

INTRODUCTION

On April 2, 2018, the United States and the State of Indiana (“State” or “Indiana”) lodged a Consent Decree with the U.S. District Court for the Northern District of Indiana in Civil Action No. 2:18-cv-127 (N.D. Ind.), to resolve claims by the United States and Indiana against Defendant U. S. Steel Corporation (“U. S. Steel”). (Consent Decree, Dkt. 2-1). The Governments’ claims allege violations of various federal and state environmental requirements, including violations relating to an April 11, 2017 process wastewater discharge of hexavalent chromium and other pollutants from U. S. Steel’s Midwest Plant in Portage, Indiana.

On April 6, 2018, the Department of Justice published a notice of the proposed Consent Decree in the *Federal Register*, inviting the public to submit comments on the proposed settlement through May 6, 2018. The public comment period was subsequently extended an additional 30 days, to June 6, 2018. 83 Fed. Reg. 17193-17194 (April 18, 2018). In addition, prior to the expiration of the public comment period, the City of Chicago (“City”) and Surfrider Foundation (“Surfrider”) requested additional time to comment on the proposed Decree; the United States allowed them a further 30-day extension. Ultimately, the United States received 2,688 comments pursuant to the *Federal Register* notice. This U.S. Response to Comments sets forth the United States’ responses to the concerns raised by the comments, with the assistance of the U.S. Environmental Protection Agency (“EPA”) and in consultation with the Indiana Department of Environmental Management (“IDEM”) and the other federal co-Plaintiffs.

TYPES OF PUBLIC COMMENTS RECEIVED

The 2,688 public comments, submitted by both individuals and organizations, take a variety of forms. Some comments consist of formal letters, one as long as 50 pages. Several such letters contain exhibits including court pleadings and expert reports. Hundreds of comments, and in one case more than 1,700 comments, were submitted via email using specific “model forms” supplied by several organizations (such as the National Park Conservation Association and the Alliance for the Great Lakes), and, depending on the model form under which they were submitted, are very similar in content to one another. Approximately 72 comments, including letters and emails, were submitted separately, using no model forms.

FORMAT OF THE U.S. RESPONSE TO COMMENTS

In Part II below, i.e., the substantive response to comments, the United States has organized the comments by topic and consolidated the text of similar comments. After each summary of a comment, which appears in italics, the United States has provided a reference to an example or examples of the comment, including the name of the commenter and page number, as applicable. For example, “City 5-8” refers to the comment letter submitted by the City of Chicago, at pages 5-8. A reference to “Supp.” means a supplemental letter, in addition to the original one, submitted by a commenter. The list of commenters following each comment summary is fairly representative, but not necessarily exhaustive, of all the commenters expressing that opinion. The United States’ responses to the comments then follow and appear in regular font.

REPRODUCTION OF REPRESENTATIVE COMMENTS IN EXHIBIT 4

Every one of the comments referenced in the response to comments below is reproduced and included as Exhibit 4 to this document. Exhibit 4 also includes several representative comments

USDC IN/ND case 2:18-cv-00127-TLS-JEM document 47-1 filed 11/20/19 page 3 of 46 that were submitted using the various “model forms” supplied by specific organizations, as described above. The United States will make all other comments available to the Court, or to any member of the public, upon request. The United States also will make available upon request a spreadsheet identifying all 2,688 comments, including the types and sources of the comments (e.g., whether the comment was submitted under a model form or separately, whether the comment was in the form of an email or letter, etc.).

Section I below provides the factual and legal background helpful in evaluating the public comments and the United States’ responses. That section includes: (1) a description of the facility at issue in this case; (2) the applicable legal provisions and the violations alleged in the Complaint; and (3) a brief history of negotiations and a summary of the main provisions of the proposed Consent Decree.¹ Section II summarizes and responds to the specific comments received on the Decree.

I. FACTUAL BACKGROUND AND APPLICABLE LEGAL PROVISIONS

A. U. S. Steel’s Midwest Plant

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. Its principal products include hot rolled bands and sheet, cold rolled sheet, electrogalvanized sheet, hot dipped galvanized sheet, low carbon sheet, and tin mill products. U. S. Steel also operates two plants at the Facility 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, which is part of the Burns Waterway Harbor System, through Outfall 004.² Lake Michigan is approximately 500 yards downstream of the point where Outfall 004 discharges in Burns Waterway. The Midwest Plant also discharges non-contact cooling water and storm water out of its outfalls to Burns Waterway.

The Facility is located in a mixed-use area including industrial operations and residential properties in the Town of Ogden Dunes, the Township of Portage, and the City of Portage. Private and public beach areas provide recreational opportunities along the Lake Michigan shoreline, including the Indiana Dunes National Park located next to the Facility. Lake Michigan also provides source water for local community drinking water systems.

¹ Although the proposed Consent Decree – for which we are proposing revisions -- has not yet been approved by the Court, for brevity it is sometimes referred simply as the Consent Decree (omitting “proposed” and/or “revised”) in this U.S. Response to Comments.

² Burns Waterway is a 5,540 foot long canal extending inland from Lake Michigan to the south of U.S. Highway 12. It provides access to the inland Portage Marina and Marina Shores.

B. Applicable Legal Provisions and General Description of Violations Alleged in the Complaint

The 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 discharge (“April 2017 Spill”). On that date, U. S. Steel discharged untreated process wastewater from the Facility via Outfall 004. The discharged wastewater contained, among other pollutants, hexavalent chromium and total chromium. According to U. S. Steel, the discharge resulted from the failure of an expansion joint on a process wastewater pipeline within the Facility. In the Monthly Monitoring Report (“MMR”) submitted by U. S. Steel to the State for April 2017, U. S. Steel reported a release of 902 lbs. of hexavalent chromium during the period April 10-12, 2017.³

EPA and IDEM determined that the April 2017 Spill resulted in a number of Clean Water Act (“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 the Emergency Planning and Community Right-to-Know Act of 1986 (“EPCRA”), 42 U.S.C. § 11004(c), the discharge also gave rise to violations of the oral and written notification provisions 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 the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9607. The National Park Service (“NPS”) also conducted response activities at the Facility and affected areas and incurred response costs under the System Unit Resources Protection Act (“SURPA”), 54 U.S.C. §§ 100722-100723, in connection with the April 2017 Spill. NPS further incurred damage assessment costs and calculated 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 2017 Spill. Finally, NOAA incurred costs under CERCLA in conducting natural resource damage assessment activities at the Facility and affected areas in connection with the spill. The Complaint asserts liability under CERCLA and SURPA, as well as analogous State law, and thus seeks reimbursement of response costs and resource damages, including natural resource damages, as a result of the April 2017 Spill.

Following the April 2017 Spill, EPA and IDEM separately conducted NPDES permit compliance inspections of the Facility and reviewed various Facility records and reports, leading to evidence of other alleged violations, including: (1) permit effluent exceedances for a number

³ U. S. Steel’s April 2017 MMR included the following explanation regarding the accuracy of its reported release of hexavalent chromium: “the daily loading of hexavalent chromium reported for April 11, 2017 at Outfall 304 is based on a single grab sample collected on the day of the incident and is not representative of the actual loading on this day. The 24-hour composite sample result for total chromium reported at Outfall 304 was 204 lb/day. Since hexavalent chromium is a subset of total chromium, it is clear that the grab sample does not account for variation in the discharge concentration that resulted from the nature of the incident on this day and any attempt to derive the daily loading from this grab sample yields an absurd result. This high result from the grab sample also skewed the monthly average of 50.26 lb/day of hexavalent chromium, which likewise is a significant overestimation and illogical conclusion.”

of other pollutants, beginning in 2013 to present; (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) an O&M violation for failure to operate all equipment and systems efficiently for the collection and treatment of process wastewater; and (5) certain violations of the Facility's Storm Water Pollution Prevention Plan. The Complaint also alleges an exceedance of the effluent limit for total chromium during an October 2017 discharge at the Facility. The Complaint includes an Appendix containing a chart that lists each CWA violation alleged in the Complaint, identifying for each violation the date of the violation, the violation type (e.g., effluent exceedance, narrative standard, reporting, monitoring, etc.) and, if relevant, the applicable outfall.

C. History of Negotiations and the Proposed Consent Decree

In the spring and summer of 2017, the Governments began information-gathering and discussions with U. S. Steel regarding the April 2017 Spill. In September 2017, the parties met in person and engaged in intensive negotiations regarding complex legal and technical issues, and thereafter exchanged numerous drafts of the proposed Consent Decree. The negotiations process included analysis of data and other information submitted by U. S. Steel pursuant to information requests and settlement discussions and internal governmental deliberations regarding U. S. Steel's permit and the company's operation and maintenance plans. The terms of the proposed Consent Decree were negotiated at arms-length over a number of months, with substantial give-and-take by experienced environmental lawyers and technical experts representing the United States, the State, and U. S. Steel.

During the course of the negotiations and prior to lodging of the proposed Decree, U. S. Steel took various steps to address the alleged pollution violations. Those steps, including repairs and improvements to critical wastewater containment infrastructure, are identified in Paragraph ("Par.") 9(a) of the Decree. Further, during the course of the public comment period and the Governments' review of public comments, and while the proposed Decree was lodged with the Court, U. S. Steel began complying with the injunctive measures outlined in Section V of the proposed Decree, despite the fact that the Decree was not yet entered as a final judgment of the Court. Those actions included making additional repairs, such as 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, and submission of a number of key plans addressing operations and maintenance and wastewater monitoring, as described below.

In addition to requiring a number of repairs and improvements, the proposed Consent Decree requires U. S. Steel to conduct additional sampling, monitoring and preventive maintenance to help prevent future discharge violations, including chromium spills. In that regard, the proposed Consent Decree requires U. S. Steel to develop an O&M and preventive maintenance plan and to design and implement new wastewater process monitoring – all to further the goal of preventing future spills and exceedances of U. S. Steel's permit.

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.⁴ Third, the design for Wastewater Process Monitoring System ("Wastewater Monitoring Design" or "Design") covers early detection of conditions that may lead to spills such as the April 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 part of the monitoring aspect of the plans and as required by the proposed Decree, U. S. Steel has been sampling daily for total and hexavalent chromium and reporting the results to IDEM.⁵

To help ensure that U. S. Steel adequately notifies all interested parties in the event of a spill or release, the proposed Consent Decree requires U. S. Steel, by July 1, 2019, to follow the newly revised "Midwest Facility Spill/Release Evaluation and External Reporting Requirements" attached as Appendix B to the proposed Decree. Among other things, Appendix B, which addresses spills and releases under CERCLA, the CWA, and the Indiana Spill Rule, in addition to releases covered by EPCRA and other applicable authorities, sets forth detailed requirements for notifying appropriate entities in the event of a spill or release to ground, soil, or water. Specifically, with regard to spills reportable under 327 IAC 2-6.1 (the Indiana Spill Rule), the Appendix B provisions require U. S. Steel to notify the nearest downstream water users within 10 miles of the spill (within Indiana borders) and to notify the Indiana Dunes National Park, the Indiana American Water local water intake, the City of Portage, the Town of Ogden Dunes, the Port of Indiana-Burns Harbor, the Michigan City Water Department, the East Chicago Water Department and the City of Chicago.⁶ As explained more fully below, Appendix B has been revised and expanded in response to concerns raised by public comments.

II. RESPONSE TO PUBLIC COMMENTS

The 2,700 comments on the proposed Consent Decree fall into ten main categories, though there is overlap in several areas: (1) Comments Relating to the O&M and PM Plans; (2) Comments Relating to the Wastewater Monitoring Design; (3) Comments Relating to Other CWA Compliance Provisions of the Proposed Decree; (4) Comments Relating to the Reporting of Spills and Other Violations; (5) Comments Relating to the Notification Requirements of Appendix B; (6) Comments Relating to the Civil Penalty; (7) Comments Relating to Lack of a

⁴ Although the O&M and PM Plans are two separate, required plans, the PM Plan is incorporated within the O&M Plan. In this U.S. Response to Comments, we sometimes refer to the "O&M/PM Plans" collectively.

⁵ 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 that were not required to be submitted until after entry of the Decree.

⁶ One of the Intervenor in this action, the City of Chicago, in discussions with the United States prior to lodging of the proposed Decree, specifically requested that the City be added to the list of parties to be notified in the event of a spill or release, reportable under the Indiana Spill Rule, to the water.

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Supplemental Environmental Project; (8) Comments Relating to Response Costs and Damages; (9) Comments Relating to Stipulated Penalties, Termination, Modification, and Other Provisions of the Proposed Decree; (10) Comments Relating to Procedural Fairness to Intervenors and Public; and (11) miscellaneous comments that do not fit in any of the above categories.

As described above, under the proposed Consent Decree, U. S. Steel was required to submit O&M, PM, and Wastewater Monitoring Design plans to the Governments for their review and approval and then to follow those plans. 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). Usually, such plans are not required to be submitted by a settling defendant until after the proposed decree is entered by the court as a final judgment. Here, as prescribed by the proposed Decree, U. S. Steel submitted its initial O&M and PM Plans on April 13, 2018, not only prior to entry of the Decree but several days prior to the pre-entry deadline set forth in the Decree.

EPA, after consulting with IDEM and other federal co-Plaintiffs, initially disapproved U. S. Steel's O&M and PM Plans, identifying in what ways the Plans needed to be improved. U. S. Steel agreed to make the changes identified by EPA and eventually EPA approved the Plans. Because the Plans were submitted prior to the close of the public comment period, many of the public comments addressed the sufficiency of the plans, even though (1) only EPA and IDEM have the authority to approve or disapprove the Plans (Decree, Par. 13), and (2) it was the proposed Decree itself, not the Plans, for which public comment was sought. Nonetheless, as part of EPA's final approval process, EPA and IDEM reviewed and considered the public comments that addressed the substance of those Plans. As explained below, EPA and IDEM agreed with several of the comments recommending changes to the Plans, including that the Plans should contain 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. U. S. Steel agreed to make such changes in its final set of Plans.

EPA and IDEM also considered several public comments that addressed the Wastewater Monitoring Design, as the Design was submitted prior to the close of the extended public comment period provided to Intervenors Surfrider and the City of Chicago. EPA and IDEM agreed with some of the recommendations in those comments to improve the Design, including that U. S. Steel should include as part of the Design a detailed evaluation of the Facility's existing wastewater process monitoring, with a schedule for completion of the improvements to its wastewater process monitoring. U. S. Steel agreed with that and other recommendations of the commenters and made such revisions to the final Design, prior to EPA's approval.

In addition to the revisions made to the initial O&M/PM Plans and the Wastewater Monitoring Design, the parties have proposed two significant revisions to the proposed lodged Consent Decree, in response to public comments. First, as identified above and described more fully below, Appendix B has been revised to strengthen and broaden the notification provisions when U. S. Steel experiences a spill or release to the ground, soil or water. Second, the revised Consent Decree requires U. S. Steel to perform an environmentally beneficial project, overseen by the State, which involves water quality testing at a number of shore locations along Lake Michigan, and reporting of such results. In that regard, one of the most common public comments on the proposed Consent Decree was that it should include a project that would

The United States provided, under a Confidentiality Agreement, a draft of the State environmentally beneficial project and revised Appendix B to the Intervenor, Surfrider and the City of Chicago. On July 8, 2019, the Intervenor submitted detailed comments to the United States on those drafts. The Governments reviewed those comments and discussed them with U. S. Steel. As discussed below, the parties found several of the Intervenor comments to be helpful, and the revised Appendix B includes improvements proposed by the Intervenor.

A. Comments Relating to the O&M and PM Plans

1. *The O&M and PM Plans should require and describe adequate training on every aspect of Consent Decree compliance and should include a summary of the key NPDES permit requirements. (National Parks Conservation Association (“NPCA”) Supp. 6-7, 9; City of Chicago (“City”) 5-8, 16). The O&M Plan does not provide sufficient information for Facility operators to adequately implement it. The Plan does not include any reference to manufacturers’ manuals or as-built drawings for the Facility operators to follow. (NPCA 5). The O&M Plan should include the Facility’s standard operating procedures, including details on how to operate all relevant systems, how to respond to spills and releases, and for semi-annual inspections and cleaning of the wastewater treatment plants. (City 5-8).*

Response: The initial proposed versions of the O&M and PM Plans (collectively, “Plans”) were submitted by U. S. Steel on April 13, 2018, prior to the close of the public comment period. After consulting with the other Plaintiff federal agencies and IDEM, on May 30, 2018, EPA wrote U. S. Steel stating that EPA and IDEM disapproved of its initial Plans and identifying what the Plans needed to include before they could be approved, including but not limited to the following actions:

- Provide additional operational procedures to help avoid or minimize the impacts from spills and upset conditions at the Chrome Treatment Plant and the Final Treatment Plant.
- Include a reference list of all Standard Operating Procedures (“SOPs”) for laboratory and field instruments (e.g., pH probes) related to NPDES permit compliance monitoring.
- Provide additional language describing how U. S. Steel is managing and documenting O&M and PM activities.
- Include language describing how U. S. Steel plans to inspect, clean and maintain the outfall channel, and how activities will be tracked.

U. S. Steel agreed to make the changes to their initial Plans as outlined in EPA’s letter. See Exhibit (“Ex.”) 1, Declaration of Dean Maraldo (“Maraldo Decl.”), Par. 15.

In the interest of transparency, the Governments posted U. S. Steel’s initial proposed Plans on the EPA and IDEM websites – specifically, on those portions dedicated to the U. S. Steel Decree – for the public to view. According to Paragraph 10(a) and (c) of the proposed Decree, U. S. Steel is required to submit the Plans to EPA and IDEM, the only entities who have authority to approve or disapprove the Plans. Nevertheless, as the Plans were available for public viewing during the public comment period, a number of public comments addressed the initial Plans, and

Though not required to consider such comments addressing the Plans as opposed to the proposed Decree terms, the Governments reviewed and took into account the public comments addressing the initial Plans prior to approving the final Plans. Following several conference calls between the Governments and U. S. Steel discussing technical issues, EPA and IDEM recommended that U. S. Steel improve the initial Plans by making certain changes to its Plans, based on public comments, in addition to making the recommended changes as outlined in EPA's May 30, 2018 disapproval letter. In its final, submitted Plans, U. S. Steel agreed to make all of the improvements recommended by the Governments, and many of the improvements recommended by public commenters, after which EPA and IDEM approved the Plans. *See* Ex. 1, Maraldo Decl., Par. 16. The final, approved Plans have been posted on the U. S. Steel-dedicated portions of EPA's and IDEM's websites.

The changes that U. S. Steel has made in the final, approved Plans fall into two main areas – training of Facility personnel, and Standard Operating Procedures relating to the O&M and PM Plans.

Training. In the final, approved Plans, entitled collectively the “Wastewater Treatment O & M Manual and Preventative Maintenance Program Plan,” U. S. Steel described generally the training required of the Facility's operators to implement the Plans. Attached to the Plans are samples of the Job Qualifications Requirements (“JQRs”) necessary for each of the Facility's operators to properly perform the functions required under the Plans to operate and maintain the Facility. *See* <https://www.epa.gov/in/u-s-steel-corporation-consent-decree-april-2018>.⁷

Further, as discussed in the Plans, U. S. Steel maintains an Environmental Management System (“EMS”) certified by an independent party to meet the requirements of the ISO14001 Standard. ISO 14001 is an international standard that specifies requirements for an effective EMS. All training with regard to employee competency and job task training is conducted in accordance with the specifications of the ISO14001 Standard. Detailed procedures, equipment, and additional responsibilities are described in the JQRs, which list the relevant training requirements as well as acknowledgements of training from the trainer, trainee and responsible manager. Each employee has his or her own specific JQR, maintained by the Utilities Department Document Custodian, tailored for the position for which he or she has been trained. Examples of employees with their own, specific JQRs are the Chrome Plant Operator, the Final Treatment Plant Operator, and the Sludge Dewatering Plant Operator, just to name a few.

SOPs. One of the areas in which EPA's concerns -- and some of the commenters' concerns -- about the initial O&M/PM Plans overlapped was with regard to the Plans' references to U. S. Steel's SOPs. U. S. Steel has developed numerous SOPs that guide each and every operating system of the Facility, be it the Chrome Treatment Plant, the North Final Treatment Plant, or the Sludge Dewatering System, among others. In EPA's review of U. S. Steel's initial O&M/PM Plans, it was clear that the Plans should not be viewed in a vacuum, but rather in conjunction with the various referenced SOPs. In response both to EPA's comments in its May 30, 2018

⁷ Once on the website, click on U. S. Steel Consent Decree Revised Submittal “Wastewater Treatment O&M Manual and Preventive Maintenance Program Plan,” then scroll to Appendix IV.

disapproval letter and to several public comments on the proposed Decree noting that U. S. Steel's initial Plans referenced some but not all of the SOPs, U. S. Steel revised its initial Plans to identify each of the more than 40 SOPs that govern the Facility's processes, referencing the specific processes to which they relate. *See* Ex. 1, Maraldo Decl., Par. 17. In addition to the Plans themselves, the SOPs are posted on the U. S. Steel-dedicated portions of the EPA and IDEM websites. As the implementation of the Plans cannot be entirely separated from implementation of the SOPs, the Governments believe that, when the Plans and SOPs are viewed together as a collective whole, the Facility operators have enough information and guidance to be able to adequately implement the necessary O&M and PM procedures, with the goal of maintaining the company's compliance with the proposed Decree and the Clean Water Act. *Id.*

Also, as requested by the commenters, the revised, approved Plans contain a summary of the key provisions of the Facility's NPDES permit. In addition, the revised Plans reference -- and include as exhibits -- approximately 20 as-built flow diagrams or graphics that relate specifically to each of the relevant processes of the Facility.

In the United States' view, the final Plans -- if implemented in accordance with the requirements of the Plans and the proposed Consent Decree, including the SOPs referenced above and the Wastewater Monitoring Design discussed more fully below, in combination with the other compliance measures and enforcement mechanisms of the proposed Decree -- will achieve the proposed Decree's objective of promoting U. S. Steel's compliance with the Clean Water Act and related requirements. *See* Ex 1, Maraldo Decl., Par. 21; Ex. 2, Declaration of Brad Gavin ("Gavin Decl."), Par. 14.

2. The O&M and PM Plans should include additional information about preventive maintenance, including: provisions requiring frequent maintenance inspections of the outfall channels; description of existing Facility assets and new equipment installed in response to recent incidents (such as turbidimeters); description of the method of assessment and specific aspects to assess, including assessment of asset vulnerability; and description of the procedures and/or methodologies for periodic inspection, including schedules for lubrication, adjustment and/or other servicing of machinery, pipes, structures, and other equipment. The Plans should also include a description of the difference between "inspection" and "full inspection;" corrective actions in the event an inspection finds a need for servicing or repair; and the process for investigating and documenting the root cause of damage. In addition, the Plans should require more detailed recordkeeping requirements, and include plant contacts and information on staffing. (NPCA Supp. 3; City 5-8; NPCA 5-7; Julia Hoham; Sierra Club 2).

Response: Heeding the commenters' concerns, and consistent with the Governments' concerns as noted in EPA's and IDEM's disapproval letter of May 30, 2018, the Governments -- along with U. S. Steel -- agreed that the initial Plans could be improved by including more specific information about preventive maintenance including inspections, assessment of equipment and asset vulnerability, and schedule for preventive maintenance; corrective action when preventive maintenance reveals the need for such action; and recordkeeping requirements.

Preventive Maintenance: Inspections, Assessment of Equipment Including Asset Vulnerability, and Schedules. As noted in the final, approved Plans, the outfalls discharging to Burns Waterway are typically observed on a daily basis by a third party contractor of U. S. Steel. The visual observations include water quality and physical condition of the outfall. The Plans explain that the Facility will conduct scheduled annual maintenance inspections of the outfall

structures, which are to be documented in the EMS. In addition, as noted in the revised, final Plans, a third-party contractor, who maintains and calibrates each flow meter per manufacturer recommendations, is responsible for flow measurements at the final Outfalls 002, 003, and 004. The flow meters are capable of accurate readings in varying flow conditions. Any new equipment, and inspection and maintenance of such equipment, will be installed and implemented in accordance with the Decree provisions for the Wastewater Monitoring Design (discussed below), which was approved by the Governments on December 28, 2018. U. S. Steel, as per the commenter's suggestion, has recommended in that document, discussed in more detail below, installation of new equipment including turbidimeters.

Although the Plans do not distinguish between "inspection" and "full inspection," there is no need to do so given the plethora of information in the Plans and the SOPs. For each relevant Facility process described in the Plans (e.g., the Chrome Treatment Plant, the Sludge Dewatering Process, etc.), the Plans include a table that outlines the specific plan for maintenance applicable to each and every piece of equipment in that process, including a description of the identified maintenance (e.g., inspection, thermal testing, etc.) and the frequency of the maintenance (e.g., annually, quarterly, etc.). For example, the revised Plans include a higher frequency of thermal testing – from semi-annually to quarterly -- of the mixer motors at the final treatment plant. Further, the revised, approved Plans, particularly in combination with the Facility's relevant SOPs, include procedures for periodic inspection for lubrication, adjustment and/or servicing of machinery, structures and all relevant equipment. In addition, the SOPs referenced in the Plans include detailed inspection and monitoring procedures for wastewater treatment processes.

Although the final treatment plant contains some of the larger, more critical pumps known as sumps, which are part of the relevant equipment that is inspected in accordance with the schedules set forth in the Plans and SOPs, U. S. Steel has represented to the Governments that most of the Facility's pipes are small and easily replaced with onsite spares. U. S. Steel has also represented that there is redundancy built into the critical components of the treatment systems. The Facility is clearly in the best position to know how all of its machinery components interact with each other and operate collectively, helping to ensure that O&M and PM procedures are effective in preventing releases such as the April 2017 Spill. Therefore, unlike the case with the sumps and larger, more critical equipment, there is no need for the Plans to include specific schedules for inspection and replacement of the routine pipes.

The approved Plans, addressing preventive maintenance activities and relevant PM portions of the SOPs, implicitly cover asset inspection and vulnerability. Additionally, information related to asset vulnerability in the SOPs include guides for troubleshooting potential issues; corrective actions to be taken; information regarding plant contacts in case of an alarm, equipment problem, or emergency; inspection processes; and frequency of inspection.

In sum, the Plans contain more than sufficient information to enable a Facility operator to know exactly what kind of maintenance is necessary for each applicable process and piece of equipment and how frequent that maintenance needs to be. *See* Ex. 1, Maraldo Decl., Par. 17.

Corrective Action. In general, both the Plans and relevant SOPs, to some extent or another, address corrective actions if and when appropriate. For example, the Plans discuss that if debris or structural deficiency is noted during observation or inspection in the outfall channel leading to Burns Waterway, appropriate measures are to be taken to return the outfall to normal operating conditions. Further, U. S. Steel has represented to the Governments that if preventive

maintenance reveals the need for corrective action, U. S. Steel will undertake corrective action at the time of the inspection and will note the action on the inspection documentation. If the problem cannot be immediately corrected and follow-up actions are required, U. S. Steel will initiate a work order, which will be documented in the EMS.

Recordkeeping. In addition to requiring a five-year retention period for appropriate data and records generated by the O&M/PM Plans, the revised Plans describe how all preventive maintenance and calibration activities, including all inspections, are tracked by U. S. Steel's EMS. Together with the five-year retention policy and the record-keeping requirements of the proposed Decree, the EMS helps ensure that all appropriate O&M and PM activities at the Facility are recorded and well-documented. Further, addressing the commenter's final concern, the O&M Plan, and supporting SOPs, describe job duties for key wastewater positions, and in that manner provide useful information relevant to plant contacts and staffing.

3. The O&M and PM Plans should include additional information on the wastewater treatment system, including whether production can be stopped if the tank fills due to problems in the treatment system; a description of how the system is controlled; piping and instrumentation drawings showing equipment tags, pumps, and instruments; and alarm setpoints and actions to be taken for each alarm. (City 5-8).

Response: Relevant SOPs referenced in the Plans, such as the Chrome Wastewater Treatment Plant Overview, include operational and control parameters for wastewater treatment, including monitoring of wastewater parameters and the ability for the system to automatically shut down and send alerts to key staff. These SOPs are maintained in the Facility's EMS. In addition, in the Wastewater Monitoring Design (described more fully below), U. S. Steel has committed to investigate methods for incorporating electronic outputs into the plant-wide alert system, and record trending data to assist in process control. Further, U. S. Steel has represented to the Governments that piping and instrumentation drawings showing equipment tags, pumps, and instruments are readily available to the operators.

U. S. Steel addresses alarms and alarm response procedures in the Wastewater Monitoring Design (discussed below), including the Assessment Summary attached as an exhibit to the Design, and in specific SOPs relevant to, and referenced in, the O&M/PM Plans (e.g., SOPs for Trench System Containment, and Chrome Treatment Plant – Testing Conductivity).

4. The O&M Plan should include a Quality Assurance Project Plan (“QAPP”) for routine and compliance monitoring and analytical procedures in wastewater, stormwater and non-contact cooling water locations in treatment facilities and conveyance systems. The work should be audited annually and the QAPP should be updated regularly. (City 8-11).

Response: The Governments do not claim in this action that U. S. Steel has violated requirements for quality assurance of monitoring or sampling procedures. Therefore, QAPP concerns are not addressed in this settlement.

5. The O&M Plan should include more detailed laboratory requirements, including for internal process controls and those controls conducted by third party vendors. (City 5-8).

Response: Heeding the commenters' concerns, and consistent with some of the concerns raised in EPA's and IDEM's disapproval letter of May 28, 2018, the Governments and U. S. Steel

agreed that the initial Plans could be improved by including more specific information in this regard. As stated in the initial Plans, the Facility assigned primary responsibility for NPDES sampling and analytical testing to an EPA-certified third-party laboratory, which is responsible for operation and maintenance of all NPDES lab and field instruments. The Plans explain that all analytical methods are approved by standard methods and undergo validation prior to their approval for use in the laboratory. The approval methods contain criteria for quality control and performance throughout all stages of analysis, including sample preparation. The laboratory also performs internal audits of all systems by a quality assurance manager responsible for the particular system. Accreditation, certification and licensing bodies also perform audits to ensure laboratory conformance to all standards and regulations. The revised, approved Plans clarify, however, that the Facility maintains the responsibility of proper operation and maintenance of five flow meters used for NPDES compliance, which the Facility maintains and calibrates per manufacture guidelines.

6. *The O&M Plan should include more information on purpose, location, and frequency of on-site analysis for process control, and should encompass conveyance systems. (City 5-11).*

Response: Details regarding a number of enhanced wastewater process controls are included in the Wastewater Monitoring Design, discussed below. Further, the relevant SOPs referenced in the O&M/PM Plans, such as the Chrome Treatment SOP, cover operational and control procedures for wastewater treatment. As noted above, the Plans must be read and reviewed in conjunction with the relevant SOPs. Conveyance systems are covered in a number of relevant SOPs referenced in the O&M/PM Plans, including the Chrome Treatment Process Control SOP, Trench Systems SOPs, and Routine Inspection SOPs. In addition, the Wastewater Monitoring Design (discussed below) includes enhanced wastewater process controls and alarms for conveyance systems.

7. *The PM Plan should ensure that the type of leaks or structural damage that caused the April 2017 Spill are identified, remediated, and fully repaired prior to causing a discharge that threatens or causes harm to the environment. (NPCA 7).*

Response: As per the commenter's concerns, the Governments asked U. S. Steel for confirmation and documentation that all equipment and structural damage that led to the April 2017 Spill have been identified, remediated and fully repaired. U. S. Steel provided such confirmation and documentation in its approved Wastewater Monitoring Design, discussed in more detail below. See <https://www.epa.gov/in/u-s-steel-corporation-consent-decree-april-2018>.⁸ In addition, U. S. Steel has provided the Governments documentation by way of invoices and the like, demonstrating the extent, scope and cost of some of the completed repairs.

Further, the revised Wastewater Monitoring Design contains a number of recommendations to improve wastewater process monitoring for early detection of conditions that may lead to spills such as the April 2017 Spill. Those recommendations, coupled with the detailed Assessment Summary that is appended to the Wastewater Monitoring Design, have adequately addressed the root causes of the lack of early detection of the April 2017 Spill and what actions need to be

⁸ Once on the website, click on U. S. Steel Consent Decree Revised Submittal "Enhanced Wastewater Process Monitoring Design," then scroll to the body of the Wastewater Monitoring Design at 1-4; Appendix 2 (Enhanced Monitoring Assessment Summary) at 1-3; and Appendix 3 (Photo Documentation of Repairs).

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taken for early detection of conditions that may lead to future such spills. The Wastewater Monitoring Design, if properly implemented and in combination with the O&M/PM Plans, relevant SOPs and other compliance measures of the Decree (including required daily total chromium and hexavalent chromium testing), should help prevent future spills such as the April 2017 Spill at the Facility. *See* Ex. 1, Maraldo Decl., Par. 20.

8. *The O&M Plan is too myopically focused on preventing precise recurrence of same events at same part of Facility that precipitated the April 2017 Spill, and should therefore be expanded to cover all of the wastewater processing and include:*

- *Inventory of all hazardous materials in the handling, processing, and generating processes;*
- *Inventory of all containment and conveyance systems for all such materials;*
- *Assessment of each containment system for such materials, including tanks, vessels, pumps, trenches, etc.;*
- *Monitoring and leak detection systems at critical locations where margin of release might be low and adverse consequences high; and*
- *Specific spill abatement systems and procedures that can contain spills, especially those in water.*

(Surfrider 10-11).

Response: As explained in the proposed Consent Decree, the purpose of the Facility's O&M Plan is to ensure that the Facility properly operates and maintains all wastewater treatment process equipment and provides personnel to carry out these functions. *See* Decree, Par. 10(a). For the purposes of the Decree, the definition of "wastewater treatment process equipment" includes "all assets used at the Facility to store, treat or discharge wastewater, including systems of conveyance and control." *Id.*, Par. 8(oo). The purpose of the PM Plan, which is incorporated into the O&M Plan, is to help prevent breakdown, reduce wear, improve efficiency and extend the life of the Facility's wastewater infrastructure. *Id.*, Par. 10(c). The O&M/PM Plan includes inventories, lists, diagrams and the like, of and for all containment and conveyance systems such as tanks, vessels, pumps and trenches, including an assessment of each such containment system.

Issues related to inventory and handling of hazardous wastes, per se, do not underlie the violations alleged in this matter and therefore are not addressed by the proposed Decree. That said, implementation of the O&M/PM Plan addresses all wastewater containment and conveyance systems, and such systems handle hazardous materials containing wastewater. U. S. Steel's Resource Conservation and Recovery Act ("RCRA") Hazardous Waste Management Permit ("RCRA permit"), issued December 13, 2013, contains an inventory of all of the Facility's hazardous waste/materials streams and includes a treatment and disposal schematic indicating the units that handle those wastes. That inventory is contained in the permit's Attachment B – Facility Description, at Table B-1a, and Figure B-2, respectively.⁹ As shown in the RCRA permit's inventory and treatment and disposal schematic, the units that comprise the containment and conveyance systems for hazardous materials handled at the Facility (the #2 Chrome Line, #2 and #3 Galvanizing Lines, Tin Line, and Chrome Treatment Plant) are component parts of the Facility's process wastewater treatment plants. As such, those

⁹ The RCRA permit and its attachments can be viewed on the IDEM Virtual File Cabinet ("VFC") at www.IN.gov/IDEM. Select "Online Services." From this website, one can access the document search page (<http://vfc.idem.in.gov/>). Enter the document number in the upper right corner of the VFC document search page. Attachment B is 82756333. The drawings are at 82756372.

containment and conveyance systems are subject to and regulated under the Facility's NPDES permit, and are the subject of some of the O&M violations alleged in this matter. Those containment and conveyance systems, along with the hazardous materials they handle, are addressed by the proposed Decree inasmuch as they are subject to the requirements of the approved O&M/PM Plan.

The balance of the hazardous wastes identified in the RCRA permit are handled outside of the wastewater treatment system, and are regulated under RCRA. One area handling hazardous waste under RCRA is the Roll Shop, which stores and handles a hazardous waste known as SWARF. U. S. Steel manifests SWARF and transports the material off site for proper disposal in accordance with RCRA. Another area is the Chem lab located near the Tin/Chrome line. That lab generates small volumes of D009, a hazardous waste under RCRA, which are also manifested and transported off site for proper disposal in accordance with the requirements of RCRA. In addition, U. S. Steel's RCRA permit regulates the continued operation of a hazardous waste landfill ("Greenbelt II Landfill") located within the Facility. Under the requirements of the RCRA permit, U. S. Steel is permitted to dispose F006 wastewater treatment sludges, considered a RCRA hazardous waste, in the Greenbelt II Landfill.

Containment, monitoring, leak detection and spill abatement systems and procedures are addressed in the O&M/PM Plan, the Facility's SOPs, the Wastewater Monitoring Design (discussed below), and/or the proposed Consent Decree itself. U. S. Steel's proper implementation of the approved O&M/PM Plan and relevant SOPs, coupled with the other compliance measures and enforcement mechanisms of the proposed Decree, including the Wastewater Monitoring Design, will achieve the proposed Decree's objective of promoting compliance with the Clean Water Act and related requirements. *See Decree, Par. 1. See also Ex. 1, Maraldo Decl., Par. 21; Ex. 2, Gavin Decl., Par. 14.*

9. The O&M and PM Plans should be implemented immediately and updated regularly, and the PM Plan should be submitted with any permit application. (City 8-11).

Response: As the O&M/PM Plans have been approved, U. S. Steel is obligated to implement them in accordance with the schedules set forth in the Plans. In accordance with the proposed Decree, U. S. Steel must annually review the components of the Plans to determine if modifications are necessary to ensure proper operation and maintenance of the wastewater treatment process equipment used to treat wastewater at the Facility. *See Decree, Par. 10(e).* Also, the proposed Decree requires that, at the time of any application of renewal of the NPDES permit, U. S. Steel must submit to IDEM the most current O&M Plan that contains the requirements of Paragraph 10(a) through (e), which include the PM Plan. *See Decree, Par. 10(f).*

10. All compliance plans, which include many technical components of the injunctive relief, should be subject to a formal public comment period. (NPCA Supp. 4; Surfrider 8).

Response: As discussed above, according to Paragraph 10(a) and (c) of the proposed Decree, only EPA and IDEM have the authority to approve or disapprove the Plans. Nevertheless, in the interest of transparency, the Governments took the unusual step of publishing such Plans on EPA's and IDEM's respective U. S. Steel-dedicated portions of the websites, and the Governments reviewed and took seriously the public's comments on such Plans when deciding whether to approve or disapprove the final Plans. As evidenced by the revised, final Plans and the responses to comments outlined herein, the Governments agreed with a number of the

public's concerns and worked with U. S. Steel to make appropriate revisions to the Plans to address those concerns. The proposed Decree, while requiring U. S. Steel to submit semi-annual reports and reports required under the Facility's NPDES permit, does not require submission of any other compliance plans (other than modified O&M Plans, if appropriate, as part of U. S. Steel's semi-annual reports, pursuant to its required annual review of those Plans). However, in furtherance of the objective to promote transparency, the Governments, with U. S. Steel's consent, have agreed to publish on the U. S. Steel-dedicated portions of the EPA and IDEM websites all semi-annual reports required to be submitted under the Decree. In addition, IDEM continues to publish on its Virtual File Cabinet all reports required under the Facility's NPDES permit. In that respect, the public will be fully informed of the status of U. S. Steel's compliance with the Decree and its NPDES permit.

B. Comments Relating to the Wastewater Monitoring Design

11. The Wastewater Monitoring Design is incomplete because it does not include several pieces of information, including details of the evaluation U. S. Steel was required to complete; details about the root cause of the April 2017 Spill; preventive actions to reduce future spills; standard operating procedures in response to high-level alarms in chrome trench sump; and identification of operator requirements for identifying and responding to drifts in treatment processes outside of normal ranges. (NPCA Supp. 3-5 and attached Carpenter expert report).

Response: The proposed Decree requires that U. S. Steel, following an evaluation of its existing wastewater process monitoring, submit to the Governments a Wastewater Monitoring Design for wastewater process monitoring for early detection of conditions that may lead to spills such as the April 2017 Spill and conditions that may lead to unauthorized discharges or discharges in exceedance of permit limits. Decree, Par. 11(b). The requirement to submit this document goes beyond what is required in the applicable laws and permits. The Wastewater Monitoring Design is intended to ensure that new and improved monitoring technologies and equipment will be installed to facilitate improvements in wastewater monitoring processes at the Facility.

Although the proposed Consent Decree does not require that U. S. Steel's evaluation, serving as the basis for the Wastewater Monitoring Design, be submitted to EPA and IDEM, the Governments asked U. S. Steel to revise its initial Design to include the details of the evaluation, prior to the Governments' approving the final Design. New Appendix 2 to the revised Design, entitled Enhanced Monitoring Assessment Summary ("Assessment Summary"), builds on the descriptions outlined in the Design and contains detailed information as to what precise equipment was evaluated, what issues were raised by the evaluation, what actions were taken to address the issues and correct any problems, and the current status of such actions, including what steps remain to be taken and when they are expected to be completed.

The revised Design's nine recommended actions to improve wastewater process monitoring for early detection of conditions that may lead to spills such as the April 2017 Spill, coupled with the detailed Assessment Summary, adequately address the root causes of the April 2017 Spill and what actions need to be taken for early detection of conditions that may lead to future such spills. Similarly, the revised Design's 13 recommended actions to help prevent future unauthorized discharges and/or discharges in exceedance of permit limits, coupled with the detailed Assessment Summary, adequately identify the actions needed to be taken to address the conditions that may lead to unauthorized discharges or discharges in excess of the permit's limits. *See* Ex. 1, Maraldo Decl., Par. 20.

As mentioned above, U. S. Steel addresses alarms and alarm response procedures -- including response to drifts in the treatment processes outside of normal ranges -- in the Wastewater Monitoring Design and, in particular, the Assessment Summary attached as an exhibit to the Design. Such alarm and response procedures are also addressed in specific SOPs referenced in the O&M/PM Plans (e.g., Trench System Containment, and Chrome Treatment Plant – Testing Conductivity).

12. The wastewater process evaluations, conclusions, and Wastewater Monitoring Design should be publicly released and subject to official public comment. Also, because U. S. Steel has not undertaken or concluded all necessary trials and investigations, it has failed to submit a complete or sufficient Wastewater Monitoring Design, which risks continued harm to natural resources. (NPCA Supp. 4-5).

Response: In the interest of transparency, as noted above, the Governments published the final Wastewater Monitoring Design on EPA’s and IDEM’s U. S. Steel-dedicated websites, including U. S. Steel’s required evaluation of its existing wastewater process monitoring in the form of the Assessment Summary. As is the case with the O&M/PM Plans, however, the proposed Decree requires that the Design be submitted for review and approval only by EPA and IDEM, i.e., not for public comment. Decree, Par. 11(b). That said, the Governments took into account a number of concerns raised by several commenters such as the City and Surfrider (who requested and were granted an extension of time to submit public comments) with regard to the initial Wastewater Monitoring Design that U. S. Steel submitted on June 29, 2018. As discussed throughout these responses, the Governments agreed with several of the commenters’ suggestions. The revised, approved Wastewater Monitoring Design contains a number of improvements as a result of such public input. U. S. Steel has begun implementing the Design’s recommendations in accordance with the schedule outlined in the approved Design, notwithstanding that the proposed Decree has not yet been formally entered by the Court.

Regarding the second comment, as is true with any proposed plan, some of U. S. Steel’s recommended actions in its revised Wastewater Monitoring Design to improve wastewater process monitoring, including further investigations and trials, will take some time to complete and implement. Before those actions under the revised Design can be put into effect, much less completed, U. S. Steel needed to have the Design approved. The fact that U. S. Steel has not yet concluded all of its investigations and trials does not mean that the Design is incomplete and insufficient. To the contrary, by pursuing all available options for recommended improvements, to determine which ones will prove to be the most successful, U. S. Steel demonstrates the robustness of the Design as a working document. In short, the Design is not a single, one-time methodology but rather represents an on-going, iterative process in the quest for better wastewater monitoring methods that could promote early detection of conditions that could lead to a spill such as the April 2017 Spill or a discharge in exceedance of permit limits.

Further, the commenter has not identified what he or she means by “risks continued harm to natural resources.” If the commenter is referring to harm to natural resources within the Indiana Dunes National Park area, the National Park Service has determined that no injuries to natural resources within the park boundaries resulted from the April 2017 Spill. *See* Ex. 3, Declaration of Dr. Charles C. Morris (“Morris Decl.”), Par. 14.

13. The Design does not contain adequate training requirements to ensure long-term compliance at the Facility. (NPCA Supp. 6-7).

Response: As discussed above, all training for U. S. Steel's personnel is conducted in accordance with the Facility's EMS certified by an independent party to meet the requirements of the ISO14001 Standard. Also, as noted above, the revised, approved O&M/PM Plans, including sample Job Qualification Requirements attached to the Plans, describe with specificity what training is required for each operator at the Facility, including operators with responsibility for the treatment of process wastewaters. (According to the Plans, water and groundwater sampling and monitoring are provided by a third-party vendor who provides separate training for its contract employees, including training in U. S. Steel's notification procedures).

14. *The monitoring requirements of the Wastewater Monitoring Design should be improved. The Design should include a daily schedule for monitoring and on-line, automated monitoring (analyzers) for soluble hex chromium at outfalls 104 and 204. Other locations for hex chromium should also be required, to provide early warning of potential process issues and identify any increases in chromium at outfall 104 prior to discharge. Also, the Design repeatedly references monitoring thresholds that U. S. Steel apparently proposes to set unilaterally at some uncertain future time. Finally, one commenter (Aqua Metrology Systems) suggested that U. S. Steel should use high frequency real-time monitoring of chromium. (City 11-12; Surfrider 10, n.5; Ogden Dunes Town Council ("Ogden Dunes") 2; Rick Bacon, Aqua Metrology Systems 1; Aqua Metrology Systems 1-2).*

Response: First, it should be noted that the proposed Decree itself requires that U. S. Steel sample daily for total and hexavalent chromium at Outfalls 104 and 204, beginning January 31, 2018. Decree, Par. 12(a). Even though the proposed Decree has not been entered as an Order of the Court, U. S. Steel has been complying with this provision for a year and a half, and has been reporting sampling results in accordance with the proposed Decree and its permit.

Second, as mentioned above, the approved Wastewater Monitoring Design contains nine recommended actions for improving wastewater monitoring, including of hexavalent chromium, to detect early conditions that could lead to a spill such as the April 2017 Spill. The recommended actions involve the installation of monitoring equipment, with alarm thresholds low enough to provide early detection of problems, at locations throughout the treatment process and prior to discharge at outfalls. Such actions (some of which have already been implemented) include, among others, installation of flow meters on chrome wastewater piping, a conductivity meter in the chrome trench sump, a high level alarm float in the chrome trench sump, and conducting trials using inline meters to detect low levels of hexavalent chromium as an early warning of a possible concentration increase. For the latter, the revised Wastewater Monitoring Design, in particular the Assessment Summary, details trials involving a continuous hexavalent chromium monitoring system (ChemScan unit). U. S. Steel has informed us that the trials of the online monitoring system have not been able yet to provide reliable results within the range needed to predict compliance at the outfalls. U. S. Steel has further informed us that it is committed to continue working with ChemScan towards innovative improvements of the current unit, as well as researching other devices and procedures as technology advances in the future, to continuously detect hexavalent chromium outside of laboratory analysis.

U. S. Steel has informed us that the chrome transfer pipe flowmeters have been installed, and that they have shown themselves to be useful for data collection, trouble shooting and identifying potential issues. U. S. Steel has further informed us, however, that the use of the flowmeters

A review of the Wastewater Monitoring Design (including the Assessment Summary) reveals that, with the exception of the ChemScan unit whose trials are still underway and the data provided by the chrome transfer pipe flowmeters that are still being evaluated for their usefulness in conjunction with visual checks and other instrumentation, U. S. Steel has completed the setting of alarm/monitoring thresholds at all relevant locations. Such threshold levels, set by U. S. Steel in accordance with its understanding of the wastewater treatment system and what is necessary to maintain compliance with the permit, help assure that U. S. Steel can meet its permit limitations and other requirements of the Consent Decree and Clean Water Act.

Regarding Aqua Metrology System's comment, the Assessment Summary reveals that U. S. Steel conducted an initial trial with a unit known as MetalGuard, the unit recommended by the commenter, which proved unsuccessful.

15. The Wastewater Monitoring Design reports unexplained inconsistencies in flow meter readings that might suggest ongoing hexavalent chromium leaks. (Surfrider 10, n.5).

Response: U. S. Steel's initial Wastewater Monitoring Design referenced inconsistent flow meter readings between the flow meters installed at the entry of the chrome plant influent wastewater piping and the flow meters installed at the exit of the chrome plant influent wastewater piping. These inconsistencies led the commenter to suggest that there may be ongoing hexavalent chromium leaks. In response to this concern, U. S. Steel's revised Design explains that the inconsistent readings are due to the line and pump configurations that cause the flow at each meter to vary. The revised Design states that the meters trend together and are capable of detecting a line failure. The Design goes on to state that the flow meters are not the only means used to detect leaks; U. S. Steel also employs conductivity metering in key locations, periodic sampling and inspections. U. S. Steel's explanation has satisfied the Governments that the inconsistencies in flow meter readings do not suggest ongoing hexavalent chromium leaks.

16. The Wastewater Monitoring Design describes several Facility improvements undertaken last year that provide further evidence of past irresponsible management. (Surfrider 10, n.5).

Response: The first item identified in the Design's list of nine recommended actions for improvement of the wastewater process monitoring includes the actions that U. S. Steel took to repair and refurbish the chrome containment trench that failed during the April 2017 Spill. The proposed Decree itself enumerates such actions, which at the time of lodging of the Decree were either complete or within several months of completion. The commenter's statement that these recent improvements evidence past irresponsible management is a matter of conjecture. In any event, the approved Design, along with the O&M/PM Plans and the proposed Decree itself, are forward-looking, intended to move on from a past history of non-compliance to the present and future time in which actions undertaken by U. S. Steel in accordance with the proposed Decree will help promote compliance with the Clean Water Act and related requirements.

C. Comments Relating to Other CWA Compliance Provisions of the Proposed Decree

17. *The proposed Decree should require an on-line analyzer for hexavalent chromium; an on-line soluble chromium probe in outfall 104's pipe; and turbidimeters in clarifier effluent channels for the life of the plant. (City 12, 16).*

Response: As discussed above, the approved, revised Wastewater Monitoring Design recommends a number of actions to improve U. S. Steel's wastewater monitoring process, including inline hexavalent chromium monitoring, installation of an inline spare conductivity probe, turbidimeters in the troughs of the chrome plant lamellas, and other process controls, alarms, and sensors. Though not identical with the recommendations of the commenter, the Design's recommendations, if properly implemented -- in combination with the revised, approved O&M/PM Plans, the relevant SOPs and other compliance measures of the Decree -- will help prevent future spills such as the April 2017 Spill. *See* Ex. 1, Maraldo Decl., Par. 20.

18. *The proposed Decree should be modified to document a number of U. S. Steel actions and other items, including: steps taken in response to the October 2017 exceedance and the January 2018 failure of the heat exchanger; inspection and possible breaches of secondary containment trenches; completed or planned repairs in the vicinity of breaches; repair of a corroded carbon steel line; all repairs or changes in operations in response to recent spills and incidents; and supporting documentation that U. S. Steel has completed the actions identified in the proposed Decree. (City 13-15, 18; Surfrider 6-7; Piver 1).*

Response: As discussed above, the approved Wastewater Monitoring Design (including the more detailed Assessment Summary), which is incorporated into the proposed Decree, outlines the actions that U. S. Steel undertook in response to the April 2017 Spill, including, primarily, the repair and refurbishment of the chrome containment trench. True to the adage that a picture is worth a thousand words, Appendix 3 to the Wastewater Monitoring Design is a photo documentation of the repairs that U. S. Steel undertook in response to the April 2017 Spill, including later repairs such as those in response to the failure of the heat exchanger. *See* <https://www.epa.gov/in/u-s-steel-corporation-consent-decree-april-2018>.¹⁰

In addition, as discussed above, the Design identifies a number of recommended actions, which U. S. Steel has either undertaken or will take pending further investigation and trials, to detect early conditions that could lead to unauthorized discharges and/or discharges that exceed permit limits, such as the October 2017 exceedance. Regarding the failed heat exchanger, the Design explains that U. S. Steel replaced a single wall and frame heat exchanger on the Chrome Line Plater section, and two spiral heat exchangers on the Chrome Line ChemTreat section, with double wall plate and frame heat exchangers. These repairs should significantly reduce the likelihood of process water leaking into the non-contact cooling water. *See* Ex. 1, Maraldo Decl., Par. 12. According to the Design, U. S. Steel will undertake daily testing of the chrome line heat exchangers for leaks, and examine the feasibility of installing inline hexavalent chromium monitoring on the discharge water lines of the chrome line heat exchangers.

19. *The proposed Consent Decree should identify the composition of the "goo" in the containment trench, referenced in EPA's inspection report following the April 2017 Spill, and*

¹⁰ Once on the website, click on U. S. Steel Consent Decree Revised Submittal "Enhanced Wastewater Process Monitoring Design," then scroll to Appendix 3.

Response: The reference to the “goo” in EPA’s inspection report is from a statement made during the investigation by a U. S. Steel representative, who told an EPA investigator that, following the April 2017 Spill, the U. S. Steel cleanup crew removed 39 barrels of “goo” from the breach in the wastewater line. The “goo” was chrome-contaminated debris in the trench, which mostly consisted of nearby dirt that had migrated into the trench that was contaminated with chromic acid. The contaminated debris was properly disposed of in accordance with the applicable RCRA requirements.

Issues of soil and groundwater contamination do not underlie the violations alleged in this matter and thus are not addressed by the proposed Decree. That said, U. S. Steel is addressing the investigation of groundwater contamination near the containment trench, as a result of the April 2017 Spill, in the context of an Indiana State-lead RCRA Corrective Action. Specifically, soon after the April 2017 Spill, IDEM staff identified the Tin Line Trench, in which the Spill originated, as a Solid Waste Management Unit under RCRA, and required U. S. Steel to investigate the containment trench and associated groundwater pursuant to the State’s RCRA Corrective Action authority. (U. S. Steel is subject to RCRA Corrective Action because, as discussed above, the Facility’s handling of hazardous materials is governed by a RCRA hazardous waste permit.) Under such corrective action authority, U. S. Steel has been conducting, and is continuing to conduct, groundwater sampling to assess the release and ensure that contaminant levels do not exceed remedial action levels prior to any migration off-site. Any final corrective action recommended by the State is subject to public notice and comment.

20. The proposed Consent Decree should require internal inspection of the carbon steel line to assess structural integrity. (City 15).

Response: U. S. Steel has represented to the Governments that, following the April 2017 Spill, the carbon steel line was immediately patched to allow for temporary service while a new 24” stainless steel pipe was tied into the piping system to convey the wastewater through the courtyard area. Once the 24” stainless steel pipe was confirmed to be properly installed, the 24” carbon steel pipe was plugged and permanently removed from service.

21. With regard to the October 2017 spill, the proposed Consent Decree should require review of sizing and past and future operation of treatment process, including if clarifiers are adequately sized, sludge withdrawal is adequate, plate cleaning is regularly scheduled and additional effluent filtration is required. (City 16).

Response: U. S. Steel submitted its approved Wastewater Monitoring Design, which is incorporated into the proposed Decree, following an evaluation that included an investigation of monitoring technologies and equipment for early detection of conditions that may lead not only to spills such as the April 2017 Spill but also to unauthorized discharges and/or discharges in exceedance of permit limits, such as the October 2017 discharge. *See Decree, Par. 11.* The Design recommends a total of 13 actions, some of which U. S. Steel has already undertaken and will undertake in the near future, to improve its wastewater monitoring in the hopes of reducing the likelihood of future unauthorized discharges and discharges exceeding permit limits.

In its December 11, 2017 inspection report, IDEM determined that the October 2017 exceedances resulted from operation and maintenance issues related to sludge buildup in the clarifiers. Thus, sizing of the clarifiers and other equipment in the treatment process is not believed to be an issue at the Facility. In any event, the Wastewater Monitoring Design includes additional inline turbidity monitoring in clarifiers to improve detection of conditions that lead to the October 2017 event and potentially future effluent limit exceedances.

The Governments believe that, if the recommendations of the Wastewater Monitoring Design are properly implemented along with the O&M/PM Plans, the SOPs and other compliance provisions of the proposed Decree, U. S. Steel's actions will help prevent future spills such as the April 2017 Spill, and help prevent occurrences of unauthorized discharges and discharges exceeding permit limits, such as the effluent limit exceedances reported by U. S. Steel in October 2017. *See* Ex. 1, Maraldo Decl., Par. 20.

In addition, the Decree's stipulated penalties for exceeding permit limits will help deter U. S. Steel from committing future NPDES permit violations.

22. The proposed Consent Decree should require that future spills include a protocol to immediately collect and analyze samples for hexavalent chromium, and those sample results should be posted on a publicly-accessible website within 24 hours. (City 16-17; Landwehr 1).

Response: The proposed Decree requires that U. S. Steel sample daily for total and hexavalent chromium at Outfalls 104 and 204, in accordance with the detailed requirements outlined in the proposed Decree. Decree, Par. 12. The hexavalent chromium sample type is by grab method and the total chromium is by a 24-hour composite. *Id.* Thus, should a discharge occur, U. S. Steel would have already been monitoring and sampling for hexavalent chromium in accordance with the proposed Decree. The proposed Decree also requires U. S. Steel to report the sampling results every month in accordance with its permit, *id.*, and, should any violation or event pose an immediate threat to public health or the environment, U. S. Steel must notify the Governments and other appropriate response entities orally or electronically as soon as possible but no later than 24 hours after it first knew of the violation or event. Decree, Par. 29. U. S. Steel must also follow the spill notification procedures in revised Appendix B to the proposed Decree, discussed below. Finally, under the new proposed State-monitored Environmentally Beneficial Project (see below), U. S. Steel agrees to take water quality samples at two Burns Waterway locations near the Facility and publicly report those results.

Given all of these notification requirements, the Governments believe that requiring U. S. Steel also to immediately post the sample results on a publicly-accessible website goes beyond what is necessary to keep the public informed of any future spills, though we encourage U. S. Steel to consider such an idea in connection with any additional actions it may take in the future to be as transparent as possible regarding future spills and discharges.

23. The proposed Consent Decree should require a comprehensive, third-party engineering audit that would address most aspects of Facility operations and wastewater treatment. Any recommendations should be implemented. (City 18-20; Surfrider 11).

Response: While the Governments do not dispute that there could be benefits from using a third-party engineering audit to address aspects of the Facility's operations and wastewater treatment processes and assisting U. S. Steel in complying with the proposed Decree, the Governments do

not believe that hiring a third-party engineer to conduct a comprehensive audit is necessary to effect U. S. Steel's compliance with the proposed Decree and the Clean Water Act. The proposed Decree itself, coupled with U. S. Steel's own operation and maintenance procedures, provides for sufficient oversight to instill confidence in the Governments that U. S. Steel will be able to comply with its environmental obligations without the need for a third-party audit.

Over the course of several months EPA and IDEM have thoroughly reviewed U. S. Steel's O&M/PM Plans and Wastewater Monitoring Design. Based on the Governments' review as well as input from some public commenters, U. S. Steel has improved its submittals such that they more comprehensively address the proposed Decree's goal of minimizing the likelihood of future spills and unauthorized discharges. In their role as regulators with oversight over U. S. Steel's compliance with the proposed Decree and more generally with the Clean Water Act, EPA and IDEM continue to provide the Facility technical expertise and guidance, not to mention exercising their inspection, monitoring and enforcement authorities when appropriate.

In particular, under the Decree, at least once a year U. S. Steel must review the components of the O&M/PM Plan to determine if modifications are necessary, and must submit the report of such review to the Governments along with the first semi-annual report due after completion of the Plan's annual review. Decree, Par. 10(e). Further, the proposed 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 and unpermitted discharges. Decree, Par. 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. *See* Decree, Pars. 28-30 and Appendix B. U. S. Steel must implement the approved Plans and Wastewater Monitoring Design as well as comply with all of the Decree's detailed reporting and notification provisions, and is subject to stipulated penalties for failure to implement the Plans and comply with such reporting and notification requirements.

In addition, as discussed above, the Facility employs third parties for certain aspects of its operation and maintenance procedures including oversight of certain compliance activities. For example, as described in the approved O&M/PM Plans, U. S. Steel uses a third-party laboratory, certified by EPA, that collects samples for analysis in compliance with the Facility's NPDES permit and the proposed Decree. *See* <https://www.epa.gov/in/u-s-steel-corporation-consent-decree-april-2018>.¹¹ Also, a third party contractor visually observes Outfalls 002, 003 and 004 at the Facility on a daily basis, and is responsible for flow measurements at the outfalls. Finally, U. S. Steel's EMS documents all preventive maintenance activities, among other activities. According to U. S. Steel, the EMS is certified in accordance with ISO14001, a highly-rated standard developed and published by the International Organization for Standardization (ISO) for organizations to systematize and improve their environmental management efforts. The

¹¹ Once on the website, click on U. S. Steel Consent Decree Revised Submittal "Wastewater Treatment O&M Manual and Preventive Maintenance Program Plan" and Supporting Standard Operating Procedures, then click on Wastewater Treatment O&M Manual and Preventive Maintenance Program Plan for U.S. Steel Midwest Plant in Portage, Indiana, and see pp. 16-18.

Thus, given all of the oversight authority inherent in the Governments' roles as regulators and as specifically exercised in the compliance and enforcement provisions of the Decree, coupled with U. S. Steel's own environmental O&M procedures that utilize third parties for certain aspects of its compliance with the Decree and conformance with the standard that certifies its EMS, the Governments believe that a third party engineering audit is not necessary in this instance to promote U. S. Steel's compliance with the law and the proposed Decree.

24. U. S. Steel should investigate and publicly report on a number of topics, including: the feasibility of using alternative chemicals to chromium and hexavalent chromium; records for the last 5 years on capital improvements and O&M expenditures related to product line and infrastructure where chromium and hex chromium are used or produced; licensing requirements for operating its wastewater treatment facility; and calculations to determine if the rehabilitated trench is adequate for secondary containment of plant flows. (City 3-4, 19).

Response: As discussed above, U. S. Steel has complied with the compliance provisions of the proposed Decree requiring submission of the Plans and the Wastewater Monitoring Design, which, as they fully conform to the requirements of Paragraphs 10 and 11 of the proposed Decree, have been approved by EPA and IDEM and are incorporated into the proposed Decree. Once the Plans and Design are properly implemented, along with adherence to the other compliance provisions of the proposed Decree and the Facility's relevant SOPs, the Governments expect to see improvements in the Facility's early detection of conditions that could lead to a future spill or unauthorized or unpermitted discharge. While useful, the suggestion that U. S. Steel investigate and report on the various listed topics are not necessary to meet the objective of the proposed Decree, which is to cause U. S. Steel to take those steps necessary to bring the Facility into compliance with the Clean Water Act, relevant State laws and its NPDES permit. *See Decree, Par. 1.* That said, with regard to the comment addressing licensing requirements for the wastewater treatment facility, U. S. Steel's permit includes requirements for operator certification, and U. S. Steel currently has Certified Wastewater Operators at the Facility. Also, U. S. Steel has represented to the Governments that the repairs made to the rehabilitated trench are adequate for secondary containment of plant flows.

25. The proposed Consent Decree should require additional sampling and risk assessment, including: characterization of chromium contamination (or other potential contaminant in the leaked fluid from the April 2017 Spill) in soils, sand, and groundwater; and a progressive sampling program including point of discharge to Lake Michigan (Burns Waterway) for elevated levels of chromium in sediments and for assessing risk to aquatic life. (City 20-21; Schultz 1).

Response: Although issues of soil and groundwater contamination do not underlie the violations alleged in this matter and thus are not addressed by the proposed Decree, U. S. Steel is addressing the issue of groundwater contamination near the containment trench, as a result of the April 2017 Spill, in the context of an Indiana State-lead RCRA Corrective Action. *See Response to Comment No. 19 above.* Regarding any risk to aquatic life, the National Park Service concluded -- after substantial data collection, testing and surveys following the April 2017 Spill -- that there was no fish kill or any measurable damages to natural resources as a result of the April 2017 Spill. *See Response to Comment No. 12 above and Ex. 3, Morris Decl., Pars. 13-14.*

26. *The proposed Decree should include specific obligations for follow-up sampling after all future NPDES violations. (Surfrider 14).*

Response: The proposed Decree, as discussed above, requires that U. S. Steel sample daily for hexavalent chromium and total chromium. Decree, Par. 12. For all other unauthorized or unpermitted discharges, in addition to reporting such violations in accordance with its permit and in its semi-annual reports required under the proposed Decree, U. S. Steel must notify the Governments and submit an explanation as to the likely causes of the violations and the remedial steps taken or to be taken to prevent or minimize the violations. Decree, Par. 28. Such steps could include follow-up sampling. If EPA and IDEM are not satisfied with the remedial steps taken by U. S. Steel in response to a reported violation, the Decree provides a mechanism by which the Governments can exercise their respective oversight and/or enforcement authorities.

27. *The proposed compliance provisions of the Decree are too narrowly focused on the April 2017 Spill and should be modified to require U. S. Steel to implement company-wide changes to comply with its NPDES permit and prevent future spills at all of its facilities nation-wide. (Surfrider 11).*

Response: The commenter's suggestion, while perhaps meriting consideration by U. S. Steel in any future plans to develop a comprehensive program for company-wide compliance with environmental laws, is not appropriate here inasmuch as the Governments' claims are focused solely on the violations at the Midwest Facility. Requiring U. S. Steel to undertake a comprehensive program to institute improvements at all of its plants nationwide would go beyond the nature, scope and extent of the violations which the compliance measures of the proposed Decree are intended to address, and far beyond the nature, scope and extent of the compliance measures of the proposed Decree.

28. *The proposed Decree requires no specific steps to correct certain NPDES violations alleged in the Complaint relating to effluent temperature, whole effluent toxicity and storm water management. (Surfrider 12). The proposed Decree should require improvements in the Storm Water Pollution Prevention Plan and give a deadline for completion and implementation of the revised plan. (Hoosier Environmental Council ("HEC") 3).*

Response: When U. S. Steel's approved Wastewater Monitoring Design, discussed above, is fully implemented, in conjunction with adherence to all other compliance measures of the proposed Decree and the Facility's SOPs, the Governments anticipate that the Decree will achieve its objective of promoting U. S. Steel's compliance with the Clean Water Act, including all requirements of its NPDES permit. *See* Ex. 1, Maraldo Decl., Par. 21.

With regard to the storm water management claim, U. S. Steel submitted to EPA and IDEM a final, complete Storm Water Pollution Prevention Plan on October 5, 2018, which is posted on IDEM's Virtual File Cabinet.

29. *The proposed Decree should not allow U. S. Steel to request a change in monitoring frequency for daily hex chromium monitoring when it applies for permit modification or renewal; instead, it should mandate continued daily monitoring to persist in future versions of the permit. (Surfrider 13).*

Response: The proposed Decree requires daily sampling of hexavalent and total chromium during the duration of the Decree, which goes beyond the requirements of the Facility's NPDES permit and the Clean Water Act. Decree, Par. 12. In that regard, allowing U. S. Steel the flexibility to request of IDEM a change in the frequency of sampling at the time of its application for the permit renewal, along with data to support the request, is reasonable, particularly if sampling consistently demonstrates compliance with the permit limits. Based on the nature and scope of the request and the supporting data and other circumstances, IDEM would exercise its judgment in deciding whether or not to approve the request.

30. *Some comments inquired why certain repairs, upgrades, and other compliance actions were not undertaken sooner and more effectively. (Surfrider 6-7).*

Response: The Governments cannot be assumed to know the answer to this question. Be that as it may, the proposed Decree does not look back but rather forward, to the present and future time during which U. S. Steel has agreed to undertake comprehensive steps to address its past violations in order to come into compliance with the Clean Water Act, its permit, and other applicable federal and state environmental laws.

31. *EPA and IDEM should commit to conducting more frequent and searching inspections, and U. S. Steel should reimburse the agencies' costs. (Surfrider 11).*

Response: The proposed Consent Decree requires U. S. Steel to provide EPA and IDEM frequent and detailed notifications, depending on the circumstances, when NPDES violations and/or spills and releases occur, and to report semi-annually on all compliance aspects of the proposed Decree, including status of implementing the approved Wastewater Monitoring Design. Coupled with the proposed Decree's requirements to submit to the Governments all reports generated under the Facility's NDPEs permit, the proposed Decree ensures that the regulatory agencies will be regularly and fully informed of the status of U. S. Steel's compliance with all aspects of the proposed Decree and the permit. Certainly, EPA and IDEM retain all authority under the law to monitor and inspect the Facility, including the discretion to determine when information provided by U. S. Steel might necessitate more frequent or searching inspections than the agencies would otherwise conduct in the regular course of their oversight, monitoring and enforcement authorities. There is no legal authority for requiring U. S. Steel to reimburse the Governments for their costs of conducting inspections. *Cf.* Decree, Par. 82.

32. *If hexavalent chromium was released into a containment area, was the containment area thoroughly decontaminated and addressed in the proposed Consent Decree? (Lynch 3).*

Response: The containment area was cleaned and all of the contaminated debris was disposed in accordance with RCRA requirements. After the cleaning, U. S. Steel made improvements to the containment area, including concrete repair work and applying epoxy coating. *See also* Decree, Par. 9 and Responses to Comments Nos. 16 and 19 above.

33. *U. S. Steel's releases of hexavalent chromium demonstrate the failure of current systems for testing and storing waste. Consequently, U. S. Steel should install a secondary liquid storage pond to contain plant effluent until tests confirm that hexavalent chromium was removed from the waste stream. (Rieger 1).*

Response: U. S. Steel is continuing, under the terms of the proposed Decree, to test daily for total and hexavalent chromium, and to report the results of such testing, notwithstanding the fact that the Consent Decree is not yet a final, court-approved document.

D. Comments Relating to the Reporting of Spills and Other Violations

34. *Paragraph 18(e) of the proposed Consent Decree [in revised Decree, Par. 27(e)] does not require U. S. Steel to include a spill in its semi-annual report if it erroneously failed to report the spill in compliance with Appendix B. (Surfrider 13).*

Response: The Governments do not read Paragraph 27(e) as limiting U. S. Steel's obligation to report semi-annually any spills and unpermitted discharges during the reporting period only to spills and unpermitted discharges that U. S. Steel first reported pursuant to Appendix B. The commenter suggests a strained reading that does not comport with the context and intent of the reporting provisions and the proposed Decree as a whole.

35. *Paragraph 20 [in revised Decree, Par. 29], requiring notification as soon as possible but not later than 24 hours after learning of a violation that may pose an "immediate threat to public health or welfare or environment," is vague and insufficient; all violations should be subject to this requirement; U. S. Steel should be penalized if there is a delay in learning about a spill; and the proposed Consent Decree should require the company to direct all contractors to notify government regulators immediately when they observe a violation. Potentially dangerous situations should be made public immediately. (Surfrider 13-14); (Ogden Dunes 3).*

Response: The proposed Decree's extensive provisions requiring U. S. Steel to notify and report violations within different time frames, depending on the severity of the violations, are appropriate and reasonable. Where a violation, or even an event that may affect U. S. Steel's performance under the proposed Decree, could pose an immediate threat to public health or welfare or the environment, U. S. Steel must orally or electronically notify not only EPA and IDEM but also any other appropriate response entity (see Decree, Appendix B for a list of such entities) as soon as possible but not later than 24 hours of when U. S. Steel first knew of the violation or event. Decree, Par. 29. Such notification ensures that the regulatory agencies and appropriate public response entities are quickly able to assess the situation and institute whatever corrective action is necessary to remedy the problem and protect the public.

Any other violation of the proposed Decree and the Facility's NPDES permit, not potentially posing an immediate public health or environmental risk, must be reported within ten working days of when U. S. Steel first becomes aware of the violation, along with an explanation of the likely cause of the violation and the remedial steps taken or to be taken to prevent or minimize the violation. (If not known within 10 days, U. S. Steel must investigate and report in no later than 30 days.) Decree, Par. 28. The extra amount of time to report a violation that does not pose a health or environment risk allows U. S. Steel the opportunity to fully investigate and report on its likely cause and the corrective actions necessary. IDEM intends to post on its Virtual File Cabinet all violation notifications submitted by U. S. Steel under the proposed Decree. In providing a graduated system of timely notifications depending on the severity of the violation and its impact on the public, the proposed Decree strikes an appropriate balance between the agencies' and public's need to be immediately informed of violations potentially posing immediate health and environmental risks, and U. S. Steel's need for a somewhat flexible time

If U. S. Steel fails to submit any notices and reports within the specified deadlines in the proposed Decree, U. S. Steel is subject to stipulated penalties. Decree, Par. 47. If there is an unreasonable delay between a spill event and the date on which U. S. Steel first learns of and then reports the spill, the Governments could take that situation into account in the exercise of its enforcement authorities.

Regarding the commenter's suggestion that the proposed Decree should require U. S. Steel to direct its contractors to notify the Government regulators immediately of any observed violation, the proposed Decree makes clear that U. S. Steel is responsible for all actions undertaken with respect to the proposed Decree, including any failures to act by its contractors in complying with the terms of the proposed Decree. *See* Decree, Pars. 6-7.

36. Semi-annual reports should be more frequent, at least quarterly. Will they be made public? (Lynch 2); (Ogden Dunes 3).

Response: Under the proposed Decree, U. S. Steel is required to report semi-annually on a number of items including 1) status of work performed under the proposed Decree including compliance measures and milestones; 2) any problems in complying with Decree requirements; 3) any non-compliance with the Decree's compliance measures, including likely cause and remedial steps taken; 4) any NPDES permit exceedances; 5) any spills and unpermitted discharges, and 6) results of annual reviews of the O&M Plan. Decree, Par. 27. These items are in addition to the Decree's detailed provisions requiring U. S. Steel to notify and report any violations of the proposed Decree and NPDES permit pursuant to Paragraphs 28, 29 and 30. In light of the time and effort needed to prepare a complete semi-annual report and the fact that U. S. Steel must in any event notify and report any violations either immediately or within a short time frame, requiring U. S. Steel to submit detailed reports more frequently than twice a year would potentially create an added burden on the Facility with little if any added benefit to the Governments and the public.

Yes, U. S. Steel's semi-annual reports under the Decree have been, and will continue to be, published on the U. S. Steel-dedicated portions of the EPA and IDEM websites.

37. The Consent Decree should require that the Facility's NPDES permit be revised to incorporate the spill containment obligations and the two-hour notice provision of the Indiana Spill Rule, 327 IAC 2-6.1-7. (Surfrider 15).

Response: The Facility's NPDES permit, in Part II.B.2.d, Part II.B.3.c.(4), and Part II.C.3, requires compliance with the Indiana Spill Rule, including the spill containment and reporting obligations pursuant to 327 IAC 2-6.1. The reporting requirements under the Spill Rule, however, are not applicable to discharges that are under the jurisdiction of an applicable permit when the substance in question is covered by the permit and death or acute injury or illness to animals does not occur. *See* 327 IAC 2-6.1-3(1). Therefore, the majority of the discharges that U. S. Steel is likely to experience will be covered by the reporting requirements of the Facility's NPDES permit and not by the two-hour notice provision of the Spill Rule.

E. Comments Relating to the Notification Requirements of Appendix B

38. The requirements of Appendix B should be more stringent and/or provisions added, including: electronic signature to activate during violations or connecting automated monitoring technology to communications or alert systems; a 24-hour timeframe to apply to all parties; additional parties to be notified, including potentially impacted stakeholders, recreation groups, and other municipalities; a more stringent, lower threshold for alerts; requirement for affirmative responses from parties to ensure receipt; requirement for at least one additional form of notification, such as email; identification of a sufficient number of responsible U. S. Steel employees; identification of the positions of the people to be notified; greater use of technology, including social media, email, and websites; and how training on the notification requirements will be conducted. (Surfrider 15; City 12-13; NPCA 8-11).

Response: EPA, IDEM and U. S. Steel have considered these and related comments suggesting that Appendix B, “Midwest Facility Spill/Release Evaluation and External Reporting Requirements,” be revised to include more extensive and stringent notification requirements. As a result, the parties discussed how the original Appendix B could be improved and have agreed to propose an amended Appendix B. The proposed Decree, for which the United States now seeks entry, includes a revised Appendix B that addresses many of the commenters’ concerns.

At the outset, revised Appendix B includes new language that clarifies that the notification requirements of the appendix are not stand-alone provisions but rather are in addition to, and in some cases tandem to, all other applicable reporting requirements contained in other authorities including U. S. Steel-generated documents that govern spill-related events at the Facility, such as U. S. Steel’s Midwest Hazardous Waste Contingency Plan, Spill Pollution Control Countermeasure, Storm Water Pollution Prevention Plan, and NPDES Permit IN0000337. Also, Paragraph 2a of the revised appendix specifies the various federal and State rules -- including the Indiana Spill Rule, CERCLA, EPCRA and the CWA -- that govern notification to the public of spills and releases, depending on the nature of the incident.

Revised Appendix B also contains a list of specific information for a Facility operator to provide once the operator notifies the appropriate authorities and response centers of a spill event and/or release. All such authorities and appropriate response centers are listed and described in detail, including their locations and contact information (email address, website if available and phone number), the titles of the authorities to be notified at the response centers, specific instructions on how to reach them and hours of operation, and follow-up procedures that the notified authorities are likely to take. Certain authorities and response centers that were not identified in the original Appendix B but that were added to the revised Appendix B include the Michigan City Water Department, the East Chicago Water Department, the Hammond Water Works Department, and EPA’s Region 5 Administrator. (The City of Chicago was included in the list of parties to be notified in the original Appendix B lodged with the Court, and remains on the list in the revised version. Prior to lodging of the proposed Decree, the City of Chicago, in discussions with the United States, specifically requested that it be added to the list of parties to be notified in the event of a release to the water.)

To ensure the accuracy of the contact information of the appropriate authorities identified in revised Appendix B, EPA counsel contacted each listed authority and confirmed that the information is correct. And to ensure the continued accuracy of the contact information (as well as all of the procedures identified in the appendix), revised Appendix B requires the Facility to

review Appendix B at least once a year to make sure that the information therein is up to date. Regarding the commenters' suggestion to require, in the event of a spill event, more than one means of notification or an affirmative response from the notified party to ensure receipt, the United States has verified that, in every case but one, only one call to the identified authorities is sufficient (inasmuch as many of the phone numbers are hotlines that are manned 24/7), without the need for an additional means of notification or a follow-up response. The one exception, as noted in the revised appendix, is that, when notifying the Local Emergency Planning Committee and/or the Porter County Sheriff's Department, the operator should seek to ensure that the report is forwarded to the Haz Mat Commander, who is available 24/7. *See* revised Appendix B, Paragraph 3a.i.4, 3a.ii.2, 3b.iii.4 and 3.b.iv.2.

Revised Appendix B also fleshes out the responsibilities of certain Facility personnel in carrying out the requirements of Appendix B. *See* Appendix B, section entitled U. S. Steel Responsibilities. In particular, Appendix B specifies that U. S. Steel's legal department will train Facility staff responsible for implementing the notification procedures in the revised appendix.

In reviewing Appendix B, the Governments realized that, although the original Appendix B contained a notification procedure in the event that 1000 gallons of oil are released in a single event, and in the event that two separate releases of 42 gallons or more of oil occur within a 12-month period, the appendix failed to provide a procedure in the event that there are releases to water of less quantities of oil. Revised Appendix B contains new notification procedures for such an event.

Regarding the commenters' suggestion of a 24-hour timeframe in which to notify the authorities of a spill, Appendix B, as noted above, is not a stand-alone document but is to be applied in tandem with all other applicable federal and State notification requirements (identified in revised Appendix B, Paragraph 2.a.), including those established by the Facility's own published procedures (identified under Appendix B, Scope). The proposed Decree itself, as discussed above, sets forth varying timeframes in which U. S. Steel must notify the Governments and appropriate response entities of certain events affecting compliance as well as violations of the proposed Decree and the Facility's permit, depending on the circumstances and whether the event or violation poses an immediate threat to public health, welfare or the environment. Decree, Pars. 19 and 20. Thus, requiring U. S. Steel to adhere to a one-deadline-fits-all 24-hour timeframe, or to a lower threshold for alerts, does not allow for variance in the scope, extent and severity of the spill or release and could conflict with other applicable federal and state notification requirements.

The commenters' suggestions that Appendix B should provide for electronic signature and/or some form of automated monitoring technology or alert systems, and greater use of technology such as social media and websites, are helpful. That said, the Governments do not believe that such automated or alert systems or additional forms of communication such as social media and websites are necessary at this time to ensure appropriate and timely notification in the event of a spill, especially given the plethora of applicable federal and state notification requirements in addition to Appendix B, as well as other sections of the proposed Decree establishing notification procedures and deadlines depending on the nature and extent of the triggering event. Also, it is relevant that U. S. Steel's approved Wastewater Monitoring Design, discussed above, includes a recommendation to investigate methods for incorporating electronic outputs into the Facility's already installed alert and alarm system at the Final Treatment Plant.

Moreover, as noted above, the Governments shared a draft of revised Appendix B with the Plaintiff Intervenor, Surfrider and the City of Chicago, who provided some comments and suggestions for improvement. One of the comments was that the section entitled “U. S. Steel Responsibilities” under the heading “Scope” could be read to allow U. S. Steel to make unilateral substantive changes to the Appendix. We do not read the provisions the same way but, in the interest of clarity and to address the Intervenor’s concerns, the parties have agreed to add a sentence to “U. S. Steel Responsibilities” stating that the substantive evaluation, reporting, and notification requirements of Appendix B cannot be changed except in accordance with the modification provisions of the Consent Decree.

39. Appendix B should require an in-person or conference call briefing with parties, including the City of Chicago, immediately after a spill to discuss response and on-going plans for spill monitoring. (City 13).

Response: The Governments understand that the chief responsibilities of the Local Emergency Planning Committee (“LEPC”), which consists of a number of affected and/or interested representatives of the public, local industry officials, and emergency responders, is to inventory risks, plan response activities and evaluate and coordinate appropriate response activities and next steps in the event of a reported spill, based on the particular nature and extent of the spill and the surrounding circumstances. Requiring an in-person meeting or conference call with the parties and the City of Chicago following each and every spill would not only proscribe some of the flexibility of the Governmental agencies to immediately initiate, if necessary, appropriate response activities but also potentially circumvent the job of the LEPC to evaluate the overall situation and recommend next steps to help prevent future spills. That said, as discussed above, Appendix B provides that the City of Chicago is one of the interested parties to which U. S. Steel must give notification of any spills or releases to the water.

40. Because the Facility discharges effluent directly to a highly trafficked public recreation area located in the National Park, procedures should account for the recreation and natural resources in the area and exceed the minimum floor required by law, to be fully protective of public health and the environment. Spills that do not meet the notification threshold could still cause nuisance-like adverse effects, including odors and discoloration, to sensitive populations and those coming in direct contact with the discharge waters; thus, Appendix B should require that recreaters in the area, including fishermen, be notified of such spills. (Surfrider 15; NPCA 10-11).

Response: For any discharge to water meeting the definition of a spill under the Indiana Spill Rule, U. S. Steel is required, pursuant to Appendix B, to notify the IDEM Emergency Response Center, the nearest downstream water user within 10 miles of the spill within the Indiana state boundaries, the Indiana Dunes National Park, Indiana American Water, the City of Chicago, the City of Portage, the Town of Ogden Dunes, the Port of Indiana-Burns Harbor, the Michigan City Water Department, and the East Chicago Water Department. For spills or releases in which a reportable quantity of a hazardous substance under CERCLA is exceeded, U. S. Steel must notify the National Response Center, IDEM, the State Emergency Planning Committee and/or the LEPC. Appendix B also requires that when a spill or release causes an excursion of the permit’s Narrative Water Quality Standards, which could include nuisance-like effects such as odors and discoloration, the Facility must notify the National Response Center and IDEM.

One of the concerns raised by the Plaintiff Intervenors, Surfrider and the City of Chicago, following their review of the proposed revised Appendix B, is that Appendix B did not include the National Park Service as a notice recipient in the event there is an oil spill or release (Paragraph 3.b.ii). The parties agreed with that concern, and, therefore, revised Appendix B includes the staff at the Indiana Dunes National Park as a notice recipient in that event.

The Governments do not know how U. S. Steel could feasibly notify every fisherman or other recreater in the water immediately at the time of any spill. In any event, it is likely that fishermen and recreaters will be informed as soon as possible, if not immediately, by one or more of the parties required to be notified under Appendix B of any immediate threats caused by discharges meeting the definition of a spill under the Indiana Spill Rule or otherwise creating nuisance-like conditions in the waters.

41. U. S. Steel should be required to periodically update the LEPC until such time as the Consent Decree terms are satisfied, and to meet annually with the LEPC to evaluate the effectiveness of response coordination. (Ogden Dunes 3; Save the Dunes 3; Sierra Club 1). The neighboring Lake and LaPorte County LEPCs should be included in the list of parties to be informed, in addition to the Porter County LEPC. (NW Ind. Reg'l Planning Commission 2-3).

Response: The commenter's suggestions for requiring U. S. Steel to provide periodic updates to, and meet annually with, the LEPC reflect a valid concern that the public be fully apprised of the status of U. S. Steel's compliance with the terms of the proposed Decree. The Governments believe, however, that there are already many opportunities embedded in the Decree itself for ensuring that the public be regularly informed of the status of compliance. For example, as noted above, all plans, reports, notifications of spills and notices of violations submitted by U. S. Steel during the course of the proposed Consent Decree will be made public by posting such documents either on the U. S. Steel-dedicated portions of EPA's and IDEM's websites or on IDEM's Virtual File Cabinet. In particular, the semi-annual reports contain detailed information on the work already performed and the progress made towards implementing the compliance requirements of the proposed Decree. See Decree, Par. 18. Further, every annual review that U. S. Steel is required to conduct of its O&M Plan to determine if modifications are necessary will similarly be posted on the Governments' websites. See Decree, Par. 10. Given these multiple Decree provisions requiring continuous compliance updates and the full access provided to the public of U. S. Steel's progress in complying with the requirements of the proposed Decree, the Governments do not believe that also requiring U. S. Steel to periodically update and/or annually meet with the LEPC is necessary.

The Porter County LEPC is the LEPC responsible for the U. S. Steel Facility; the neighboring Lake and LaPorte County LEPCs have responsibilities for other sites. It is within the discretion and judgment of the Porter County LEPC, upon being notified by U. S. Steel of a spill or release pursuant to Appendix B, to determine whether the neighboring LEPCs also should be informed of the incident.

42. Appendix B should include more detailed instructions on the content of notifications, rather than simply reference EPCRA. (Ogden Dunes 3-4; NW Ind. Reg'l Planning Commission 3).

Response: The Governments have considered this comment and have revised Appendix B accordingly. As noted above, revised Appendix B includes, under a new section entitled

“Information to Gather/Report,” a detailed list of specific information that the Facility operator is expected to know and relay to the appropriate authorities when reporting an environmental incident pursuant to Appendix B. Also, as noted above and specified in Appendix B itself, the notification provisions of Appendix B are not to be read in a vacuum but rather are to be applied in tandem with the requirements of other identified federal and State laws, and U. S. Steel’s own applicable reporting requirements, governing notification of environmental incidents.

F. Comments Relating to the Civil Penalty

43. *The civil penalty is too small based on the number, duration, and seriousness of the violations. (City 21-22; Surfrider 16-23; NPCA 11-23; Sierra Club 1).*

Response: 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). “For purposes of [Section 309(d)], a single operational upset which leads to simultaneous violations of more than one pollutant parameter [is] treated as a single violation.” *Id.*

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. Application of the CWA penalty factors supports assessment of this sizable penalty in this case. In negotiating a final penalty amount, the United States and the State considered the seriousness of the April 2017 Spill, which resulted in violations for two daily effluent limit exceedances and two monthly effluent limit exceedances (total chromium and hexavalent chromium), and several associated O&M violations. The Governments also considered the seriousness of the October 2017 discharge, which resulted in a one-day violation for an exceedance of the daily total chromium limit, along with several associated O&M violations. Although these were significant violations, they were the result of discrete and isolated events. The proposed civil penalty also covers a significant number of alleged permit violations going back to 2013, in addition to two alleged violations of EPCRA. Further, the civil penalty fully recovers the economic benefit that U. S. Steel obtained as a result of avoided or delayed expenditures needed to address the violations. As explained more fully in Response to Comment no. 45 below, the economic benefit component of the total penalty amount is relatively modest.

In addition to considering the seriousness of the spill-related violations and U. S. Steel’s other instances of noncompliance with its permit, the Governments took into account a factor that in this case supports some penalty mitigation, i.e., U. S. Steel’s good faith efforts to clean up the April 2017 Spill and develop plans to reduce the risk of future spills, as well as its cooperation in reaching a settlement relatively quickly. As described in the proposed Consent Decree (and as further verified by the Governments and explained herein), U. S. Steel continued to demonstrate good faith efforts to comply prior to and following the lodging of the proposed settlement by performing a number of repairs and carrying out all of the requirements of the proposed Consent Decree that have deadlines prior to the Decree’s Effective Date (i.e., date of entry). For example, U. S. Steel has complied with all pre-entry deadline requirements to prepare and submit its O&M/PM Plans and its Wastewater Monitoring Design, and to conduct daily sampling of chromium and hexavalent chromium. U. S. Steel has also submitted its first, second and third semi-annual reports that otherwise would not be due until the first quarter after entry.

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, and is consistent with the EPA Clean Water Act Settlement Policy, as explained below.

44. *The civil penalty is inconsistent with the EPA Penalty Policy; the Governments should release penalty policy calculations.* (Surfrider 17-18, 21; NPCA 16-19).

Response: EPA utilizes an internal, Interim Clean Water Act Settlement Penalty Policy (Penalty Policy) as guidance to assist the agency in establishing appropriate penalties in the settlement of civil enforcement actions. The purpose of the Penalty Policy is to further the goals of deterring noncompliance, promoting consistency and a level playing field, and providing a logical calculation methodology for resolution of enforcement actions. As stated in the guidance, the Penalty Policy "sets forth how [EPA] generally expects to exercise its enforcement discretion in deciding on an appropriate enforcement response and determining an appropriate settlement penalty."¹² EPA's Interim Clean Water Act Settlement Penalty Policy, available at <https://www.epa.gov/enforcement/interim-clean-water-act-settlement-penalty-policy>, at 3. The Policy is purely for the use of EPA enforcement personnel in settling cases, and is not intended to be binding or to set a standard enforceable either by or against the agency. *See Id.*, at 23.

The Penalty Policy's calculation methodology includes two components, economic benefit and gravity. The Penalty Policy also contemplates case-specific considerations, such as litigation risk. In this case, EPA internally considered all of the factors laid out by the policy and negotiated a final settlement penalty amount that is consistent with all of the above factors. The final \$601,242 civil penalty appropriately captures the potential economic benefit of U. S. Steel's noncompliance with its permit (*see* Response to Comment no. 45 below), and appropriately factors in the gravity of the violations (i.e., their frequency, significance, and any health and environmental harm).¹³ As the Penalty Policy is a guidance document designed to assist EPA in the exercise of its enforcement discretion, documentation and explanations of a particular penalty calculation constitute confidential information. Penalty Policy, at 23.

45. *The civil penalty does not "deprive[] U. S. Steel of the economic benefits of noncompliance."* (Surfrider 19-20; NPCA 13-16).

Response: Section 309(d) of the CWA states that a court should consider "the economic benefit of noncompliance" for the violator in determining an appropriate civil penalty amount. Similarly, EPA's Penalty Policy explains that "every effort should be made to calculate and recover the economic benefit of noncompliance" when determining an appropriate settlement civil penalty. *See* Penalty Policy, at 4.

¹² The Penalty Policy also states: "This Policy is purely for the use of U.S. EPA enforcement personnel in settling cases....[and] does not create any rights, implied or otherwise, in any third parties." *Id.*, at p. 23

¹³ The Governments also considered EPA's Enforcement Response Policy for Sections 304, 311 and 312 of EPCRA and Section 103 of CERCLA in settling on an appropriate penalty amount. That policy is available at <https://www.epa.gov/enforcement/enforcement-response-policy-epcra-sections-304-311-312-and-cercla-section-103>.

The Governments agree with the commenters that U. S. Steel derived some economic benefit over the years from its failure to take actions and make expenditures needed to help it comply with its permit and applicable federal and state laws. As part of the settlement negotiation process, EPA considered the guidance relating to economic benefit in the Penalty Policy, as well as EPA's BEN model for calculating the economic benefit of noncompliance.¹⁴ As a general matter, the potential economic benefit derived from noncompliance is affected by the cause of that noncompliance. If the violation results from failure to make large capital expenditures, there will generally be a large economic benefit component of a civil penalty. In other cases, the cause of noncompliance may be deficiencies in operation and maintenance procedures, which may result in a smaller economic benefit component of a civil penalty. Here, generally, the noncompliance did not stem from delay of large capital expenditures but rather, for the most part, from deficiencies in operation and maintenance procedures. Thus, the economic benefit component of the penalty, calculated using the EPA BEN model, is modest when compared to the rest of the penalty amount, which is comprised mostly of gravity. In sum, the final settlement penalty amount, \$601,242, appropriately recovers both the economic benefit derived by U. S. Steel and an appropriate amount that reflects the gravity, i.e., the seriousness, of U. S. Steel's violations. See Response to Comment nos. 43 and 44 above.

46. The civil penalty is insufficient to deter future violations by U. S. Steel or others (City 22; Surfrider 18-19; NPCA 20-22), and it is significantly lower than civil penalties assessed in comparable scenarios. (Surfrider 20-21).

Response: As explained above, the Governments considered the CWA statutory penalty factors and EPA's CWA Settlement Penalty Policy, as well as EPCRA/CERCLA Enforcement Response Policy, in settling on a final civil penalty in this case. Because the circumstances of every case are unique, comparing a penalty amount in one matter to penalty amounts attained in other matters is often not helpful, even if the same environmental laws are impacted. Not only might the nature, extent and scope of the violations differ, but also the many penalty factors to be considered – including economic benefit, the history of violations and good faith efforts to comply -- often do not involve the same or even similar sets of facts and circumstances. In addition, the penalty amount agreed to in any given settlement 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.

Indeed, the difficulty of making meaningful comparisons across settlements is illustrated by one of Surfrider's references to a published consent decree in its public comment, namely, 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 Clean Air Act (CAA) violations at an iron pipe manufacturing facility, as an example of a comparable settlement with a higher civil penalty. 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 CAA violations not present here. Thus, if this 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.

¹⁴ More information on EPA's BEN and other financial models can be found at <https://www.epa.gov/enforcement/penalty-and-financial-models>.

In addition to the civil penalty, other sections of the proposed Consent Decree serve to deter future violations as well. The Consent Decree subjects U. S. Steel to stipulated penalties for failure to comply with various requirements, including payment of the civil penalty and compliance with the terms of the O&M/PM Plans and U. S. Steel's NPDES permit. Taken together, the civil penalty and the stipulated penalties provide a significant deterrent to noncompliance, helping to achieve the Decree's objective of promoting U. S. Steel's compliance with its Clean Water Act obligations into the future.

47. The civil penalty should be paid in steel products, which could be used to make a new recreational center or roll steel for government vehicles. (Halgrimson 1). U. S. Steel should be required to give up land and turn it over to the Indiana Dunes National Park in the event of further violations. (Miller 1). The proposed Decree should require U. S. Steel to pay the Governments' fees. (Surfrider 23).

Response: The \$601,242 civil penalty will be evenly split between the United States and the State of Indiana. As to the portion of the penalty attributable to the United States, federal law requires that civil penalties awarded to the United States under Section 309 of the Clean Water Act go to the United States Treasury. As to the portion for the State of Indiana, IC § 13-14-12-1 provides that civil penalties collected pursuant to IC § 13-30-4-1 shall be deposited in the Environmental Management Special Fund.

The Clean Water Act does not provide for the payment of attorneys' fees by the defendant. *Cf.* Decree, Par. 82 (providing that parties bear their own costs including attorneys' fees, but the Governments are entitled to collect costs, including attorney fees, incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by U. S. Steel). Although the proposed Consent Decree does not require the payment of attorneys' fees, it does require U. S. Steel to pay for the United States' response costs incurred under CERCLA and SURPA. *See* Sections XI and XII of the proposed Consent Decree.

G. Comments Relating to Lack of a Supplemental Environmental Project

48. Several commenters suggested that the proposed Decree should include a supplemental environmental project ("SEP"). Suggestions for potential SEPs include additional notification and monitoring; projects aimed at improving water quality in the vicinity of the Facility; and the provision of clean sand to beaches. (City 22-23; Surfrider 22-23; NPCA 24-26; Schultz 1).

Response: The originally proposed Decree, as lodged, did not contain a SEP or other similar environmental project, beyond the injunctive relief needed to achieve and ensure compliance with the regulatory requirements. It is important to note that 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. U.S. EPA Supplemental Environmental Projects Policy 2015 Update, available at <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>, at 1. 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. *See id.*, at 21.

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. At U. S. Steel's suggestion, the revised Consent Decree now contains a proposed Environmentally Beneficial Project (EBP), overseen by the State of Indiana, in which U. S. Steel would monitor, test 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. Decree, Pars. 13-21. U. S. Steel estimates that it will expend \$600,000 over the course of the three-year project, which is designed to protect the public health and welfare of community members who frequent Lake Michigan near the Facility and recreate in and around the lake's shoreline area and the park. The State of Indiana will oversee the project because the State already assumes oversight responsibility for ambient sampling and monitoring of certain parameters in some locations along the Lake's shoreline; thus, U. S. Steel's project, which would greatly enhance such sampling and monitoring, fits well within the purview of the State's oversight.

Specifically, the 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* Decree, Appendix C (Map of Sampling Locations). U. S. Steel would measure a number of water quality parameters, including hexavalent chromium, total chromium, cyanobacteria, E. coli, pH, total suspended solids, temperature, and transparency. The EBP would cover a period of three years, with sampling occurring at each of the seven sampling locations on a monthly basis from October 1 through April 30. From May 1 through September 30, the sampling would be more frequent, with samples being taken weekly at Michigan City and the American Water intakes, and twice weekly at Kemil Beach, Indiana Dunes Beach, and the Burns Ditch locations. Importantly, U. S. Steel would be required to submit weekly or monthly sampling reports, depending on the time of year, and to make those reports publicly available on the following website: www.midwest.uss.com. In addition, U. S. Steel would input all E. coli measurements into IDEM's Beach Guard notification system, available at <https://www.in.gov/idem/lakemichigan/pages/beachguard/>.

To ensure enforcement of the State-Only EBP, the revised proposed Consent Decree contains a paragraph providing for stipulated penalties for EBP non-compliance. If U. S. Steel fails to satisfactorily complete the project, U. S. Steel would be required to pay to the State a stipulated penalty equal to 125% of the difference between \$600,000 and any eligible project dollar amounts expended to implement the project. *See* Decree, Par. 48.¹⁵

The EBP is expected to provide a significant benefit to the communities near the Facility and those who use the popular Indiana Dunes National Park for recreation. And the reporting obligations 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 project.

¹⁵ If the failure to complete the EBP is due to a "force majeure" event, U. S. Steel could either pay a stipulated penalty or extend the sampling period to complete sampling and reporting required by the EBP.

As recently written up in the Washington Post, “this newly designated national park spans 15,000 acres and encompasses wide-ranging habitats and recreational opportunities in all seasons...[T]he juxtaposition of development [nearby steel mill and power plant] and captivating natural landscape serves as a practical reminder of why preservation is so critical in a place like this.” *Washington Post*, June 9, 2019.



Indiana Dunes National Park, sunset at Central Beach, Washington Post, June 7, 2019

H. Comments Relating to Response Costs and Damages

49. *The public should be informed about how SURPA response costs and damages were incurred, and additional details about the environmental harm caused by the April 2017 Spill. (Surfrider 23; NPCA 23-26; Save the Dunes 2).*

Response: The National Park Service incurred SURPA response costs in the amount of \$12,564 in responding to the April 2017 Spill. Specifically, NPS incurred such costs to minimize destruction to, loss of and/or injury to park resources, provide for visitor safety, and monitor the effects of the April 2017 Spill. NPS also incurred damages under SURPA, in the total amount of \$240,504, for assessing the costs of replacing, restoring or acquiring the equivalent of a park system resource and the value of any significant loss of use. Included in the damages sum are the damage assessment costs of sampling and testing of the beaches within the Indiana Dunes National Park that were closed for a week as a result of the April 2017 Spill, and the administrative costs of closing and then re-opening the beaches. Also included in the damages sum are the compensation/lost use costs that NPS calculated to compensate for the public’s

On April 12, the morning following the April 2017 Spill, representatives from NPS, EPA, IDEM, the City of Ogden Dunes, the Indiana American Water, Portage Police and City of Portage met and established a sampling protocol to include locations along four beaches within the National Park -- West Beach, Ogden Dunes, Portage Lakefront, and Porter Beach. Once three consecutive days of sampling revealed non-detect results for hexavalent chromium, NPS, on April 17, re-opened the beaches. It was then decided that U. S. Steel should continue collection of water samples throughout the recreational season (Memorial Day to Labor Day) along the four Park beaches. U. S. Steel collected and analyzed such samples during that time period. The NPS also collected samples in those areas in conjunction with the beach bacteria monitoring program. 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. *See* Ex. 3, Morris Decl., at Pars. 8-11.

Due to the unstable nature of the chemical, scientists among the representatives identified in the previous paragraph concluded that the hexavalent chromium discharged in the April 2017 Spill quickly dispersed throughout the system. They concluded that they would not be able to find the chemical in the sediment or distinguish it from background levels created by U. S. Steel's legal NPDES discharges. If there was an imminent risk to natural resources, there should have been some evidence of a fish kill. NPS conducted beach surveys looking for dead fish, but no dead fish were located, demonstrating that no fish kill occurred. Based on such data collection, testing and surveys, NPS concluded that no measurable natural resource injuries occurred within Park boundaries. As discussed above, NPS focused on calculating damages based on lost visitor use during the week the beaches were closed. *See* Ex. 3, Morris Decl., at Pars. 12-14.

Further, in accordance with Paragraph 12 of the proposed Decree, in January 2018 U. S. Steel began daily monitoring of total chromium and hexavalent chromium at Outfalls 104, 204 and 304. Those results are posted on the U. S. Steel-dedicated portion of the IDEM website at https://ecm.idem.in.gov/cs/idcplg?IdcService=GET_FILE&dID=82545946&dDocName=82546351&Rendition=web&allowInterrupt=1&noSaveAs=1&fileName=82546351.pdf.

50. The public should be involved in determining how the compensatory restoration costs will be used. (Surfrider 23).

Response: SURPA governs the recovery and use of damages. Under SURPA, the NPS has discretion in this matter to use the recovered damages sum to fund a future project or projects for the benefit of the public at the Indiana Dunes National Park. As of this date the NPS has not decided on such a project or projects.

51. The Town of Ogden Dunes and other local jurisdictions should be compensated for loss of beach use and response costs. (Ogden Dunes 1; NW Ind. Reg'l Planning Commission 1).

Response: Compensating the Town of Ogden Dunes and other local jurisdictions for their response costs and loss of beach use is beyond the scope of the Governments' claims in this matter. To the Governments' knowledge, none of those jurisdictions has made a claim against U. S. Steel for recovery of response costs or damages.

I. Comments Relating to Stipulated Penalties, Termination, Modification, and Other Provisions of the Proposed CD

52. Stipulated penalty amounts are too small to deter noncompliance. They should be consistent with penalty guidance and statutory maximums. (NPCA 22-23; Southeast Environmental Task Force 2).

Response: The Consent Decree subjects U. S. Steel to stipulated penalties for failure to comply with various requirements, including payment of the civil penalty; the submittal of plans, permit applications and reports; and requirements set forth in each of the plans required under the Consent Decree. Section XIV of the Consent Decree lays out graduated stipulated penalty amounts that increase the longer the violation continues. For example, if U. S. Steel fails to comply with a provision of its O&M Plan, the Consent Decree states that U. S. Steel shall be liable for penalties of \$1,500 per violation, per day for the first 15 days of the violation. If the violation continues, that stipulated penalty amount per day increases to \$3,000 and then \$5,000. These penalties are consistent with negotiated stipulated penalty amounts in other cases and provide a significant deterrent to noncompliance in this case.

The law provides that the United States may commence a civil action against any person for violations of its NPDES permit and the Clean Water Act, and that person shall be subject to a civil penalty not to exceed a certain amount set by law (i.e., a statutory maximum penalty amount). See Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and the Civil Penalties Inflation Act of 1990. Even in such a civil action, the law does not insist on imposing a statutory maximum penalty amount but rather, as explained above in Response to Comment no. 43, provides for consideration of the nature and seriousness of the violations, as well as mitigating factors such as good faith efforts to comply and other matters as justice may require. 33 U.S.C. § 1319(d). In contrast to civil penalty actions, the purpose of stipulated penalties is to provide ongoing, reasonable deterrence in the context of an enforceable settlement agreement, without the need for the Governments to bring a separate civil penalty action whenever a settling defendant violates its permit or applicable federal/state laws.

53. The termination provisions of the proposed Decree are ambiguous and should require, prior to a request for termination, 24 consecutive months of compliance with the CWA, the Facility's NPDES permit, and the Decree. (NPCA 33).

Response: Paragraph 89 of the proposed Consent Decree requires U. S. Steel to maintain satisfactory compliance with all provisions of the Consent Decree for at least 24 months after completion of the requirements of Section VI, which include implementation of all required plans and monitoring. U. S. Steel must also pay the entire civil penalty and any accrued stipulated penalties before being able to request termination of the Decree. It is true that the termination provisions of the proposed Decree do not require 24 consecutive months of compliance with the entire CWA and the Facility's NPDES permit, which include many requirements that are not related to the United States' claims in this case. But the Consent Decree does contain a broad stipulated penalty provision requiring compliance with all aspects of the Facility's permit, including all pollution discharge limits. These stipulated penalty provisions, coupled with the termination provisions requiring payment of all stipulated penalties prior to serving a request for termination, provide a strong incentive for U. S. Steel to maintain compliance with its permit.

In addition, the Governments reserve their rights to separately enforce any potential violation of the CWA, the Facility's permit, or other applicable federal and state laws. *See* Decree, Par. 78 (“This Consent Decree shall not be construed to limit the rights of the United States and the State to obtain penalties or injunctive relief under the CWA, EPCRA and applicable State law, their implementing regulations, or regulations authorized by the CWA, EPCRA and applicable State law, or under other federal or state laws, regulations, or permit conditions except as specifically stated in [the Governments’ claims in the Complaint].”)

Further, as provided in Paragraphs 10 and 12 of the proposed Decree and incorporated in Paragraph 89, U. S. Steel cannot request termination until the Facility's final permit contains the Decree requirements to develop, implement and annually review the O&M/PM Plan, as well as the requirements to monitor daily for total and hexavalent chromium. Thus, the settlement ensures that, post-Decree termination, many of the core compliance measures of the proposed Decree will live on – and remain enforceable – in the Facility's NPDES permit. *See* Ex. 1, Maraldo Decl., Par. 22; Ex. 2, Gavin Decl., Par. 15.

54. The proposed Decree does not require compliance with final compliance plans moving forward; compliance and increased monitoring should be more than 24 months, to extend after the Decree is no longer in effect. (Surfrider 11, n. 6).

Response: Paragraph 10(f) of the proposed Decree requires that, at the time of renewal of the Facility's NPDES permit, U. S. Steel submit to IDEM its most current O&M/PM Plan as part of the application for the renewed permit, with a request that the renewed permit contain the Decree requirements to develop, implement and annually review the O&M/PM Plan. Paragraph 12(b) of the proposed Decree contains similar language with regard to including in the Facility's renewed permit application the Decree requirements for daily monitoring for total and hexavalent chromium at Outfalls 104 and 204. Further, U. S. Steel cannot serve upon the Governments a request for termination of the Decree until after the effective date of a final NPDES permit that contains the requirements of Paragraph 10 (the O&M/PM Plan) and Paragraph 12 (daily chromium monitoring). In this fashion, as noted above, the proposed Decree provides that U. S. Steel's compliance with the Decree requirements and the law continue into the future following termination of the Decree, as part of the Facility's renewed, on-going NPDES permit. *See* Ex. 1, Maraldo Decl., Par. 22; Ex. 2, Gavin Decl., Par. 15.

55. The proposed Decree should be in effect for longer than 24 months to ensure continued compliance. (Ogden Dunes 4).

Response: The proposed Consent Decree does not set forth an amount of time for it to be in effect. Instead, the Consent Decree states that U. S. Steel is able to request termination of the Decree after several requirements are met, including: (1) completion of the requirements of Section VI, which include implementation of all required plans and monitoring; (2) satisfactory compliance with all provisions of the Consent Decree for at least 24 months after completion of the requirements of Section VI; and (3) payment of response costs, damages, civil penalties, and stipulated penalties. The Consent Decree will be terminated only if U. S. Steel demonstrates that it has met each of these prerequisites. The Governments believe that a period of at least 24 months following implementation of the requirements of Section VI is a sufficient amount of time to ensure that U. S. Steel is maintaining satisfactory compliance with Decree requirements. As explained above in Response to Comment no. 53, the Governments reserve their rights to separately enforce any potential violation of the CWA or U. S. Steel's permit.

56. *The modification provisions of the Consent Decree fail to provide meaningful public participation or court oversight over all modifications. (Surfrider 8).*

Response: As in most other similar settlements, the proposed Consent Decree contains provisions governing potential modifications to the Decree. Paragraph 87 provides that a Decree modification requires a written agreement signed by the United States, Indiana, and U. S. Steel, and, where the modification constitutes a material change to the Decree, shall be effective only upon approval by the Court. Thus, any proposed material modification will be filed with the Court and available to the public, and, like the Decree itself, will be overseen by the Court.

57. *The proposed Decree should include deadlines for EPA and IDEM to approve or disapprove of plans and reports. (Save the Dunes 3; Light 1; Sierra Club 2).*

Response: The proposed Consent Decree sets certain deadlines for U. S. Steel to submit various plans and reports to the Governments, but does not set deadlines for the Governments to respond to those submittals. In general, EPA and/or IDEM often require additional information or changes to a settling defendant's initial submittal before the Governments can act to approve or disapprove a plan submittal. In any event, EPA and IDEM have already acted on, and approved (after U. S. Steel made any required revisions), the main compliance documents under the proposed Consent Decree. i.e., the O&M/PM Plan and the Wastewater Monitoring Design.

58. *The proposed Decree does not make clear that there is "continuing joint and several liability that is not nullified once a liable business sells its assets to another entity." (Gingerich 2).*

Response: Paragraphs 4 and 5 of the proposed Consent Decree govern U. S. Steel's liability in the event of a change to U. S. Steel's legal status or the possible transfer of the Facility. First, the proposed Consent Decree makes clear that "[a]ny change of ownership, corporate status, or other legal status of U. S. Steel shall in no way alter U. S. Steel's responsibilities under" the Decree. Decree, Par. 4. Second, U. S. Steel is required to condition any transfer of ownership, operation, or interest in the Facility upon the execution of a modification to the Consent Decree that would require the transferee to assume the requirements of the Decree. Decree, Par. 5. Even in the event of a transfer that complies with Paragraph 5, U. S. Steel may not be released from the obligations under the Consent Decree if the transferee does not have the financial and technical ability to assume the obligations and liabilities of the Decree. *Id.*

59. *The Governments' covenant not to sue obfuscates responsibilities. (Gingerich 2).*

Response: The proposed Consent Decree provides that the Governments "covenant not to sue or to take administrative action pursuant to Section 107 of CERCLA; 42 U.S.C. § 9607; Section 3 of SURPA, 54 U.S.C. § 100723; and IC 13-25-4-8(a)(3), against U. S. Steel for 1) Past Response Costs as a result of the April 11, 2017 Spill; 2) Natural Resource Damages resulting from or relating to releases of hazardous substances at or from the Midwest Plant Facility as a result of the April 11, 2017 Spill; and 3) SURPA Response Costs and Damages as a result of the April 11, 2017 Spill." Decree, Par. 75. The covenant at hand is typical of covenants not to sue in similar cases, is narrow in scope, applies only to the claims raised in the Governments' Complaint, and, as further provided in Paragraph 75, is conditioned upon complete and satisfactory performance by U. S. Steel of its obligations under the Consent Decree.

J. Comments Relating to Procedural Fairness to Intervenors and Public

60. *The proposed Decree is not “procedurally fair,” for several reasons: 1) DOJ refused to allow the Surfrider Foundation to participate in the negotiations with U. S. Steel; 2) the public has not had access to all of the relevant documents; 3) there appears to be widespread opposition to the proposed Decree based on the volume of negative comments; 4) DOJ has rejected a request from some local organizations to hold a public meeting to explain the Decree; and 5) the Governments have failed to make the O&M/PM Plans and the Wastewater Monitoring Design subject to public comment, precluding meaningful public review (Surfrider 24-25; NPCA 33-34). On the topic of holding a public meeting, the proposed Decree should require U. S. Steel to host on-going public meetings to keep the public informed about status of compliance, plans, and reports. (Save the Dunes 3; Sierra Club 1).*

Response: The proposed Decree is procedurally fair because, as explained in the memorandum accompanying the United States’ motion to enter the proposed Decree (Memorandum), the Decree was negotiated at arm’s length and in good faith among experienced environmental counsel and represents the agreement ultimately reached among the parties. *See* Memorandum, at 18-21. The fact that the proposed Decree has generated a large volume of negative comments does not mean that the proposed Decree is procedurally unfair. On the contrary, the Governments’ willingness to thoroughly consider and respond to all public comments, and, as explained above, to take them into account when deciding whether to approve U. S. Steel’s initially submitted plans, demonstrate procedural fairness. And certainly the Governments’ decision to propose certain revisions to the proposed Decree as a result of public comments manifests procedural fairness.

The fact that the Governments and U. S. Steel did not agree to Surfrider’s request to include it in the negotiations over the proposed Consent Decree does not make the proposed Decree procedurally unfair. *See* Memorandum, at 20. At the time that the negotiations were underway, Surfrider and the City were not yet intervening parties in this action. In their separate actions against U. S. Steel, Surfrider and the City alleged many similar but several different claims than those alleged by the Governments in this action. Further, 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 arms’ length by experienced representatives of two governmental sovereigns, each charged with representing the public interest and in a posture adverse to U. S. Steel.

In any event, during the negotiations over the proposed Decree the Governments were in frequent contact with Surfrider and the City, updating them concerning the progress of negotiations. Further, during the public comment period, the Governments took a number of comments by Surfrider and the City into account when deciding whether to approve U. S. Steel’s O&M/PM Plans and the Wastewater Monitoring Design and in requesting revisions to the proposed Decree. And, as discussed above, the Governments and U. S. Steel agreed with several recently proposed improvements to revised Appendix B recommended by Surfrider and the City, and have agreed to incorporate those improvements into the revised Appendix B.

In contrast to the commenter’s allegation that the proposed Decree lacks transparency of relevant documents, the public has had full access to the proposed and final O&M/PM Plans and the

Wastewater Monitoring Design, as all initial and final submissions have been published on the U. S. Steel-dedicated portions of the EPA and IDEM websites. In addition, U. S. Steel's semi-annual reports under the Decree are likewise available to the public via publication on the U. S. Steel-dedicated portions of the EPA and IDEM websites. And the results of the Facility's daily monitoring of chromium, not to mention all notifications of any violations of the Decree or the Facility's NPDES permit, are available on IDEM's Virtual File Cabinet.

A letter to DOJ dated April 6, 2018, on behalf of "supporters and residents in the Great Lakes Region," requested an additional 30-day extension of the comment period and for EPA to hold a public hearing on the proposed Decree. In response to that request, the Governments extended the public comment period for an additional 30 days, and further extended the comment period for yet another 30-day period for Surfrider and the City, at their request. Given the decision to grant the public additional time to review and comment on the proposed Decree, the Governments decided that holding a public hearing at that time was not necessary. Following the decision to extend the public comment period, the Governments received approximately 2,700 comments, none of which requested a public hearing. Nor did the "supporters and residents of the Great Lakes Region" renew their request for such a hearing. In any event, the lack of a public hearing, particularly in light of the proposed Decree's transparency and the ample opportunities for public input, does not make the proposed Decree procedurally unfair.

Similarly, although the proposed Decree certainly does not prohibit U. S. Steel or any Governmental entity from holding a public meeting if determined to be appropriate, requiring U. S. Steel to host public meetings is not warranted in light of the Decree's extensive reporting and notification provisions and the Governments' protocol in making the public aware of the status of U. S. Steel's compliance with the proposed Decree and applicable federal/state laws.

K. Miscellaneous Comments

61. *U. S. Steel's permit should include a stricter standard for chromium and hexavalent chromium and provisions addressing residual sludge materials. Others suggested that U. S. Steel's permit should be revoked and all discharges prohibited, or that chromium be contained and then taken away for disposal. (Izaak Walton League of America ("IWLA") Indiana Div. 1; IWLA Porter County Chapter 1; Miller 1; R. Rhodes 1). Others urged that U. S. Steel should find a way to remove hexavalent chromium from its waste stream (Brakauskas/Pleirys 1), or be re-engineered for the long term to prevent future spills of chromium and other toxins in the waterways (Breitinger 1).*

Response: Whether the standard for chromium and hexavalent chromium in the Facility's current NPDES permit should be made stricter, and/or whether the permit should be revoked or otherwise should prohibit all discharges, are beyond the scope of this enforcement matter and the proposed settlement agreement. Such potential actions could be considered in the regulatory and permit review realms. While the Governments sometimes seek re-engineering of facility processes and methods to remove pollutants from a facility's waste stream in enforcement matters, that approach to developing remedial measures typically entails a highly complex and lengthy process. Here, the Governments believe that the many operational improvements required by the proposed Decree are sufficient and the more appropriate remedy in this case. As discussed above (*see, e.g.*, Response to Comment no. 1), the United States believes that U. S. Steel's approved O&M/PM Plans and the Wastewater Monitoring Design, if implemented in accordance with the requirements of the Plans and the Wastewater Monitoring Design and the

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proposed Consent Decree, in combination with U. S. Steel's relevant SOPs and other compliance measures of the Decree, will help prevent future spills such as the April 2017 Spill, and help prevent the occurrences of unauthorized discharges and discharges in excess of permit limits. *See Ex. 1, Maraldo Decl., Par. 20.*

Moreover, the enforcement provisions of the proposed Consent Decree, including stipulated penalties for failing to comply with the provisions of the Plans and the Wastewater Monitoring Design and the compliance requirements of the proposed Decree, help to deter U. S. Steel from experiencing another spill such as the April 2017 Spill and from committing other violations of its NPDES permit and the Clean Water Act.

62. *The proposed Consent Decree should include criminal charges and fines. (Gingerich 1).*

Response: In accordance with the United States' consistent practice in civil environmental enforcement cases, the proposed Consent Decree addresses only civil claims and reserves all rights with respect to any criminal claims.

63. *U. S. Steel should also be forced to address air pollution problems. (Miller 1).*

Response: The commenter does not identify the basis for any allegation of air pollution violations at U. S. Steel's Facility. The proposed Consent Decree contains injunctive relief and compliance requirements designed to address violations of the CWA and EPCRA, because those are the violations alleged by the Governments in their Complaint.

64. *The fact that U. S. Steel asked the authorities to delay the release of information about the October 25, 2017 chromium discharge should result in punitive fines. (J. Peller 1). Also, IDEM should "be held accountable for colluding with [U. S. Steel] to not notify the EPA about the October 2017 permit exceedance." (IWLA Indiana Div. 1; IWLA Porter County Chapter 2).*

Response: The Governments' claims in this action include civil penalties provided under the Clean Water Act for alleged violations of the Act and the Facility's NPDES permit and for alleged violations of EPCRA. The claims do not cover violations for which criminal fines are available. In any event, allegations of collusion are unfounded.

On October 25, 2017, U. S. Steel discharged total chromium in excess of the daily maximum limit in its NPDES permit. U. S. Steel provided oral notice to IDEM of the discharge on October 27. On October 31, within five days of the discharge, U. S. Steel communicated the exceedance to IDEM in writing, as required by the permit. The Facility also recorded the exceedance on its monthly discharge monitoring report submitted under the permit. Further, the report of the discharge, like all reported effluent limit exceedances, was added to EPA's NPDES database, known as Enforcement and Compliance History Online, which is accessible by the general public.

In the Facility's October 31, 2017 five-day submission to IDEM under the permit, U. S. Steel included language requesting confidentiality "pursuant to all applicable statutes." U. S. Steel's confidentiality request, however, did not meet the conditions for such request under the applicable rules. Among other reasons, effluent data cannot be claimed as confidential. *See 327 IAC 12.1-5-1.* Upon receipt of U. S. Steel's submission, IDEM informed U. S. Steel that its confidentiality request was not in compliance with the applicable regulations, and U. S. Steel

Further, any person or organization responsible for a release or spill is required to notify the federal government when the amount reaches a federally-determined limit. For releases of hazardous substances, the federal government has established Reportable Quantities (RQs). If a hazardous substance is released to the environment in an amount that equals or exceeds its RQ, the release must be reported to federal authorities by calling the National Response Center. In the case of the October 2017 discharge, the release into Burns Waterway did not exceed the RQ of 5,000 pounds for chromium and, therefore, there was no need for U. S. Steel to report the discharge to the National Response Center. Finally, as described above, revised Appendix B to the Consent Decree details the circumstances in which U. S. Steel must report spills and/or releases to federal, state and local authorities.