UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMUNITY IN-POWER AND DEVELOPMENT ASSOCIATION INC., et al., *Plaintiffs*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants.*	Civil Action Nos. 1:23-cv-02715 (DLF)/ 1:23-cv-03726 (DLF) (consolidated)
AMERICAN CHEMISTRY COUNCIL, *Plaintiff*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants.*	

CIDA PLAINTIFFS' STATEMENT OF POINTS AND AUHORITIES IN OPPOSITION TO HEXION'S MOTION FOR LEAVE TO INTERVENE

This is a deadline suit that raises a single, narrow legal issue: EPA's noncompliance with the statutory deadline to complete specific chemical risk evaluations under the Toxic Substances Control Act ("TSCA"). Nearly ten months after EPA informed the Court that it was pursuing settlement of the CIDA Plaintiffs' deadline claims, *see* Defs.' Unopp. Mot. for Enlargement of Time to File Answer or Other Resp. to Pls.' Compl., ECF No. 19, the chemical company Hexion

has moved for permissive intervention to address a different issue: whether the substance of one of those overdue risk evaluations—for the chemical formaldehyde—will comply with various TSCA requirements when EPA publishes it in final form. "Because this suit involves only the timing of EPA's decision" respecting the health and environmental risks formaldehyde presents, Hexion's "interests in the [risk evaluation's] substance do not satisfy this circuit's requirements for intervention." *Sierra Club v. McCarthy*, 308 F.R.D. 9, 11 (D.D.C. 2015).

A movant seeking to intervene permissively under Federal Rule of Civil Procedure 24(b) must demonstrate "(1) an independent grounds for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *In re Endangered Species Act Section 4 Deadline Litig.*, 270 F.R.D. 1, 6 (D.D.C. 2010); *see* Fed. R. Civ. P. 24(b). "If a prospective intervenor satisfies these criteria, courts 'must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *In re Endangered Species Act Section 4 Deadline Litig*, 270 F.R.D. at 6 (quoting Fed. R. Civ. P. 24(b)(1)(B)). In evaluating a motion for permissive intervention, the Court "may also consider 'whether [the] parties seeking intervention will significantly contribute to the just and equitable adjudication of the legal question presented.'" *Env't Integrity Project v. McCarthy*, 319 F.R.D. 8, 12 (D.D.C. 2016) (alteration in original (quoting *Sierra Club v. McCarthy*, 308 F.R.D. at 12).

"Because permissive intervention is granted solely at the discretion of the district court, the Court may deny permission to intervene even if the applicant satisfies the necessary criteria." *In re Endangered Species Act Section 4 Deadline Litig.*, 270 F.R.D. at 6. Permissive intervention "is an inherently discretionary enterprise," and "[r]eversal of a district court's denial of permissive intervention is a 'very rare bird indeed.'" *EEOC v. Nat'l Child.'s Ctr.*, 146 F.3d 1042,

1046, 1048 (D.C. Cir. 1998) (quoting *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994)).

Here, Hexion has not satisfied Rule 24's requirements and its bid to inject issues into this proceeding concerning the substance of the forthcoming formaldehyde risk evaluation will unduly delay and prejudice the adjudication of Plaintiffs' claims. Accordingly, Hexion's motion should be denied.

I. HEXION HAS NOT ESTABLISHED AN INDEPENDENT BASIS FOR SUBJECT MATTER JURISDICTION

Hexion's intervention bid fails, first, because Hexion has not established an independent basis for subject matter jurisdiction. "Permissive intervention . . . has always required an independent basis for jurisdiction." *Nat'l Child.'s Ctr.*, 146 F.3d at 1046. Hexion claims incorrectly that it is exempt from this requirement because it purportedly seeks to intervene "for a limited purpose," namely, to determine the deadline by which EPA must complete the overdue risk evaluation for formaldehyde. Hexion Inc.'s Mot. for Leave to Intervene as a Def. 10, ECF No. 26 ("Hexion Mot.").

This is not a limited purpose. To the contrary, the untimeliness of the overdue risk evaluations is the sole issue in this case, and the establishment of deadlines for their completion is the principal remedy Plaintiffs seek. Accordingly, Hexion's motion does not fall within the "narrow exception" to the jurisdictional requirement for intervention established in the cases on which Hexion relies, which courts have applied "when the movant seeks to intervene for the collateral purpose of challenging a confidentiality order" in litigation to which they are not a party. *Nat'l Child.'s Ctr.*, 146 F.3d at 1047. Here, Hexion does not "seek[] to intervene for the limited purpose of obtaining access to documents protected by a confidentiality order," *id.*, nor for any comparably collateral purpose. Instead, the reason Hexion claims that it seeks to

intervene—to influence the deadline for the overdue formaldehyde risk evaluation—is the sole issue animating Plaintiffs' claim regarding that risk evaluation. Hexion cites no authority for the proposition that a party seeking permissive intervention to litigate a core issue in the existing case is exempt from the requirement to establish subject matter jurisdiction.

To the extent that Hexion does posit a basis for jurisdiction, its motion makes plain that its real interest is in litigating issues beyond the deadline for the overdue formaldehyde risk evaluation that are outside the scope of this case and this Court's jurisdiction. Specifically, Hexion prematurely challenges whether the substance of EPA's forthcoming formaldehyde risk evaluation—which does not yet exist in final form—satisfies a long list of statutory requirements, such as TSCA's requirement that EPA's risk evaluations reflect the best available science, 15 U.S.C. § 2625(h). *See* Hexion Mot. 11–12. EPA's eventual compliance with those requirements is not at issue in this case, which concerns only EPA's violation of the deadline for completing the formaldehyde and other overdue risk evaluations.

Moreover, even when EPA eventually issues the final formaldehyde risk evaluation, this Court will not have jurisdiction to review the risk evaluation's consistency with the statutory requirements Hexion invokes. Like many federal environmental statutes, TSCA contains two judicial review provisions. The "citizen suit" provision in TSCA section 20 grants this Court jurisdiction to review only (1) claims against regulated parties, and (2) claims against EPA "to compel [EPA] to perform any act or duty under [TSCA] which is not discretionary," such as the duty to complete risk evaluations by the statutory deadline. 15 U.S.C. § 2619(a); *see id.* § 2605(b)(4)(G) (establishing risk evaluation deadline). The general judicial review provision in TSCA section 19 grants the Court of Appeals exclusive jurisdiction to review claims challenging the substance of EPA's risk evaluations, risk management rules, and other specified final agency

actions. *Id.* § 2618(a)(1)(A)–(B); *see also id.* § 2605(i)(2) (providing that EPA's determination in a risk evaluation that a chemical presents unreasonable risk is subject to judicial review in a challenge to the risk management rule that follows such a determination). Thus, even when the formaldehyde risk evaluation is final, this Court will not have jurisdiction to entertain the arguments Hexion seeks to raise in this proceeding. *See id.* §§ 2605(i)(2); 2618(a)(1)(A)–(B); *see also Sierra Club v. Browner*, 130 F. Supp. 2d 78, 90 (D.D.C. 2001) (holding that, under substantially similar bifurcated jurisdictional scheme in the Clean Air Act, the district court "can only order EPA to take nondiscretionary actions required by the statute itself" and may not "address the content of EPA's conduct").

II. HEXION HAS FAILED TO IDENTIFY A CLAIM OR DEFENSE IN COMMON WITH THE MAIN ACTION OR SATISFY THE PLEADING REQUIREMENT

For largely the same reasons, Hexion fails to identify "a claim or defense that shares with the main action a common question of law or fact," as required to support permissive intervention. Fed. R. Civ. P. 24(b)(1)(B). The only issue in this case is EPA's violation of the statutory deadline for completing the formaldehyde and other overdue risk evaluations. Hexion's concern, however, is with the *substance* of the forthcoming formaldehyde risk evaluation—a concern that is premature, outside this Court's jurisdiction, and beyond the scope of this litigation. *See*, *e.g.*, Hexion Mot. 15 (asserting that the findings and conclusions in EPA's draft formaldehyde risk evaluation and toxicity assessment on which it relies, including EPA's proposed selection of toxicity values for formaldehyde, "cannot be squared with" feedback provided by EPA's scientific peer review panel); *id.* at 7 (asserting that Hexion "will be negatively impacted by the Proposed Consent Decree and the resulting final risk evaluation" because it purportedly may prompt "formaldehyde use bans or unachievable workplace standards"). "Because this litigation pertains to the timeline and not the substance of EPA's

decision," Hexion's concerns about the substance of EPA's forthcoming formaldehyde risk evaluation do not justify permissive intervention. *Sierra Club v. McCarthy*, 308 F.R.D. at 13.

Indeed, Hexion makes no attempt to identify a claim or defense presenting common questions with the main action and it improperly asks the Court to "excuse[]" its noncompliance with the requirement in Federal Rule of Civil Procedure 24(c) and Local Civil Rule 7(j) to plead such a claim or defense when presenting a motion to intervene. Hexion Mot. 10, 10 nn. 5–6; *cf.* Fed. R. Civ. P. 24(c) ("A motion to intervene must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought."); LCvR 7(j) ("A motion to intervene as a party pursuant to Fed. R. Civ. P. 24(c), Procedure, shall be accompanied by an original of the pleading setting forth the claim or defense for which intervention is sought."). "[T]he Court could deny the motion based on that failure to comply with the federal rules alone." *Friends of the Earth v. EPA*, No. 12-0363, 2012 WL 13054264, at *2 (D.D.C. Apr. 11, 2023); *see also*, *e.g.*, *United States v. Facebook*, 456 F. Supp. 3d 105, 114 n.9 (D.D.C. 2020) (denying intervention motion because, among other defects, the motion was not accompanied by a proposed pleading "as required by the Federal Rules of Civil Procedure and this Court's local rules"). More fundamentally, "intervening in this essentially procedural matter is not an appropriate mechanism for [movants] to protect [their] substantive interests." *Ctr. for Biological Diversity v. EPA*, 274 F.R.D. 305, 313 (D.D.C. 2011) (alteration in original) (quoting *In re Endangered Species Act Section 4 Deadline Litig.*, 270 F.R.D. at 6).

III. PERMITTING HEXION TO INTERVENE WOULD PREJUDICE THE CIDA PLAINTIFFS BY UNDULY DELAYING RESOLUTION OF THIS CASE

Granting Hexion's motion to intervene would delay and disrupt the parties' resolution of this action, to the prejudice of the CIDA Plaintiffs. In exercising its discretion to determine whether to allow permissive intervention, "the court must consider whether the intervention will

unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *see also In re Endangered Species Act Sec. 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 979 (D.C. Cir. 2013).

The CIDA Plaintiffs are presently prepared to move for entry of two proposed consent decrees, which if approved by the Court would resolve all of Plaintiffs' claims. *See* Proposed Consent Decrees, Toxic Substances Control Act Suit, 89 Fed. Reg. 32,424-01 (Apr. 26, 2024). The proposed consent decrees are the result of the diligent work of the parties, since November 2023, to agree on a set of deadlines by which EPA will complete overdue draft and final risk evaluations for twenty-two distinct chemicals. Now, months after the close of the public comment period for the proposed consent decrees, Hexion seeks to upend this global resolution of this litigation so it may further delay the completion of a single, long overdue final risk evaluation. *See* Hexion Mot. 6. ("Hexion objects solely to the proposed consent decree's arbitrary deadline of December 31, 2024 for finalization of the TSCA risk evaluation for Formaldehyde . . . .").

Hexion's intervention in this action would undoubtedly delay resolution of this case. First, as stated above, the CIDA Plaintiffs are presently prepared to move for the entry of the proposed consent decrees, so even "a simple brief, in opposition to the Parties' anticipated motion for entry" would extend the time needed to resolve this action and further delay completion of the overdue risk evaluations. Hexion Mot. 20. Second, Hexion and the CIDA Plaintiffs have opposing views regarding the pace at which EPA should finalize the formaldehyde risk evaluation. The CIDA Plaintiffs assert that the already overdue risk evaluation for formaldehyde must be completed as soon as practicable, which EPA has determined is by December 31, 2024—five years after EPA initiated the risk evaluation and more than one and a

half years after the statutory deadline. Compl. ¶¶ 34, 39, ECF No. 1. EPA has already violated TSCA by failing to finalize the risk evaluation by the statutory deadline, and Plaintiffs' members suffer ongoing harm so long as EPA delays the completion of the overdue risk evaluation, since the completion of the risk evaluation is a mandatory prerequisite to the regulation of the subject toxic chemical. *Id*. ¶¶ 4–9, 76–78, 81–85, 87, 91, 96, 98.

In contrast, Hexion aims to further delay the completion of the formaldehyde risk evaluation, presumably to forestall regulation of a chemical it produces. *See* Hexion Mot. 7–8 (asserting that "Hexion and its associates and customers will be negatively impacted by the Proposed Consent Decree and the resulting final risk evaluation, which is set to include 'unreasonable risk' determinations for many formaldehyde uses" that "will directly prompt Agency risk management regulations"). If permitted to intervene, Hexion's view that the formaldehyde risk evaluation should not be completed by the deadline in the proposed consent decree could "trigger[] renewed negotiations over the terms of the consent decree[s] in an attempt to resolve the proposed intervenors' claims" and "undermine part of the benefit of entering into a consent decree for the settling parties—namely, minimizing litigation." *District of Columbia v. Potomac Elec. Power Co*., 826 F. Supp. 2d 227, 236–37 (D.D.C. 2011).

Further, the CIDA Plaintiffs have negotiated the deadlines in the proposed consent decrees as part of a global resolution of their claims, and any change to a proposed deadline for a specific chemical could have cascading effects on other deadlines in the proposed consent decrees. Renegotiating the proposed deadlines could take months, as it took the original parties seven months to agree to the deadlines currently in the proposed consent decrees and adding another party to this action would further complicate negotiations. *See Sierra Club v. McCarthy*, 308 F.R.D. at 13 (denying industry party's motion for permissive intervention in deadline suit

where movant "expressed hostility to [the] settlement negotiated by the [existing parties]" and the court was "unwilling to put [the movant] in a position to draw out ongoing settlement negotiations and to further delay the resolution of th[e] case" (third alteration in original)).

Hexion asserts that its intervention would not unduly delay this litigation or prejudice the CIDA Plaintiffs because "[t]he EPA Defendants have not yet answered the Complaint[] filed by the CIDA Plaintiffs" and "[t]here have been minimal proceedings in this case to date." Hexion Mot. 19. This assertion ignores the reasons no answer has been filed and filings have been limited in this action—*i.e.*, that the parties have been engaged in settlement discussions to resolve Plaintiffs' claims, a fact EPA has made plain in multiple motions for extensions of time to answer the CIDA Plaintiffs' Complaint. *See* ECF Nos. 20, 22, 23, 24, 25 (unopposed motions explaining more time was needed to answer or otherwise respond to Plaintiffs' Complaint due to ongoing settlement negotiations). Hexion also argues that because the parties have not "yet moved for entry of the Proposed Consent Decree" this action will not be unduly delayed, and the CIDA Plaintiffs will not be prejudiced, by its intervention. Hexion Mot. 19. But as previously mentioned, Plaintiffs are currently prepared to move to enter the proposed consent decrees, and Hexion's intervention would only delay the resolution of that motion.

IV. HEXION WILL NOT CONTRIBUTE TO JUST AND EQUITABLE ADJUDICATION OF THE LEGAL QUESTION PRESENTED IN THIS CASE

In evaluating a motion for permissive intervention, the Court "may also consider 'whether [the] parties seeking intervention will significantly contribute to the just and equitable adjudication of the legal question presented.'" *Env't Integrity Project*, 319 F.R.D. at 12 (alteration in original) (quotation omitted). This factor also disfavors Hexion's intervention because, as discussed above, Hexion's concern is not with ensuring that EPA finally completes its overdue risk evaluation for formaldehyde, but rather with anticipated objections to the

substance of that forthcoming risk evaluation. Further, Hexion's purportedly "unique perspective" as a manufacturer of formaldehyde-containing products will not be helpful to the Court in evaluating the parties' proposal for remedying EPA's deadline violation, Hexion Mot. 20. *See Ctr. for Biological Diversity*, 274 F.R.D. at 313 (concluding that industry groups' intervention would not contribute to just and equitable resolution of question presented in deadline suit concerning overdue EPA response to petition seeking regulation of aircraft emissions, despite movants' "substantial expertise and . . . unique perspective" regarding such emissions). Where, as here, the litigation "pertains to the timeline and not the substance of EPA's decision," and the aspiring intervenor "has expressed hostility to [the] settlement negotiated by the [existing parties]," courts in this district have repeatedly denied requests for permissive intervention. *Sierra Club v. McCarthy*, 308 F.R.D. at 13; *see also Defs. of Wildlife v. Jackson*, 284 F.R.D. 1, 2, 8 (D.D.C. 2012); *Ctr. for Biological Diversity*, 274 F.R.D. at 313; *In re Endangered Species Act Section 4 Deadline Litig.*, 270 F.R.D. at 6; *Env't Def. Fund v. Thomas*, No. 85-1747, 1985 WL 6050, at *7 (D.D.C. Oct. 29, 1985). The Court should reach the same conclusion here. Rather than contribute to the just and equitable resolution of the deadline issue presented in this litigation, Hexion's participation would inject into this case a multitude of additional issues concerning the substance of the forthcoming formaldehyde risk evaluation that are irrelevant to this deadline suit, speculative and premature, and beyond this Court's jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should deny Hexion's motion to intervene.

Respectfully submitted this 13th day of September, 2024.

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[PROPOSED] ORDER DENYING HEXION'S MOTION TO INTERVENE

Upon consideration of Hexion Inc.'s Motion for Leave to Intervene as a Defendant, ECF No. 26, and the oppositions thereto, it is hereby **ORDERED** that the motion to intervene is **DENIED**.

IT IS SO ORDERED.

Dated:

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HON. DABNEY L. FRIEDRICH
United States District Judge