IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. DENKA PERFORMANCE ELASTOMER, LLC, et al. Defendants.	Civ. No. 2:23-cv-735 Judge Barbier (Section "J" (5)) Magistrate Judge North

UNOPPOSED MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE

The American Chemistry Council ("ACC"), Louisiana Chemical Association ("LCA"), the Chamber of Commerce of the United States of America ("Chamber"), and the National Association of Manufacturers ("NAM") respectfully request that this Court grant leave to participate as *amici curiae* in the above-captioned case and accept the attached amicus brief. The brief provides amici's unique perspective on one issue raised in this enforcement case that is important to a broad swath of American industry: the nature of Environmental Protection Agency ("EPA") Integrated Risk Information System ("IRIS") values, and the appropriate legal context in which such a value may be used.

Counsel for the amici has conferred with counsel for the Plaintiff and counsel for the Defendants regarding this Motion and is authorized to state that Defendants consent to the relief requested in the Motion and that Plaintiff takes no position on the Motion.

THE AMICI AND THEIR INTERESTS

The American Chemistry Council ("ACC") is a trade association representing the leading companies engaged in the business of chemistry, a $486 billion enterprise and a key element of the nation's economy. ACC participates on behalf of its members in administrative proceedings

and in litigation arising from those proceedings.

The Louisiana Chemical Association ("LCA") is a local trade association that represents 63 member companies in the chemical manufacturing sector throughout Louisiana. LCA stands as a representative of one of the cornerstone industries in this state's economy.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.91 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

ARGUMENT

While the Federal Rules of Civil Procedure do not contain provisions governing the participation of *amici curiae* at the district court level, it is well established that this Court has the authority to allow participation of *amici curiae*. *Thibodeaux v. Africk*, 2014 WL 3796078 (E.D. La. July 30, 2014) (Order granting amicus curiae United States' Motion to Dismiss Pursuant to

Rule 12(b)(6)); *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, 2:10-md-02179-CJB-DPC, Rec. Doc. 6367 (E.D. La. Apr. 26, 2012) (Order granting Motion for Leave to File Response of Amicus Curiae American Shrimp Processors Association); *Barisich et al. v. BP, PLC et al*., 2:10-cv-01324-CJB-JCW, Rec. Doc. 88 (E.D. La. May 25, 2010) (Order granting Motion for Leave to File Joinder or alternatively Amicus Submission in Support of Plaintiffs' Motion for Court Supervision). It is within the court's discretion to permit or deny amicus briefing. *Halo Wireless, Inc. v. Alenco Commc'ns. Inc.* (*In re Halo Wireless, Inc*.), 684 F.3d 581, 596 (5th Cir. 2012); *United States v. Hamden*, 2021 WL 809376 at 5 (E.D. La. Mar. 3, 2021) ("*Hamden*") (citing *United States v. Davis*, 180 F. Supp. 2d 797, 799 (E.D. La. 2001) ("*Davis*")).

In this case, EPA argues that chloroprene emissions over 0.2µg/m3 represent an "imminent and substantial endangerment" based on a value set forth in the EPA's Integrated Risk Information System ("IRIS") assessment. Denka defends by arguing that EPA has failed to demonstrate that emissions from the plant present an imminent and substantial threat of irreparable harm. Neither the government's motion nor Denka's opposition discuss the nature and intended use of an IRIS value, and amici seek to help the Court understand that issue and that issue alone. As set forth in the attached brief, an IRIS assessment is an estimate of the highest potential risk from exposure to a certain substance over a lifetime. IRIS is a human health assessment program that looks at information on the potential health effects of certain chemicals. IRIS analyses are not regulations, they are not prepared pursuant to any particular statute, and they are not authorized by Congress. Nor are they subject to the due process protections that are part of regulations, such as notice-and-comment and the right to immediate judicial review.

Decisions from this Court have identified several factors as relevant to a district court's decision on whether to grant amicus status in a particular case. *United States v. City of New Orleans*, 2022 WL 4465534 at 2 (E.D. La. Sept. 26, 2022); *Hamden*, 2021 WL 809376 at 5; *Davis*, 180 F. Supp. 2d at 800. Those factors include: (1) whether the amicus brief is useful to the Court; (2) whether the amicus brief is neutral; (3) whether the amicus brief is arguing fact issues; and (4) whether the parties oppose the participation of the amicus. *Id.*[1] Here, these factors weigh in favor of granting this Motion.

First, amici's proposed brief will be useful to the Court because it will help the Court understand what an IRIS value actually is, how it is used by EPA in the development of regulations, and its relevance to an enforcement case. Neither party has addressed precisely this issue. Amici will also provide context not provided by the parties to the case regarding the potential impacts of using an IRIS value for enforcement purposes.

Second, the proposed brief is neutral in the context of this litigation. Amici take no position on the nature of emissions from the plant at issue in this case, or, for example, on whether the Government has shown or could show a basis for the relief that it seeks that is not reliant on the IRIS value at issue in this case.

Third, the proposed brief does not argue any factual issues. Again, the proposed brief will explain only what an IRIS value is and is not, and discuss its proper uses.

Finally, none of the parties oppose this motion for leave to appear as amici curiae. In sum, the above-mentioned factors favor granting this motion for leave to appear as amici. Amici's

[1] Parties are represented by competent counsel.

proposed brief would assist the Court's deliberations as it considers the Government's pending motion for a preliminary injunction.

CONCLUSION

Accordingly, amici respectfully request that this Court grant them leave to file the attached proposed brief.

Dated: August 14, 2023

Respectfully submitted,

/s/ Greg L. Johnson

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CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of August, 2023, a copy of the foregoing Unopposed Motion for Leave to Appear as Amicus Curiae was filed with the Clerk of Court through the CM/ECF system, which will send notice of electronic filing to all counsel of record who have consented to electronic notification.

/s/ Greg L. Johnson

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. DENKA PERFORMANCE ELASTOMER, LLC, et al. Defendants.	 Civ. No. 2:23-cv-735 Judge Barbier (Section "J" (5)) Magistrate Judge North

ORDER

Considering the Unopposed Motion to File Amicus Curiae;

IT IS HEREBY ORDERED that the Unopposed Motion to File Amicus Curiae is **GRANTED**.

New Orleans, Louisiana this _____ day of August, 2023.

THE HON. CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. DENKA PERFORMANCE ELASTOMER, LLC, et al. Defendants.	 Civ. No. 2:23-cv-735 Judge Barbier (Section "J" (5)) Magistrate Judge North

AMICUS BRIEF OF THE AMERICAN CHEMISTRY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE LOUISIANA CHEMICAL ASSOCIATION, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS

INTRODUCTION

This case is an enforcement action brought by the United States Environmental Protection Agency ("EPA") against Denka Performance Elastomer, LLC ("Denka") alleging that chloroprene emissions from certain Denka neoprene manufacturing operations present an imminent and substantial endangerment to public welfare under Section 303 of the Clean Air Act, 42 U.S.C. § 7603 because they exceed levels set forth in an EPA database known as the Integrated Risk Information System ("IRIS").[1] While EPA contends that it is enforcing the prohibition in Section 303 directly, both the complaint and EPA's response to interrogatories make clear that it

[1] Complaint ¶¶ 1, 13, *United States v. Denka Performance Elastomer, LLC*, No. 2:23-cv-735 (E.D. La. 2023).

is bringing this action based on the chloroprene IRIS value, which EPA is effectively treating as a regulatory standard.[2]

IRIS values, however, are not statutes or regulations. As EPA has stated, "IRIS values are not legally binding"[3] and the use of an IRIS value as the basis of an enforcement action in this case is highly unusual, if not unprecedented. Amici file this brief to help the Court understand the nature of IRIS values, and the appropriate legal context in which such a value may be used.[4]

The outcome of this enforcement action could have a substantial impact on many other businesses in the United States. If the use of IRIS as a basis for enforcement is upheld, companies will understand that they can be found liable for causing imminent and substantial endangerment on the basis of a theoretical upper bound hazard assessment that has undergone neither judicial review nor formal notice and comment, seemingly rendering irrelevant the companies' compliance with statutes, regulations and permit requirements that have undergone notice and comment processes and were judicially reviewable.

BACKGROUND[5]

Amici are the American Chemistry Council ("ACC"), the Chamber of Commerce of the United States of America ("the Chamber"), the Louisiana Chemical Association ("LCA"), and the National Association of Manufacturers ("NAM").

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[2] *See* United States Response to Interrogatory No.4 (May 31, 2023) (equating any exceedance of the chloroprene IRIS value with an imminent and substantial threat) (Exhibit 41 to Denka's Opp'n to Mot. For Prelim. Inj.).

[3] National Primary Drinking Water Regulations: Minor Revisions to Public Notification Rule and Consumer Confidence Report Rule, Proposed Rule, 66 Fed. Reg. 46928, 46929 (Sept. 7, 2001) ("Water Rule").

[4] Neither plaintiff nor defendants provide the type of legal analysis of the IRIS value that is set forth in this brief.

[5] *Amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

ACC is a trade association representing the leading companies engaged in the business of chemistry, a $486 billion enterprise, and a key element of the nation's economy. ACC participates on behalf of its members in administrative proceedings and in litigation arising from those proceedings.[6]

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.[7]

LCA is a nonprofit Louisiana corporation, composed of 63 members with over 100 chemical manufacturing plant sites in Louisiana. LCA was formed in 1959 to promote a positive business climate for chemical manufacturing that ensures long-term economic growth for its member companies. LCA members are committed to excellence in safety, health, security, and environmental performance and to earning their "license to operate." LCA participates on behalf of its members in administrative proceedings and in litigation arising from those proceedings.[8]

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and every industrial sector. Manufacturing employs nearly

[6] ACC has no parent corporation, and no publicly held company has 10 percent or greater ownership in ACC.
[7] The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.
[8] LCA has no parent corporation, and no publicly held company has a 10% or greater ownership interest in LCA.

13 million men and women, contributes $2.91 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.[9]

ARGUMENT

I. IRIS VALUES ARE INTENDED TO BE USED FOR INFORMATIVE PURPOSES ONLY, AND ARE NEITHER LEGALLY BINDING NOR INTENDED FOR REGULATORY PURPOSES WITHOUT CLOSE INQUIRY INTO THEIR ACCURACY AND VALIDITY

In this enforcement action, EPA alleges imminent and substantial endangerment because modeled chloroprene emissions have at times exceeded 0.2 micrograms per cubic meter (μg/m³) outside the facility fence line. However, this 0.2 μg/m³ "limit" or ambient standard is not found in any applicable law, regulation, or term of a duly issued permit. Instead, EPA relies on its IRIS value for chloroprene for this number.[10] As described below, IRIS values are developed by EPA as part of an EPA database that summarizes information on the potential adverse human health effects of certain chemicals. IRIS values are not legally binding, and are not regulatory standards. Additionally, IRIS values are the product of a process that, on the advice of the National Academy of Sciences ("NAS") and at the direction of Congress, EPA has been working to reform for over a decade.

[9] The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

[10] *See* Complaint ¶¶ 9-11, 12, *United States v. Denka Performance Elastomer, LLC*, No. 2:23-cv-735 (E.D. La. 2023).

A. IRIS is Non-Binding Guidance Used by EPA to Assess the Possible Effects of Chemical Exposure – not to Definitively Measure Adverse Effects of Exposure

IRIS is an EPA database that summarizes information on the potential adverse human health effects of certain chemicals. IRIS Background Paper (Feb. 1993) ("Background Paper") at 1.[11] The "core of IRIS" is three "summary sections" for each chemical that summarize estimates of noncancer health effects from oral exposure, noncancer health effects from inhalation, and of cancer risks. *Id.* at 3.

One purpose of these summaries is to address the "dose-response" relationship of the chemical (the "relationship between the magnitude of the effect and the dose inducing such an effect"). *Id.* at 1. IRIS entries often include a variety of statistics, or "values," to help summarize this relationship. *Id.* at 3-4. Here, key values include: (1) the Risk-Specific Concentration, which reflects the level at which exposure to the chemical is estimated to create a 1-in-1,000,000 lifetime cancer risk; and (2) the Inhalation Unit Risk estimate ("IUR"), which reflects the statistical "upper-bound" on the "increased likelihood that an individual will develop cancer" from a lifetime exposure to "1 microgram per cubic meter (1 µg/cu.m) in air[.]" *Id.* at 4.[12]

IRIS assessments are not prepared pursuant to any particular statute, and IRIS was never authorized by Congress.[13] Rather, IRIS is an EPA initiative, designed to establish a *starting point* for EPA staff across a variety of regulatory programs. Background Paper at 2, 5. EPA

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[11] *Available at*: EPA Background Paper, https://nepis.epa.gov (last visited Aug. 14, 2023).

[12] Denka refers to the term "IUR" to describe the basis of EPA's enforcement action. *See* Denka Performance Elastomer LLC's Opp'n To Mot. for Prelim. Inj. at 13-21 (July 18, 2023). The IUR is one important component of an IRIS value. Because amici are providing this Court with legal analysis on the broader nature of IRIS values beyond their relevance solely to this enforcement action, amici address the "IRIS value" here.

[13] EPA maintains IRIS under a patchwork of research authorities, none of which expressly authorizes IRIS. *See*, *e.g.*, EPA Fiscal Year 2022 Justification of Appropriation Estimates for the Committee on Appropriations, Tab 03: Science and Technology, at 108. *Available at*: https://www.epa.gov/system/files/documents/2021-07/fy22-cj-03-science-technology.pdf (last updated May 2021).

acknowledges that explicitly in its IRIS guidance, stating that "[c]ombined with specific situational exposure assessment information, the summary health hazard information in IRIS may be used as *one* source in evaluating potential public health risks of or from environmental contaminants". Background Paper at 3 (emphasis added). The NAS, an organization whose relevant recommendations Congress required EPA to assess in every CAA rulemaking,[14] reviewed EPA's recent draft of its now-finalized IRIS Handbook, which describes EPA's current process for developing an IRIS assessment. In summarizing the role of the IRIS program in risk assessments, NAS stated that IRIS assessments are "used to *inform* risk assessments" – not to serve as the risk assessment itself.[15]

B. Use of an IRIS Value as a Bright Line Threshold, as EPA Does Here, Is at Sharp Variance With Over Thirty Years of EPA Risk Assessment Policy

EPA's position in this case – that it can rely *exclusively* on an IRIS value to bring an enforcement action for a violation of the Clean Air Act – is contrary to its own guidance on the nature and purpose of IRIS values. EPA's IRIS guidance states that "IRIS values are not entitled to conclusive weight" and that "[i]f an outside party questions IRIS values during the course of an EPA proceeding . . . EPA will consider all credible and relevant information before it in that proceeding." Water Rule, 66 Fed. Reg. at 46929.

For example, in promulgating rules for benzene emissions, EPA did not use the benzene IRIS value, let alone rely on it exclusively. Instead, EPA evaluated the broader scientific record and chose a risk value based on that record. See 53 Fed. Reg. 28496, 28506 (July 28, 1988). Indeed, when Congress significantly amended Section 112 of the Clean Air Act in 1990 to address

[14] *See* 42 U.S.C. § 7607(d)(3).

[15] National Academy of Sciences, *Review of U.S. EPA ORD Staff Handbook for Developing IRIS Assessments: 2020 Version* at 1 (Nov. 2021) (emphasis added) ("IRIS Handbook peer review") *available at*: https://nap.nationalacademies.org/catalog/26289/review-of-us-epas-ord-staff-handbook-for-developing-iris-assessments (last visited Aug. 14, 2023).

air toxics, it specifically preserved the interpretation of Section 112 set forth in EPA's 1989 benzene rule promulgating National Emissions Standards for Hazardous Air Pollutants (NESHAP) for benzene, 54 Fed. Reg. 38044 (Sept. 14, 1989), explicitly embedding that interpretation into the statute's residual risk provisions. *See* 42 U.S.C. 7412(f)(2)(B) (providing that nothing in Section 112 "shall be construed as affecting, or applying to" EPA's interpretation of Section 112 as set forth in the 1989 benzene rule). The 1989 rule "announces the EPA's final decision on the policy approach for setting NESHAP" under Section 112, and makes clear that EPA "believes that the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information." 54 Fed. Reg. at 38044, 38046; *see id.* at 38045-38057. The incorporation of the benzene NESHAP rule's approach into the Clean Air Act demonstrates that Congress recognized that the consideration of multiple scientific and technical issues (beyond an IRIS value) was the appropriate way to regulate air toxics. This nuanced approach used by EPA and adopted by Congress stands in sharp contrast to EPA's approach here.

In the context of residual risk rulemakings under the Clean Air Act -- rulemakings that regulate risk from hazardous air pollutants such as chloroprene -- EPA specifically assured Congress that it would "not be relying exclusively on IRIS values" but instead would "be considering all credible and readily available assessments."[16] And indeed, in other regulatory actions, EPA has emphasized that regulators "should not rely exclusively on IRIS values but should consider all credible and relevant information that is submitted in any particular

[16] EPA, *Residual Risk Report to Congress,* at 57 (Mar. 1999). *Available at*: https://www.epa.gov/sites/default/files/2013-08/documents/risk_rep.pdf (last visited Aug. 14, 2023). EPA's guidelines for ensuring data quality in influential scientific risk assessments take a similar approach, stating that EPA intends to "use all relevant information," "evaluate that information based on sound scientific practices," and "reach a position based on careful consideration of all such information. EPA, *Guidelines for Ensuring and Maximizing Information Quality*, at 26 (Oct. 2002). *Available at*: https://www.epa.gov/sites/default/files/2019-08/documents/epa-info-quality-guidelines_1.pdf (last visited Aug. 14, 2023).

rulemaking[.]"[17] It is the non-determinative nature of IRIS values that led the U.S. Court of Appeals for the D.C. Circuit to allow EPA to avoid formal rulemaking obligations when developing IRIS. *Chemical Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1263 (D.C. Cir. 1994) ("[t]he [IRIS] database by itself has no preclusive effect; the data in the database constrain no one until so applied in a particular rule."). EPA cannot have it both ways: it cannot both exclude the IRIS process from the procedural protections provided by notice-and-comment rulemaking, and then claim the resulting IRIS value is decisive and enforceable.

Consistent with its use of IRIS as a tool and not a regulatory threshold, EPA itself has said that the 2010 chloroprene 0.2 ug/m^3 threshold "is not based on an evaluation of current, real-world exposure, is not an air quality standard, and it is not used directly for regulatory purposes."[18] The Louisiana Department of Environmental Quality (LDEQ) agrees in this case: "…neither the 0.2ug/m^3 exposure concentration nor a cancer risk threshold of 100-in-1-million are an enforceable standard or applicable requirement under the Title V permitting program. Rather chloroprene is regulated … pursuant to Section 112 of the Clean Air Act."[19]

C. Congress and Independent Scientific Organizations Have Raised Concerns that the IRIS Development Process has Scientific and Procedural Flaws

There are further reasons for the Court to carefully consider the appropriateness of reliance on an IRIS value as the sole or determinative basis for supporting an enforcement action. Because IRIS values are not regulations, EPA has not subjected them to the procedural requirements of the

[17] Water Rule, 66 Fed. Reg. at 46929.
[18] Letter from P. Tsirigotis (EPA) to Dr. C. Brown (LDEQ), dated Sept. 23, 2019, at 2, *available at*: https://www.epa.gov/sites/default/files/2020-09/documents/image2019-09-23-132129.pdf (last updated Sept. 23, 2019).
[19] Letter from Dr. C. Brown (LDEQ) to L. Dorka (EPA), dated June 3, 2022, at 9 (Exhibit 1); *see also* Answer, Affirmative Defenses, and Counterclaims at 53, *United States v. Denka Performance Elastomer, LLC*, No. 2:23-cv-735.

Clean Air Act or the Administrative Procedure Act.[20] The lack of appropriate vetting for IRIS values, as well as their lack of transparency, has long raised concerns, including within Congress.[21]

Indeed, NAS has raised concerns with IRIS' methodology, including a critique of "recurring methodologic problems" with EPA's IRIS assessments, including "problems with clarity and transparency of the methods" EPA used.[22] To "ensure that EPA adequately considere[d] the [NAS'] recommendations," Congress further requested that the National Research Council ("NRC") within the NAS assess EPA's planned and implemented changes and recommend further improvements. EPA did make some programmatic changes, and NAS assessed those changes in a 2014 report, finding multiple areas that required further improvement, including public participation, problem formulation, evidence identification, evidence evaluation, evidence integration, and calculation of IRIS values.[23] Specifically, NAS recommended in its 2014 Report that EPA revise its IRIS program by improving evidence integration and transparency, developing specific criteria to determine when evidence is sufficient to derive toxicity values, and preparing a quality-management plan for future IRIS assessments.[24]

EPA agreed with the recommendations of the 2014 NAS Report and has since committed substantial resources to overhauling the IRIS process, including, most recently, issuing a 243-page

[20] *See, e.g.*, Water Rule at 46929 ("IRIS values are not rules adopted after notice and comment rulemaking.").
[21] *See, e.g.*, Integrated Risk Information System (IRIS); Announcement of Availability of Background Paper, 58 Fed. Reg. 11490 (Feb. 25, 1993) ("IRIS Announcement"); H.R. Doc. No. 106-379, at 129 (Oct. 13, 1999) ("The conferees are concerned about the accuracy of information contained in the Integrated Risk Information System (IRIS) data base"); *Cf.* H.R. 120, 118th Congress (Jan. 9, 2023) (proposing to require chemical assessments to be performed by the relevant EPA program office rather than the IRIS program to improve science).
[22] NAS, *Review of the Environmental Protection Agency's Draft IRIS Assessment of Formaldehyde* (2011) at 4.
[23] NAS, *Review of EPA's Integrated Risk information System (IRIS) Process*, at 3-9 (2014) ("2014 NAS Report").
[24] *Id.* at 23, 37, 58, 77, 105, 129-130.

peer-reviewed handbook for conducting IRIS assessments.[25] A draft of this Handbook underwent review by NAS, which found that while the Agency had made significant steps in implementing the 2011 and 2014 recommendations, work still needed to be done even with respect to the recommendation to develop a handbook that would "'provide a single detailed guidance document for all those involved in the development of IRIS assessments' and make the IRIS process transparent to stakeholders."[26] Specifically, NAS recommended that EPA clarify the role of mechanistic data in evidence integration, and provide a step-by-step description of the process for appropriate study selection.[27] However, despite these remaining areas of improvement necessary for the IRIS program, EPA has not revisited its 2010 IRIS value for chloroprene – the basis for this enforcement action – to account for these changes, despite the scientific community's deep concerns about the accuracy and efficacy of the IRIS program.

D. IRIS Values Are Not Legally Binding Obligations, and Therefore Enforcing an IRIS Value, Without Independent Evidence to Support Doing So, is Contrary to Settled Principles of Administrative Law

The government can bring an enforcement action only when a defendant has violated a legal obligation, and an IRIS value is not a legal obligation. As discussed above, IRIS is a database, with no regulatory effect. It is not a rule, and it is not subject to notice and comment. Justice Kagan, writing for herself and three other members of the Supreme Court, has noted that an "interpretive rule itself never forms 'the basis for an enforcement action'" because it cannot "impose any 'legally binding requirements' on private parties." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion of Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ.) (quoting *National Min. Assn. v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (opinion of

[25] *See generally ORD Staff Handbook for Developing IRIS Assessments*, EPA/600/R-22/268 (Dec. 2022).
[26] IRIS Handbook Peer Review at 13-14 (quoting (NRC, 2014 at 23)).
[27] *Id.* (*e.g.,* Recommendation 6.3, 7.1).

Kavanaugh, J., for the court)); *see National Min. Ass'n*, 758 F.3d at 252 (a guidance document, which "imposes no obligations or prohibitions on regulated entities… may not be the basis for an enforcement action against a regulated entity").[28] Similarly, in *Perez v. Mortgage Bankers Association*, the Supreme Court held that interpretative rules – in other words, agency actions that do not go through notice-and-comment rulemaking processes – "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Bankers Ass'n*, 575 U.S. 92, 97 (2015).

The U.S. Department of Justice's Manual, which sets forth the standards of conduct for Department of Justice attorneys, similarly instructs attorneys on how to use agency "guidance" in litigation on behalf of the federal government.[29] The Manual states that "enforcement actions must be based on the failure to comply with a binding obligation, such as one imposed by the Constitution, a statute, a legislative rule, or a contract."[30] Or, put a different way, as articulated Justice Kagan in *Kisor*, "[a]n enforcement action" may not rely on a mere interpretive rule but "must instead rely on a legislative rule, which (to be valid) must go through notice and comment." *Kisor*, 139 S. Ct. at 2420 (opinion of Kagan, J.).

In this case, the only alleged violation is an exceedance of an IRIS value, and, as discussed above and acknowledged by EPA, an IRIS value is not a rulemaking with the force of law. As Justice Kagan stated in *Kisor*, "[n]o binding of anyone occurs merely by the agency's say-so." *Kisor*, 139 S. Ct. at 2420.

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[28] *See also, e.g.*, *D&B Boat Rentals, Inc. v. United States,* 508 F. Supp. 3d 87, 95 (E.D. La. 2020) ("[T]he Court follows the analysis laid out in *Kisor v. Wilkie*").

[29] *See* DOJ, *Justice Manual § 1-19.000: Principles for Issuance and Use of Guidance Documents* (Apr. 2022), https://www.justice.gov/jm/1-19000-limitation-issuance-guidance-documents-1#:~:text=In%20the%20enforcement%20context%2C%20an,.%E2%80%9D%20Kisor%2C%20139%20S (last updated Apr. 2022).

[30] *Id.*

Even further, as EPA has acknowledged, "IRIS is not an exhaustive toxicological database, nor a risk assessment methodology resource."[31] IRIS presents only summaries of hazard and dose-response assessments, with references for deeper research.[32] As EPA has repeatedly warned:

> IRIS values are not rules adopted after notice and comment rulemaking, although . . . public comments are solicited, IRIS values are not legally binding **and are not entitled to conclusive weight in any rulemaking**. In addition, EPA or any State agency that uses IRIS **should not rely exclusively on IRIS values** but should consider all credible and relevant information that is submitted in any particular rulemaking. If an outside party questions IRIS values during the course of an EPA rulemaking . . . EPA considers all credible and relevant information before it in that proceeding.

Water Rule, 66 Fed. Reg. at 46929 (emphases added); *see also* Integrated Risk Information System (IRIS) History, https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=2776 ("In general ***IRIS values cannot be validly used to accurately predict the incidence of human disease*** or the type of effects that chemical exposures have on humans.") (emphasis added) (last updated May 15, 2019). Despite these acknowledgments, EPA is treating the IRIS value in this case as a binding norm.[33]

II. USE OF AN IRIS VALUE AS THE BASIS FOR AN ENFORCEMENT ACTION RAISES DUE PROCESS QUESTIONS

Because an IRIS value does not have the force of law and is not entitled to conclusive weight in a rulemaking, industry has not been on notice that exceeding an IRIS value, where a facility is otherwise in compliance with its permits and all other applicable legal standards, can

[31] Integrated risk Information System (IRIS); Health Risk Assessment; Guidelines, etc., 53 Fed Reg. 20162 (June 2, 1988) ("Public Notice").
[32] *Id*.; *see also* Background Paper at 5 ([o]ne of the major intents of IRIS was to encourage users to evaluate the primary literature used to develop the IRIS information in light of the assumptions and uncertainties underlying the risk assessment process.").
[33] U.S. Response to Interrogatory No. 4 ("…the EPA believes that the ambient air concentration of chloroprene that Denka needs to achieve in order to abate the imminent and substantial endangerment alleged in the [Preliminary Injunction] motion is 0.2 μg/m^3").

result in an enforcement action. Therefore, giving an IRIS value the force of law now raises due process concerns.

IRIS values are subject to judicial review only when they are used in a rulemaking, and that has not occurred with the chloroprene IRIS value.[34] Accordingly, the chloroprene IRIS value has been shielded from judicial review to date. This raises particular due process concerns in an enforcement context. *See United States v. Hoechst Celanese Corp*., 128 F.3d 216, 224 (4th Cir. 1997) ("Due process requires that a party must receive fair notice before being deprived of property.").[35]

CONCLUSION

An IRIS assessment is a tool that is used by EPA to assist the agency in developing its emissions standards and other related rules under the Clean Air Act. It is not a regulation or a component of a regulation. The IRIS value is the most conservative estimate of exposure hazards and does not represent risk to individuals in the real world. EPA, *Guidelines for Carcinogen Risk Assessment* at 5-2 (Mar. 2005).[36] For all of the reasons discussed above, the Court should consider these aspects of the chloroprene IRIS value in assessing its use here as the basis for an imminent and substantial endangerment enforcement action.

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[34] By contrast, ACC is currently litigating the validity of the ethylene oxide IRIS value in the D.C. Circuit as a result of EPA's use of that value in the miscellaneous organic NESHAP ("MON") rulemaking. *See* Pet's. Brief, *Huntsman Petrochemical LLC v. EPA*, No. 23-1045 (D.C. Cir. July 24, 2023).

[35] *Cf. Diamond Roofing Co. v. Occupational Safety and Health Review Commission [OSHRC]*, 528 F.2d 645, 649 (5th Cir. 1976) ("Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires."), *quoted in Gates & Fox Co., Inc. v. OSHRC*, 790 F. 2d 154, 156 (D.C. Cir. 1986) (Scalia, J.).

[36] *Available at*: https://www.epa.gov/risk/guidelines-carcinogen-risk-assessment (last updated Sept. 8, 2022).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of August, 2023, a copy of the foregoing Unopposed Motion for Leave to Appear as Amicus Curiae was filed with the Clerk of Court through the CM/ECF system, which will send notice of electronic filing to all counsel of record who have consented to electronic notification.

/s/ Greg L. Johnson

EXHIBIT 1

JOHN BEL EDWARDS
GOVERNOR

CHUCK CARR BROWN, PH.D.
SECRETARY

State of Louisiana

DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF THE SECRETARY

June 3, 2022

Lilian Sotolongo Dorka, Director
U.S. Environmental Protection Agency
External Civil Rights Compliance Office
(2310A)
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
Dorka.Lilian@epa.gov

Re: Response to Concerned Citizens of St. John, *et. al*, Complaint Filed Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Complaint No: 01R-22-R6)

Director Dorka:

The Louisiana Department of Environmental Quality (LDEQ) acknowledges receipt of the referenced complaint alleging violations of Title VI of the U.S. Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and U.S. Environmental Protection Agency (EPA) regulations implementing Title VI into EPA's programs and activities (40 C.F.R., Part 7). Title VI prohibits discrimination based on race, color, or national origin under programs or activities or recipients of federal financial assistance. EPA has adopted Title VI implementing regulations that prohibit unjustified discriminatory effects resulting from federally assisted programs or activities. Discrimination can result from policies and practices that are neutral on their face, but have the effect of discriminating. Facially neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless they are justified and there are no less discriminatory alternatives.

At the outset, specifically with regard to Denka-related air-permitting portions of the referenced complaint, the LDEQ questions the EPA's jurisdictional finding which led it to

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accept the complaint for investigation.[1] Although the State of Louisiana is a recipient of federal funding, its Title V air-permitting program is not "a program or activity receiving EPA assistance."

In accordance with the Clean Air Act and its implementing regulations under 40 CFR 70, the costs of a permitting authority's Title V program must be covered solely by fees paid by the owners or operators of Part 70 sources.[2] LDEQ's Title V program is funded with what LDEQ specifically identifies as Title V fees – criteria pollutant annual fees from Title V facilities[3] and fees charged for processing a Title V application on an expedited basis.[4] This revenue is supplemented by additional funds – again, solely from Part 70 sources – in the form of permit application fees,[5] annual maintenance fees,[6] and air toxics annual fees.[7] EPA's most recent fee audit concluded that the "revenue from Title V emissions fees and other fees derived from Title V sources appear to be sufficient to pay for both the direct and indirect costs of the LDEQ Title V program."[8]

EPA's regulations at 40 CFR Part 7 implementing the Title VI prohibitions regarding discrimination apply specifically to "any program or activity receiving EPA assistance." Although the term "program or activity" is defined broadly to encompass "all operations" of the Department, that term is clearly qualified in the rule by adding the adjective phrase "receiving EPA assistance." That is, the rule is applicable to only those operations receiving EPA assistance.

> § 7.35 Specific prohibitions.
>
> (a) As to any program or activity receiving EPA assistance, a recipient shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, national origin or, if applicable, sex:
>
> (1) Deny a person any service, aid or other benefit of the program or activity…
>
> § 7.30 General prohibition.
>
> No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin…

Despite LDEQ's position that a Title VI complaint is an improper vehicle for raising allegations of discrimination under the Title V permitting program, LDEQ takes seriously the complaints raised. Accordingly, LDEQ has reviewed all the allegations set forth in the

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[1] LDEQ does not dispute EPA's Title VI jurisdiction over the portion of the complaint related to the grant discussed in Part V of this response.
[2] 40 CFR 70.9(a).
[3] LAC 33:III.223 (fee number 2310).
[4] LAC 33:I.1805.
[5] LAC 33:III.207, 211, & 223.
[6] LAC 33:III.209, 211, & 223.
[7] LAC 33:III.211.B.14 & 223 (fee number 2200).
[8] EDMS Doc No. 9698990 (pg. 9 of 39).

complaint. Although EPA Title VI regulations do not require a response to the complaint, LDEQ strongly denies any intent to discriminate whatsoever in its programs and activities. The LDEQ also denies that it conducts any of its programs and activities in a manner that creates a discriminatory effect on any group based on race, color, national, origin, disability, sex, and age. Like EPA, the LDEQ strives to ensure that its programs and activities are consistent with federal and state laws protecting civil rights and are conducted in a manner that is fair, transparent, and mindful of protected classes under the Civil Rights Act.

The LDEQ acknowledges that EPA is required to investigate the complaint once jurisdiction is established and the EPA accepts the complaint for investigation. While denying any discriminatory intent or effect, the LDEQ offers the following substantive response to the referenced complaint. It is LDEQ's intent to cooperate fully with the EPA in its investigation of the referenced complaint.

The Concerned Citizens of St. John (CCSJ) and the Sierra Club, appear to have submitted the complaint to EPA via email in the form of a letter dated January 20, 2022. The complaint contains no signatures, but the individuals named in the letter purport to represent CCSJ and the Sierra Club. The complaint alleges discriminatory actions on the part of both the LDEQ and the Louisiana Department of Hospitals (LDH) in St. John the Baptist Parish, Louisiana. Specifically, and as pertinent to LDEQ, complainants allege that LDEQ is failing to review permit renewal applications that Denka Performance Elastomer LLC (Denka) has submitted to the LDEQ, and that LDEQ is failing to determine whether to renew and strengthen those permits. The complainants further allege that LDEQ is failing to conduct the public notice and comment process that Louisiana and federal law require for permit renewal applications, and that LDEQ is failing to control hazardous air pollution from Denka, and other air toxic sources as needed to protect St. John residents from disproportionate, adverse impacts from this pollution. Finally, the complaint alleges that LDEQ and LDH both failed to timely and transparently fulfill the terms of an EPA grant awarded to determine if Denka's hazardous air pollutant emissions have caused higher instances of cancer in St. John the Baptist Parish. The complainants allege discriminatory and/or disproportionate impact based on race, namely, on St. John the Baptist Parish residents of African descent. The LDEQ respectfully responds that these allegations are without merit and, following investigation, urges denial of the complaint.

I. ALLEGED FAILURE TO REVIEW DENKA PERMITS

The complainants allege that LDEQ has engaged in discriminatory conduct because LDEQ allegedly has failed to fulfill its obligations under Title V of the Clean Air Act or state law by allowing Denka to operate with outdated or expired air permits. Complainants

reference the following specific Denka permit renewal applications in their Title VI complaint:

1) Chloroprene Unit Title V Operating Permit (No. 3000-V5);
2) Neoprene Unit Title V Operating Permit (No. 2249-V9); and,
3) HCl Recovery Unit Title V Operating Permit (No. 206-V-4).

In the complaint, CCSJ and Sierra Club write, "If a facility applies for a renewal of a permit, the permitting authority must review the permit to assure compliance with the Clean Air Act and provide an opportunity for meaningful public notice and comment. LDEQ's multiple failures to review Denka's permit renewal applications and determine whether to renew and strengthen those permits are ongoing violations of Title VI and are therefore timely for ECRCO to consider. LDEQ has an ongoing duty to review and determine whether to renew these permits. Each day that LDEQ failures to review and take action on Denka's renewal applications, it allows Denka to operate without a current, unexpired permit that assures compliances with all applicable Clean Air Act requirements." (citations omitted)[9]

Although LDEQ agrees that it has a duty to review and act on the permit applications, all remaining allegations in this statement are both patently false and misleading. First, contrary to complainants' allegations, Denka is not operating under an expired permit. Under the Louisiana Environmental Regulatory Code and corresponding federal law and regulations, if a permittee submits a complete permit renewal application to the LDEQ within the six months prior to the current permit's expiration date, "the terms and conditions of the existing permit shall remain in effect until such time as the department takes final action on the application for renewal."[10] Such is the case with all three of the referenced permits. The LDEQ is not allowing Denka to operate without permits and to suggest otherwise is simply untrue.

In fact, LDEQ is presently reviewing the applications to determine how to act on the renewal requests. LDEQ's decision not to process the Denka Title V permit renewal applications in the months following initial submittal, contrary to the complainants' assertions of discriminatory effect, was in the interest of expediting and facilitating emission reductions and corresponding risk reduction, thereby directly benefiting the nearby communities and the complainants.

In direct response to EPA's December 2015 release of the NATA report indicating an elevated risk for cancer in the area around the Denka facility, LDEQ quickly took several actions. For example, LDEQ conducted ambient air monitoring in the surrounding areas in March 2016; LDEQ participated with EPA in conducting a comprehensive compliance inspection in June 2016; LDEQ participated with EPA to hold a public meeting to inform the community of the new information in the summer of 2016; and, perhaps most importantly, LDEQ commenced negotiations with Denka to reach an agreement on substantive emission controls to be implemented at the facility in an expedited manner.

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[9] Complaint, pg. 7.
[10] LAC 33:III.503.C.3.c.

The Denka Chloroprene Unite Title V permit renewal application was submitted in October 2016. Shortly thereafter, on January 6, 2017, LDEQ and Denka entered into an Administrative Order on Consent (AOC),[11] under which Denka agreed to install controls designed to reduce actual chloroprene emissions by 85 percent from 2014 emission levels. In the context of these developing actions, LDEQ chose not to process the renewal application for the Chloroprene Unit immediately, in large part in order to assess the effectiveness of the controls and to assure the new control requirements and associated compliance assurance provisions could be incorporated and made enforceable through the permits.

Denka implemented the required control measures in 2018. Since the installation of controls under the AOC, Denka has made numerous renewal application submittals, including multiple addendums containing additional material to reflect updated emissions data reflecting the controls installed. The AOC specifically required Denka to:

- install a brine condenser on the Poly Kettles Vent (1700-3);
- install a vacuum pump and brine condenser on the CD Refining Column (1700-20 and 1700-20-A);
- route seven sources to the Hydrochloric Acid Production Furnace (HAPF) in the HCl Recovery Unit;
- install an regenerative thermal oxidizer (RTO) to control emissions from 16 sources; and
- reduce chloroprene emissions from the Poly Building Wall Fans and Stripper Wastewater and Associated Aeration Tank(s) by at least 50%.

On May 16, 2019, DEQ sent Denka a letter requesting verification that the 85% reduction of chloroprene ordered under the 2017 AOC had been achieved because the 2018 emissions report that Denka submitted did not show an 85% chloroprene emission reduction. On July 1, 2019, Denka responded to DEQ's verification request and advised DEQ that, in the first two months of 2018, the RTO was in shakedown period. However, the RTO started operating in steady state condition beginning March 2, 2018. On September 23, 2019, in response to Denka's response of July 1, 2019, DEQ requested that Denka calculate and submit the chloroprene emissions from the facility for the full year from January to December of 2019 and verify the 85% reductions of chloroprene. On May 20, 2020, after verifying the emissions report submitted by Denka on April 28, 2020, for the calendar year 2019, LDEQ sent a letter to Denka that determined an 85% (84.63% rounded) reduction of chloroprene was achieved as required by the paragraph V of the AOC. The reported emissions were about 20 tons of chloroprene for 2019 vs about 140 tons of chloroprene in 2014.

LDEQ believes prioritizing efforts to secure these reductions in actual emissions, in advance of any federal rulemaking or formal enforcement action or consent decree to mandate controls, demonstrates LDEQ's commitment to the protection of public health

[11] EDMS Doc No. 10457076.

and the environment for the surrounding communities. Further, the additional time has allowed LDEQ to assess the long-term effectiveness of the emissions controls and their impact on reducing ambient chloroprene concentrations. Notably, EPA concluded that the "percent average decrease in annual average rolling concentrations at the community monitoring sites ranged from 79% to 91%."[12]

Additional developing information and activities related to chloroprene emissions and the Denka facility were also factors in LDEQ's temporary deferral of action on the Title V renewal applications. One such related matter involves Denka's request that EPA reevaluate and correct the inhalation unit risk (IUR) for chloroprene based on physiologically based pharmacokinetic (PBPK) modeling, which was first submitted in July 2018. Denka's requests ultimately prompted EPA to facilitate two rounds of peer review of the model. EPA's latest response to these requests for correction was not issued until March 14, 2022. EPA's evaluation of chloroprene risk has a direct impact on EPA's review of residual risk under Section 112 of the CAA, and the potential for additional applicable regulations that would need incorporation into the Title V permits.

EPA and LDEQ currently are engaged in ongoing discussions to consider ways to assist Denka in reducing emissions. Given the dynamic circumstances involving Denka's actions under the LDEQ Administrative Order to substantially reduce chloroprene emissions, EPA's reconsideration of the chloroprene IUR and potential residual risk rulemaking, and LDEQ and EPA discussions seeking to assist Denka in further emission reductions, LDEQ made a deliberate decision to temporarily defer processing of the Title V renewal applications. In direct contradiction of the complainants' claims, both LDEQ's intent and the real effect of this decision has been to substantially reduce hazardous air pollution emissions and associated risk for the communities living in close proximity to the Denka facility, not to create or exacerbate any disproportionate adverse effect.

At this time, LDEQ is processing the Title V renewal applications for the Chloroprene, Neoprene, and HCl Recovery Units and expects to release proposed permits in the coming months. LDEQ intends to make enforceable through the updated permits the continued operation and maintenance of the controls installed under the LDEQ AOC, and to establish enforceable emission limits substantially below the limits in the currently effective permits.

Finally, it is important to note that LDEQ's delay in acting on the Denka Title V permit renewal applications is not indicative of a pattern of Department actions with the intent to discriminate or the effect of discrimination. Further, the decision to temporarily defer action on Denka's Title V renewal applications is not indicative of systemic deficiencies or resource constraints within LDEQ's Title V program. Over the last 5 years, the average processing time for Title V renewal applications (based on permits issued during this timeframe) was 13.5 months, and about 80 percent of all such applications were

[12] *Addendum to Summary Report - Air Monitoring for Chloroprene Concentrations in LaPlace, LA from May 25, 2016 through September 26, 2020 - November 2020 (pdf).* (https://www.epa.gov/la/denka-air-monitoring-data-summaries).

processed within 18 months, despite delays due to COVID-19 impacts on staffing and public participation processes.

II. ALLEGED FAILURE TO CONDUCT PUBLIC NOTICE AND COMMENT PROCEDURES ON PERMIT RENEWALS

The allegations relative to inadequate public notice and comment procedures involving the Denka permit renewals are factually inaccurate. They also are being raised prematurely in the permit renewal process.

LDEQ implements an EPA-approved Title V permitting program under LAC 33:III.Chapter 5. These regulations include provisions for public participation consistent with 40 CFR Part 70 for Title V permit renewals. Specifically, the procedures provide for public notice prior to issuance of any permit renewal, with a minimum of 30 days for public comment and public notice at least 30 days in advance of any public hearing (LAC 33:III.531). LDEQ will provide for public participation in accordance with the program requirements as the review of the Denka Title V permit renewal applications proceeds. LDEQ has not arrived at this point in the process. Therefore, characterization of LDEQ's actions as discriminatory is baseless. LDEQ will provide the notice and opportunity to comment on the permit renewal applications in accordance with all applicable laws and regulations at the appropriate and legally required times. As always, LDEQ also will consider and respond to all relevant public comment as part of the decision-making process.

III. LDEQ'S ALLEGED FAILURE TO CONTROL HAZARDOUS AIR POLLUTION IN ST. JOHN THE BAPTIST PARISH

Complainants allege, "St. John the Baptist [Parish] residents are adversely impacted by hazardous air pollution, especially chloroprene and ethylene oxide emissions,"[13] and that LDEQ has failed "to control hazardous air pollution from Denka and other air toxics sources as needed to protected St. John residents from disproportionate impacts from this pollution." In support of this allegation, complainants cite EPA data that purports to show that, "St. John the Baptist Parish residents face the highest cancer risk in the nation due to toxic air pollution…and that 97% of this risk comes from chloroprene and ethylene oxide emissions."[14] However, complainants have omitted to mention the decisive measures LDEQ has taken to reduce chloroprene emissions from Denka and the significant reductions in estimated risk from both chloroprene and ethylene oxide emissions that have occurred in recent years.

[13] Complaint, pg. 20, part B.
[14] *Id.*

Given that LDEQ has acted quickly and definitively under state authority to secure an 85% reduction in actual chloroprene emissions, without awaiting EPA rulemaking or other federal action, LDEQ believes this claim grossly mischaracterizes the facts.

As an initial matter, LDEQ implements federally promulgated emission control standards through delegation by EPA, and incorporates all such control standards in the operating permit for each subject source, including Denka, under an EPA-approved Title V program. EPA has delegated LDEQ the authority to implement and enforce certain New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPs) promulgated by EPA at 40 CFR 60, 61, and 63. In granting this delegation of authority to the LDEQ, the EPA has determined that LDEQ's air program:

1) Is "no less stringent" than the corresponding Federal program or rule;
2) Has adequate authority and resources to implement the program;
3) Has a schedule for implementation and compliance that is sufficiently expeditious; and
4) Otherwise complies with federal guidance.[15]

Even going back to the initial delegation of Federal air programs to the State of Louisiana on February 22, 1982, EPA "determined that [Louisiana's] pertinent laws and the rules and regulations of the Louisiana Department of Natural Resources[16] were found to provide an adequate and effective procedure for implementation of the NSPS program."[17] Finally, in the nearly 40 years that EPA has delegated Federal air programs to the State of Louisiana, EPA has, at all times through the administrator, retained oversight of the delegated programs.[18] The LDEQ takes the position that, in the past four decades, EPA would not have continued to allow for the delegation of a Federal program to a state that was not doing everything possible to implement the protective goals of the programs in an effective, fair and equitable manner. Like EPA, the LDEQ believes that environmental protection and civil rights are interwoven and must be considered in tandem.

Moreover, Title V permits are not the appropriate vehicle to effectuate chloroprene reductions. Title V permits are legally enforceable documents designed to improve compliance by clarifying in a single document all of the federally applicable requirements to which the stationary source is subject under the CAA. According to EPA:

> Title V is primarily procedural, and is not generally intended to create any new substantive requirements.

* * *

[15] 80 FR 9613 (February 24, 2015) NSPS & NESHAP Delegation of Authority to Louisiana.
[16] The Louisiana Department of Natural Resources was the predecessor agency to LDEQ.
[17] 47 FR 07665 (February 22, 1982).
[18] 40 C.F.R. 70.1.

> The Title V permit is intended to record in a single document the substantive requirements derived from elsewhere in the Act. Therefore, in most cases the only emissions limits contained in the permit will be emissions limits that are imposed to comply with the substantive requirements of the Act (including SIP requirements).[19]

Although the complainants focus on the updated IRIS IUR[20] and EPA's estimate of 0.2 µq/m^3 as representative of the life-time exposure equivalent to a cancer risk of 100-in-1 million, neither the 0.2 µq/m^3 exposure concentration nor a cancer risk threshold of 100-in-1-million are an enforceable standard or applicable requirement under the Title V permitting program. Rather, chloroprene is regulated as a hazardous air pollutant (HAP) pursuant to Section 112 of the Clean Air Act. Section 112 mandates that HAP emissions from major sources such as Denka be controlled using maximum achievable control technology (MACT) in accordance with source category specific regulations adopted by EPA under 40 CFR Part 63. Permit Nos. 3000-V5, 2249-V9, and 206-V4 require Denka to comply with the following subparts under 40 CFR 63:

A – General Provisions;
G – National Emission Standards for Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater;
H – National Emission Standards for Organic Hazardous Air Pollutants for Equipment Leaks;
U – National Emission Standards for Hazardous Air Pollutant Emissions: Group I Polymers and Resins;
EEE – National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors; and,
FFFF – National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing.

It is EPA's role, not LDEQ's, to strengthen MACT standards if such standards do not provide an ample margin of safety to protect public health. According to the Clean Air Act:

> If standards promulgated pursuant to subsection (d) of this section and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, **the Administrator shall promulgate standards under this subsection for such source category**. [*Emphasis added*][21]

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[19] 57 FR 32284.
[20] The IUR has been under reconsideration by EPA from approximately July 2018 through March 2022.
[21] CAA § 112(f)(2)(A).

EPA is currently collecting and evaluating data for purposes of developing rulemaking in according with this CAA requirement. Nevertheless, through the actions of LDEQ, current risks from chloroprene are substantially lower than as represented by the complainants. The complainants repeatedly portray the cancer risk to St. John the Baptist residents as the highest in the nation – 1,505 in 1 million – based on the 2014 National Air Toxics Assessment (NATA), a value largely attributed to emissions of chloroprene and ethylene oxide. However, this portrayal grossly overestimates the current cancer risk for the area. Furthermore, the complainants consistently reference maximum short-term ambient air concentrations as representative of lifetime cancer risk rather than considering longer-term exposure concentrations for comparison to risk benchmarks.

As evidenced below, EPA's 2017 Air Toxics Screening Assessment, or AirToxScreen, found that the point source cancer risk declined by 35% in census tract 708 and by 56 percent in census tract 709 between 2014 and 2017 alone.[22] Moreover, as shown in the "Actual Emissions" table below, emissions of chloroprene and ethylene oxide have continued to decline since 2017, chloroprene by 82% and ethylene oxide by 34%.[23] Overall, an 86.2% reduction in actual emissions of chloroprene has been achieved since 2014, driving a similar benefit in risk reduction.

2014 NATA[24]

Census Tract	Point Source Cancer Risk (per million)			
	Total	Chloroprene	Ethylene Oxide	All Others
708	1470.4	1279.5	187.3	3.6
709	583.7	366.0	214.3	3.4

2017 AirToxScreen[25]

Census Tract	Point Source Cancer Risk (per million)			
	Total	Chloroprene	Ethylene Oxide	All Others
708	960.2	891.1	65.3	3.8
709	256.2	200.0	53.0	3.2

[22] Denka's Pontchartrain Site spans the boundary of census tracts 22095070800 (i.e., 708) and 22095070900 (i.e., 709). For a map of these census tracts, see https://www2.census.gov/geo/maps/dc10map/tract/st22_la/c22095_st_john_the_baptist/DC10CT_C22095_001.pdf.

[23] Data per LDEQ's Emissions Reporting and Inventory Center (ERIC). See "Annual Certified Emissions Data 1991-present (Updated 6/23/2021)" at https://deq.louisiana.gov/page/eric-public-reports.

[24] Data per the Access file "ConcExpRisk_tract_poll_LA.mdb" available at https://www.epa.gov/national-air-toxics-assessment/2014-nata-assessment-results.

[25] Data per the Access file "ConcExpRisk_tract_poll_LA.mdb" available at https://www.epa.gov/AirToxScreen/2017-airtoxscreen-assessment-results.

Reported Actual Emissions

Pollutant	Emissions (tons per year) [26]			Percent Change (relative to 2014)
	2014	2017	2020	
Chloroprene	128.81	99.70	17.77	– 86.2 %
Ethylene Oxide [27]	1.61	1.25	0.83	– 48.4 %

In summary, the complaint is grossly misdirected in alleging that LDEQ has failed to sufficiently reduce Denka's chloroprene emissions. In fact, it is EPA that bears the responsibility to update control standards for hazardous air pollutants under Section 112 of the CAA; this is not a state responsibility nor is it an element of the Title V permitting program. Nonetheless, LDEQ has taken direct, specific, expedited and highly effective action beyond any requirements of the federal programs to secure a greater than 85% reduction in chloroprene emissions from the Denka facility, despite the fact that EPA has not at this time proposed or adopted any strengthened MACT or residual risk standards. In addition, LDEQ is working in partnership with EPA/DOJ to execute a Consent Decree with Denka and DuPont that could provide further emission reductions, and is currently in the process of developing draft permits that would incorporate and make enforceable the emission controls installed under the LDEQ AOC.

IV. INADEQUATE, INEFFICIENT, AND NON-TRANSPARENT ENFORCEMENT PROCEDURES

In the complaint, CCSJ and Sierra Club allege that LDEQ's enforcement activities relative to the Denka facility lack transparency. One example provided is, "LDEQ conducted an onsite compliance inspection on June 6, 2016, but failed to notify the public as to the results of that inspection."[28] Complainants also cite to a Louisiana Legislative Auditor report issued in 2021 that complainants allege found that LDEQ's "monitoring and enforcement processes contain numerous gaps."[29] LDEQ does not agree with complainants' portrayal of the Legislative Auditor's report. Indeed, complainants' description of the report mischaracterizes the report's findings and omits the fact that LDEQ agreed with many the Legislative Auditor's findings and recommendations on how LDEQ could strengthen its monitoring and enforcement processes by identifying violations and issuing enforcement actions in a more timely manner.

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[26] Annual Certified Emissions Data 1991-present (Updated 6/23/2021) (https://deq.louisiana.gov/page/eric-public-reports).

[27] Evonik Corporation's Reserve Plant (AI 13560). Reported emissions from sources located in the adjacent parishes of Ascension and St. Charles have decreased by 40.1 % since 2014.

[28] Complaint, Page 16.

[29] *Id.* at Footnote 79, hyperlink to Louisiana Legislative Auditor Report.

One example of complainants' mischaracterization of the report reads as follows: "The agency has failed to remedy this process which appears to *be due in part to its choices leading* to insufficient staffing, high workloads, frequent staff turnover, and inefficient data systems." [*Emphasis added*][30] The Legislative Auditor's report says or implies no such thing about LDEQ's *choices*. Rather, it states, ""We found as well that LDEQ faces challenges related to low staffing levels, high workloads, frequent turnover or staff, and ineffective data systems that make it more difficult to perform its regulatory work."[31] In response to the Legislative Auditor's report, LDEQ acknowledged the opportunity for improvement in some of its enforcement activities and procedures, accepted many of the Legislative Auditors findings and recommendations, and offered concrete solutions of how it would improve and/or rectify them.[32]

The complainants self-servingly omit some of the positive aspects of the Legislative Auditor's report. For example, the Legislative Auditor's analysis of U.S. EPA data found that the number of good air quality days in Louisiana increased by 20.9 percent between 2008 and 2018, while the number of unhealthy days for sensitive groups deceased 75.1 percent. Although the Legislative Auditor pointed out that Louisiana has the highest toxic air emissions per square mile of any state, it is irrefutable that progress in reducing emissions, and consequently risk, has been made.

The complaints about transparency are simply false. All LDEQ inspection reports are public records and any person may review a public record in the State of Louisiana.[33] Additionally, the majority of LDEQ public records are available for viewing on LDEQ's Electronic Document Management System (EDMS), which is easily accessible on LDEQ's public website and user friendly.[34] In the event a particular document is not available or cannot be identified on EDMS, procedures for making a public records request are readily available on LDEQ's public website.[35]

Finally, addressing the inspection of Denka on June 6, 2016, complainants write, "LDEQ conducted an on-site inspection on June 6, 2016, but failed to notify the public of the results of that inspection."[36] Once again, this statement is incorrect. First, according to the EPA Action Plan prepared by and published on EPA's website,[37] "*the EPA* and LDEQ conducted an on-site compliance inspection at the [Denka] facility." This was a joint LDEQ and EPA inspection, with EPA's National Enforcement Investigations Center (NEIC) conducting the inspection for EPA and developing the inspection report. The EPA

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[30] Complaint, pg. 16.
[31] Legislative Auditor's Report, Cover Letter, pg. 2.
[32] LDEQ did not agree with every finding and/or recommendation of the Legislative Auditor's report. However, in every case of disagreement, the LDEQ provided an explanation as to why it disagreed.
[33] Louisiana Public Records Act, La. 44:1, *et seq.*
[34] Some public records are not placed in EDMS for security reasons [i.e. radiation documents] or due to declarations of confidentiality. See Louisiana Public Records Act La. R.S. 44:1 *et. seq.* and Louisiana Administrative Code, 33:1, Chapters 5-6.
[35] https://edms.deq.louisiana.gov/edmsv2/create-my-request.
[36] Complaint, pg. 16.
[37] Complaint, Footnote 77.

also provides a contact person in its action plan (Steve Thompson, Region 6). In EPA's transmittal of the report to LDEQ, EPA notes "Region 6 posts inspection reports to the EPA's public website except when the report or information contained therein is subject to protections, such as confidential business information." In this case, some of the information is redacted from the report based on a claim of business confidentiality. EPA Region 6 provided a copy of the report to LDEQ in redacted format, which LDEQ posted to EDMS as public record. Therefore, for complainants to suggest LDEQ has been conducting enforcement procedures in a clandestine manner is false. The LDEQ has no affirmative duty to notify the public of inspection results. However, the results of such inspections are readily available and accessible to the public.

LDEQ's enforcement program has statewide application. Enforcement activities are conducted throughout the state in a fair and equitable manner. LDEQ denies any intentional discrimination or disparate effect in its enforcement activities. Complainants have failed to establish any such prohibited conduct. For this reason, LDEQ requests dismissal of the complaint.

V. FAILURE TO TIMELY AND TRANSPARENTLY FULFULL TERMS OF EPA GRANT

In the complaint, CCSJ and Sierra Club allege that LDEQ and LDH failed to "timely and transparently fulfill the terms of an EPA grant to study cancer in St. John [the Baptist Parish]."[38] The complaint further alleges, "LDEQ and LDH have contributed to the disparate impact affecting Black [sic] St. John residents by failing to fulfill the terms of an EPA grant in a timely and transparent fashion."[39] According to the complainants, "failing to fulfill the purpose of this EPA grant and provide this information to the public, LDEQ and LDH have prolonged the delay for much-needed support for St John [the Baptist Parish] residents.[40]

LDEQ disagrees with the complainants' allegations and characterizations regarding activities under the EPA grant in question. LDEQ also finds the allegations confusing and contradictory. For example, although the complainants state they have had no knowledge about activities under the grant, they write on page 18 that, "the community has been informed that LDEQ and LDH have performed an audit of the [Louisiana] Tumor Registry in fulfillment of the grant's second objective."[41]

The grant at issue is U.S. EPA Grant Number 01F70601, through which EPA awarded funds to LDEQ, in partnership with Louisiana State University and LDH "to assess health risks associated with Chloroprene exposure in St. John the Baptist Parish near the Denka

[38] Complaint, pg. 18.
[39] Complaint, pg. 24.
[40] *Id.*
[41] Complaint, pg. 18.

Plant."[42] The objectives of the project were to determine if there are higher instances of cancer in the community due to toxic chemical emissions by the Denka Plant, and to determine if there has been any under-reporting of these cases in the Louisiana Tumor Registry.[43] The total budget for this funded project was $224,931.00. Of this amount, LDEQ used $25,147.00 to purchase field equipment consisting of eight Latitude 7212 Rugged Tablets (field tablets) to be used to conduct field inspection commitments. As Louisiana's primary steward of the environment, LDEQ protects all citizens of the state by conducting inspections of permitted and non-permitted facilities, by responding to environmental incidents such as unauthorized releases, spill and citizen complaints, natural disasters, and other environmental emergencies. The funding for and the purchase of these eight field tables allowed LDEQ personnel access to dedicated field equipment that would withstand the rigors of conditions in the field.[44]

LDEQ transferred the remaining funding to LDH as a sub-grant to conduct the substantive activities set forth in the grant application and LDEQ Multipurpose Grant work plan. LDEQ and LDH entered into a "Memorandum of Understanding" for this purpose. EPA was aware of and approved all activities conducted under the grant award. Surely, EPA would not have approved or funded any activity that would intentionally discriminate against, or could be anticipated to result in a disparate impact on any protected class. EPA assigned a Project Officer (Ashley Williams) and a Grant Specialist (Anedia Feaster), and indicated in the "Administrative Conditions" attachment to the grant that EPA would be "substantially involved" in the agreement.[45] In addition, EPA's "substantial involvement" included, but was not limited to, reviewing project phases and providing approval to continue to the next phase, as well as approving substantive terms included in contracts or sub awards.

LDEQ's role in this project was limited to purchasing equipment, preparing a report, and transferring funds to LDH for reimbursement of its research activities upon receipt, review, and approval of supporting documentation showing completion of project commitments. LDEQ fails to see how the purchase of field equipment and activities that the EPA approved and funded for the benefit of residents of St. John Parish can be in any way discriminatory. Such equipment and research benefited all residents of St. John the Baptist Parish regardless of race, color, national origin, or any other protected class. Further, in a letter dated April 5, 2021, then Acting EPA Region Administrator David W. Gray advised CCSJ that the work done under this grant, "is within the scope of work provided by the state and the activities align with the requirements of the CAA [Clean Air

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[42] U.S. EPA Cooperative Agreement Award Notification digitally signed on September 19, 2020 by EPA Award Official James McDonald, Director-Mission Support Division, Project Title and Description Section.

[43] U.S. EPA Cooperative Agreement Award Notification digitally signed on September 19, 2020 by EPA Award Official James McDonald, Director-Mission Support Division.

[44] The Multipurpose Grant Work plan makes it clear that use of the tablets purchased with this grant award was not intended solely for the Denka/chloroprene investigation, but rather as dedicated equipment made available to LDEQ's Surveillance Division as it works to protect citizens statewide.

[45] EPA Grant No. 01F70601, Section I, "Administrative Conditions."

Act] § 105 criteria.[46] EPA stated in the enclosure included with Mr. Gray's letter that, "the EPA, the LDEQ, and the LDH believe that the tasks in the work plan will provide information that these government agencies believe will be useful to the community."[47]

As noted above, LDEQ's "programs and activities" funded through this grant were permissible under the CAA, reviewed and approved by EPA prior to funds being awarded, and subject to EPA oversight. Purchasing equipment to assist in the performance of inspections in St. John the Baptist Parish is in no way discriminatory. For this reason, LDEQ respectfully urges that EPA dismiss this portion of the complaint under 40 C.F.R. §7.120(g).

VI. CONCLUSION

Just like the EPA, LDEQ is committed to ensuring its programs and activities are conducted in a manner that ensures environmental protection for all and meaningful participation in the environmental decision-making process without regard for race, color, national origin, sex, religion, language barrier, disability, or any other factor, be it covered under Title VI or any other law prohibiting non-discrimination. It is somewhat surprising that EPA would accept this complaint for processing especially given the fact that EPA and LDEQ have been working so closely to reduce chloroprene emissions at the Denka facility over the past few years. EPA even touts this partnership on its website:

> *"The Louisiana Department of Environmental Quality (LDEQ) is actively working with EPA and officials from Denka Performance Elastomer (DPE) to address the chloroprene issues in LaPlace, Louisiana. LDEQ staff have met with DPE officials and requested that the company formulate modeling, implement a monitoring plan, and develop actions to reduce emissions."*[48]

However, the LDEQ understands fully EPA's obligation to examine and/or investigate the complaint, even though, in this case, as stated above, LDEQ is of the opinion EPA lacks jurisdiction over the complaint.

EPA has overseen LDEQ's delegated air programs for over forty years and has collaborated with the LDEQ on many occasions in helping to improve the overall environmental quality for all Louisianans. EPA and LDEQ collaborative efforts addressing air emissions at the Denka facility in St. John the Baptist Parish are emblematic of a positive federal-state partnership. With all this historic collaboration, it is inconceivable that EPA would allow a program to continue that violates the civil rights of individuals who

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[46] Letter from David W. Gray, dated April 5, 2021, attached to the Title VI complaint from CCSJ and Sierra Club dated January 20, 2022.

[47] Enclosure attached to David W. Gray's letter dated April 5, 2021. Prior to awarding the grant, EPA reviewed the proposed tasks for the work and negotiated with LDEQ and LDH to ensure that the CAA § 105 criteria were met. Collection, evaluation, and analysis of data associate with risk from air toxics emissions are allowable activities under the CAA (See 42 U.S.C. § 7405(a)(1)(A)).

[48] https://www.epa.gov/la/laplace-louisiana-ldeq-response.

live near the Denka facility. EPA did not allow this because no such civil rights violations have occurred. Indeed, with EPA's help, LDEQ has consistently worked to improve air emissions, particularly chloroprene emissions, from the Denka facility, thereby benefiting, not disparately effecting, those who live near the facility.

LDEQ thanks EPA for the opportunity to respond to the complaint and requests its dismissal.

Sincerely,

Chuck Carr Brown, Ph.D