

Exhibit 2

15-cv-11804

GLELC Comment



By electronic mail to pubcomment-ees.enrd@usdoj.gov

November 21, 2023

Re: Proposed Consent Decree Modification in the United States, et al. v. Cleveland-Cliffs, Case No. 15-cv-11804, D.J. Ref. No. 90-5-2-1-10702.

The following comment is submitted by the Great Lakes Environmental Law Center, a nonprofit organization providing legal support to communities across Michigan disproportionately impacted by pollution. This comment addresses the modified consent order proposed by the United States Department of Justice to resolve a series of violations at the Cleveland-Cliffs facility (f/k/a AK Steel) in Dearborn, Michigan.

Please feel free to contact our office with any questions or concerns.

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In determining the proper penalty for the violations this action intends to address, it is critical to emphasize that this consent decree is based on over fifteen years of violations of the Clean Air Act. On August 12, 2008, the State of Michigan and EPA began issuing violation notices that led to the original consent decree, which itself took seven years to come to fruition.¹ Today, an additional eight years of continuous opacity and emission limit violations have gone by. Throughout this time, Defendant has been allowed to continue to violate the particulate matter emissions limits, lead emissions limits, manganese emissions limits, and opacity limits at substantial detriment to the community around it.

Since the first violation notice relevant to this case was issued in 2008, the Defendant's facility has received nearly 70 violation notices under the Clean Air Act. Twenty-five were issued since the initial consent decree was implemented in 2015.² Many notices included multiple violations of permit conditions, consent decrees, federal regulations, and state rules. In all, Defendant's facility is responsible for thousands of individual violations over this period.

Much of what the consent decree modifications require are simply upgrades that are necessary for the Defendant to end its continued failure to comply with the law. While the electrostatic precipitator (ESP) replacement is welcome and indeed absolutely necessary for reducing the impacts the Defendant continues to inflict on the lives of residents, it is also necessary in order for the plant to operate in compliance with the Clean Air Act. Permitting a company to continuously operate in violation of the law for over a decade only to allow its "penalty" to be largely offset by the costs incurred by necessary updates that it should have undertaken voluntarily years ago is the antithesis of an effective deterrence policy.³

At the same time, monitoring to ensure Defendant's compliance, particularly in light of the nature and extensive history of its violations, must be highly protective of the impacted community. EGLE describes continuous opacity monitoring systems (COMS) as "the best and quite often the only way for the facility and the regulatory agency to

¹ Consent Decree, United States v. AK Steel, No. 15-cv-11804 (2015)

² Mich. Dep't of Env't, Great Lakes, and Energy, Source Information Documents for: Cleveland-Cliffs Steel / AK Steel Corporation, <https://www.egle.state.mi.us/aps/downloads/SRN/A8640/Cleveland-Cliffs%20AK%20Steel%20Source%20Info%20Documents.pdf>.

³ The EPA has acknowledged the necessity of penalties to serve as an effective deterrent and devised means of calculating and penalizing economic benefits resulting from noncompliance. See, e.g., U.S. Env't Prot. Agency, Clean Air Act: Stationary Source Civil Penalty Policy (1991); U.S. Env't Prot. Agency, FIFRA Enforcement Response Policy (2009).

determine compliance with emission limits.”⁴ By foreclosing on the use of COMS in determining compliance regarding visible emission standards, the EPA is impeding a primary means of “provid[ing] assurance that a facility is not emitting pollutants in excess of its standards.”⁵

Defendant’s facility is located in the center of a densely populated and diverse community. Two schools, Salina Elementary and Salina Intermediate, immediately abut the facility, with little more than a rail yard separating children from the plant’s emissions. More than 95% of Salina’s students are English language learners, a majority of whom are Yemeni Americans.⁶ Around 90% of students are from families fulfilling the eligibility guidelines for free or reduced-price school meals.⁷

The composition of Salina Elementary’s student body mirrors that of the Southend community of Dearborn, where both these schools and this facility are located.⁸ 82% of residents living within a one-mile ring of the facility speak Arabic at home.⁹ 18% of households are classified as limited English proficient, over eight times the state average.¹⁰ 63% are low-income, more than double the state average.¹¹

As is far too familiar across our state, the community’s high socioeconomic vulnerability has been accompanied by high levels of industrial pollution. Individuals living, working, and learning near Defendant’s plant are inundated with environmental indicators exceeding the state average in nearly every instance.¹² Within a one-mile ring of the facility, more than half of the thirteen pollution and pollution sources that make up the environmental variables in the EPA’s EJ Screen rank at or above the 90th percentile in the state.¹³ These include particulate matter (99th percentile), diesel particulate matter (90th percentile), air toxics cancer risk (98th percentile), and toxic releases to air (99th percentile).¹⁴ The area has failed to meet the EPA’s National

⁴ Mich. Dep’t of Env’l Quality, Guidance for Continuous Opacity and Continuous Emission Monitoring Systems, 2 (1998), <https://www.michigan.gov/-/media/Project/Websites/egle/Documents/Programs/AQD/Compliance/fact-sheet-coms-cems.pdf?rev=28056e50f39d495cb0b9e6a6a704164a>.

⁵ *id.* at 1.

⁶ Lydia Breiseth, More Than a Warm Welcome: Supporting Immigrant Students in Dearborn, Michigan, AMERICAN EDUCATOR, Spring 2020, at 5.

⁷ *id.*

⁸ U.S. Env’t Prot. Agency, EJScreen Version 2.2: Community Report for 1 mile Ring Centered at 42.301742, -83.162934, Retrieved November 22, 2023.

⁹ *id.*

¹⁰ *id.*

¹¹ *id.*

¹² *id.*

¹³ *id.*

¹⁴ *id.*

Ambient Air Quality Standard (NAAQS) for ground-level ozone since 2018 and sulfur dioxide since 2013.¹⁵

Over ten years ago, EGLE's precursor, the Michigan Department of Environmental Quality (DEQ), concluded that manganese levels in the area surrounding the Defendant's plant "remain consistently above the health-protective benchmark level, higher than other Michigan sites, and some of the highest values measured within [EPA] Region 5 and across the U.S."¹⁶ The department made explicitly clear that the two steel mills in the area, one of which is the Defendant's, were the source of the "vast majority" of the pollution leading to "[e]levated levels of manganese represent[ing] a health concern." In an email obtained through Freedom of Information Act requests, a DEQ official described the Defendant's facility as "the most egregious facility in the state."¹⁷

Salina Elementary's principal, Eman Ali-Ahmed, regularly witnesses the impacts of this air pollution on her pupils. Still, its sheer ubiquity has skewed children's perception of what their environment could and should be like. "The issues [students] are experiencing with the noise pollution, what they are seeing around the factories, what they smell, it [has become] second nature... They think it's normal."¹⁸

The impacts of this pollution are made plain by examining health data. According to the CDC, 11.5% of adults in Michigan currently have asthma, nearly 4% higher than prevalence nationally.¹⁹ The state ranks the 8th highest in the country in this regard. However, the communities within its borders do not bear Michigan's asthmatic burden equally. 88 of the 100 top 100 census tracts in the state for prevalence of asthma are in Wayne County.²⁰

¹⁵ U.S. Env't Prot. Agency, Michigan Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants (Oct. 31, 2023), https://www3.epa.gov/airquality/greenbook/anayo_mi.html.

¹⁶ Mich. Dep't of Env'l Quality, Ambient Levels of Manganese in Southeast Michigan: Evaluation and Recommendations by the AQD Manganese Workgroup (Mar. 27, 2012), https://www.michigan.gov/documents/deq/deq-aqd-aqe-monitoring-Mn-Report-Michigan-Sept-8-2011_402342_7.pdf.

¹⁷ Craig Pearson, Permit for Dearborn Steel Plant Raises Concern, WINDSOR STAR (May 14, 2014).

¹⁸ Ibrahim Samra, Lack of Representation on Dearborn's South End Has Residents Rallying for Citywide Wards, CBS NEWS (June 3, 2023), <https://www.cbsnews.com/detroit/news/lack-of-representation-on-dearborn-south-end-residents-rallying-for-citywide-wards/>.

¹⁹ Ctr. for Disease Control, Most Recent Asthma State Data (November 22, 2023), https://www.cdc.gov/asthma/most_recent_data_states.htm.

²⁰ Ctr. for Disease Control, Asthma Prevalence Among Adults, (November 22, 2023), <https://ephtracking.cdc.gov/DataExplorer/?c=3&i=54&m=-1>.

A more granular examination of the area surrounding Defendant's plant highlights the disparity of the facility's impacts. The prevalence of asthma in a one-mile ring around its grounds is within the top one percentile in the entire United States.²¹ The neighboring census tract with the highest prevalence is 5735.²² Located immediately downwind to the east of the facility, 16.4% of the tract's adult residents currently have asthma, a level of prevalence 143% of the statewide rate. The tract is also home to both Salina Elementary and Salina Intermediate.

The prevalence of chronic obstructive pulmonary disease (COPD) among adults adopts a nearly identical pattern. 8.2% of Wayne County's adult residents have COPD. Like asthma, the neighboring census tract abutting Defendant's plant with the highest prevalence of COPD is 5735.²³ At 15.6%, the tract's COPD prevalence is 190% of Wayne County as a whole.

For the EPA, "any penalty should, **at a minimum**, remove any significant economic benefits resulting from noncompliance."²⁴ Consider the hundred million dollars Defendants were able to invest towards higher profits and payouts to investors over the decade since this action began, all by refusing to use their resources to address their emissions violations. Consider the years of being allowed to operate in violation of the emissions standards to which all corporations are supposed to be equally held. Consider the asthma-related medical costs residents have been forced to carry in a state with the highest per capita asthma-related medical costs in the entire country.²⁵ Consider the Defendant's repeated use of required pollution control expenses to secure millions of ad valorem real and personal property tax abatements for terms of 12 years, at the expense of the same residents of Dearborn and students of the Dearborn City School District that they have willfully and unlawfully inundated with pollution.²⁶

²¹ U.S. Env't Prot. Agency, EJScreen Version 2.2: Community Report for 1 mile Ring Centered at 42.301742,-83.162934, Retrieved November 22, 2023.

²² Ctr. for Disease Control, Asthma Prevalence Among Adults, (November 22, 2023), <https://ephracking.cdc.gov/DataExplorer/?c=3&i=54&m=-1>. (Census tract 26163573500 exhibits 16.4% prevalence of asthma among adults).

²³ id.

²⁴ U.S. Env't Prot. Agency, Clean Air Act: Stationary Source Civil Penalty Policy, 4 (1991) (emphasis in the original).

²⁵ Tursynbek Nurmagambetov, State-Level Medical and Absenteeism Cost of Asthma in The United States, Table 2, JOURNAL OF ASTHMA (2017).

²⁶ Mich. State Tax Comm'n, Amended Industrial Facility Exemption Certificates (March 2, 2022), https://www.michigan.gov/taxes/-/media/Project/Websites/treasury/BLGSS-PSD-FOLDER/Property-Tax-IFT-Certs/2021_22-IFT-Certs/IFT_2152022_Amended.pdf?rev=7041ee46ba6b4917b2d820990de251be&hash=F722310859E72889302A18315FB61F3C.

Or perhaps the EPA could utilize its own method of estimating the economic benefit of delayed compliance: “5% per year of the delayed one-time capital costs . . . for the period from the date the violation began until the date compliance was or is expected to be achieved.”²⁷ In this case, that is 5% of \$100 million in delayed capital costs annually over fifteen years, compounding and less any tax savings.

The Environmental Protection Agency’s (EPA) inclusion of a meaningful supplemental environmental project (SEP) developed in partnership with our clients is a commendable step towards promoting environmental justice and enhancing community well-being. By investing in initiatives that go beyond mere compliance, the inclusion of a SEP in this context suggests a necessary acknowledgment of the disproportionate impact of environmental hazards on marginalized communities.

While commendation is due for this overdue recognition, it also underscores the urgent need for consistent, proactive measures to address environmental injustices in marginalized areas from the outset. Cases like this one highlight government’s historical failure to prioritize the well-being of impacted communities in regulatory proceedings. To prevent SEPs from being tokenistic post-violation gestures, they must be accompanied by the proper financial penalty to ensure the deterrence of behaviors threatening the health and well-being of communities. Sadly, outside of the SEP, the penalty amount proposed in this modified consent decree is woefully inadequate.

In short, imposing a fine of \$81,380 and requiring a \$244,000 Supplemental Environmental Project in this case is millions of dollars shy of what the EPA must impose to comply with its own policies. This is not a penalty. It is a giveaway. As such, commenters strongly recommend a reassessment and drastic increase in total fines levied on the Defendant as well as for the Defendant to be required to install and maintain COMS at the ESP stack to ensure noncompliance with visible emissions standards can be rapidly addressed, protecting the community from additional needless harms.

²⁷ U.S. Env’t Prot. Agency, FIFRA Enforcement Response Policy, 22 (2009)