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 REPLY IN SUPPORT OF ITS MOTION FOR AN EVIDENTIARY HEARING OR, IN THE ALTERNATIVE, AN ORAL ARGUMENT, ON PLAINTIFFS' MOTION TO ENTER REVISED CONSENT DECREE

An evidentiary hearing is appropriate here because it would assist the Court in deciding whether to enter the Governments' "Revised Consent Decree," (Dkt. No. 46-1) ("Proposed CD"), a judicial order the Court can issue only after it independently "determine[s] whether the decree adequately protects and is consistent with the public interest." *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1049 (N.D. Ind. 2001); *accord E.E.O.C. v. Hiram Walker & Sons*, 768 F.2d 884, 889 (7th Cir. 1985). To judge whether a proposed consent decree is "fair, reasonable, adequate, and consistent with applicable law," a court "must avoid any rubberstamp approval in

favor of an independent evaluation." *BP Exploration*, 167 F. Supp. 2d at 1049–50. While judicial review of a proposed consent decree generally involves deference to the agencies involved, deference does not mean that the Court can or should simply accept government positions that are unsupported by facts. *See United States v. City of Akron*, 794 F. Supp. 2d 782, 796 (N.D. Ohio 2011) (rejecting government position that it was entitled to "deference only for [the] overall conclusion, regardless of whether the evidence supports such a conclusion"). Though the facts on the record support the Court's denial of the Governments' motion to enter the Proposed CD now, an evidentiary hearing would aid the Court in its "independent evaluation" of the limited facts offered by the Governments.[1]

ARGUMENT

The parties agree that the decision to hold an evidentiary hearing under Local Rule 7-5, and of what sort of hearing or other fact development to allow, is entirely within the discretion of this Court.[2] The cases offered by the Governments and U. S. Steel stand simply for the other side of that same coin—that a decision *not* to hold a hearing is also a matter of the court's discretion.[3] The cases cited in Surfrider's Local Rule 7-5 Motion demonstrate how courts have found it helpful to hold hearings and allow other means of developing additional facts to examine the adequacy of

[1] The Governments neither object to holding oral argument nor oppose Surfrider's suggestion that a status conference would be a reasonable next step. U. S. Steel does oppose even appearing before the Court. The arguments presented herein also support Surfrider's requests to hold an oral argument or conference. Accordingly, Surfrider reiterates its requests made in the alternative, but does not address them independently.

[2] Surfrider never claimed an "unconditional right to an evidentiary hearing," as U. S. Steel describes Surfrider's position. Def.'s Resp. In Opp'n to the Surfrider Foundation's Mot. for an Evidentiary Hr'g Or, In the Alternative, An Oral Arg., on Pl.'s Mot. to Enter Revised Consent Decree at 2 (Dkt. No. 66) ("U. S. Steel's L.R. 7-5 Resp.").

[3] The Governments and U. S. Steel both cite out-of-circuit opinions upholding denials of evidentiary hearings. Those cases, though, merely stand for the uncontested proposition that a trial court has discretion to decide whether to hold a hearing. *See, e.g.*, *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 278 (1st Cir. 2000) (reviewing decision of district court on whether to grant evidentiary hearing under abuse of discretion standard); *United States v. Metro. St. Louis Sewer Dist.*, 952 F.2d 1040, 1044 (8th Cir. 1992) ("[I]t is within the sound discretion of the trial court to decide whether an evidentiary hearing is necessary before ruling on a proposed consent decree."); *United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997) (applying *Metro. St. Louis Sewer Dist.*); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 93 (1st Cir. 1990) (noting that review of district court's decision of whether to convene evidentiary hearing is "only for abuse of discretion").

a proposed Clean Water Act ("CWA") consent decree. *See* The Surfrider Foundation's Mot. for an Evidentiary Hr'g Or, In the Alternative, An Oral Arg., on Pl.s' Mot. to Enter Revised Consent Decree at 2 (Dkt. No. 51). For example, the district court in *City of Akron* ordered supplemental submissions, held hearings, and eventually appointed a special master. *City of Akron*, 794 F. Supp. 2d at 787; *United States v. City of Akron*, No. 5:09CV272, 2013 WL 999909, at *8 (N.D. Ohio Mar. 13, 2013). The Governments' point out that the *United States v. Metropolitan Water Reclamation District of Greater Chicago* court denied intervenors' request for an evidentiary hearing. However, the court in that case specifically allowed both oral argument and deposition discovery before ruling on the adequacy of the consent decree. *United States v. Metro. Water Reclamation Dist. of Greater Chicago*, No. 11 C 8859, 2014 WL 64655, at *1 (N.D. Ill. Jan. 6, 2014).

Most of the Governments' and U. S. Steel's briefs amount to assuming away the fundamental question that a hearing could help answer: each argues that the strength of the Proposed CD eliminates the utility of an evidentiary hearing. Of course, that assumption is the very crux of the dispute on the Governments' underlying motion to enter the Proposed CD. The briefing before the Court identifies several fundamental problems with the Proposed CD, issues on which the Governments have provided flawed evidentiary support or no evidentiary support at all. The Seventh Circuit, in a case relied upon by several cases discussed in the briefing, has made clear that courts have a duty "to consider whether the decree [they are] being asked to sign is lawful and reasonable" and, in the face of third party concerns that a consent decree will be inequitable, "cannot just brush . . . complaints aside." *Donovan v. Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1985). A hearing would address fundamental questions raised in the briefing by allowing the Court to hear directly from witnesses with relevant knowledge as part of its independent evaluation.

Holding a hearing is within the Court's discretion and reviewed under an abuse of discretion standard, but *even if* the relevant case law *did* impose some sort of "special circumstances" test, such "special circumstances" are clearly present here.[4] Though evidentiary hearings may be "rare," none of the cases cited by the Governments or U. S. Steel in which courts have found a hearing unnecessary involved the menagerie of fundamental problems with, and open questions about, the adequacy of the Proposed CD.[5] Unlike in any case offered by U. S. Steel or the Governments, the Proposed CD here: (1) fails to sufficiently protect a National Park and its users; (2) is built on injunctive provisions that have already been revealed as insufficient through a string of continuing violations during a functional test period; and (3) includes a penalty amount for which the Governments have provided scant evidentiary support. In fact, of all of the cases cited, the most similar appears to be *City of Akron*. In both that case and this one, there was justified doubt as to whether the proposed consent decree would halt the defendant's violations, which harmed a nearby national park. *City of Akron*, 794 F. Supp. 2d at 787. Evidentiary hearings on proposed CWA consent decrees may be "rare," but it is also "rare" for a consent decree to be so demonstrably inadequate when it is presented to a court. To demonstrate the utility of an evidentiary hearing, this brief will discuss each of these considerations—the National Park, the continuing violations, and the unsupported penalty—in turn.

[4] U. S. Steel's L.R. 7-5 Resp. at 2–6. The strongest language from the Seventh Circuit offered by U. S. Steel to support its argument that there is a "special circumstances" test simply makes clear that due process does not "mandate a full evidentiary hearing in every situation." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 205 (7th Cir. 1982). In other words, holding a hearing is within the discretion of the trial court; there is no additional test that must be met before a court holds an evidentiary hearing.

[5] Some out-of-circuit cases, cited by the Governments and U. S. Steel, have noted that courts grant requests for hearings on motions to enter consent decrees infrequently. See Pl.s' Resp. to Surfrider's Mot. for Evidentiary Hr'g Or, In the Alternative, Oral Arg. at 1–2 (Dkt. No. 63) ("Governments' L.R. 7-5 Resp."); U. S. Steel's L.R. 7-5 Resp. at 7. Generalizations about the frequency of hearings aside, none of these cases state that a hearing is inappropriate in all cases or where the parties have raised significant questions about the adequacy of the proposed consent decree.

I. Because U. S. Steel's violations flow directly into a National Park and a Great Lake, there is a heightened public interest at stake justifying greater independent judicial scrutiny of the Proposed CD.

This Court should look to *City of Akron* for guidance in applying heightened scrutiny to the Proposed CD, which purports to resolve violations involving illegal pollution that harms a national park. *City of Akron*, 794 F. Supp. 2d at 791–92. As the *City of Akron* court explained, "[t]he purpose in creating the Park parallels the purpose of the Clean Water Act—both were designed to preserve natural resources. Accordingly, the public interest in this matter is extremely high." *Id*. at 792. The court denied the governments' motion to enter the consent decree there because the proposed settlement did not "provide full, complete, and certain relief to the public." *Id.* at 808. The Governments' characterization of *City of Akron* as "unique," without substantive analysis, is belied by the basic facts of the present case, where U. S. Steel's pollution similarly has affected—and continues to affect—the Indiana Dunes National Park.[6]

Impacts of U. S. Steel's continued CWA violations on the Indiana Dunes National Park—a literal stone's throw from U. S. Steel's polluting pipe—justify an evidentiary hearing as part of this Court's close scrutiny of whether the Proposed CD is adequate to protect the public interest. The briefs filed by Surfrider and the City of Chicago, along with the proposed amicus brief of the National Parks Conservation Association and the letter submitted by other local organizations, highlight several ways in which the Proposed CD fails to "provide full, complete, and certain relief to the public" that relies on and enjoys Indiana Dunes National Park. *See* The Surfrider Foundation's Br. in Opp'n to Entry of the Proposed Consent Decree at 5, 7, 13, 15–7, 19, and 21–

[6] The Governments attempt to distinguish *City of Akron* by noting that the *City of Akron* court called its hearing a "fairness hearing" and held a hearing "even though no intervenor or public commenter requested one, and over the objections of all of the parties." *See* Governments' L.R. 7-5 Resp. at 2. Those differences—to the extent meaningful at all—should cut *in favor* of a hearing here where intervenors *have* requested a hearing and nearly a dozen important local organizations have spoken up against the Proposed CD as insufficient and unfair.

24 (Dkt. No. 50) ("Surfrider Brief in Opposition"); National Parks Conservation Association's Proposed *Amicus Curiae* Brief at 4–12 (Dkt. No. 55-1); Letter from Save the Dunes *et al.* Re: Pl's Mot. to Enter Revised Consent Decree at 2 (Dkt. No. 54). The utility of a hearing is evidenced in particular by one such major deficiency: The Proposed CD still fails to guarantee that people swimming in the nearby waters of the National Park beaches are notified directly when U. S. Steel next discharges illegal pollution. In its response to comments, the Governments offer no facts or analysis regarding direct public notification, merely dismissing the idea as "beyond what is necessary."[7] United States' Resp. to Comments at 21 (Dkt. No. 47-1) ("U.S. Response to Comments"). Rather than require it, the Governments merely "encourage" U. S. Steel to be as "transparent as possible regarding future spills and discharges." *Id.* A hearing could help the Court evaluate the Governments' rejection without explanation of a straightforward public notification provision that the Governments simultaneously admit has merit.

II. An evidentiary hearing will assist the Court in evaluating the adequacy of the Proposed CD in light of U. S. Steel's persistent violations even after it has implemented the technical provisions of the Proposed CD.

An evidentiary hearing would also allow this Court to scrutinize whether the Proposed CD "adequately protects and is consistent with the public interest," *BP Exploration*, 167 F. Supp. 2d at 1049, in light of U. S. Steel's continued serious CWA violations that have persisted after U. S. Steel's implementation of the technical provisions in the Proposed CD. After all, the Seventh

[7] U. S. Steel argues that the National Parks Service's role as a government plaintiff should preclude any further consideration of impacts to the National Park. U. S. Steel's L.R. 7-5 Resp. at 6. The Governments do not make this misplaced argument about their own role in this litigation, and the argument is wrong for at least two reasons. First, there is no basis in law for ignoring impacts to a National Park simply because the National Park Service is also involved in a dispute. Second, it once again merely begs the ultimate question. The inadequacy of the Proposed CD is evidence in and of itself of the failure by the National Parks Service, as one of the many government plaintiffs, to fully protect the public's interest in the Park and to achieve "complete and certain relief" for the Park, a point importantly explained by the National Parks Conservation Association. *See* Mot. of Nat'l Parks Conservation Ass'n for Leave to File Amicus Curiae Br. in Opp'n to Consent Decree at 2–5 (Dkt. No. 55); Nat'l Parks Conservation Ass'n Reply in Support of its Mot. for Leave to File Amicus Curiae Br. in Opp'n to Entry of Revised Consent Decree at 2–5 (Dkt. No. 62).

Circuit has made clear that, in assessing the adequacy of a consent decree, "[c]ompliance means an *end* to violations, not merely a reduction in the number or size of them." *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewage Dist.*, 382 F.3d 743, 764 (7th Cir. 2008).

The inadequacy of the Proposed CD to put an "end to violations" is evident from the numerous reports from Indiana Department of Environmental Management ("IDEM") inspectors and U. S. Steel's own briefing. Statements of both IDEM and U. S. Steel's attorneys depict U. S. Steel's numerous post-implementation violations as including yet *another* chromium violation and stemming from the persistence of several of the same "unacceptable" practices and operational failures by U. S. Steel that predate the Proposed CD. *See* Def. U. S. Steel's Reply Brief in Supp. of Pls' Mot. to Enter Revised Consent Decree at 4–6 (Dkt. No. 64) ("U. S. Steel Reply Brief"); Surfrider Brief in Opposition at 1, 14. This Court has an obligation to consider the entire record, including details of the post-implementation violations, and a hearing would allow the Court to hear directly from IDEM inspectors who—unlike U. S. Steel's lawyers or the Governments' declarants—have recent, first-hand knowledge of the context, seriousness, and implications of those violations.

The submissions on record do not render a hearing unnecessary because the Governments have not addressed meaningfully how the post-implementation violations effect the Governments' past predictions of future compliance by U. S. Steel. The Governments exclusively rely on two agency declarations that predicted that the Proposed CD will bring U. S. Steel into compliance. *See* United States' Resp. to Comments, Ex. 1, Decl. of Dean Maraldo (Dkt. No. 47-2); United States' Resp. to Comments, Ex. 2, Decl. of Brad Gavin (Dkt. No. 47-3). Each declaration is dated after some post-implementation violations, including one violation during which U. S. Steel "unacceptabl[y]" misled IDEM officials by "[w]ithholding pertinent information over the course

of an investigation" and failed to respond properly to illegal pollution, a failure IDEM expressly linked to U. S. Steel's violations committed before it implemented the Proposed CD provisions. *See* Aff. of Dr. Ranajit Sahu ¶ 39, 43 (Dkt. 50-1) ("Sahu Aff."); Sahu Aff. Ex. 11 at 5, 10, (June 14, 2019 IDEM letter identifying previous similar violations noted during November 2017 inspections). Moreover, after the date of the Governments' declarations, IDEM inspectors declared that U. S. Steel needs to "revise[ ] or rewrit[e]" its wastewater treatment operations and maintenance plan—the very document the Governments approved just months before as the keystone of the Proposed CD. *See* Sahu Aff. ¶38; Sahu Aff. Ex. 12 at 6 (September 6, 2019 IDEM letter). Even U. S. Steel's attorneys admit that U. S. Steel's operational failures continue to cause CWA violations, including the violation of the facility's chromium discharge limits.[8] *See* U. S. Steel Reply Brief at 9 (admitting that October 2019 illegal chromium discharge "occurred because of operator decisions"). The Governments' declarations do not discuss the post-implementation violations *at all*; such thin and outdated predictions as to the expected success of the Proposed CD cannot be considered credible. Because the Governments fail to provide evidence explaining the impact of these post-implementation violations on the adequacy of the Proposed CD, the Court should hear directly from competent witnesses who can provide such testimony.

Rather than actually explore what these persistent violations might say about the adequacy of the technical relief initially proposed in April of 2018, the Governments respond that they never even intended to prevent all future violations of the CWA and that the terms of the Proposed CD are "iterative." *See* Pls' Reply to Surfrider Foundation's and City of Chicago's Briefs in Opp'n to the Entry of the Proposed Consent Decree at 2–7 (Dkt. No. 65) ("Governments' Reply").

[8] This is noted to the extent that the Court at all considers the factual assertions of U. S. Steel's attorneys, which are unsupported by evidence of any kind. U. S. Steel's inadmissible attorney testimony could properly be subject to a motion to strike, though such a motion is unnecessary at this point, as the Court should simply ignore such inadmissible material.

Relatedly, though the Governments refuse to consider the substance of the expert testimony before the Court, *see* Governments' Reply at 9–11, they note that U. S. Steel is "free to consider Dr. Sahu's recommendations" when it conducts its required annual review of its practices. Governments' Reply at 9. In other words, it is the Governments' position that it is in the public interest to enter a decree that does not even seek to end U. S. Steel's CWA violations.[9] Further, the Governments' position is that the public interest is served when the success or failure of such a decree—even as measured against their impermissibly low objective—hinges entirely on a demonstrably recalcitrant defendant's choices made after the close of the Court's review. The Court should hear directly from those with first-hand, recent knowledge about U. S. Steel's continuingly deficient practices so the Court can evaluate independently whether the Governments' "iterative" approach is adequate to prevent future violations.

Finally, that IDEM may, one day, bring an enforcement action of some sort in relation to these recent violations, *see* Governments' Reply at 3, is irrelevant to the question before the Court, *see* Surfrider Brief in Opposition at 7. These post-implementation violations illuminate the deficiencies of the Proposed CD itself. This Court should consider testimony from witnesses with relevant and recent knowledge regarding U. S. Steel's continuing violations, rather than rely on the inadmissible attorney statements offered by U. S. Steel or the largely unsupported and outdated declarations put in the record by the Governments.

[9] As a practical matter, the Governments have admitted that the Proposed CD fails the Seventh's Circuit's "[c]ompliance means an end to violations" standard, *Friends of Milwaukee's Rivers*, 382 F.3d at 764, by conceding that the Proposed CD does "not [ ] guarantee an end to all violations." *See* Plaintiffs' Reply at 5 n.1.

III. As the Governments have provided nearly no relevant information, an evidentiary hearing would help the Court evaluate whether the proposed civil penalty is adequate and in the public interest.

The Governments have not provided the Court with factual support for their proposal of a $600,000 civil fine to one of the world's largest steel companies, and one that routinely violates environmental laws. The Governments argue the Court need not consider any arguments with respect to the proposed civil penalty because the Governments considered public comments about the penalty. Governments' Reply at 13. In responding to those comments, however, the Governments have failed to provide sufficient facts regarding key penalty issues including the seriousness of U. S. Steel's violations, the economic benefit U. S. Steel enjoyed as a result of those violations, and the need to deter U. S. Steel from future violations. That the Governments may have considered public comments to some degree does not somehow eliminate the need for the Court to evaluate independently the adequacy of the penalty.

The Governments' only discussion of how the civil penalty reflects the seriousness of U. S. Steel's violations lacks factual support and is inconsistent with the facts on record. The Governments claim both that the "sizable penalty" reflects the seriousness of U. S. Steel's violations and that those violations were "discrete and isolated events," which seems to be the Governments' only explanation for why the penalty does not appear so "sizable." U.S. Response to Comments at 32–33 (response to comment number 43). This is the Governments' only response to comments that identified a litany of examples of consent decrees featuring significantly higher penalties. *See* Surfrider Brief in Opposition at 18; Surfrider Comments at 124–25 (Dkt. No. 47-5). Rather than articulate facts that justify a relatively low penalty here, the Governments cherry-pick a lone case and fail to address the many examples of higher penalties. Importantly, the Governments' characterization of U. S. Steel's violations as "discrete and isolated," is contradicted

by the record, which, as discussed above, includes the Governments' own employees explicitly identifying patterns in violations both before and after U. S. Steel began complying with the Proposed CD. *See also* Sahu Aff. ¶ 15. Hearing directly from those government officials with first-hand knowledge would help the Court evaluate for itself whether the violations at issue were "discrete and isolated" or part of a larger, and ongoing pattern that demands a higher penalty.

The CWA and agency policies require the Governments to secure a penalty at least as large as the economic benefit U. S. Steel derived from its violations, Surfrider Brief in Opposition at 19–20, yet the Governments provide even fewer facts regarding such economic benefit. The Governments rely on their response to comment number 45 to assert that the civil penalty properly captures the economic benefit of noncompliance. Governments' Reply at 13. That response, however, simply explains the definition of "economic benefit" under the CWA and indicates that the agencies used a particular computer model. U.S. Response to Comments at 33–34 (response to comment number 45). The Governments's response to comments argues that the economic benefit here is necessarily small because U. S. Steel's failures consisted of "maintenance and operation" deficiencies rather than a failure to make large capital expenditures. But, there are no facts supporting those conclusions. Rather, it appears likely that significant sums of money would be required to reform the "maintenance and operation" of a large industrial facility and that such reforms were years overdue.[10] The Governments offer no facts about the incremental costs of training personnel, hiring more qualified personnel, or conducting and implementing the corporate policy reviews and revisions that are required under the deficient Proposed CD (let alone cost information about the sorts of steps that would be necessary for U. S. Steel to achieve actual CWA

[10] Facts before the Court indicate that U. S. Steel's failures to make crucial expenditures persisted for many years. For example, U. S. Steel did not have any preventative maintenance system whatsoever before the April 2017 spill. Sahu Aff. ¶ 9 (quoting United States Environmental Protection Agency inspection report).

compliance). Similarly, the Governments offer no facts about how long U. S. Steel has been deferring these costs, making it impossible to evaluate whether the penalty proposed captures the economic benefit U. S. Steel enjoyed by delaying or failing to make important investments. The Court currently has no facts before it that even articulate what avoided costs the Governments considered in assessing economic benefit.

Further obscuring U. S. Steel's true economic benefit, the Governments provide no explanation of what constitutes a "large" capital expenditure, the sort of expense the Governments apparently did not consider in its analysis here. *But see* Sahu Aff. ¶ 26 (describing the need to consider larger improvements to overall wastewater treatment infrastructure at the facility). The Governments' characterization of U. S. Steel's expenditures as not being "large," is unhelpful in any event because the record shows that U. S. Steel did fail to make several significant expenditures to correct apparently longstanding physical and operational deficiencies at the facility. *See* Proposed CD ¶ 9 (requiring various improvements to physical infrastructure at the facility). Expert testimony supports the relevance and seriousness of those failures. *See* Sahu Aff. ¶¶ 6–9, 18–19. The Governments, however, have provided no facts supporting what those costs were, whether considered "large" or not. To evaluate whether the Proposed CD strips U.S. Steel of the economic benefit it enjoyed from violating the law, the Court need not second-guess the Governments' computer model nor force the revelation of litigation strategy. U.S. Response to Comments at 33–34. Rather, the Court should simply require that the Governments support their assertions with facts.

The facts before the Court currently cannot support a finding that the civil penalty is sufficient to deter future violations of law. *See* Surfrider Brief in Opposition at 16–17. The Governments point to their response to comment number 46 to disappear this criticism, *see*

Governments' Reply at 13, but this response is once again unhelpful. The Governments assert adequate deterrence because the Proposed CD also includes stipulated penalties and requires compliance with injunctive provisions. *Id.*; U.S. Response to Comments at 35 (response to comment number 46). The Governments' argument once again simply assumes the adequacy of the overall Proposed CD and offers no facts to support their assertion that the penalty will deter U. S. Steel. The failure of deterrence here is evidenced by the facts before the Court, which, as described above, demonstrate that U. S. Steel continues to violate the CWA even after it has implemented the Proposed CD's technical provisions and has done so with full knowledge of the amount of civil and stipulated penalties that were proposed in April of 2018 and remain unchanged. Moreover, the Governments have never responded to the facts in the record showing that U. S. Steel's size and shameful environmental compliance record require a greater penalty for adequate deterrence. *See* Surfrider Comments at 18–19 (Dkt. No. 47-5). For these reasons, a hearing would assist the Court in evaluating if the proposed penalties deliver real deterrence.

The Governments' continued insistence on keeping facts from the Court and the public frustrates the Court's ability to exercise its independent judgment. Contrary to their claims, neither the Governments' response to comments nor any other information before the Court provide facts sufficient to assess whether the proposed penalty is adequate and in the public interest. The facts that are on the record suggest the current penalties are woefully inadequate.

Conclusion

The Governments claim that the use of time and resources associated with holding a hearing defeat the purpose of reaching a settlement in the first place.[11] Governments' L.R. 7-5

[11] Relatedly, the Governments assert that a hearing would consume too many resources because the Governments would be forced to call Surfrider's affiants, specifically Dr. Ranajit Sahu. Governments' L.R. 7-5 Resp. at 4. Surfrider provided the Court with Dr. Sahu's affidavit specifically because—unlike the Governments' declarants—he is an expert who has examined the actual and up-to-date state of compliance at U. S. Steel's facility. Dr. Sahu's

Resp. at 3–4. Of course, settlements generally lower litigation costs, but it is not as if holding a hearing now will impose anything approaching the costs of fully litigating the Governments' case through discovery and trial. Even still, the Governments' argument here again rests on the faulty assumption that the Proposed CD is adequate as it is. Deploying marginally more resources now to ensure that there is an end to U. S. Steel's violations is necessary to adequately protect the heightened public interests here and will prevent the need to use additional government and judicial resources in the long-run by eliminating the need for serial enforcement actions against U. S. Steel. Approval of the Proposed CD would be an exercise of judicial power with significant effects on a National Park, a Great Lake, and the millions who enjoy and depend on those shared resources. The Court should only reach such a decision after it is able to consider all relevant evidence and is assured that the Proposed CD meets the applicable standards and puts an end to U. S. Steel's violations.

Finally, Surfrider is compelled to respond to U. S. Steel's farcical accusation that Surfrider's request for a hearing somehow amounts to unreasonable, "scorched-earth litigation." U. S. Steel's L.R. 7-5 Resp. at 9. This allegation is wholly unsupported by the record: Surfrider initially agreed to stay its citizen suit and did so in the hopes that a consent decree eventually submitted by the Governments would put an end to U. S. Steel's routine violations of the CWA.[12] The Proposed CD, unfortunately, still fails in that regard and now the Governments have gone so

testimony would assist the Court in evaluating the Proposed CD. Therefore, Surfrider welcomes the opportunity for Dr. Sahu to speak directly to the Court, just as the Department of Justice itself has presented Dr. Sahu's testimony to assist other courts. Sahu Aff. at ¶ 3.

[12] U. S. Steel takes Surfrider's words wildly out of context. Paragraph 11(a) of Surfrider's Motion to Lift Stay of Proceedings, cited by U. S. Steel, states that the version of the consent decree proposed at that time would not resolve Surfrider's citizen suit because it "fail[ed] to adequately or fully resolve the Governments' CWA claims, much less [Surfrider's] broader and more numerous claims." *The Surfrider Foundation v. U. S. Steel Corp.*, 2:18-cv-00020 (N.D. Ind. July 13, 2018) (Dkt. No. 26) ¶ 11(a). Pointing the Court to U. S. Steel's ongoing violations, Surfrider explained that it had "agreed to stay [its] claims in the hopes that focusing on the Governments' litigation would be the most expeditious means to protect the public from the risks created by U. S. Steel's illegal and dangerous practices. Unfortunately, that has not come to pass . . . ." *Id.* ¶ 11(d).

far as to expressly abandon their responsibility to ensure U. S. Steel stops breaking the law. Surfrider is not interested in litigation for litigation's sake. Rather, Surfrider's approach to this litigation is the same now as it has been since it was the first entity to take U. S. Steel to court for its unceasing pattern of disregard for the Clean Water Act and disrespect for our shared National Park and Great Lake. Surfrider continues to litigate only because U. S. Steel continues to violate while the Governments continue to fail to put an end to those violations.

Respectfully submitted,

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