

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA**

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

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTION TO ENTER REVISED CONSENT DECREE**

INTRODUCTION

The United States, on behalf of the U.S. Environmental Protection Agency (“EPA”), the National Park Service (“NPS”) of the United States Department of the Interior, and the National Oceanic and Atmospheric Administration (“NOAA”) of the U.S. Department of Commerce; and the State of Indiana (“Indiana” or “State”), on behalf of the Indiana Department of Environmental Management (“IDEM”) and the Indiana Department of Natural Resources (collectively the “Plaintiffs” or “Governments”), jointly request that the Court approve and enter the revised Consent Decree with U. S. Steel Corporation (“U. S. Steel”) that is Attachment A to the Plaintiffs’ Motion to Enter Revised Consent Decree (“Motion”). The Parties have proposed three changes to the Consent Decree as lodged with the Court, in response to public comments: (1) the addition of an Environmentally Beneficial Project to be supervised by Indiana; (2) several revisions to Appendix B to strengthen and broaden the notification procedures required if U. S.

Steel experiences a spill or release; and (3) clarifying language to make clear that U. S. Steel must comply with Appendix B. Further, after the lodging of the Consent Decree and pursuant to the Decree's review and approval procedures, the United States and Indiana required a number of changes to U. S. Steel's submitted operation and maintenance ("O&M"), preventive maintenance, and wastewater monitoring design plans required under the Decree. The plans themselves, including revisions made to the initially submitted plans, address many of the public comments received. The United States, in consultation with Indiana, has carefully considered the public comments received on the proposed Consent Decree, and believes the proposed revised Consent Decree to be fair, reasonable, and consistent with the Clean Water Act ("CWA" or "Act") and other applicable federal and state laws.

On April 2, 2018, the Plaintiffs filed a Complaint in this action against Defendant U. S. Steel alleging violations of the CWA and various other state and federal laws at U. S. Steel's Midwest Plant in Portage, Indiana ("Facility"). *See* Complaint, Dkt. # 1. The Complaint seeks injunctive relief, cost recovery, civil penalties, natural resource damage assessment costs and damages for lost use/compensatory restoration in accordance with a number of federal and state statutes, including the CWA; Titles 13 and 327 of the Indiana Administrative Code; the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"); the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"); and/or the System Unit Resources Protection Act ("SURPA").

Simultaneously with filing the Complaint, the Governments lodged a proposed Consent Decree to remedy the violations alleged, and now seek entry of a proposed revised Consent Decree (hereinafter, any reference to "proposed revised Consent Decree" may be simplified to "Consent Decree" or "Decree"). Under the Consent Decree, and as explained more fully below,

U. S. Steel is required to perform a number of repairs and improvements, as well as conduct additional sampling, monitoring and preventive maintenance, to help prevent future discharge violations of all permit parameters, including chromium permit exceedances and spills. In the event of a spill or release to ground, soil, or water, Appendix B to the Consent Decree sets forth detailed requirements for notifying appropriate entities. The proposed Consent Decree also requires U. S. Steel to implement a preventive maintenance program plan and to implement new wastewater process monitoring. Further, the proposed Consent Decree requires U. S. Steel to pay a \$601,242 civil penalty and over \$625,000 in response costs and damages. Finally, the revised Consent Decree includes a new State-only environmental beneficial project in which U. S. Steel would conduct an Indiana-monitored water quality sampling program at various locations on the shore of Lake Michigan, in the vicinity of the Indiana Dunes National Park and near the Facility, to provide useful information to community members who recreate in the area.

At the time of lodging of the original Consent Decree, the Governments asked the Court to defer action on it while the United States submitted the proposed settlement for public review and comment pursuant to 28 C.F.R. § 50.7. On April 6, 2018, the Department of Justice published notice of the proposed Consent Decree in the Federal Register. The public comment period was subsequently extended an additional 30 days, to June 6, 2018. 83 Fed. Reg. 17,193 (April 18, 2018). The United States received approximately 2,700 comments on the Consent Decree. The commenters raise a number of concerns that the United States, in consultation with Indiana, has carefully considered and addresses in this Memorandum and the accompanying United States' Response to Comments.

After careful review of the public comments, the United States, in consultation with Indiana, believes that the revised Consent Decree is fair, reasonable, consistent with the CWA

and other applicable environmental laws, and in the public interest. The comments do not disclose facts or considerations leading the Governments to believe that the Consent Decree is inappropriate, improper, or inadequate. Decree, ¶ 82. Accordingly, the Governments respectfully request approval, signature and entry of the proposed revised Consent Decree by this Court. U. S. Steel has agreed to entry of the revised Consent Decree, *id.*, and concurs in this Motion and Memorandum.

BACKGROUND

I. The Facility and the Alleged Violations

U. S. Steel owns and operates its Midwest Plant in Portage, Indiana (“Facility”), where the company manufactures steel sheet and tubular products. The Facility’s operations include acid pickling, alkaline cleaning, cold rolling, sheet temper milling, continuous annealing, electro-galvanizing, and tin electroplating. U. S. Steel also operates two plants to treat process wastewater. The Chrome Treatment Plant treats hexavalent chromium-bearing wastewater from the tin free steel lines, electroplating tinning lines, and galvanizing lines via a reduction process (i.e., chromium removal). The North Final Treatment Plant treats process wastewater from the pickling lines, cold reduction, annealing, temper milling, electroplating, hot dip coating, and prep lines. Both wastewater plants discharge to Burns Waterway through Outfall 004. The Midwest Plant also discharges non-contact cooling water and storm water out of its outfalls to Burns Waterway, which flows into Lake Michigan. Burns Waterway is a 5,540-foot-long canal extending inland from Lake Michigan to the south of U.S. Highway 12. Outfall 004 discharges into Burns Waterway about 500 yards upstream of Lake Michigan.

The Governments’ Complaint seeks injunctive relief and civil penalties for alleged violations of various environmental requirements, as well as cost recovery for response actions

by the Governments and recovery of damages, primarily relating to an April 11, 2017 spill. On that date, U. S. Steel discharged process wastewater from the Facility via Outfall 004, which bypassed treatment. The discharged wastewater contained, among other pollutants, hexavalent chromium and total chromium. EPA and IDEM determined that the April 11, 2017 spill resulted in a number of CWA violations and corresponding violations of the Indiana Code, including violations of the effluent limits for total chromium and hexavalent chromium in U. S. Steel's National Pollution Discharge Elimination System ("NPDES") permit, issued by Indiana. Because chromic acid was discharged in an amount greater than the reportable quantity for such pollutant under EPCRA, 42 U.S.C. § 11004(c), the discharge also gave rise to violations of the written notification provision of EPCRA.

In response to the release or threatened release of hazardous substances from the Facility on April 11, 2017, EPA incurred a total of \$350,653.20 in response costs under CERCLA, 42 U.S.C. § 9607. The NPS also conducted response activities at the Facility and affected areas and incurred response costs under SURPA, 54 U.S.C. §§ 100722-23, in connection with the April 11, 2017 spill. NPS further incurred damage assessment costs and damages for lost use/compensatory restoration for loss of recreational opportunities and/or use of the beaches along the Indiana Dunes National Park, which were closed as a result of the April 11, 2017 spill. Finally, NOAA incurred costs under CERCLA in conducting natural resource damage assessment activities in connection with the spill.

Following the April 11, 2017 spill, the Governments' investigation uncovered evidence of other alleged violations, including: (1) permit effluent exceedances for a number of other pollutants, going back to year 2013, and an exceedance of the effluent limit for total chromium during an October 2017 discharge at the Facility; (2) violations of the narrative standards in the

permit, including discharges creating a nuisance due to discoloration of the water; (3) monitoring and reporting violations; (4) O&M violations for, among other things, failure to operate all equipment and systems efficiently for the collection and treatment of process wastewater as necessary to achieve compliance with the terms and conditions of the permit; and (5) certain violations of the Facility's Storm Water Pollution Prevention Plan.

II. The Proposed Revised Consent Decree

The proposed Consent Decree notes that U. S. Steel made a number of repairs and improvements at the Facility since the April 11, 2017 spill, including repairs to the Facility's concrete containment trench and replacement of a single-wall chemtreat heat exchanger with a double-wall heat exchanger in order to reduce the potential for the release of chromium to noncontact cooling water. In addition to those required repairs, performed prior to lodging, the Consent Decree requires U. S. Steel to conduct additional sampling, monitoring and preventive maintenance. The proposed Consent Decree requires U. S. Steel to develop several O&M and preventive maintenance plans and to design and implement new wastewater process monitoring – all to further the goal of preventing future discharge violations and permit exceedances.

There are three main plans required by the Consent Decree. First, the comprehensive wastewater O&M Plan (“O&M Plan”) is designed to ensure that the company will at all times properly operate and maintain all wastewater treatment process equipment used to treat wastewater at the Facility. Second, the preventive maintenance program plan (“PM Plan”) is designed to help prevent breakdowns, reduce wear, improve efficiency and extend the life of the Facility's wastewater infrastructure so as to help ensure consistent compliance with permit requirements. Third, the design for wastewater process monitoring (“Wastewater Monitoring Design”) covers early detection of conditions that may lead to spills such as the April 11, 2017

spill, as well as conditions that may lead to unauthorized discharges or discharges in exceedance of U. S. Steel's permit limits. EPA and IDEM initially disapproved U. S. Steel's O&M and PM Plans on May 30, 2018. On December 28, 2018, following U. S. Steel's improvements to and resubmission of the plans, EPA and IDEM approved the O&M and PM Plans. Also on December 28, 2018, EPA and IDEM approved U. S. Steel's Wastewater Monitoring Design. Under the proposed Decree, U. S. Steel agrees to implement all of these approved plans on a fixed timeframe, including installation of the approved monitoring technologies and equipment and operation of the approved wastewater process monitoring. In addition, as required by the proposed Decree, since January 31, 2018, U. S. Steel has been sampling daily for total and hexavalent chromium and reporting the results to IDEM.¹

Appendix B of the Consent Decree ("Midwest Facility Spill/Release Evaluation and External Reporting Requirements") addresses releases under CERCLA, the CWA and the Indiana State Spill Rule, in addition to releases covered by EPCRA and other applicable authorities. It sets forth detailed requirements for when, and how soon, U. S. Steel must notify certain appropriate entities in the event of a spill or release to ground, soil, and water. As explained more fully below, Appendix B has been expanded and improved in response to concerns raised by public comments.

The revised Consent Decree also includes a new State-monitored environmentally beneficial project in which U. S. Steel will conduct a water quality sampling and reporting program at various locations on the shore of Lake Michigan not far from the Facility and in the

¹ U. S. Steel has timely submitted all plans and designs required by the proposed Decree, including submission of the first, second and third semi-annual progress reports, which were not required to be submitted until after entry of the Decree.

vicinity of the Indiana Dunes National Park, at an expected cost of \$600,000 over the course of the three-year program. That project is described in more detail below.

III. Summary of Public Comments Received on Consent Decree

The Department of Justice received 2,688 public comments on the proposed Consent Decree. Most of the comments were submitted using several varieties of “model forms” supplied by a number of citizen organizations. Those comments were similar in content to one another, depending on the specific form under which they were submitted. Approximately 72 comments, including letters (one as long as 50 pages) and emails from individuals or organizations, were submitted separately, outside of the various form templates.

The United States, in consultation with the State, has given careful consideration to all of the public comments received, a process that has involved a review of the specific comments received and proposed responses thereto, discussions with U. S. Steel, and discussions on the proposed revisions to the Decree with the City of Chicago (“City”) and the Surfrider Foundation (“Surfrider”), who have intervened in this matter (collectively, “Intervenors”).²

The main concerns expressed in the comments, addressed below and in the United States’ Response to Comments, fall into the following categories, namely, comments relating to: (1) the O&M and PM Plans; (2) Wastewater Monitoring Design; (3) other CWA compliance provisions of the proposed Decree; (4) reporting of spills and other violations; (5) notification requirements of Appendix B; (6) civil penalty; (7) lack of a supplemental environmental project (“SEP”);

² The City and Surfrider’s motions to intervene in this case were granted by the Court on December 13, 2018. Dkt. # 20. Both the City and Surfrider submitted detailed comments on the proposed Consent Decree, after being granted an extension of 60 days to submit their comments. As discussed below, a number of their comments resulted in improvements to U. S. Steel’s initial plans submitted under the Decree and to proposed revisions to Appendix B of the Decree.

(8) response costs and damages; (9) stipulated penalties, termination, modification, and other provisions of the proposed Decree; (10) procedural fairness to the Intervenors and the public; and (11) miscellaneous items that do not fit into any of the above categories.

The United States' Response to Comments, which is Attachment A to this Memorandum, provides a detailed response to all substantive, representative comments received, whereas this Memorandum summarizes and addresses several main categories of comments as they relate to the standard for entry of the proposed Consent Decree. Specifically, this Memorandum focuses on responses to the comments raised regarding (1) the sufficiency of the plans submitted pursuant to the Decree; (2) notification requirements in the event of a spill or discharge; (3) adequacy of the civil penalty; (4) environmental harm caused by the April 2017 spill and how NPS calculated its damages; (5) lack of a SEP, and, in its place, a new State-only environmentally beneficial project; and (6) procedural fairness to the Intervenors and the public.

IV. Thematic Summary of Responses to Certain Sets of Comments

1. Sufficiency of the Plans Submitted Under the Decree

An important component of the proposed Consent Decree is the requirement for U. S. Steel to develop and comply with three different, detailed plans covering operation, maintenance, and monitoring of the Facility. These plans include the O&M Plan, PM Plan, and Wastewater Monitoring Design. Such a requirement to submit detailed operating and maintenance plans is a common requirement in consent decrees covering complex or technical aspects of a facility's pollution control practices. *See, e.g., United States v. Indiana Harbor Coke Co.*, No. 2:18-cv-00035 (N.D. Ind. 2018) (Consent Decree addressing alleged violations of the Clean Air Act and requiring preventive maintenance and operation plans). As prescribed by the proposed Decree, U. S. Steel submitted its initial O&M and PM Plans on April 13, 2018, prior to the close of the

public comment period, and its Wastewater Monitoring Design on June 29, 2018, within the extended public comment period provided to Surfrider and the City of Chicago. Many of the public comments received by the United States addressed the sufficiency of the plans submitted by U. S. Steel, even though (1) only EPA and IDEM have the authority to approve or disapprove the plans (Decree, ¶ 13), and (2) it was the proposed Decree itself, not the plans, for which public comment was sought.

EPA and IDEM closely reviewed, and eventually approved, U. S. Steel's submitted plans to ensure that they were sufficient to maintain future compliance. As part of this process, EPA and IDEM also reviewed and considered the public comments that addressed the substance of those plans. As explained more fully in the U. S. Response to Comments, EPA and IDEM required several important changes to the plans, including but not limited to a detailed description of the training requirements for specific personnel responsible for the Facility's operations and maintenance and how such training will be conducted and tracked. The Response to Comments addresses in what ways U. S. Steel revised certain aspects of its initial plans, in part in response to concerns raised by public comments, and/or the reasons why other aspects of the initial plans were sufficient. The United States' responses to comments in this regard are supported by declarations from Dean Maraldo, Environmental Scientist at EPA Region 5 in Chicago, who conducted several inspections of the Facility, and Brad Gavin, Environmental Engineer at IDEM, who jointly inspected the Facility with Mr. Maraldo (attached as Exhibits 1 and 2, respectively, to the U.S. Response to Comments).

2. Notification Requirements in the Event of a Spill or Release

Many comments were received on Appendix B, "Midwest Spill Evaluation and External Reporting Requirements," which identifies U. S. Steel's required procedures for notifying the

public of any spills or releases, generally, to ground, soil and water. As a result of public comments, the Governments, along with U. S. Steel, have agreed to a revised proposed Appendix B that makes such provisions more extensive and, in some cases, more stringent.

The U.S. Response to Comments details all of the ways in which the Appendix, re-titled “Midwest Facility Spill/Release Evaluation and External Reporting Requirements,” has been improved, including, among other things, the addition of specific information for a Facility operator to provide once the operator notifies the appropriate authorities and response centers of a spill event. Also, revised Appendix B now specifies that U. S. Steel’s legal department will train Facility staff responsible for implementing the notification procedures in the revised appendix. Further, more entities have been added to the list of recipients that U. S. Steel must contact in the event of a spill or release, and current contact information for all such entities has been updated and verified. Several of the proposed revisions to Appendix B were suggested by Surfrider and the City, both in their public comments and, later, in their feedback that the Governments solicited on a preliminary version of the revised Appendix B.

3. The Adequacy of the Civil Penalty

A number of public comments expressed concern that the civil penalty was too small based on the number, duration, and seriousness of the violations alleged in the Complaint. Some also argued that the penalty was inconsistent with internal EPA policies on civil penalties, or that the penalty was insufficient to deter future violations by U. S. Steel.

Under the proposed Decree, U. S. Steel will pay a total civil penalty of \$601,242 for the CWA and EPCRA claims, split evenly between the United States and the State of Indiana. Section 309(d) of the CWA sets forth the factors that a court should consider in determining an appropriate civil penalty amount, which include the seriousness of the violations; the economic

impact of the penalty on the business; the violator's history of violations and good faith efforts to comply; the economic benefit of noncompliance; and "other matters as justice may require." 33 U.S.C. § 1319(d). The Governments consider these factors when negotiating a settlement with a defendant who has allegedly violated the CWA. Here, as explained below and in the U.S. Response to Comments, the Governments considered the seriousness of the violations and the history of U. S. Steel's noncompliance with its permit, as well as the potential for mitigation based on U. S. Steel's good faith efforts to cooperate in reaching a settlement and carrying out a number of the Decree's proposed compliance measures during the negotiations, prior to lodging of the Decree. The U. S. Response to Comments also describes how the civil penalty is consistent with the EPA CWA Settlement Penalty Policy.

One of Surfrider's comments is that the civil penalty is too small in comparison with agreed-upon civil penalties in environmental cases as published in other settlements, including several settlements referenced by Surfrider. But attempting to compare the civil penalty amounts in different settlements is often more confusing than helpful. Each such settlement referenced by Surfrider was shaped by the unique facts of the case. Indeed, the penalty amount agreed to in any given settlement, including those referenced by Surfrider, is likely to have been influenced by potential litigation risks that are not disclosed publicly because they are (and should be) protected by attorney-client and attorney work product privileges.

The difficulty of making meaningful comparisons across settlements is illustrated by Surfrider's reference in its public comment to the settlement in *United States v. Griffin Pipe Prod. Co., LLC*, No. 1:14-cv-00027 (S.D. Iowa 2014). Surfrider cited the *Griffin* decree, which assessed a \$950,000 civil penalty for CWA and CAA violations at an iron pipe manufacturing facility, as an example of a comparable settlement with a higher civil penalty. As noted in the

U.S. Response to Comments, even on its face the *Griffin* settlement resolved many more effluent violations (i.e., discharges, including of lead and zinc, above permit limits) than the Governments alleged against U. S. Steel, plus several Clean Air Act violations not present here. Thus, if such comparison could be considered meaningful (which we do not contend it is), the penalty in *Griffin* would tend to support, rather than undermine, the appropriateness of the penalty assessed in the proposed Decree with U. S. Steel.

In any event, in light of all of the circumstances, the \$601,242 civil penalty represents a substantial and appropriate resolution of the Governments' civil penalty claims in this case.

4. Environmental Harm and How NPS Calculated Its Damages

Several commenters said that not enough information was provided on the environmental harm and/or natural resource injuries caused by the April 2017 spill, and inquired how damages under SURPA were calculated. As detailed in the U.S. Response to Comments and in a declaration signed by Dr. Charles C. Morris, expert in Aquatic Ecology and Contaminant Biology at the Indiana Dunes National Park, the NPS -- which administers the Park -- examined whether the April 2017 spill resulted in environmental harm and natural resource injuries at the Park. During the summer months following the April 2017 spill, both the NPS and U. S. Steel embarked on a sampling program along the four beaches that were closed for a week following the spill, to assess any on-going environmental harm. All results from the NPS samples collected throughout the summer months revealed non-detects for hexavalent chromium, and all U. S. Steel samples during that time period revealed similar, non-detect results.

According to scientists involved in the sampling program, the hexavalent chromium discharged in the April 2017 spill quickly dispersed throughout the system, and the hexavalent chromium could not be found in the sediment or distinguished from background levels created

by U. S. Steel's legal NPDES discharges. The NPS conducted beach surveys looking for dead fish, but no dead fish were located, evidencing that no fish kill occurred. The scientists believed that some evidence of a fish kill would have emerged if there was an imminent risk to natural resources. Based on such data collection, testing and surveys, the NPS concluded that no measurable natural resource injuries occurred within Park boundaries. Therefore, the NPS calculated damages under SURPA based not on environmental harm but rather on lost visitor use during the week that the beaches were closed because of the spill, based on well-accepted beach trip values from the recreation economics literature. *See* Declaration of Dr. Charles C. Morris, Exhibit 3 to U.S. Response to Comments, at ¶¶ 12-14.

5. Lack of a SEP, and, in its Place, a State-only Environmentally Beneficial Project

The originally proposed Decree, as lodged, did not contain a SEP, beyond the injunctive relief needed to achieve and ensure compliance with the regulatory requirements. As explained in the U.S. Response to Comments, a SEP, by definition, is a project that goes beyond what could legally be required in order for a defendant to return to compliance, and that could not be obtained in litigation of the Government's claims. While the United States sometimes secures a defendant's agreement to perform one or more SEPs in settlement, a SEP is in no way a legally required element of a settlement, and the United States often chooses to resolve environmental claims without a SEP, as the Governments originally did here. When a SEP is included, the United States typically takes the cost of the SEP into account in making its civil penalty demand.

In response to the many public comments -- including those of Surfrider and the City -- expressing concern as to why there was no SEP or similar environmental project, the Governments and U. S. Steel explored options for a Consent Decree project that would provide

an additional environmental benefit to the community (without penalty mitigation). At U. S. Steel's suggestion, the revised Consent Decree now contains a proposed State-only Environmentally Beneficial Project (EBP), overseen by Indiana, in which U. S. Steel will sample, monitor and report on water quality for parts of the Lake Michigan shoreline in the vicinity of the Indiana Dunes National Park and near the U. S. Steel Facility. U. S. Steel estimates that it will expend \$600,000 over the course of three years on the State-Only EBP.

The State-Only EBP consists of water quality sampling performed by a certified third-party at a number of significant Lake Michigan locations. Those locations include Burns Ditch and the mixing zone where Burns Ditch flows into Lake Michigan (both locations near the U. S. Steel Facility), the shorelines of three public beaches (Kemil Beach, Indiana Dunes Beach – Western Area, and Michigan City), and sampling locations near the American Water drinking water intakes in Gary and the Town of Ogden Dunes. *See* revised Consent Decree, Appendix C (Map of Sampling Locations). The State of Indiana will oversee this project because the State already assumes oversight responsibility for sampling and monitoring of certain parameters in some locations along the Lake's shoreline; thus, U. S. Steel's proposed project, which would greatly enhance such sampling and monitoring as explained in detail in the U. S. Response to Comments, fits well within the purview of the State's oversight.

The Governments believe that the EBP addresses the concerns of many of the commenters, inasmuch as the project would provide a significant public health benefit to the communities near the Facility and those who use the Indiana Dunes National Park for recreation. And the reporting obligations associated with the EBP will ensure that the public and the relevant government agencies will be kept informed of all water quality sampling results obtained over the course of the three-year project.

6. Procedural Fairness to the Intervenor and Public

Intervenor Surfrider asserted that the proposed Decree should not be entered because it is procedurally unfair, citing, among other things, that DOJ did not permit Surfrider to participate in the negotiations with U. S. Steel over the original, lodged Decree. In the U.S. Response to Comments, we explain that the fact that the Governments and U. S. Steel negotiated the proposed settlement without participation by Surfrider does not make the proposed Decree procedurally unfair. Because of the confidentiality of settlement negotiations, to have included Surfrider in the negotiations would have required agreement by both the Governments and U. S. Steel. That Surfrider did not participate directly in no way undermines the record that the negotiations were conducted at arm's length by experienced representatives of two governmental sovereigns, each charged with representing the public interest and in a posture adverse to U. S. Steel. The Response to Comments also outlines the Governments' efforts to keep the Intervenor abreast of the status of the negotiations with U. S. Steel and notes that the Governments took several of the Intervenor's comments into account when deciding whether to approve U. S. Steel's O&M/PM Plans, and in recommending revisions to the proposed Decree.

ARGUMENT

As a result of the Governments' careful review and consideration of the 2,700 comments on the proposed Decree, the Governments and U. S. Steel have negotiated several changes and additions to the Consent Decree, resulting in a robust document designed to improve U. S. Steel's compliance with the Clean Water Act and other applicable laws, including deterring future violations, and benefits public health and the environment for members of the public residing near the Facility and recreating in and near the Indiana Dunes National Park. The

revised Consent Decree should be approved by the Court because it is fair, reasonable, consistent with the goals of the CWA and other environmental statutes, and in the public interest.

I. Standard of Review

The standard of review applied to a proposed government environmental settlement is whether the settlement is fair (from both procedural and substantive standpoints), reasonable, and consistent with the statute's purposes. *See, e.g., United States v. Davis*, 261 F.3d 1, 23-28 (1st Cir. 2001); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1424, 1426 (6th Cir. 1991); *United States v. BP Expl. & Oil Co.*, 167 F. Supp. 2d 1045, 1049 (N.D. Ind. 2001). As the Seventh Circuit has emphasized, in considering an environmental settlement proposed by the government, "the district court must approve a Consent Decree if it is reasonable, consistent with [the statute]'s goals, and substantively and procedurally fair." *United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011). The Seventh Circuit has cautioned that a district court should be "chary of disapproving a Consent Decree," and may not deny approval unless the decree "is unfair, unreasonable, or inadequate." *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889-90 (7th Cir. 1985).

Government agencies with "substantial expertise," such as EPA, should be granted broad deference when evaluating whether a settlement is fair, reasonable, and in the public interest. *See, e.g., United States v. District of Columbia*, 933 F. Supp. 42, 47 (D.D.C. 1996); *see also Whiting Paper*, 644 F.3d at 372 ("[T]rial court must defer to the expertise of the agency and to the federal policy encouraging settlement."). The judicial deference to environmental settlements reached by the parties is "particularly strong" where, as here, that settlement "has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field." *Akzo Coatings*, 949 F.2d at

1436; *see also Whiting Paper*, 644 F.3d at 372, and *Davis*, 261 F.3d at 21. The balance of competing interests affected by a settlement with the federal government “must be left, in the first instance, to the discretion of the Attorney General,” *Kelley v. Thomas Solvent Co.*, 717 F. Supp. 507, 515 (W.D. Mich. 1989) (citation omitted), since the Attorney General retains “considerable discretion in controlling government litigation and in determining what is in the public interest.” *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 117 (8th Cir. 1976); *see also United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 907 (E.D. Wis. 2004) (“The test is not whether this court would have fashioned the same remedy nor whether it is the best possible settlement”).

II. The Consent Decree is Procedurally and Substantively Fair Because it Requires U. S. Steel to Pay a Substantial Penalty and Follow Detailed Operation and Maintenance, Preventive Maintenance, and Monitoring Design Plans to Promote Compliance.

In assessing the “fairness” of a proposed Consent Decree, courts examine whether the decree is both procedurally and substantively fair. *Davis*, 261 F.3d at 23; *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 86-87 (1st Cir. 1990). To determine whether a proposed settlement is procedurally and substantively fair, courts look to factors such as “the strength of the plaintiff’s case, the good faith efforts of the negotiators, the opinions of counsel, and the possible risks involved in the litigation if the settlement is not approved.” *Akzo Coatings*, 949 F.2d at 1435 (citation omitted).

1. The Consent Decree is Procedurally Fair

Generally speaking, courts find procedural fairness where the settlement was negotiated at arm’s length among experienced counsel. *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003). *See also United States v. BP Products North America, Inc.*, No. 12-cv-207, 2012 WL 5411713, at *2 (N.D. Ind. Nov. 6, 2012). If the decree was the product of good

faith, arm's length negotiations, it is presumptively valid. *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990); *see also United States v. Comunidades Unidas Contra La Contaminacion ("CUCCo")*, 204 F.3d 275, 281 (1st Cir. 2000) (noting that there was "no evidence that the United States and [defendant] had other than an arm's length, good faith bargaining record" in upholding entry of settlement).

Here, the Consent Decree is the result of good faith and arm's length bargaining between the Governments and U. S. Steel, and thus meets the procedural fairness requirement. Importantly, this bargaining process continued even after the public comment period was completed. As part of the Governments' public comment review process, the Governments and U. S. Steel negotiated further compromises that resulted in several substantive revisions to the Decree, strengthening the substantive requirements of the settlement. Specifically, the negotiated changes to Appendix B and the addition of an environmentally beneficial project were sought in direct response to comments submitted by the public, including the Intervenors.³

The Governments' willingness to thoroughly consider and respond to all public comments, and to take them into account when deciding whether to approve U. S. Steel's initially submitted plans, demonstrates procedural fairness. And certainly the Governments' decision to propose certain revisions to the Consent Decree as a result of public comment manifests procedural fairness. *See United States v. Lexington-Fayette Urban Cty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010) ("The United States' good faith is further evidenced by its manifested willingness...to thoroughly consider all oral and written comments made with regard to the proposed decree." (internal quotation marks omitted)).

³ As detailed in the U.S. Response to Comments, the Governments also required extensive and substantive revisions to U. S. Steel's initial O&M, PM and Wastewater Monitoring Design Plans that were submitted pursuant to the Decree. A number of those revisions resulted from suggestions by the public commenters, including the Intervenors.

The Consent Decree is also procedurally fair because the Consent Decree (and the Governments' process in negotiating the Decree and reviewing public comments) promotes transparency and the sharing of information with the public. First, the Governments have taken the unusual step of disseminating to the public all initial and final submissions of U. S. Steel's required plans under the Decree, which have been published on the U. S. Steel-dedicated portions of the EPA and IDEM websites.

Second, during the negotiations with U. S. Steel over the proposed, original Decree, the Governments were in frequent contact with the Intervenors, i.e., Surfrider and the City, updating them concerning the progress of negotiations. In addition, the Governments actively reached out to the Intervenors, both during the public comment period to keep them abreast of the comments and status of the Governments' proposed responses, and, more recently, to solicit their feedback regarding the proposed revisions to the Consent Decree and to answer any questions about those changes. As noted above, and detailed in the U.S. Response to Comments, the Governments agreed with a number of the Intervenors' suggestions – both in their public comments and as part of their feedback that the Governments solicited on the proposed revisions to the Decree – to improve certain aspects of the Decree. The fact that the Governments and U. S. Steel did not agree to include Surfrider, the City, or any other third party directly in the negotiations over the proposed Consent Decree does not make the proposed Decree procedurally unfair. *See BP Expl. & Oil Co.*, 167 F. Supp. 2d at 1052 (finding an environmental consent decree to be fair and reasonable, and holding that “there is no requirement that the Government allow third parties to participate in settlement negotiations”).

The revised proposed Consent Decree is the result of a hard-fought and good-faith negotiation process, led by experienced representatives of two governmental sovereigns charged

with representing the public interest, as well as a thorough and serious consideration of the public's views through the public comment review process, as demonstrated by the detailed Response to Comments. Those efforts, along with the Governments' transparency in making documents submitted by U. S. Steel under the Decree accessible to the public, demonstrate that the Consent Decree meets the procedural fairness requirement.

2. The Consent Decree is Substantively Fair Because it Requires U. S. Steel to Follow Detailed Plans, Undertake Compliance Measures, and Pay a Substantial Civil Penalty

During the negotiations over the original Consent Decree lodged with the Court, U. S. Steel undertook all necessary repairs and structural changes to eliminate the cause of the April 2017 Spill. The Decree itself notes in detail all such past compliance measures. The Decree's plan requirements are additional compliance measures to ensure that all of the Facility's systems are properly operated, maintained and monitored to prevent future noncompliance. Decree, ¶ 9.

As explained above, there are three main plans required by the Consent Decree: the O&M Plan, the PM Plan, and the Wastewater Monitoring Design. The Consent Decree is substantively fair because those plans include detailed and comprehensive requirements related to U. S. Steel's overall operation, maintenance and wastewater monitoring, which are designed to directly address the conditions that led to past violations and to promote future compliance with the CWA and U. S. Steel's NPDES permit. Before ultimately being approved by EPA and IDEM, those plans were strengthened, and further requirements were added, in part based on public comments that suggested ways in which the plans could be improved. U. S. Steel is charged with implementing those plans, as well as undertaking other compliance measures under the Decree such as daily sampling for hexavalent and total chromium, all enforceable by the United States and Indiana via a comprehensive set of stipulated penalties.

The Consent Decree is also substantively fair because it requires U. S. Steel to pay a substantial civil penalty. As explained above, Section 309(d) of the CWA sets forth the factors that a court should consider in determining an appropriate civil penalty amount, which include the seriousness of the violations, the economic impact of the penalty on the business, the violator's history of violations and good faith efforts to comply, the economic benefit of noncompliance, and "other matters as justice may require." 33 U.S.C. § 1319(d). In negotiating a final penalty amount, the United States and the State considered the seriousness of all of the NPDES permit violations, including the violations associated with the April 11, 2017 spill. *See* Complaint, Dkt. # 1, Appendix A. Although the April 2017 spill resulted in significant violations, it was a discrete and isolated event. The proposed civil penalty also covers a number of other alleged permit violations going back to 2013. *Id.* Though numerous and well-grounded, none of those alleged violations rises to the level of seriousness that characterized the hexavalent chromium discharge into Burns Waterway resulting from the April 2017 spill.

In calculating the penalty, the Governments considered EPA's CWA Settlement Penalty Policy and the EPCRA/CERCLA Enforcement Response Policy, in addition to the CWA statutory penalty factors. In addition to the key penalty factors relating to the seriousness of the violations, both the statutory penalty factors and the applicable settlement policies allow for some mitigation of a penalty where appropriate. Here, some mitigation of the penalty was appropriate, given U. S. Steel's cooperation and good faith efforts in reaching a settlement relatively quickly. In addition, as described in the Consent Decree (and as further verified by the Governments and explained in the U.S. Response to Comments), U. S. Steel demonstrated good faith by performing repairs early on and carrying out a number of proposed compliance measures in the Consent Decree prior to lodging of the Decree, much less entry by the Court.

In short, the \$601,242 civil penalty is not only adequate but also represents a substantial and appropriate resolution of the Governments' civil penalty claims in this case.

III. The Consent Decree is Reasonable, Consistent with the Goals of the CWA, and in the Public Interest.

The reasonableness of a consent decree is basically “a question of technical adequacy, primarily concerned with the probable effectiveness of proposed remedial responses.” *Cannons Eng'g*, 899 F.2d at 89-90; *see also Akzo Coatings*, 949 F.2d at 1436. Here, the proposed Consent Decree is reasonable because it includes stringent and detailed requirements related to the operation and maintenance of the Facility, as well as rigorous monitoring requirements, which will accomplish the goal of cleaning the environment. *See CUCCo* 204 F.3d at 281 (citing *District of Columbia*, 933 F. Supp. at 50-51).

As explained in the U.S. Response to Comments, and as supported by the declarations of Dean Maraldo and Brad Gavin, the requirements of the Consent Decree – including the plans and associated standard operating procedures (“SOPs”) developed by U. S. Steel – are technically detailed and are sufficient to deter future violations and promote compliance with the CWA and the NPDES permit. The Governments believe that the compliance requirements of the Consent Decree, including the Wastewater Monitoring Design, the O&M/PM plans, relevant SOPs, and other Decree compliance measures (including required daily total chromium and hexavalent chromium testing), will help prevent future spills and occurrences of unauthorized discharges and discharges in excess of permit limits. *See* Declaration of Dean Maraldo, Ex. 1 to U.S. Response to Comments, at ¶ 20. Moreover, U. S. Steel's proper implementation of the approved plans, SOPs and Wastewater Monitoring Design, in combination with the enforcement provisions of the proposed Consent Decree such as stipulated penalties for failing to comply with the requirements of the plans and the compliance measures of the proposed Decree, will go a

long way towards meeting the proposed Decree's objective of promoting U. S. Steel's compliance with the CWA and related requirements. *See Id.*, at ¶ 22; Declaration of Brad Gavin, Ex. 2 to U.S. Response to Comments, at ¶ 14.

The Consent Decree is also consistent with the goals of the CWA. The overarching goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The revised Consent Decree furthers the objectives of the CWA by requiring U. S. Steel to conduct additional sampling, monitoring and preventive maintenance that, if implemented in accordance with the requirements of the plans and the proposed Consent Decree, will help prevent future spills and promote U. S. Steel's overall compliance with the CWA and the Facility's NPDES permit.

Further, the proposed Consent Decree is in the public interest. In addition to the operation, maintenance, monitoring, and pollution control requirements, the Consent Decree includes several provisions to keep the public informed about water quality and U. S. Steel's progress under the Decree. The Decree's detailed reporting provisions require U. S. Steel to report semi-annually all work performed and progress made towards implementing the requirements of the Decree, any significant problems encountered or anticipated, all non-compliance with any of the compliance provisions of the Decree, any NPDES permit exceedances, and any spills or unpermitted discharges. Decree, ¶ 27. Such semi-annual reports, in addition to being sent to the Governments, will be posted for public viewing on EPA's and IDEM's U. S. Steel-dedicated websites. The Decree's requirements for continuous, regularly-submitted reports are in addition to the Decree's other notification requirements in the event of spills, discharges, and other violations of the Decree and U. S. Steel's NPDES permit, including

the revised provisions of Appendix B that, as explained above, were made more robust in response to public comment. *See* Decree, ¶¶ 28-30 and Appendix B.

And the revised Consent Decree's new proposed State-monitored environmentally beneficial project, in which U. S. Steel will sample and report on various pollution levels at a number of locations along the shore of Lake Michigan, addresses some of the more pressing concerns of the public commenters inasmuch as the project is expected to result in a significant public health benefit to the communities near the Facility and to those who use the popular Indiana Dunes National Park for recreation. In particular, the EBP's reporting provisions, requiring U. S. Steel to submit weekly or monthly reports on water sampling results (depending on the time of year) and to make those reports publicly available online, ensure that the public and the relevant government agencies will be kept informed of all water quality sampling results obtained over the course of the three-year project. U. S. Steel's willingness to expend an additional \$600,000 on this project demonstrates the seriousness with which U. S. Steel takes its responsibility to resolve this matter in a way that not only promotes future compliance with the Clean Water Act but also addresses the concerns of the public for a cleaner and safer environment in which to live and recreate.

CONCLUSION

For the foregoing reasons, the proposed Consent Decree is fair, reasonable, consistent with the goals of the Clean Water Act, and in the public interest. Therefore, the Governments respectfully request that the Court approve, sign and enter the proposed revised Consent Decree.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2019, I filed the foregoing Memorandum, including Attachment A and Exhibits 1 through 4 to Attachment A, electronically with the Clerk of the Court using the Court's Electronic Case Filing System, which sent notification of such filing to all counsel of record through the ECF notification system.

s/Arnold S. Rosenthal
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