IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA and the STATE OF INDIANA, Plaintiffs, v. UNITED STATES STEEL CORPORATION, Defendant.	)))))))	Case No. 2:18 cv-00127

CITY OF CHICAGO'S MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION TO ENTER REVISED CONSENT DECREE

Available evidence indicates that, even if defendant United States Steel Corporation ("U. S. Steel") complies with the proposed Revised Consent Decree, Dkt. No. 46-1 ("Revised Consent Decree"), violations at U. S. Steel's Midwest Plant ("Facility") of the Clean Water Act, 33 U.S.C. § 1251 *et seq*. ("CWA") and the Facility's NPDES permit ("Permit") remain foreseeable and even likely. The Revised Consent Decree, therefore, is not reasonable and fails to uphold the objectives of the CWA. In short, the Revised Consent Decree fails to satisfy the criteria necessary for approval.

District Courts examine proposed consent decrees settling litigation under the CWA to determine whether they are fair, reasonable and equitable and do not violate law or public policy. *See U.S. v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Colo. 1994); *U.S. v. Metropolitan St. Louis Sewer Dist. (MSD)*, 952 F.2d 1040, 1044 (8th Cir. 1992); *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990); *Earth Island Institute, Inc. v. Southern Cal. Edison Co.*, 838 F. Supp. 458, 463 (S.D. Cal. 1993). The District Court's role is not to substitute its judgment of what constitutes an appropriate settlement or to reform the decree, but to ensure that the decree upholds the important policies underlying the CWA. *See U.S. v. Telluride Co.*, 849 F. Supp. at 1402.

"The words 'fair, reasonable and equitable' have more than a superficial meaning." *Id.* "'[T]he evaluation of a consent decree's reasonableness will be a multifaceted exercise.'" *Id.* (citing and quoting *U.S. v. Cannons Eng'g Corp.*, 899 F.2d 79, 89 (1st Cir. 1990)). "At least three factors are relevant in discerning whether the decree is reasonable: (1) whether the decree is technically adequate to accomplish the goal of cleaning the environment, (2) whether it will sufficiently compensate the public for the costs of remedial measures, and (3) whether it reflects the relative strength or weakness of the government's case against the environmental offender." *Id.* (citing *Cannons Eng'g*, 899 F.2d at 89-90). "Overlaid on this evaluation is the most important factor: whether the consent decree is in the public interest and upholds the objectives of the CWA, the primary of which is 'to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'" *Id.* at 1402-03 (citing and quoting 33 U.S.C. § 1251(a); citing also *U.S. v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991) ("Protection of the public interest is the key consideration in assessing whether a decree is fair, reasonable and adequate."); *U.S. v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1339 (S.D. Ind. 1982)).

I. The Revised Consent Decree is Not Reasonable Because it is Not "Technically Adequate to Accomplish the Goal of Cleaning the Environment."

With regard to the first reasonableness factor, whether the Revised Consent Decree is technically adequate to accomplish the goal of cleaning the environment, the answer is no. Even construing this factor in the narrowest sense, to wit: whether the decree is technically adequate to accomplish its own stated goal of "caus[ing] U. S. Steel to take those steps that are necessary to bring the U. S. Steel's Midwest Plant Facility into compliance with: (a) the CWA, 33 U.S.C. § 1251 *et seq.*, and the regulations promulgated thereunder; . . . [and] (c) U. S. Steel's 2016 NPDES Permit, . . .," Dkt. No. 46-1, Revised Consent Decree at 4, § II, ¶ 1, the answer remains no, the Revised Consent Decree is not technically adequate to accomplish this goal.

A. The Revised Operation & Maintenance and Preventive Maintenance Plans Have Already Proven Inadequate to Prevent Violations.

The Revised Consent Decree requires U. S. Steel to have submitted to the U.S. Environmental Protection Agency ("USEPA") and the Indiana Department of Environmental Management ("IDEM"), by April 15, 2018, both a comprehensive wastewater operation and maintenance plan ("O&M Plan"), and a preventive maintenance program plan ("PM Plan") (collectively, the "Plans"). *See* Dkt. No. 46-1, Revised Consent Dec. at 13-14, ¶¶ 10(a) and 10(c), respectively. The purpose of the O&M Plan is to "ensure that U. S. Steel shall at all times properly operate and maintain all wastewater treatment process equipment used to treat wastewater at the Facility, and provide personnel to carry out the operation, maintenance, repair, and testing functions required to achieve and maintain compliance with the conditions of the [NPDES] Permit." *Id.* at 13-14, ¶ 10(a). The purpose of the PM Plan is "to help prevent breakdowns, reduce wear, improve efficiency and extend the life of its wastewater infrastructure." *Id.* at 14, ¶ 10(c).

The Revised Consent Decree further requires U. S. Steel to implement both Plans upon approval by USEPA and IDEM. *See id.* at ¶¶ 10(b) and 10(d), respectively. USEPA and IDEM approved U. S. Steel's O&M and PM Plans, dated November 14, 2018, on December 28, 2018. *See* Letter of Patrick F. Kuefler, dated 12/28/2018, attached hereto as **Exhibit 1**. According to the terms of the Revised Consent Decree, therefore, the Plans should have been in effect and implemented since December 28, 2018, nearly one year ago.

Available evidence shows, however, that, since December 28, 2018, the Facility has sustained numerous Permit violations as listed below:

Date of NPDES Permit Violation	**Nature of Permit Violation**	**Permit Provision Violated**
May 9, 2019	Turbid, discolored discharge due to increased suspended	Part I.B.1(a-c) Part II.A.2

Date of NPDES Permit Violation	**Nature of Permit Violation**	**Permit Provision Violated**
	solids from Final Treatment Plant	Part II.B.1
August 8, 2019	Discharge of oil sheen at Outfall 004	Part I.B.1(b-c)
August 20, 2019	Discolored discharge at Outfall 004	Part I.B.1(b-c)
August 29, 2019	Exceedance of daily max copper concentration at Outfall 004	Part I.A.3
September 6, 2019	Discharge of oil sheen at Outfall 004	Part I.B.1(b-c) Part II.B.1
September 7, 2019	Exceedance of daily max copper concentration at Outfall 004	Part I.A.3
October 13, 2019	Exceedance of daily max copper concentration at Outfall 004	Part I.A.3
October 30, 2019	Exceedance of daily loading for hexavalent chromium at Outfall 304	Part I.A.5
November 21, 2019	Discolored discharge due to "solids and small amounts of sheen" observed at Outfall 004	Part I.B.1(a-c)

See Declaration of Kimberly Siemens, attached as **Exhibit 2**, at ¶ 6.

The May 9, September 6, and October 30, violations relate, partially or completely, to basic deficiencies in the O&M and PM Plans. *See id.* at ¶ 7. The May 9 violation, for example, indicates U. S. Steel's failure to conduct routine inspections, lack of adequate treatment plant capacity during routine maintenance activities, lack of training (operators did not know treatment train capacity and were unable to estimate quantities of discharged pollutants), and missing or

unavailable standard operating procedures (the operator could not locate the standard operating procedure for pH calibration when asked by an IDEM inspector). *See id.* at ¶ 7.a. In the October 30, 2019 Notice of Violation regarding this violation, IDEM stated that U. S. Steel failed to maintain equipment in working order by having the western treatment train off-line for cleaning and maintenance, thus likely causing or contributing to the violation. *See id.*

Based on IDEM's Inspection Summary Letter dated September 30, 3019, the September 6 violation is believed to have been caused by an in-plant spill of coating oil. *See id.* at ¶ 7.b. IDEM also stated that U. S. Steel failed to properly maintain certain separators. *See id.* And IDEM inspectors noted oil on both sides of the Final Treatment Settling Tanks, which IDEM believed may have been attributed to U. S. Steel's failure to properly maintain the separators. *See id.*

The October 30 violation indicates a plugged pH monitoring line and that the operator failed to follow standard operating procedures requiring manual pH readings. *See id.* at ¶ 7.c. If the operator had followed the standard operating procedures, the incorrect pH value likely would have alerted operators to the need for further investigation. *See id.* U. S. Steel subsequently "institute[d] a temporary work instruction that requires the operators to record pH and other relevant information once per hour." (U. S. Steel November 8, 2019 5-Day Letter). *See id.*

The problem is not that the Plans are not perfect; no Plan is perfect. The problem, rather, is that the Plans are deficient in such fundamental ways, that they have already failed,[1] and will foreseeably continue to fail, to prevent foreseeable, preventable violations.

[1] As acknowledged in the letter attached hereto as **Exhibit 3**, "IDEM has identified a number of alleged violations by U. S. Steel of its Midwest Plant's [NPDES] Permit (Permit), the CWA and Indiana Administrative Code requirements in late 2018 and during several months of this year. All of those alleged violations post-date the April 2018 date of lodging of the Decree and therefore are not covered by the Decree's resolution of claims. IDEM has initiated enforcement action for the post-lodging violations."

B. The Enhanced Wastewater Process Monitoring Design Has Proven Inadequate to Prevent or Mitigate Violations.

The Revised Consent Decree requires that, "[b]y no later than March 30, 2018, U. S. Steel shall complete an evaluation of the existing wastewater process monitoring at its Midwest Plant Facility." *See* Dkt. No. 46-1, Revised Consent Decree at 16, ¶ 11(a). It requires, further, that "[b]y no later than three (3) months after completing the evaluation specified in subparagraph a. above, U. S. Steel shall submit to EPA and IDEM for review and approval, in accordance with Section VIII (Review and Approval of Submittals), a design for wastewater process monitoring for early detection of conditions that may lead to spills such as the April 11, 2017 Spill, and conditions that may lead to unauthorized discharges or discharges in exceedance of Permit limits, at the wastewater treatment works." *Id.* at ¶ 11(b). And it requires that, within five months after receiving USEPA and IDEM approval, U. S. Steel "complete the installation of the approved monitoring technologies and equipment and begin operating the approved wastewater process monitoring at the wastewater treatment works in accordance with the approved design" and "incorporate visual inspection and maintenance of the approved wastewater process monitoring equipment, in accordance with the approved design . . . into its O&M Plan." *Id.* at ¶ 11(c)-(d).

USEPA and IDEM approved the monitoring design on December 28, 2018. *See* Letter of Patrick F. Kuefler, dated 12/28/2018, attached hereto as **Exhibit 4**. The Revised Consent Decree requires, therefore, that U. S. Steel have completed installation, begun operating the approved wastewater process monitoring, and incorporated inspections and maintenance into the O&M Plan by May 18, 2019.

The above-referenced October 30, 2019 violation reveals the failure of the installed early detection system to detect a hexavalent chromium leak prior to discharging hexavalent chromium from Outfall 304 in violation of the NPDES Permit. *See* Ex. 2, Siemens Decl. at ¶ 8. Also, the

City notes that the May 9, 2019 violation, which occurred just nine days before the May 18 deadline, indicates that U. S. Steel failed immediately to monitor for affected parameters after a discharge. *See id.* at ¶ 9. Yet Part II.A.2 of the NPDES Permit requires U. S. Steel to conduct accelerated monitoring for the affected parameters during periods of noncompliance. *See id.* Thus, even in the relatively short time since the approval of the design, U. S. Steel has failed to remain in compliance with its Permit.

II. The Revised Consent Decree Is Not Reasonable Because It Does Not Reflect the Relative Strength of the Governments' Case Against U. S. Steel.

With regard to the third reasonableness factor, whether the decree "reflects the relative strength or weakness of the government's case against the environmental offender[,]" *U.S. v. Telluride Co., supra,* at 1402, the answer is also no. Every party to litigation must understand that risk is inevitable; however, admissions made by U. S. Steel in its answer to the City's complaint in *The Surfrider Foundation v. U. S. Steel*, Case No. 2:18-cv-00020, which is substantially identical to the City's complaint in intervention in the present case, significantly weaken U. S. Steel's litigation position, *vis a vis* the Governments. *See* Dkt. No. 32-4, Answer to City's Complaint., at ¶¶ 38-40, 50, 68-107, 110-16, 124, 130-31, 142, 145-46, and 155.

Among U. S. Steel's admissions are the following. "U. S. Steel admits that it violated the (i) daily maximum limit for hexavalent chromium on January 12, 2017, April 11, 2017, and April 12, 2017; and (ii) monthly average rate for hexavalent chromium in April 2017." *Id.* at 33, ¶ 76. "U. S. Steel admits that on April 17, 2017, it issued a letter to IDEM disclosing that during April 11 and 12, 2017, the Midwest Facility released a total of approximately 346 pounds of total chromium, approximately 298 pounds of which was hexavalent chromium." *Id.* at 43-44, ¶ 93. "U. S. Steel admits that on the morning of April 11, 2017, it reported to the National Response Center discoloration in the effluent from Outfall 004. U. S. Steel admits to a violation of narrative

water quality standards for discoloration on April 11, 2017." *Id.* at 45, ¶ 95. "U. S. Steel admits that between November 13, 2012 and November 13, 2017, it self-reported DMRs identifying dates on which violations of the NPDES Permit's effluent limitations for Total Recoverable Chromium, Hexavalent Chromium, Oil & Grease, and Temperature and violations of Whole Effluent Toxicity conditions occurred." *Id.* at 58, ¶ 124.

In light of U. S. Steel's admissions, the likelihood that the Governments would be relatively successful at trial is high. It is, therefore, unreasonable to enter a consent decree that has already proven itself inadequate to prevent violations.

III. The Revised Consent Decree's Penalty Has Already Proven to Be Too Low to Deter Future Violations.

In addition to demonstrating the technical inadequacy of the Revised Consent Decree, U. S. Steel's history of permit violations, including the permit violations in the time since the Governments' approval of U. S. Steel's O&M and PM Plans and enhanced wastewater process monitoring design, prove that the Governments' proposed penalty is actually too low to deter additional violations. The penalty that the Governments propose in the Revised Consent Decree, $601,242, is the same penalty that they proposed in the original consent decree of April 2, 2018. Thus, U. S. Steel has been cognizant of this penalty for over a year and a half. Yet in that time, U. S. Steel has committed at least the additional known violations discussed in Section I of this brief. The penalty amount proposed by the Governments, therefore, has already failed to deter U. S. Steel from violating its Permit.

In this case, as described above, there is no need to speculate as to whether the Revised Consent Decree is technically adequate to bring the Facility into compliance. The available evidence confirms that it is not. There is also no need to speculate as to whether the Governments have a reasonable likelihood of success at trial. The available evidence shows that the

Governments' case is strong, particularly considering U. S. Steel's numerous admissions in its Answer to the City's Complaint. For the reasons stated above, the Revised Consent Decree fails to satisfy the reasonableness requirement and the Governments' motion should, accordingly, be denied.

WHEREFORE, the City asks that this Court deny the Governments' Motion to Enter Revised Consent Decree, Dkt. No. 46.

Dated: December 19, 2019

Respectfully submitted,

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