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

UNITED STATES OF AMERICA, and the STATE OF INDIANA, Plaintiffs, THE SURFRIDER FOUNDATION, Plaintiff-Intervenor, THE CITY OF CHICAGO, Plaintiff-Intervenor, v. UNITED STATES STEEL CORPORATION, Defendant.	Civil Action No. 2:18-cv-00127

THE SURFRIDER FOUNDATION'S BRIEF IN OPPOSITION TO ENTRY OF THE PROPOSED CONSENT DECREE

Defendant United States Steel Corporation ("U. S. Steel") violated the Clean Water Act ("CWA") on the day after Plaintiffs (the "Governments") asked this Court to enter the "Revised Consent Decree," Dkt. No. 46-1 ("Proposed CD"), the central purpose of which is to prevent U. S. Steel's continued violation of the CWA. Though U. S. Steel reports that it has been implementing the technical provisions of the Proposed CD for the past year, it has violated the CWA frequently and repeatedly in late 2018 and 2019. U. S. Steel's persistent violations demonstrate that the Court should reject this Proposed CD, as it is fundamentally inadequate to meet its most basic purpose.

The Governments focus on U. S. Steel's April 2017 spill of roughly 300 pounds of carcinogenic hexavalent chromium—600 times more than what is tolerated under U. S. Steel's CWA permit. That spill shut down the neighboring Portage Lakefront, part of the new Indiana Dunes National Park and a popular surfing spot. But the April 2017 spill was only the worst manifestation of a longstanding and persistent pattern of admitted CWA violations, maintenance failures, and environmental neglect at U. S. Steel's Midwest Plant (the "Facility"), a pattern that preceded and postdated it. According to IDEM's own inspectors, U. S. Steel's persistent CWA violations have continued throughout 2019, even though U. S. Steel has already implemented the technical provisions of the Proposed CD. This last year has featured the very same unacceptable practices that led to the catastrophic April 2017 spill: U. S. Steel still operates and maintains its Facility irresponsibly, neglects to train key employees, fails to monitor and minimize ongoing violations, misrepresents problems to regulators, and refuses to make proper public notifications.

The Court should reject the Proposed CD because events this year have revealed it to be a fundamental failure. In many environmental enforcement cases, courts appropriately defer to agency predictions that the terms of a proposed settlement will prevent recurrence of the underlying violations. Prediction has no purpose, however, where this Proposed CD has had a trial

period and has failed to prevent the same problems that precipitated this litigation in the first place.

The Court should also reject the Proposed CD because the current civil penalties are inadequate and substantively unfair to the public: Higher penalties are necessary to reflect the unusual strength of the Governments' case and to deter future violations of the CWA. Plaintiff-Intervenor The Surfrider Foundation ("Surfrider"), therefore respectfully requests that the Court reject the current Proposed CD and withhold approval of any settlement until the serious and several defects discussed below are addressed through additional fact-finding and substantially improved consent decree provisions.

FACTUAL BACKGROUND

A. The volume of U. S. Steel's April 2017 hexavalent chromium spill was at least roughly 300 pounds, but it may have been significantly higher.

Though the Governments' brief and Proposed CD focus almost entirely on U. S. Steel's April 2017 hexavalent chromium spill, the Governments cannot even be sure how much hexavalent chromium U. S. Steel spilled during that incident. Though the spill had likely gone on for some time, *see* Affidavit of Dr. Ranajit Sahu (attached hereto as Exhibit A) (hereafter "Sahu Aff.") ¶ 6, U. S. Steel first noticed that spill on April 10 and it continued on to April 11, 2017. U. S. Steel estimates it discharged at least 346 pounds of chromium, including at least 298 pounds of the carcinogenic hexavalent chromium, into Burns Waterway just feet from Lake Michigan and what is now a National Park. *The Surfrider Foundation v. United States Steel Corp.*, No. 2:18-cv-00020, Surfrider Compl., ¶¶ 58, 64 (Jan. 17, 2018), Dkt. No. 1 ("Surfrider Compl."); *The Surfrider Foundation v. United States Steel Corp.*, No. 2:18-cv-00020, U. S. Steel's Answer and Affirmative Defense to Pls' Compl. ¶ 57 (March 9, 2018), Dkt. No. 17 ("U. S. Steel Answer"). This massive spill led to serious concerns about human health and safety, the closure of the Indiana American Water public drinking water intake, and the closure of four public beaches, including the Portage

Lakefront and Indiana Dunes National Lakeshore. *Id*. ¶ 60.

U. S. Steel described the cause of the April 2017 spill as maintenance and equipment problems: a broken expansion joint that allowed chromium-carrying wastewater to leak out of its proper pipe and into an improperly maintained containment trench made of material incapable of containing it. U. S. Steel Answer ¶ 57; Affidavit of Robert Weinstock (attached hereto as Exhibit B) (hereafter "Weinstock Aff.") Ex. 1 at 2 (IDEM report on April 2017 spill). IDEM observed that various "cracks, gaps, and damaged areas… in the concrete walls and base of the utility containment trench," provided a route for contaminated wastewater to enter groundwater beneath the Facility. Weinstock Aff. Ex. 2. Without any treatment for hexavalent chromium, the rest of the contaminated wastewater discharged directly into Burns Waterway. That such a dramatic spill resulted from maintenance failures was predictable: U. S. Steel admitted to USEPA that it had "no written procedures for cleaning and maintenance" and did not even keep records of all maintenance activities. Sahu Aff. Ex. 16 at 11. "This is ***not*** normal or acceptable for any industrial facility, let alone one that handles large volumes of toxic chemicals[.]" Sahu Aff. ¶9 (emphasis maintained).

The amounts of hexavalent and total chromium released during the April 2017 spill may be even higher than represented by the Governments because U. S. Steel's reported figures have been inconsistent and unverified and do not include pollution released to groundwater that flows into Burns Waterway. First, the Governments' allegations appear to be based entirely on U. S. Steel's undisclosed calculations from limited sampling during the event. Weinstock Aff. Ex. 3 at 2 (U. S. Steel providing volumes later alleged in Governments' complaint); Sahu Aff. Ex.16 at 10 (USEPA report describing being presented with U.S. Steel calculations during onsite investigation). The Governments appear to have adopted U. S. Steel's calculations without serious scrutiny despite U. S. Steel also reporting a much higher figure of 902.8 pounds of hexavalent

chromium spilled on April 11.[1] Weinstock Aff. Ex. 5 at 31, 32; *See also* Gov't Compl. ¶ 64 (Apr. 2, 2018), Dkt. No. 1 ("Gov't Compl."). Furthermore, groundwater sampling conducted long after the April 2017 spill suggests that a significant amount of hexavalent chromium entered soils and then migrated into the Burns Waterway,[2] though U. S. Steel initially claimed to USEPA that no chromium discharged to the soil. Sahu Aff. Ex. 16 at 5 (statement of U. S. Steel "Director of Environmental Control"). The extent of groundwater contamination has never been determined. Because the Governments neither ever scrutinized U. S. Steel's estimates nor included contamination that moved (and appears to still be moving) from soil to Burns Waterway, the actual size of the April 2017 spill remains unknown.

B. While dramatic, the April 2017 spill is only one example of U. S. Steel's long-running pattern of violations related to maintenance and operations failures.

The April 2017 spill was not an isolated event, but rather the most dramatic consequence of a persistent pattern that shows how refusing to properly comply with its CWA permit is business as usual for U. S. Steel. In total, U. S. Steel violated its CWA permit nearly 100 times between November 2013 and January 2018, all while being in constant violation of its permit obligation to properly maintain the Facility. *See* Surfrider Compl. ¶¶ 97, 101–03, 105–15, 121, 124 (violations of monthly limits counted on each day of month, per USEPA policy). Many of these violations are undisputed; U. S. Steel admitted under penalty of perjury to 54 of these violations since 2013. U. S. Steel Answer ¶¶ 78, 82, 85, 92, 96, 104, 106, 121–22.

[1] U. S. Steel dismissed this significantly larger measurement of hexavalent chromium on April 11 as an "absurd result" "based on a single grab sample." Weinstock Aff. Ex. 5 at 34. There is no record of U. S. Steel taking additional samples of the contaminated discharge in an effort to get a more accurate number. Nor is there any record of the Governments taking any steps to independently verify any of these numbers reported by U. S. Steel or even confirming that U. S. Steel properly calculated amounts that were projected rather than observed.

[2] Sampling in February 2018 found hexavalent chromium in excess of IDEM screening levels. Follow-up sampling in October 2018 also found high levels. Indeed, levels went up to more than double the February results at one well, and were almost fifty times the screening level. Weinstock Aff. Ex. 6; Weinstock Aff. Ex. 7. Groundwater flows from beneath the Facility into Burns Waterway and Lake Michigan. See Weinstock Aff. Ex. 8 at 12.

Although each of these violations is unacceptable, U. S. Steel's violation on October 25, 2017—less than six months after the April 2017 spill—is of particular concern. U. S. Steel *again* violated its chromium limits. IDEM describes this violation as another result of U.S. Steel's maintenance and operation failures. Sahu Aff. Ex. 18 at 1–2 (describing cause as failure of visual inspection practices and noting the Facility needed "additional pathing" to "facilitate viewing and maintenance"). IDEM cited U.S. Steel for refusing to take reasonable steps during the incident to determine whether the chromium was hexavalent chromium, the significantly more dangerous form. *Id*. at 2. U.S. Steel failed to notify the public of this violation, asked IDEM that its report of the violation be afforded "confidential treatment," and, apparently, did not even notify USEPA despite being in the midst of negotiating this Proposed CD. *See* Weinstock Aff. Ex. 9.

Many of U. S. Steel's violations since 2013 resulted from deteriorating equipment and a complete lack of preventative maintenance plans. Sahu Aff. ¶¶ 6–9. U. S. Steel's CWA violations are not the result of rare breakdowns of single pieces of equipment, but rather represent continuous and long-running systemic failures to maintain the Facility. *Id*. at ¶15.

C. Expert review of the technical requirements of the Proposed CD finds those requirements insufficient to bring U. S. Steel into compliance with the CWA.

The objective of the Proposed CD is "to bring the U. S. Steel's Midwest Plant Facility into compliance with . . . the CWA" and its permit issued thereunder. Proposed CD ¶ 1. Surfrider has retained an independent industrial engineering expert, Dr. Ranajit Sahu to evaluate the technical requirements of the Proposed CD, found principally in paragraphs 9 through 12. Dr. Sahu has over 29 years of relevant experience, including work in the steel industry and evaluating industrial wastewater treatment. Dr. Sahu frequently serves as an expert witness for the Department of Justice in environmental enforcement actions. Sahu Aff. ¶¶1–3, Ex. 1.

According to Dr. Sahu, "though it requires U. S. Steel to take some reactive and very

limited (i.e. targeted only towards the specific problems that caused the April 2017 release) steps toward a barely-adequate environmental compliance regime, the Proposed CD is fundamentally inadequate to meet," its stated goal. Sahu Aff. ¶ 10. Those "reactive and limited steps" include paragraph 9 of the Proposed CD, which requires certain physical repairs to be made to the Facility "prior to lodging." Mem. In Support of Pls.' Mot. to Enter Revised Consent Decree at 6 (Nov. 20, 2019), Dkt. No. 47 ("Govts' Br."). The Proposed CD, in paragraphs 10 and 11, also requires U. S. Steel to develop and implement "three main plans": (1) an O&M Plan to ensure that U. S. Steel "properly operates and maintains at all times all wastewater treatment process equipment;" (2) a Preventative Maintenance Plan "to help prevent breakdowns, reduce wear, improve efficiency and extend the life of the Facility's wastewater infrastructure" and (3) the Wastewater Monitoring Design to improve "early detection of conditions that may lead to spills." Govts' Br., Attach. B, Dkt. 47-2 ¶ 14. After an initial disapproval, USEPA and IDEM ultimately approved U. S. Steel's O&M Plan (which included the Preventative Maintenance Plan) on December 28, 2018. Govts' Br. at 7.

In Dr. Sahu's opinion, despite the redaction of key information, the O&M Plan is still evidently deficient because it "does not include adequately detailed flow numbers for many of its systems," and "does not include the current condition of U. S. Steel's equipment," which is crucial to planning for upkeep of that equipment. Sahu Aff. ¶¶ 28–30. The O&M Plan also never actually addressed the first basis upon which USEPA and IDEM initially refused to approve it: there is no specific procedure "aimed at minimizing or avoiding the impacts of spills as they occur." *Id.* ¶ 31.

In Dr. Sahu's expert opinion, the Monitoring Design "lacks key information and context" and "important details regarding U. S. Steel's evaluation[s]" that the Government accepted without independent verification. Sahu Aff. ¶¶ 20–21. Approval of this document—in which U. S. Steel

rejected the only inline chromium monitoring technology it piloted—means that U. S. Steel still operates without inline chromium monitoring in key parts of the Facility. *Id.* ¶¶ 19, 25. The rejection of inline monitoring appears inadequately justified and is particularly troubling because such monitoring could allow for earlier detection of events like the April 2017 spill. *Id.* ¶ 18–19.

D. U. S. Steel has continued to violate its CWA permit even though it is already complying with the technical provisions of the Proposed CD.

By December 2018—upon approval of its technical plans—U. S. Steel reported that it had made all facility upgrades required and is implementing the approved technical plans. Weinstock Aff. Ex. 10, §§(c)-(f). Nonetheless, U. S. Steel continued to violate the CWA and its permit throughout the past year and its violations exhibit the same sorts of problems that precipitated the April 2017 spill.[3] Sahu Aff. ¶¶ 36–44.

On November 28 and 29, and December 18, 2018, U. S. Steel discharged unidentified scum and foam in violation of its CWA permit. Sahu Aff. Ex. 9 at 1. Following the discharges on November 28 and 29, officials closed the Portage Lakefront and Riverwalk portion of Indiana Dunes National Park and Ogden Dunes Beach for four days. Weinstock Aff. Ex. 12.

On May 19, 2019, U. S. Steel violated its permit by creating an oil sheen on Burns Waterway. According to IDEM, U.S. Steel "withh[eld] pertinent information" from investigators about the cause of the violation and failed to take appropriate steps to assess and mitigate the violation, a violation IDEM described as similar to U. S. Steel's failures during its October 2017 chromium violation. Sahu Aff. Ex. 11 at 3, 5, 11. U.S. Steel's public statement, released only after IDEM specifically requested it, "was not timely, was not directed to potentially affected downstream users, and did not detail the actual problems." *Id.* at 6, 11.

[3] Surfrider and the City of Chicago made the Department of Justice aware of these ongoing failures in a letter on October 14, 2019. *See* Weinstock Aff. Ex. 11 (Letter from Surfrider and City of Chicago).

On two occasions in August 2019 and a third in September, U. S. Steel again violated its permit by discharging oil that caused sheens in Burns Waterway. IDEM subsequently discovered that U.S. Steel operators were recording important sampling results on temporary paper notes and storing them where they could easily become wet and destroyed, in addition to improperly reporting wastewater temperatures. Sahu Aff. Ex. 12 at 2. IDEM determined that "[t]he Operations Manual for Final Treatment needs to be revised or rewritten." *Id*. at 6. Indiana American Water shut down its Ogden Dunes treatment facility as a result of this violation. Weinstock Aff. Ex. 13. Upon investigating those three oil discharges, IDEM rated operation and maintenance as "unsatisfactory." Sahu Aff. Ex. 12 at 1–2.

U. S. Steel twice violated its CWA permit limit by discharging excessive amounts of copper into Burns Waterway, on August 29 and October 13, 2019. Sahu Aff. Exs. 6, 7.

In the last two months alone, U. S. Steel has continued to violate the CWA because of its maintenance and operational failures. Yet ***another*** hexavalent chromium violation occurred on October 30, 2019, this time, per U. S. Steel, due to blockage in wastewater treatment infrastructure that went undetected longer than it should have because U. S. Steel failed to follow its own procedures. Sahu Aff. Ex. 14 at 1–2. Oil sheens were again observed by IDEM inspectors on November 6, 2019, which a U. S. Steel operator attributed to "holes" in pollution control equipment that made it "not effective." *Id*. at 2. Finally, as recently as November 21, 2019, U. S. Steel reported a violation involving water discoloration, sheening, and a likely "loss of solids" into Burns Waterway caused by uncapped equipment. Sahu Aff. Ex. 15.

U. S. Steel committed these ongoing violations while exhibiting company-wide disregard for maintenance and environmental compliance. Govts' Br. Ex. 4 (Dkt. 47-5) at 122–23 ("Surfrider Comments"). *See also* Weinstock Aff. Ex. 14. U.S. Steel's Clean Air Act violations have recently

led to deadly industrial accidents at its Clariton, Pennsylvania facility, *id.*; Sahu Aff. ¶ 16, and have previously led to multi-facility consent decrees with millions of dollars in injunctive relief and civil penalties covering the nearby Gary facility. *United States v. United States Steel Corp.*, No. 2:12-cv-304, Dkt. 135 (order entering decree). Just this past November, U. S. Steel's nearby Gary Works facility, which shares compliance management with the Midwest Facility, experienced the failure of a large water pipe that caused massive flooding and apparent water pollution. *See* Sahu Aff. ¶ 16. USEPA's online enforcement database lists Gary Works as in violation of its CWA permit during 11 of the last 12 quarters and notes that IDEM has cited Gary Works for "improper operation and maintenance." Weinstock Aff. Ex. 15.

E. U. S. Steel's illegal water pollution has had a negative impact on Northwest Indiana and its residents who drink from and recreate in Lake Michigan.

The April 2017 spill made headlines across the region—shutting down Portage Lakefront and three other beaches, closing Ogden Dunes' drinking water intake, and endangering the health of beach-goers and water-users.[4] Weinstock Aff. Ex. 4. Millions of people living in Northwest Indiana and Chicagoland rely on the clean water of Lake Michigan.

Portage Lakefront is the beach directly across the Burns Waterway from the Facility, and is part of America's newest and Indiana's first national park: Indiana Dunes National Park. The National Park is an ecological treasure[5] and a major economic force in the region.[6] Indiana Dunes National Park is especially loved for its beaches, where local families swim and surf in Lake

[4] Adverse health effects that have been associated with exposure to hexavalent chromium include "asthma, eye irritation and damage, perforated eardrums, respiratory irritation, kidney damage, liver damage, pulmonary congestion and edema… [and] respiratory cancer." *See Hexavalent Chromium: Health Effects*, United States Department of Labor (Dec. 19, 2019), http://www.osha.gov/sLTC/hexavalentchromium/healtheffects.html.
[5] *Indiana Dunes: Nature & Science*, National Park Service (December 19, 2019) https://www.nps.gov/indu/learn/nature/index.htm.
[6] The Indiana Dunes generated up to $50 million in economic activity in 2018, even before it was a national park. Weinstock Aff. Ex. 16. In fact, the Indiana Dunes is the top tourist attraction in Indiana, and the new national park is expected to be the seventh-most-visited national park, just after Yosemite. *Id.*

Michigan. This includes Surfrider members who surf at Portage Lakefront throughout the year, because it offers some of the best surfing in the Great Lakes when the wind is coming from the right direction. As surfers spend hours in the water, they are particularly vulnerable to unsafe concentrations of chemicals in the water. For example, the weekend after the October 2017 chromium release was unseasonably warm, and many people were surfing and swimming at Portage Lakefront completely unaware of the elevated chromium levels in the water. U. S. Steel's pollution *directly adjacent* to the Park has the potential to scare away potential visitors who fear for their health–particularly when the public cannot trust U. S. Steel to tell them when a water pollution violation has taken place. *See, e.g.*, Surfrider Mot. to Intervene (Sept. 13, 2018), Dkt. No. 12, ¶¶ 7–11; *id.* Ex. J. ¶6; *id.* Ex. E. ¶14.

U. S. Steel's continued violations after that spill continue to erode public trust in the company and regulators. The best evidence of the profound public concern is the nearly 2,700 comments DOJ received that appear to be nearly uniformly critical of the Proposed CD.

LEGAL STANDARD

Though a court's review of a consent decree is not de novo and generally involves deference to the agencies involved, a consent decree is nonetheless an exercise of judicial power, not merely a private settlement agreement. Courts "must avoid any rubberstamp approval in favor of an independent evaluation." *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1050 (N.D. Ind. 2001); *United States v. City of Akron*, 794 F. Supp. 2d 782, 796 (N.D. Ohio 2011) (noting deference to agencies, but rejecting the idea of "deference only for [the] overall conclusion, regardless of whether the evidence supports such a conclusion"). Courts must "determine whether the decree adequately protects and is consistent with the public interest" and cannot enter a decree unless it is "fair, reasonable, adequate and consistent with applicable law." *BP Exploration*, 167

F. Supp. 2d at 1049; *accord E.E.O.C. v. Hiram Walker & Sons*, 768 F.2d 884, 889 (7th Cir. 1985).

For a consent decree to be "fair," it must be both procedurally and substantively fair. *BP Exploration*, 167 F. Supp. 2d at 1051. Procedural fairness means the parties' negotiations must have been "open and at arms-length," not "conducted in bad faith," and not "a product of collusion." *Id.* at 1051, 1053. Substantive fairness "involves corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." *United States v. Bayer Healthcare, LLC*, No. 2:07-CV-304, 2007 WL 4224238, at *4 (N.D. Ind. Nov. 28 2007) (internal quotation omitted). Courts in the Seventh Circuit consider five factors to evaluate substantive fairness, the most important being "a comparison of the strengths of plaintiffs' case versus the amount of the settlement offer;" and also including "the amount of opposition to the settlement among affected parties." *Hiram Walker & Sons*, 768 F.2d at 889.[7]

A proposed decree must also be "reasonable," evaluated under "a multi-faceted exercise" that includes analysis of the decree's "effectiveness, whether it satisfactorily compensates the public for the actual (and anticipated) costs, and the relative strengths of the parties' litigating positions.'" *Bayer Healthcare,* 2007 WL 4224238, at *5 (internal quotation omitted). *See also BP Exploration*, 167 F. Supp. 2d at 1053 (listing factors including "whether the decree is technically adequate to accomplish the goal of cleaning the environment"). The Seventh Circuit has instructed that a government CWA settlement failed this "reasonableness" test when there was a "persistence of violations due to the same underlying causes even after the [settlement] was fully implemented" because "[t]he record to date… [did] not inspire confidence" that the long-standing problems would be adequately redressed. *See Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage*

[7] The Governments rely on out-of-circuit precedent for the proposition that "the good faith efforts of the negotiators" is appropriate to consider when evaluating substantive fairness of the Proposed CD. Govts' Br. at 18. Though some district courts examine this factors as part of the ***procedural*** fairness inquiry, the Seventh Circuit, however, has not endorsed this as one of the factors to consider for determining whether a consent decree is ***substantively*** fair.

Dist., 382 F.3d 743, 764 (7th Cir. 2004).[8] Courts must evaluate broadly whether "approval of the consent decree is in the public interest." *BP Exploration*, 167 F. Supp. 2d at 1053. The "public interest… is extremely high" where the CWA violations impact a national park, *City of Akron*, 794 F.Supp.2d at 792.[9]

Though a court must ultimately either grant or deny a motion to enter a consent decree, a court is also empowered to deny or hold open a motion and require additional fact-finding or even appoint a special master as it sees fit. *See, e.g.*, *United States v. Wal-Mart Stores, Inc*., No. Civ.A.04-301 GMS, 2004 WL 2370700 (D. Del. Oct. 14, 2004) (ordering additional filings *sua sponte* to fulfill "important duty to ensure the public interest is adequately protected"); *BP Exploration* 167 F. Supp. 2d at 1052 (holding a hearing and hearing arguments from nonparties); *City of Akron*, 794 F. Supp. 2d at 787 (referencing "two-day fairness hearing on the Decree" and holding motion to enter in abeyance for nearly 18 months to receive additional information and filings); *United States v. City of Akron*, No. 5:09CV272, 2013 WL 999909 at *8 (N.D. Ohio Mar. 13, 2013) (ordering court-appointed expert to review revised proposed decree due to "overriding interest in preserving" national park); *U.S. v. Metrop. Water Reclamation Dist. of Greater Chicago*, No. 11 C 8859, 2014 WL 64655, at * 1 (N.D. Ill. Jan. 6, 2014) (considering "voluminous

[8] Later, the Seventh Circuit, explicitly "merged" the "reasonableness" evaluation of a proposed decree with both the diligent prosecution test under 33 U.S.C. §1365(b)(1)(B) at issue in *Friends of Milwaukee's Rivers* and a question within the res judicata test of whether a government settlement barred an earlier-filed citizen suit related to the same CWA violations. *United States v. Metro. Water Reclamation Dist*., 792 F.3d 821, 825 (7th Cir. 2015).

[9] Some of the cases above involve defendants that were public entities operating "combined sewer" systems and not industrial dischargers like U. S. Steel. As explained by the Seventh Circuit, the CWA prohibits discharges except in compliance with a permit and combined sewer system permits are governed by a particular part of that law that "recognize[s] the inevitability of discharges" from such sewers and therefore provide flexibility to implement cost-effective plans that will not result in the elimination of all discharges but are nonetheless consistent with the statute. *See also* CSO Policy 59 Fed. Reg. 18688–89 (Apr. 19, 1994) (providing "flexibility" to "achieve cost effective" controls and recognizing that overflows may be permitted to continue during wet weather). U. S. Steel's permit does not allow discharges in excess of numeric limits or that violate narrative water quality standards under any circumstances. Weinstock Aff. Ex. 17 at 19–20 (water quality standards must be met "at all times" and numeric limits stated without exception). Thus, the language requiring that a decree ensure compliance with the relevant permit and be "likely to achieve compliance" in cases like *MWRD, Friends of Milwaukee's Rivers*, and *City of Akron* should be applied with even greater force here.

briefs and reams of exhibits, including deposition transcripts" and holding oral argument).[10]

ARGUMENT

All that rely on a clean, safe Lake Michigan—surfers and swimmers, drinking water utilities and wildlife—are entitled to a resolution of U. S. Steel's CWA violations that 1) actually puts a stop to those continuing violations; and 2) includes a financial penalty large enough to reflect both the severe harm U. S. Steel has caused and the unusual strength of the case against it, and deters future violations. That U. S. Steel continues to violate the CWA regularly while complying with the technical provisions of the Proposed CD demonstrates that document fails to meet its basic purpose of ensuring compliance. As such, the Court should deny the Governments' motion. Additionally, though the only substantive changes in the Proposed CD represent marginal improvement in two discrete areas, the new provisions neither address the need for meaningful public notification of violations by U. S. Steel nor deliver real public benefit through the flawed, but fixable, Environmentally Beneficial Project.

A. The Proposed CD has already failed to prevent U.S. Steel's continued CWA violations, and is therefore unreasonable and substantively unfair to the public.

Before entering any proposed consent decree, this Court must ensure that it is "likely to bring about compliance with the Act," *Metro. Water Reclamation Dist.*, 792 F.3d at 825, and it must "result in [the] elimination of the root causes underlying the large-scale violations alleged," *Friends of Milwaukee's Rivers*, 382 F.3d at 764. This is also the standard imposed by the Proposed CD itself. *See* Proposed CD ¶ 1. Viewed against this standard and in light of the facts, this Proposed CD is an abject and obvious failure. Sahu Aff. ¶ 11.

1. Implementation of the technical provisions of the Proposed CD has already repeatedly failed to prevent continued CWA violations.

[10] The district court docket in this case, 11-CV-8859 (N.D. Ill.), shows that the court permitted intervenors to take discovery over several months in the summer of 2013.

In defining what it means to ensure compliance, the Seventh Circuit minces no words: "[c]ompliance means an ***end*** to violations, not merely a reduction in the number or size of them." *Friends of Milwaukee's Rivers*, 382 F.3d at 764 (emphasis in original). When evaluating technical injunctive relief, courts often defer to agency predictions that such requirements will result in future compliance. *See, e.g. Metropolitan Water Reclamation Dist.*, 792 F.3d at 827–28. Such deference is inappropriate here, however, as "the best way to decide between competing predictions is to see what happens." *Id.* at 826. U. S. Steel has implemented the technical provisions of the Proposed CD for a year, so 2019 has functioned as a test-year, a test-year full of failures.

Recent CWA violations at the Facility demonstrate that the Proposed CD's technical provisions are inadequate. *See supra* at 7–9. In the expert opinion of Dr. Sahu, these ongoing violations demonstrate that the technical terms of the Proposed CD have failed to eliminate the causes of the earlier violations and exemplify the same improper U. S. Steel practices with respect to operational plans, responding to violations, training personnel, making proper notifications, and sampling and recordkeeping. Sahu Aff. ¶¶ 11, 36–42. Indeed, IDEM inspectors explicitly connect U. S. Steel's unacceptable foot-dragging and "failure to accelerate sampling" during a violation in 2019 with violations in 2017. *Id.* ¶ 39.c; Sahu Aff. Ex. 11. Most perniciously, U. S. Steel's "misleading behavior" during IDEM's follow-up to the May 2019 oil violation "undermines the ability of regulatory agencies to rely on reports and representations made by U. S. Steel . . . ." Sahu Aff. ¶ 43. Based on first-hand accounts of IDEM inspectors, Dr. Sahu concludes that "[e]ach of these [2019] violations or conditions noted by IDEM staff is a substantial compliance deficiency exhibited at the Facility both before and after implementation of the technical provisions of the Proposed CD. This is direct evidence that the technical provisions of the Proposed CD are inadequate to assure permit and Clean Water Act compliance by U. S. Steel." Sahu Aff. ¶ 44.

Regardless of whether IDEM ultimately initiates any future enforcement actions with respect to these continued violations, the fact that U. S. Steel continues to violate its CWA permit demonstrates the inadequacy of the Proposed CD. The technical terms of the Proposed CD have demonstrably failed to eliminate the "root causes" of U. S. Steel's past CWA violations. *Friends of Milwaukee's Rivers*, 382 F.3d at 764.

2. The technical provisions of the Proposed CD and required plans, as written, do not ensure future compliance with U. S. Steel's CWA permit.

The technical provisions of the Proposed CD were crafted with fundamental flaws. Technical provisions of the Proposed CD and the plans U. S. Steel has created thereunder are too narrowly responsive to the particular facts of the April 2017 spill to ensure compliance with the CWA and U. S. Steel's permit. Sahu Aff. ¶¶ 10, 12–15. Another over-arching problem is that USEPA and IDEM have relied far too heavily on U. S. Steel's representations and technical judgments; USEPA and IDEM should verify the effect of facility and policy changes and should make their own technical judgments. Sahu Aff. ¶¶ 43, 50.

Even if confined to their overly narrow scope, the existing plans exhibit important deficiencies that should be corrected. For example, USEPA and IDEM initially disapproved U. S. Steel's O&M Plan, in part, because it "lack[ed] operating procedures to help avoid or minimize the impacts from spills" as they occur. Weinstock Aff. Ex. 18 at 1. Though some relevant procedures have been appended to the O&M plan, there is "no evidence that U. S. Steel has created or implemented a specific, coherent, effective, and focused [plan] aimed at minimizing or avoiding the impacts of spills as they occur." Sahu Aff. ¶ 31. This is particularly problematic because IDEM has cited U. S. Steel for violating its permit requirement to respond adequately to ongoing violations both before ***and after*** implementation of the technical provisions of the Proposed CD. *Id.*, Sahu Aff. Ex. 11.

The technical declarations that accompany the Governments' motion fail to address 2019 CWA violations by U. S. Steel, rely too heavily on U. S. Steel's judgment and unverified representations, and do not support a finding that the technical provisions will bring U. S. Steel into compliance. Sahu Aff. ¶¶45–50. Perhaps most damningly, those declarations do not even reflect the agencies' actual knowledge of U. S. Steel's facility and practices: IDEM inspectors have explicitly called for the Facility's wastewater operations manual for final treatment to be "revised or rewritten" as recently as this September. Sahu Aff. Ex. 12 at 2. Whatever the Governments' declarants assert, IDEM's own technical staff with first-hand knowledge of the Facility have concluded that the O&M Plan is a failure.

Rather than rubberstamp the Governments' reliance on U. S. Steel's hollow claims of reform and narrow focus on specific pipes that broke in 2017, the Court should require a decree that obligates U. S. Steel to implement the recommendations of an independent, third-party evaluation of both the root causes of past violations and the Facility's current wastewater treatment infrastructure and practices, and the broader resource and operational issues that prevent consistent compliance at this and other U. S. Steel facilities. Sahu Aff. ¶¶ 12–16; 22–23; 50.

B. The civil penalty is too low in light of the strength of the Governments' case, the severity of the violations, and the need for meaningful deterrence.

A CWA civil penalty must reflect the gravity of the offense, eliminate any economic benefit of violation, and deter future violations. 33 U.S.C. § 1319(d). Penalties negotiated in settlements must, most importantly, reflect the strength of the plaintiffs' case. *Hiram Walker & Sons*, 768 F.2d at 889. The penalty should deliver "corrective justice and accountability" to be substantively fair. *BP Exploration*, 167 F. Supp. 2d at 1051.

USEPA's Interim Clean Water Act Settlement Penalty Policy ("CWA Settlement Policy") helpfully concretizes "justice and accountability" into real numbers and details "the lowest penalty

figure which the Federal Government should accept in a settlement."[11] CWA Settlement Policy at 2. The CWA Settlement Policy elaborates on the statute and instructs agencies to consider factors like the seriousness of the violations, the strength of the government's case, the offender's ability to pay, the deterrence effects of a penalty, and how much the offender profited from their violation. *Id*. at 4-21. The low civil penalty in the Proposed CD—just $600,000 imposed against one of the world's largest steel companies— does not reflect the strength of the case against U. S. Steel and fails to achieve the purpose of a penalty. *See generally* Surfrider Comments, Dkt. 47-5 at 120–26.

1. The low proposed penalty does not reflect the unusual strength of the Governments' case against U. S. Steel.

The Governments have an uncommonly strong liability case against U. S. Steel: Unlike in many environmental enforcement cases where a settlement is proposed before any litigation has taken place and, therefore, the defendant may still contest liability and other key facts, U. S. Steel has already admitted to many of the most serious violations at issue, including at least 54 CWA violations alleged by the Government. *See supra* at 4. These admissions remove, or severely limit, any litigation risk with respect to the Government obtaining civil penalties on the CWA violations. In total, the violations alleged by the Governments to which U. S. Steel ***has already admitted to liability*** carry a total maximum civil penalty of $5,370,448.[12] The Proposed CD would discharge those CWA violations, as well as many additional offenses of the CWA and other statutes, with a

[11] The Governments improperly wield the CWA Settlement Policy as both a sword and a shield, relying on it to defend their positions, Govts' Br. at 22, while at the same time claiming it is not binding, Govts' Resp. to Comm., Dkt. 47-1 at 33. The CWA Settlement Policy is an agency guidance document; that the Governments have departed from it here in important respects demonstrates that the Proposed CD fails to meet the general standards that USEPA believes apply in all CWA cases and undermines the Governments' assertions that its judgments deserve substantial deference here.

[12] U. S. Steel had admitted to eight violations between January 13, 2009 and November 2, 2015, and 46 violations on or after November 2, 2015. *See supra* at 4. "For each violation that occurs between January 13, 2009, and through November 2, 2015, inclusive, penalties of up to $37,000 per day may be assessed; and $53,484 per day for each violation occurring on or after November 2, 2015, and assessed after January 15, 2018." 83 F.R. 1190 (January 10, 2018).

mere $601,242 in civil penalties, Proposed CD ¶¶ 41–42, less than 12% of the total maximum penalty for violations *already admitted*.[13] The Governments' vague suggestion that litigation risks somehow justify the low penalty here, Govts' Br. at 12, is unsupported by any rationale and belied by U. S. Steel's admission of liability. *See City of Akron*, 794 F. Supp. 2d at 804 (previous admission of violations demonstrates lack of litigation risk and supports denial of entry of decree).

The substantive unfairness of the small monetary penalty juxtaposed against the strong liability case here, stands in stark contrast to another consent decree entered by the Northern District of Indiana. In *BP Exploration*, the strength of the government's case was "unsettled" and it was "unclear" if the government could obtain the same relief at facilities in eight different states through litigation that would be "very complex" and "could take years." *B. P. Exploration*, 167 F. Supp. 2d at 1053. Even so, that decree included "a $10 million civil penalty and … another $10 million in implementing five environmentally beneficial projects." *Id.* at 1048. Surfrider confronted the Governments with examples of still more decrees showing the penalty in this Proposed CD to be inadequate. Surfrider Comments, Dkt. 47-5 at 124–25. The Governments' response was to cherry-pick a single case and ignore entirely the litany of other information.[14] Govts' Br. at 12–13. While each case certainly has its own facts and the Justice Department is no doubt confident in every case it brings, the particular strength of the Governments' case here is the "most important" indication that a $600,000 penalty is unfair and inadequate. *Hiram Walker &*

[13] The Governments' have also included in the proposed CD an "Environmentally Beneficial Project" ("EBP"), which they report will cost U. S. Steel approximately $600,000 over three years. Govts' Br. at 15. The fundamental problems with the EBP are addressed below, but, as an initial matter, the Governments' admit that the Court should not factor that project cost into any consideration of the appropriateness of the penalty. *See* Govts' Br. at 14–15 (describing EBP as proposed for inclusion "without penalty mitigation" and as different than a Supplemental Environmental Project, a type of project that is taken "into account in making [a] civil penalty demand").

[14] This included both various specific examples, as well as a holistic review of 18 federal CWA enforcement action consent decrees in the metal industry over the past 10 years. Govts' Br. Ex. 4 at 124. While no two cases may ever be precisely comparable, the collection of cases cited by Surfrider in its comments continue to show that the low civil penalty in the Proposed CD is out of step with many other environmental enforcement consent decrees.

Sons, 768 F.2d at 889.

2. A higher penalty is necessary to reflect the unusual gravity of harm caused by U. S. Steel's violations.

The civil penalty in this Proposed CD fails to reflect the gravity of U. S. Steel's violations as measured under the CWA Settlement Policy. The gravity component of the policy explicitly considers in part both the "significance of violation," including the degree of exceedance, and the significance of non-effluent limit violations, such as violations of monitoring and reporting requirements. CWA Settlement Policy at 7–10; Surfrider Comments, Dkt. 47-5 at 121–22. The April 2017 spill exceeded the facility's hexavalent chromium limit by a factor of at least 600, and U. S. Steel's maintenance and violation response violations necessitated the closure of four nearby public beaches, and the Ogden Dunes drinking water intake. U. S. Steel's CWA violations have harmed and continue to harm the environment, economic vitality and reputation of Indiana's only National Park. U. S. Steel's irresponsible operations and maintenance practices that presaged that dramatic example of their consequences have persisted and continue to threaten Lake Michigan. Far from substantively fair, the proposed penalties are shockingly low given how USEPA's own guidance document instructs the agency to gauge the gravity of violations to determine the lowest acceptable settlement amount.

3. The Proposed CD's penalties are insufficient to deter future violations.

The CWA instructs courts to consider "the economic impact of the penalty on the violator," 33 U.S.C. § 1319(d), and a settlement should contain sufficient penalties to "promote environmental compliance and protect public health by deterring future violations by the same violator and deterring violations by other members of the regulated community." CWA Settlement Policy at 2. Additionally, penalties should eliminate the "economic benefit" of the violation, 33 U.S.C. § 1319(d), and "ensure . . . that violators do not obtain an economic advantage over their

competitors" by benefiting from their violations. CWA Settlement Policy at 3.

The Proposed CD will not deter U. S. Steel from future violations unless the financial penalty is unambiguously larger than the costs U. S. Steel would incur if it complied with its permit in the first place. The Court need not speculate on whether the Proposed CD is effective deterrence—because the penalty is unchanged from the original decree proposed in 2018, U. S. Steel has known precisely what its penalty would be and yet that knowledge has not deterred it from continuing to violate the CWA regularly in 2019. That deterrence has failed is not surprising, given the low penalty figure compared to the economic resources of U. S. Steel. Surfrider Comments, Dkt. 47-5 at 123–24.

There is also a pronounced need for general deterrence of CWA violations in Northwest Indiana. Since the Governments have proposed weak civil penalties here, another local steel manufacturer had its own catastrophic CWA violation.[15] This Court should consider the context of persistent CWA violations in the region when evaluating the penalty proposed here.

An acceptable resolution to this litigation must ensure U. S. Steel realizes no economic benefit from its violations, which stem from an apparent policy of refusing to invest in proper maintenance and facility design. Sahu Aff. ¶¶ 6–9. The Governments barely mention economic benefit, disclaiming it as "modest," and referring to the use of a software model without discussion of its inputs, which, of course, determine its output. Govts' Br. Attach. A, Dkt. 47-1 at 34 ("Govts' Resp. to Comm.")). The Governments acknowledge that "U. S. Steel derived some economic benefit over the years from its failure to take actions and make expenditures needed" but fail to lay out the actual costs avoided. *Id*. The Governments have provided no factual support suggesting

[15] On August 11, 2019, ArcelorMittal released cyanide and ammonia into the Little Calumet River, a body of water that flows into the Burns Canal, killing over 3,000 fish and shutting down the Portage Lakefront and Riverwalk. Weinstock Aff. Ex. 19.

these economic benefits—including both interest on overdue infrastructure and all ongoing expenses U. S. Steel avoided entirely for years to plan for and implement proper practices—somehow totaled less than $600,000. That these investments should have been made years ago is not speculation, *id*. but an expert conclusion. Sahu Aff ¶¶ 6–9. The Court should not approve a decree with such low penalties unless the Governments prove that the civil penalty actually deprives U. S. Steel of all economic benefit from its violations.

4. The two "mitigating" factors the Government argues justify a low penalty are inapplicable and unsupported by the facts.

First, the Governments' argument that the violations here are each only a "discrete and isolated event," Govts' Resp. to Comm., Dkt. 47-1 at 34; Govts' Br. at 22, is absurd. Sahu Aff. ¶ 15. Each violation involved the same plant, same management, same pollutants, similar permit terms, and they have continued from at least 2013 right through the Governments' motion. Each violation of a particular numeric limit or narrative water quality standards is a manifestation of U. S. Steel's underlying refusal to implement adequate wastewater treatment practices and part of the same long-running pattern of maintenance and operational failures. Sahu Aff. ¶¶6–9.

Second, the Governments assert that a low penalty is justified because U. S. Steel exhibited "cooperation and good faith" in negotiating a settlement. Govts' Br. at 22. The Seventh Circuit has never endorsed considering negotiating behavior in evaluating the substantive fairness of a decree. *See supra* at 11 n7. In a different case, "good faith efforts" of a different type—i.e. where a violator was earnestly trying to avoid a violation that happened despite those efforts—may be relevant. *See* 33 U.S.C. § 1319(d) (listing "good-faith efforts to comply with the applicable requirements," i.e. the permit terms violated, as relevant). But U. S. Steel's myriad violations at issue did not happen ***despite*** "good faith efforts" to comply, but rather ***because of*** U. S. Steel's flatly inadequate efforts to comply. The April 2017 spill occurred, in part, because U. S. Steel failed to make technical and

operational changes that should have already been in place at that time. Sahu Aff. ¶¶ 6–9. Moreover, both U. S. Steel's efforts to hide its October 2017 violation from the public and even USEPA and its misleading of IDEM investigators in May 2019 bely the Governments' position that U. S. Steel deserves special credit for good faith negotiations. To reward a violator for coming into compliance only *after* being caught red-handed is illogical.

5. The natural resource damages do not reflect all National Park closures caused by U. S. Steel.

While the natural resource damages figure calculated in the Proposed CD accounts for the National Park and beach closures caused by the April 2017 spill, Gov't Br. at 14, the figure does not account for all park closures caused by U. S. Steel's CWA violations. In November and December 2018, the Facility caused unnatural foaming in Burns Waterway. This led to the closing of the Portage Lakefront and Riverwalk for four days. *See supra* at 7. Any additional National Park closures related to U. S. Steel's 2019 violations must also be accounted for. An increased natural resource damages figure is necessary here to account fully for the significant natural resource costs in negative publicity, missed tourism revenue, and discouragement to would-be beachgoers that the Park continues to suffer each time U. S. Steel's pollution forces it to close.[16]

6. The public opposes the Proposed CD, and the Proposed CD's failures negatively impact third parties, including Surfrider's members.

The Court "must consider the effect of the consent judgement on nonsettling parties" even if those parties have no formal veto right over the proposal. *United States v. County of Muskegon*, 33 F. Supp. 2d 614, 621 (W.D. Mich. 1998). *See also Airline Stewards & Stewardesses Ass'n, Local 550, TWU, AFL-CIO v. Am. Airlines, Inc.*, 573 F.2d 960, 964 (7th Cir. 1978) (courts have

[16] That IDEM may pursue state enforcement actions for late-2018 and 2019 violations cannot cure this deficiency because the basis for those damages, the System Unit Resource Protection Act, only creates liability to the United States for such response costs and damages. 54 U.S.C. § 100722(a).

"duty to consider the interests [of an intervening third party] before approving the settlement"). The fairness of a consent decree is not only evaluated from the perspective of negotiating parties, but also third parties affected by the decree. *BP Exploration*, 167 F. Supp. 2d at 1052.

Because of the serious flaws outlined in the preceding sections, entry of the Proposed CD will adversely affect the interests of Surfrider's members, as well as others who want to surf and swim in Lake Michigan or drink water from the Lake without worrying about dangerous water pollution. These legitimate concerns fuel widespread public opposition to the fundamental components of the Governments' settlement. The Department of Justice received approximately 2,700 comments from concerned citizens and organizations, which appear by all accounts to be overwhelmingly negative. *See generally* Govts' Br. Ex. 4. These grievances from thousands of members of the public demonstrate that the penalty figure fails to reflect the gravity of harms U. S Steel's violations have inflicted upon the public. Though the Governments assure the Court that they have considered this remarkable and rare public outcry against their proposed settlement, there has been no change to the technical or civil penalty terms assailed by the public commenters. The Court must evaluate for itself whether this Proposed CD adequately serves the public interest, and in doing so the Court should hold an evidentiary hearing and include an opportunity for members of the public to voice their concerns directly.

C. The only substantive changes in the Proposed CD—revisions to Appendix B and inclusion of an Environmentally Beneficial Project—are insufficient to make the Proposed CD substantively fair.

1. The Proposed CD's notification requirements still fail to require public notification.

The Governments claim that changes made to Appendix B of the Proposed CD adequately respond to comments that pointed out deficiencies in the notification requirements originally proposed. Govts' Resp. to Comm., Dkt. 47-1 at 28. These changes to Appendix B, however, fail

to address the most fundamental notification need: a requirement that U. S. Steel swiftly, meaningfully and directly warn the public itself during and after CWA violations.

Filling this gap at the center of Appendix B is so important because U. S. Steel persistently refuses to issue proper notifications to the public. In October 2017, U. S. Steel discharged illegal amounts of chromium without notifying the public in a timely manner, leaving nearby surfers completely unaware of any risk. IDEM cited U. S. Steel for giving an "unsatisfactory" notification of its May 2019 oil violation, describing U. S. Steel's statement as "not timely," "not directed to potentially affected downstream users," and "misleading." Sahu Aff. Ex. 11 at 2–3, 5, 6.

To limit the impacts of future CWA violations, U. S. Steel should be required to directly notify the public promptly of violations, such as by installing signs visible to water recreation areas and by providing digital notification to those who request it. Although the Governments recognize that such forms of notification may be useful, the Governments instead presume the burden of notifying the public will be taken up by Park staff and local municipalities. Govts' Resp. to Comm., Dkt. 47-1 at 30–31. Allowing U. S. Steel to push notification costs onto public entities—and thereby distance itself from violations and evade public accountability—is inconsistent with the notion that a violator should bear all costs of its violations.

2. The Environmentally Beneficial Project fails to provide meaningful public benefit.

Surfrider could certainly support a properly designed Environmentally Beneficial Project ("EBP") with the stated purpose of providing the public with water quality information. Govts' Br. at 15. Indeed, Surfrider was first to propose such a project here. Govts' Br. Ex. 4 at 127.

This particular EBP, however, is not designed to deliver meaningful public benefit sufficient to militate against the various substantive failures of the Proposed CD because it is deficient in its requirements related to scheduling, testing, and reporting of water quality samples.

See generally Affidavit of Mara Dias (attached hereto as Exhibit C). Five particular inadequacies of the EBP should be rectified before entry of any consent decree here: (1) the EBP should be implemented by an independent research institution, not an environmental consultant beholden to U. S. Steel, Dias Aff. ¶8; (2) additional sampling locations should be added at popular recreational beaches, particularly in Whiting and Miller Beach, *id.* ¶ 10; (3) the frequency of sampling for different pollutants needs to be adjusted to be efficient and scientifically sound, *id.* ¶¶ 11–14; (4) the list of pollutants sampled should be expanded, *id* ¶ 15; and (5) the reporting and publication requirements should be improved to deliver meaningful, transparent information to the public, *id.* ¶ 16. Without revisions, the EBP may collect unreliable data and will not add meaningfully to public understanding of water quality threats to the region. The Court should reject the Proposed CD until the EBP–which was never subject to public comment, *id.* ¶ 17–is improved to deliver meaningful public benefit.

CONCLUSION

The Proposed CD is an unreasonable failure to prevent CWA violations by U. S. Steel, violations that have continued even after the Governments made their motion. The Proposed CD is a substantively unfair failure of the public interest for the same reason and because its penalty and notification requirements do not reflect the harms U. S. Steel has imposed. For these reasons, Surfrider respectfully asks that the Court deny the Governments' Motion to Enter the Consent Decree, (Nov. 20, 2019) Dkt. No. 46, and issue an opinion indicating that it will not approve any consent decree until the shortcomings described above are fully addressed. Alternatively, the Court should hold a conference to discuss discovery or evidentiary hearings appropriate to address the issues above and to allow the public to be heard directly.

Respectfully submitted,
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