting *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 300 (N.D. Ohio 2001)).

First, Plaintiffs' claims are not typical because they "must individually prove that . . . [they] experienced personal injuries and/or property damage," and thus "whether each class member suffered damages . . . will depend upon individual factors." *Id.* (granting motion to strike class allegations under Rules 12(f) and 23(d)(1)(D)); *see also Flint v. Ally Fin. Inc.*, No. 3:19-cv-189, 2020 WL 1492701, at *5 (W.D.N.C. Mar. 27, 2020) (striking class allegations pursuant to Rule 23(d)(1)(D) and finding no commonality or typicality due to "individualized inquiry central to Plaintiff's allegations"); *Daigle*, 133 F.R.D. at 604 ("Because the factual and legal issues of Shell's and the Army's liability in the instant case do differ dramatically from one plaintiff to the next, I conclude that the plaintiffs have not satisfied the commonality and typicality requirements.").

Second, Plaintiffs' pursuit of private nuisance and negligence claims precludes class certification because representatives' claims must be "based on the same legal theory" for their claims to be "typical" of the class's claims. *See Howard v. Cook Cty. Sheriff's Office*, 989 F.3d

587, 605 (7th Cir. 2021) (reversing class certification); *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (reversing certification for lack of typicality because "Plaintiffs do not 'advance the same . . . legal arguments' as the class they are supposed to represent"). Nuisance actions are "limited to one's interest in property, rather than providing any protection to one's person." *Babb*, 405 S.C. at 137. Negligence actions, however, permit recovery for either "physical injury or property damage." *Id.* at 153. This difference in allowable injuries creates a possibility that Plaintiffs may prove their negligence claims that allow recovery for personal injury, which is not compensable through private nuisance. For instance, suppose Plaintiffs prove they experienced headaches. *See* CAC ¶ 35. This injury would not be typical of the putative class, as the CAC generally alleges the class has suffered "property damage" and "the loss of use of property." *See id.* ¶¶ 149-52. *Howard* is instructive because in that Title VII matter, the named plaintiffs alleged they were victims of "direct harassment." *Howard*, 989 F.3d at 606. However, "some of the class members would have to resort to ambient harassment to prove their claims." *Id.* The Seventh Circuit reversed because the district court's certification order "elides material differences between direct harassment and ambient harassment." *Id.* Here, there are material differences between nuisance and negligence, and "plaintiffs are poor proxies for any class members whose claims rise or fall on" property damage. *See id.*

Third, typicality is lacking because Plaintiffs, who live 2.5 to 14.3 miles from the Mill, *see* CAC ¶¶ 25-34, allegedly experienced hydrogen sulfide at greater concentrations than those located twenty miles from the Mill. *See Reilly v. Gould, Inc.*, 965 F. Supp. 588, 598-99 (M.D. Pa. 1997) (granting motion to dismiss class action allegations for lack of typicality because, *inter alia*, residents in class area had "varying levels of lead in their soil, apparently due to varying distances from the site"). The EPA Order indicates that "[h]ydrogen sulfide concentrations generally

decreased with downwind distance from the facility." Dkt. 49-2 ¶ 27 (emphasis added). Indeed, Plaintiffs acknowledged this in their proposed Intervention Complaint. *See EPA Action* Dkt. 7-1 ¶ 37 (alleging that EPA found "concentrations generally decreased as the mobile lab got further away from the Facility"). Because the named Plaintiffs live closer to the Mill, this means that class members living 20 miles from the Mill experienced hydrogen sulfide at lower concentrations. This is fatal to Plaintiffs' ability to certify their class because Plaintiffs plead there are different health effects depending on whether a person is exposed to hydrogen sulfide in "elevated concentrations," "low concentrations," "[r]epeated or prolonged exposure," or "chronic exposure." CAC ¶¶ 69-70.

Fourth, Plaintiffs not only experienced the odors at different concentrations than the class members, but they also experienced the odors at different times depending on how far they live from the Mill. The Plaintiffs living closest to the Mill – Hovanec (2.5 miles) and Manus-Cook (3 miles) – claim to have experienced the odors first in November 2020. *Kennedy* Dkt. 27 ¶¶ 27-28. Those living 7 miles from the Mill – Kennedy, Lizano, and Gain – claim that they started noticing odors next in January and February 2021. *Id.* ¶¶ 24-26. Moran, who lives 9 miles away, did not notice odors until March 2021. *Id.* ¶ 29.[14] This further undercuts typicality, as a Plaintiff

[14] In their amended complaint, the *Kennedy* Plaintiffs alleged when each Plaintiff "started noticing strong and frequent odors." *Kennedy* Dkt. 27 ¶¶ 24-29. After Defendants raised this argument in their *Kennedy* motion to dismiss, *see Kennedy* Dkt. 30 at 30 n.17, Plaintiffs removed from the CAC all references to the dates when each Plaintiff started noticing odors. CAC ¶¶ 25-34. Clearly, Plaintiffs found Defendant's argument persuasive and now try to save their class allegations by removing these dates from the CAC. The Court should not tolerate such gamesmanship, as courts are free to reject "artful pleading" in an amended complaint when a plaintiff uses it to attempt to thwart dismissal. *Cf. Rodriguez v. Sony Computer Entm't Am., LLC*, 801 F.3d 1045, 1054 (9th Cir. 2015) (affirming grant of motion to dismiss and rejecting plaintiff's "attempt to thwart the statutory language by artfully pleading" because "the more recent pleading completely contradicts the earlier pleading" (citations omitted)); *Soo Line R.R. Co. v. St. Louis Sw. Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997) ("judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court" in its pleading). Thus, the *Kennedy* Plaintiffs' prior

experiencing odors for the first time in March 2021 would be exposed to odors in lower concentrations and for a shorter time period than a class member who first experienced them at the start of the class period on November 1, 2021. CAC ¶ 101. Thus, certification is impossible because Plaintiffs have not plausibly alleged their claims are typical of the class's claims.

(ii) The Class Cannot Be Certified for Lack of Commonality and Predominance

First, Plaintiffs have not pled facts that plausibly establish "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Although Plaintiffs recite a laundry list of purported common questions of law and fact, *see* CAC ¶ 106, "[r]eciting these questions is not sufficient to obtain class certification." *Dukes*, 564 U.S. at 349. Rather, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id.* at 349-350 (citation omitted). The CAC demonstrates that commonality is lacking because class members have suffered numerous different purported injuries, including nausea; headaches; nose, throat, and eye irritation; coughing; difficulty breathing; asthma flare ups; dizziness; lost sleep; a desire to stay indoors; stress; and anxiety. CAC ¶¶ 77-78; *see Gentry v. Hyundai Motors Am., Inc.*, No. 3:13-cv-30, 2017 WL 354251, at *8 (W.D. Va. Jan. 23, 2017) (dismissing class allegations because "the diversity of the class representatives undercuts the allegations" of commonality and typicality); *Martin v. JTH Tax, Inc.*, No. 9:10-cv-3016, 2013 WL 442425, at *7 (D.S.C. Feb. 5, 2013) (finding commonality lacking because certification "would still require the court to engage in a case-by-case analysis" of injury and damages); *Wu v. MAMSI Life & Health Ins. Co.*, 269 F.R.D. 554, 562 (D. Md. 2010) ("Finally, lack of commonality among the class members is also

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allegations bind them here because they constitute judicial admissions. *See Bright v. QSP, Inc.*, 20 F.3d 1300, 1305 (4th Cir. 1994) (stating that "admissions in the pleadings are binding on the parties" (citations omitted)); *see also Doe 2 by and through Doe 1 v. Fairfax Cty. Sch. Bd.*, 832 F. App'x 802, 806 (4th Cir. 2020); *Flexi-Van Leasing, Inc. v. Travelers Indem. Co.*, 837 F. App'x 141, 145 (4th Cir. 2020).

evidenced by the extent to which individualized inquiries would be necessary to determine the extent of damages in this case."). Given that the face of the CAC indicates a diversity of injuries, it cannot be said that Plaintiffs' claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution." *Dukes*, 564 U.S. at 350. These injury differences mean that determination of the "truth or falsity" of whether Plaintiffs have been injured "will [not] resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Rather, the putative class's differences in injuries, which would entail individualized damages determinations, make Plaintiffs' class "no more than 'a hodgepodge of factually as well as legally different plaintiffs,' that should not . . . be[] cobbled together for trial." *Broussard*, 155 F.3d at 343 (citation omitted).[15]

Second, Plaintiffs' request for a Rule 23(b)(3) class, *see* CAC ¶ 113, should be stricken because – based on the allegations in the CAC – individual issues predominate over any classwide issues. Rule 23(b)(3) classes can only be certified if the Court finds "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Here, Plaintiffs and the class members generally and in a non-specific way complain of differing personal injuries and property damage. *Compare* CAC ¶ 35 (describing Plaintiffs' "health effects" including "headaches, bloody noses, sinus issues, and persistent nausea"), *with* ¶ 96 (alleging that class properties have been "physically invaded by . . . wastewater from the Mill"), *and* ¶ 97 (alleging that "people within the Class Area" have been

[15] Because "predominance" under Rule 23(b)(3) "requires 'the same analytic principles' governing Rule 23(a)'s commonality analysis [and] the predominance requirement is 'more demanding,'" *Waters*, 2016 WL 3926431, at *5 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013)), Plaintiffs' inability to plead commonality necessarily means they cannot plead predominance.

harmed because hydrogen sulfide has "precluded the use and enjoyment of . . . public spaces"). Of course, this problem would be exponentially compounded by a class consisting of approximately 625,000 people, as alleged by Plaintiffs. *See* CAC ¶ 60. The fact of and extent of injury – as well as differences in concentration and timing of exposure, *see supra* Section IV.B(i) – are individual issues that would predominate (indeed, overwhelm) any common issues.[16] *See Waters*, 2016 WL 3926431, at *6 (striking class allegations for lack of Rule 23(b)(3) predominance and superiority because "damages to each class members' person or property will not be uniform in this litigation, increasing the complexity and burden of calculating damages" as each "class member would need to present individualized evidence regarding particular damages they suffered"); *Duffin*, 2007 WL 845336, at *6 (denying certification for lack of Rule 23(b)(3) predominance and superiority because "Plaintiffs' evidence shows substantial factual differences between class members whose properties touch the plume and those that do not" and, thus, "[s]ignificant trial time would be devoted to determining separate issues of liability regarding individual properties" (citation omitted)); *Reilly*, 965 F. Supp. at 603 (dismissing class allegations because "[a]lthough there is one common fact among the plaintiffs—that there was widespread lead exposure due to the operations of the site—there is 'a plethora of other individual facts which affect each of the plaintiffs' claims'").

Indeed, this Court's recent decision denying class certification in *Tillman v. Highland Industries, Inc.* shows why the Court should strike the class allegations on predominance grounds.

[16] The CAC acknowledges (as it must) that whether the hydrogen sulfide odor causes even transient health issues to people who experience it requires fact-finding on a class member by class member basis. *See, e.g.*, CAC ¶ 69 ("exposure to low concentrations of hydrogen sulfide *can* cause irritation to the eyes, nose, or throat, difficulty breathing *for some asthmatics*, and headaches, poor memory, tiredness, and balance problems" (emphasis added)); ¶ 72 ("the general population, including susceptible individuals, *could* experience notable discomfort, irritation, or certain asymptomatic nonsensory effects" (emphasis added)).

No. 4:19-cv-2563, 2021 WL 4483035 (D.S.C. Sept. 30, 2021) (Lydon, J.). There, just as here, the plaintiffs sought class certification on a nuisance claim in an environmental tort action. And there, just as here, the plaintiffs argued "that the question of 'whether the release of PCBs from the Highland Site to class members' properties constitutes a nuisance' is a common one." *Compare id.* at *15, *with* CAC ¶ 106(f) (alleging that "[w]hether Defendants' actions constitute actionable misconduct as set forth in the complaint" is a common question). Noting that "'prov[ing] an injury to the use and or the enjoyment of the property' . . . . is an individualized plaintiff-by-plaintiff determination," this Court denied class certification because:

> Some individualized questions may include: Did the plaintiff use the portion of the property now-contaminated by PCBs? How did the plaintiff use that portion of the property before PCBs? After? How did the existence of PCBs impact the plaintiff's enjoyment of her property? Etc. As these questions show, of the three claims, *nuisance requires the most individualized analysis to establish liability*—A fact Plaintiff does not dispute.

Tillman, 2021 WL 4483035, at *15 (emphasis added) (citation omitted). Although *Tillman* concerned PCBs and this matter concerns air emissions, these same questions will need to be answered here on an individualized basis. If class certification were not appropriate in *Tillman*, there is no reason it will be appropriate here, and the Court should strike the class allegations.

V. CONCLUSION

As set forth above, Plaintiffs fail to state a claim for private nuisance (Count 1) because they have not pled an actionable injury and South Carolina statutory and regulatory law bar their claim. Plaintiffs' negligence per se claim (Count 3) fails because none of the statutes on which the claim is predicated were enacted to benefit them as private parties. Plaintiffs' negligence, gross negligence, recklessness, and willful conduct claim (Count 2) fails for lack of legal duty and because recklessness and willful conduct are not standalone causes of action. All claims concerning New-Indy Catawba's purported discharges of wastewater to the Catawba River must

be dismissed for lack of standing. Alternatively, the Court should strike the class allegations because the proposed class is overbroad and Plaintiffs have not pled facts that plausibly establish typicality, commonality, and predominance.

Respectfully submitted,

BY: s/ Peter M. McCoy, Jr.

Peter M. McCoy, Jr.
McCoy Law Group LLC
15 Piroleau Street
Charleston, South Carolina 29401
Phone: 843.459.8835
Fax: 843.459.8834
peter@mccoylawgrp.com
Federal ID Number: 9896

MORGAN, LEWIS & BOCKIUS LLP
John McGahren (admitted *pro hac vice*)
Sean Radomski (admitted *pro hac vice*)
502 Carnegie Center
Princeton, NJ 08540-6241
Phone: 609.919.6600
Fax: 609.919.6701
john.mcgahren@morganlewis.com
sean.radomski@morganlewis.com

Scott T. Schutte (admitted *pro hac vice*)
110 North Wacker Drive, Suite 2800
Chicago, IL 60606-1511
Phone: 312.324.1000
Fax: 312.324.1001
scott.schutte@morganlewis.com

Brady Edwards (*pro hac vice* forthcoming)
1000 Louisiana Street, Suite 4000
Houston, Texas 77002
Phone: 713.890.5000
Fax: 713.890.5001
brady.edwards@morganlewis.com

Counsel for Defendant New-Indy Catawba LLC

Charleston, South Carolina
January 14, 2022

CERTIFICATE OF SERVICE

I, Peter M. McCoy, Jr., an attorney, certify that I filed the foregoing using the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record on this 14th day of January 2022.

s/ Peter M. McCoy, Jr.
Peter M. McCoy, Jr.