UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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| UNITED STATES OF AMERICA and the MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, | |
| Plaintiffs, | Civil Action No. 15-cv-11804 |
| v. | Judge Robert H. Cleland |
| CLEVELAND-CLIFFS STEEL CORPORATION | Magistrate R. Steven Whalen |
| Defendant. | |

JOINT UNOPPOSED MOTION TO ENTER FIRST MATERIAL MODIFICATION TO CONSENT DECREE

The United States respectfully requests that the Court approve and enter the proposed First Material Modification (Modification) to the Consent Decree previously entered by this court (Dkt. #6) on August 21, 2015 (the 2015 CD). The Modification arose out of a dispute in 2019 over opacity exceedances at Defendant's facility after the entry of the 2015 CD. The Modification will resolve the dispute. If approved, the Modification requires Cleveland-Cliffs to complete an ESP Rebuild project that is designed to provide greater pollution control than the original ESP.

The United States lodged the Modification with the Court on November 8, 2023 (Dkt. # 8-1), but asked the Court to defer action on it while proposed settlement was made available for public review and comment pursuant. The Department of Justice gave notice of the proposed Modification in the Federal Register and solicited public comment during a 30-day period that commenced upon publication of the notice. *See* 88 Fed. Reg. 80,764 (Oct. 20, 2023). One comment was submitted on the Modification by the Great Lakes Environmental Law Center (GLELC). As discussed in the Memorandum in Support of this Motion filed herewith, the United States has carefully reviewed the comment received and continues to believe that the Consent Decree is fair, adequate, reasonable and consistent with the Clean Air Act. Accordingly, it requests that the Court enter the First Material Modification. No proposed order is attached because the Modification has a signature slot for the Court on page 22.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
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| UNITED STATES OF AMERICA and the MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, | ) |
| Plaintiffs, | ) |
| v. | ) |
| | ) Civil Action No. 15-cv 11804 |
| CLEVELAND-CLIFFS STEEL CORPORATION (f/k/a AK Steel Corporation | ) Judge Robert H. Cleland |
| Defendant. | ) Magistrate R. Steven Whal |

MEMORANDUM IN SUPPORT OF MOTION TO ENTER
FIRST MATERIAL MODIFICATION TO CONSENT DECREE

# STATEMENT OF ISSUES

Is the proposed medication to the Consent Decree in the above-captioned action (Dkt. No. 6) fair, reasonable and adequate, and in the public interest. *Pedreira v. Sunrise Children's Servs., Inc.*, 802 F.3d 865, 872 (6th Cir. 2015) (quoting *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010)).

INTRODUCTION

The United States requests that the Court approve and enter the proposed First Material Modification (Modification) to the Consent Decree previously entered by this Court (Dkt. # 6) on August 21, 2015 (the 2015 CD). The 2015 CD resolved claims by the United States and the Michigan Department of Environment, Great Lakes, and Energy (EGLE)[1] (collectively the "governments") for violations of the Clean Air Act (CAA) at Defendant's steel manufacturing facility in Dearborn, Michigan (the Facility). The United States lodged the Modification with the Court on November 8, 2023 (Dkt. # 8-1), but asked the Court to defer action on it while proposed settlement was made available for public review and comment pursuant. The Department of Justice published notice of the proposed Modification in the Federal Register. *See* 88 Fed. Reg. 80,764 (Oct. 20, 2023*)*. In accordance with the notice, the public had thirty days to submit comments to the Department of Justice. One comment was submitted on the Modification by the Great Lakes Environmental Law Center (GLELC). The governments have reviewed this comment and concluded that it does not raise any facts or issues suggesting that the Modification is inappropriate, improper, or inadequate. *See* Modification ¶ 26. The governments continue to believe that the

Modification meets the standards for Court entry because it is fair, reasonable, and consistent with the CAA. Defendant supports entry of the Modification (¶ 26). Therefore, the governments respectfully request that the Court enter the Modification. No proposed order is attached because the Modification has a signature slot for the Court on page 2.

## BACKGROUND

### I. THE COMPLAINT AND 2015 CONSENT DECREE

The Facility is an integrated steel mill producing new steel from iron ore and scrap steel. Complaint, Dkt. #1, ¶ 9. AK Steel Corporation, now called Cleveland-Cliffs, Inc., owned and operated the Facility at the time the Complaint was filed in 2015. *Id.* The 2015 Complaint alleged, *inter alia*, that the Facility violated the CAA and Michigan law by emitting air pollutants in amounts that exceeded limits established by EPA-approved and federally enforceable Michigan state regulations and set forth in the federally enforceable operating permit that EGLE issued to the Facility. *Id.* ¶¶ 45-74. The Complaint also alleged that Defendant violated applicable federal regulations (40 C.F.R. Part 63, Subpart FFFFF) by failing to operate, maintain, and monitor certain processes at the Facility. *Id.*

On August 21, 2015, the Court entered the 2015 CD resolving the governments' claims and requiring, *inter alia,* Defendant to implement various

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[1] Formerly named the Michigan Department of Environmental Quality.

injunctive measures to address the violations in the Complaint. Dkt. #6. Specifically, the 2015 CD required the Facility to address the opacity[2] of visible air emissions from the Facility's Basic Oxygen Furnace (BOF) stack that exceeded federal and state requirements. The Facility uses an electrostatic precipitator (ESP) as the primary method to reduce opacity and to remove particulate matter (PM) and metals such as lead and manganese from BOF emissions. Declaration of Daniel Schaufelberger, attached hereto as Exhibit 1, (Schaufelberger Decl.) ¶ 6. The 2015 CD required Defendant to review and report on Continuous Opacity Monitor (COM) data demonstrating opacity exceeding the applicable limit and to propose corrective actions in response that were subject to EPA approval. 2015 CD ¶¶ 20-21. It also required Defendant to hire a consultant to annually inspect the ESP and take necessary corrective actions in response to the inspector's report. *Id.* ¶ 21.

## II. POST-2015 CD DEVELOPMENTS

At the time the 2015 CD was entered, renovation work on the ESP had curtailed emissions to below applicable limits. Modification at 3. However, beginning in 2019, the opacity of BOF ESP stack emissions began to exceed the applicable limit as measured by the COM system (COMS). *Id.* In addition, the

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[2] Michigan state regulations define opacity as "the degree to which an emission reduces the transmission of light or obscures an observer's view." Mich. Admin. Code, R 336.1115(a). Opacity may be measured by EPA's Method 9 opacity

third-party inspector found serious maintenance issues with the ESP. *Id.* Several tests also demonstrated that the Facility exceeded permit limits for lead and manganese. *See* Modification Appendix F. Defendant also reported continuing violations of the BOF roof monitor opacity limits for multiple days. *Id.* Consequently, since the 2015 CD, EGLE has issued the Facility numerous Violation Notices for exceedances of emission limits and other requirements. *Id.*

Where COMS data indicated exceedance of the opacity limits, Paragraphs 21 and 22 of the 2015 CD required Cleveland-Cliffs to submit to EPA and EGLE an analysis of steps taken, if any, and steps to be taken, if any, for repair or improvement of operation of the ESP with a timely schedule for implementation. 2015 CD ¶ 21. Under Paragraph 22, EPA could notify Cleveland-Cliffs that it disagreed with its proposed corrective measures in which case Cleveland-Cliffs could dispute EPA's determination pursuant to Section XII (Dispute Resolution). 2015 CD ¶ 22. Cleveland-Cliffs proposed addressing these issues by undertaking further repairs to the ESP. Schaufelberger Decl. ¶ 8. Pursuant to the 2015 CD (¶ 22), EPA wrote to Cleveland-Cliffs on December 23, 2019, advising it that based on the information Cleveland-Cliffs provided, it did not agree that the proposed ESP repair would be sufficient to address the opacity exceedances. *Id.* ¶ 9,

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observation procedures or other approved alternative method, such as a Continuous Opacity Monitor. *See* Mich. Admin. Code, R. 336.1301, 1303.

Cleveland-Cliffs thereafter invoked dispute resolution. *Id.* ¶ 10. The proposed Modification resolves this dispute.

## III. PROPOSED MODIFICATION TO THE 2015 CONSENT DECREE

The Modification requires Cleveland-Cliffs to complete an ESP rebuild project (ESP Project) that is designed to provide greater pollution control than the original ESP. Modification at 4. In 2019, the ESP consisted of four vertical metal casings, each consisting of two compartments, in which PM emissions from the BOF are negatively charged when passing through a series of electrical fields, then collected on grounded electrodes (referred to as collection plates), and removed into a hopper to prevent their release to the atmosphere. Modification at 3.
The Modification requires Cleveland-Cliffs to replace all four casings, plus build an additional new casing that contains a single new compartment with approximately the same pollution control capacity as each of the other four casings (Modification ¶ 4, redlined CD ¶ 22.1). The rebuilt ESP contains a total of 46 fields comprised of five fields in each compartment in the casings compared with only four fields in each compartment of the original ESP (Modification ¶ 2, redlined CD ¶ 7). In addition, the new casing has six fields, each of which is 1.67 times larger than the other fields. *Id.* This will result in greater emissions control than the prior ESP. Modification at 4.

Negotiations and finalization of the Modification took over three years but the governments required Cleveland-Cliffs to commence the ESP Project before finalization of the Modification. The ESP Project deadlines were set to specific dates between June 24, 2021 and March 21, 2023, which elapsed while negotiations were continuing (Modification ¶ 4, redlined CD ¶ 22.1). Cleveland-Cliffs completed the Project in March of 2023. Modification at 6.

Additionally, the Modification (¶¶ 5, 7 redlined CD ¶¶ 22.2, 22.4(b)) requires Cleveland-Cliff to establish and operate according to an operating standard that consists of the minimum number of fields in the ESP. Cleveland-Cliffs must also conduct a series of nine performance tests over the next two years to demonstrate the ESP's ability to continuously operate in compliance with appliable emission limits. The first three tests require the Facility to demonstrate compliance with the PM, coarse particulate matter ($PM_{10}$), fine particulate matter ($PM_{2.5}$), and visible emissions limits for the ESP stack and lead and manganese for the ESP stack and secondary baghouse stack combined. The remaining six performance tests require Cleveland-Cliffs to test the ESP stack and the secondary baghouse stack for lead and manganese. (Modification ¶ 8, redlined CD ¶ 22.5). Cleveland-Cliffs conducted the first performance test on May 16, 2023, which demonstrated compliance with all of these limits. *Id.* at 5. In August of 2023, Cleveland-Cliffs conducted a second test that indicated exceedance of the

manganese emissions limit and compliance with the other limits. Schaufelberger Decl. ¶12. The Facility retested manganese and other emissions in September of 2023 and the Facility passed for all the limits. *Id.* ¶ 13. In November 2023 the Facility again conducted emission tests and the Facility passed for all limits. *Id.*¶14. Since completion of the ESP Project, COMS data has shown a significant reduction in opacity exceedances with the latest report (4$^{th}$ quarter 2023) showing only seven total six-minute average events excluding steam. *Id.* ¶15.

Defendant and Plaintiffs disagree as to the impact the ESP Project will have on the Facility's compliance with lead and manganese emission limits. *Id.* at 5. To the extent violations of lead and manganese limits resume in the future, the Modification does not preclude further action by Plaintiffs with respect to excess lead and manganese emissions.

The Modification (¶ 10, redlined CD ¶ 22.7) also requires Cleveland-Cliffs to perform additional ESP ductwork inspections to detect issues that have been responsible for some of the opacity exceedances at the roof monitor. In addition, Cleveland-Cliffs will need to perform additional visible emissions monitoring of the roof monitor. *Id.*

The Modification (¶ 7, redlined CD ¶ 22.4) requires Cleveland-Cliffs to comply with all applicable limits for the ESP stack and adds stipulated penalties for violation of these limits (¶¶ 16-17, redlined CD ¶ 17.e and f). In addition to the

injunctive measures described above, Cleveland-Cliffs will pay a civil penalty of $81,380 to EGLE to resolve its violations of the permit's limits (Modification ¶ 3, redlined CD ¶ 11.1). It will also implement a state supplemental environment project (SEP) consisting of the purchase and delivery of air purifier units to over 1,000 residential units in South Dearborn at an estimated cost of $244,000 (Modification ¶ 13, redlined CD ¶¶ 27-35).

IV. SUMMARY OF COMMENT RECEIVED

The GLELC comment submitted on the Modification, attached hereto as Exhibit 2, is addressed in detail below. Its key points are that while the ESP rebuild is "welcome" and "absolutely necessary," the $81,380 penalty and $244,000 SEP are inadequate given the severity and duration of the violations, and the economic benefit Defendant gained from these violations. *Id.*

**STANDARD OF REVIEW**

Before approving a consent decree, a court must determine "that the agreement is "'fair, adequate, and reasonable, as well as consistent with the public interest.'" *Pedreira v. Sunrise Children's Servs., Inc.*, 802 F.3d 865, 872 (6th Cir. 2015) (quoting *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010)); *United States v. Cnty. of Muskegon*, 298 F.3d 569, 580-81 (6th Cir. 2002); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991). Courts have also described the public interest element of this

standard in terms of whether the consent decree is consistent with the purposes that the underlying statutes are intended to serve. *See Akzo*, 949 F.2d at 1435.

While approval of a settlement is in the discretion of the trial court, courts usually exercise this discretion in a "limited" and "circumscribed" manner. *United States v. Bliss*, 133 F.R.D. 559, 567 (E.D. Mo. 1990); *United States v. Findett Corp.*, 75 F. Supp. 2d 995, 1000 (E.D. Mo. 1999). For example, a trial court does not have the power to modify a settlement; it may only accept or reject the terms to which the parties have agreed. *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986); *Akzo*, 949 F.2d at 1435; *Officers for Justice v. Civil Serv. Comm'n & Cnty. of S.F.*, 688 F.2d 615, 630 (9th Cir. 1982). Further, in reviewing a consent decree negotiated to enforce compliance with the environmental laws, "the controlling criteria is not what might have been agreed upon . . . nor what the district court believes might have been the optimal settlement." *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1036 (D. Mass. 1989) (internal citations omitted), *aff'd*, 899 F.2d 79, 84 (1st Cir. 1990). A trial court should review the consent decree as the product of compromise in which, "in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States v. City of Jackson*, 519 F.2d 1147, 1152 (5th Cir. 1975). Therefore, the "[t]he trial court should not make a proponent of a proposed settlement 'justify

each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'" *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (citations omitted); *United States v. Allegheny-Ludlum Indus. Inc.*, 517 F.2d 826, 850 (5th Cir. 1975) (settlement need not provide "every benefit that might someday be obtained in contested litigation.").

This deferential standard of review reflects a public policy that strongly favors settlements of disputes without protracted litigation. *Lexington-Fayette*, 591 F.3d at 490; *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976). Settlements conserve courts' and litigants' resources and "should . . . be upheld whenever equitable and policy considerations so permit." *Id; Walker v. United States Dept. of Hous. & Urban Dev.*, 912 F.2d 819, 825 (5th Cir. 1990); *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 80 (3d Cir. 1982). This is particularly true in disputes involving environmental violations "where voluntary compliance by the parties . . . will contribute significantly toward ultimate achievement of statutory goals." *Kelley v. Thomas Solvent Co.*, 717 F. Supp. 507, 516 (W.D. Mich. 1989) (citations omitted). "A remedy that everyone agrees to is a lot more likely to succeed than one to which the defendants must be dragged kicking and screaming." *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist.*, 921 F.2d 1371, 1383 (8th Cir. 1990).

Finally, the balancing of competing interests affected by a proposed consent decree to which the United States is a party "must be left, in the first instance, to the discretion of the Attorney General." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981). As the Sixth Circuit has noted, judicial deference to a settlement is "particularly strong" when that settlement "has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA[,] which enjoys substantial expertise in the environmental field." *Lexington-Fayette*, 591 F.3d at 490-91 (quoting *Akzo*, 949 F.2d at 1436); *see also id.* at 1424, 1435. The government's expertise and discretion "carries over to discretion in fashioning settlement." *U.S. EPA v. City of Green Forest*, 921 F.2d 1394, 1402 (8th Cir. 1990); *Kelley v. Thomas Solvent Co.*, 790 F. Supp. 731, 735 (W.D. Mich. 1991). See also *Akzo*, 949 F.2d at 1436 ("in evaluating the efforts of an agency charged with making technical judgments and weighing complex data, we must give a proper degree of deference to the agency's expertise"). Thus, where an agency committed to the furtherance of the public interest has negotiated an agreement, there is a presumption of validity. These same standards apply to a motion to modify an existing consent decree. *See Ohio Valley Envtl. Coal., Inc. v. Hobet Mining, LLC*, 2013 WL 12284418, at *3 (S.D. W. Va. Jan. 9, 2013).

# DISCUSSION

## I. THE PROPOSED MODIFICATION IS FAIR

A proposed settlement must be both procedurally and substantively fair. *Cannons*, 899 F.2d at 86.

### A. The Modification is Procedurally Fair

When analyzing the procedural fairness of a settlement, courts examine the "candor, openness, and bargaining balance" of the negotiation process. *Cannons Eng'g,* 899 F.2d at 86. Courts find procedural fairness where the settlement was negotiated at arms-length among experienced counsel. *Akzo*, 949 F.2d at 1435; *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207, 209 (3d Cir. 2003); *BP Prods. N. Am. Inc.*, No. 12-CV-207, 2012 WL 5411713, at *2 (N.D. Ind. Nov. 6, 2012). A decree that is the product of good faith, arms-length negotiations is presumptively valid. *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990); *see also United States v. Comunidades Unidas Contra La Contaminacion ("CUCCo")*, 204 F.3d 275, 281 (1st Cir. 2000).

In this case, the Modification is the product of arms-length negotiations that were conducted in good faith over more than three years. Schaufelberger Decl. ¶ 16. All parties had experienced legal and technical representatives who vigorously advocated their respective positions resulting in, at times, contentious negotiations. *Id.* ¶ 16. These circumstances reflect procedural fairness. *United*

*States v. NL Indus.*, No. 91-cv-578, 2006 WL 8455840, at *3 (S.D. Ill. Sept. 25, 2006) ("Respect for the agency's role in settlement negotiations is heightened when the affected parties, themselves knowledgeable and represented by experienced counsel, have reached an agreement at arm's length and advocate entry of the agreement in a judicial decree."); *United States v. 3M Co.*, No. 14-cv-32, 2014 WL 1872914, at *3 (S.D. Ohio May 8, 2014) (Lengthy negotiations suggest "a degree of thoroughness and deliberation permeated the negotiations, which supports a finding of procedural fairness.").

Additionally, during negotiations before the Modification was lodged, representatives of the United States and EGLE consulted with GLELC attorney Nicholas Leonard on multiple occasions, who later submitted the only comment received on the Modification. Schaufelberger Decl. ¶ 17. The solicitation and consideration of public comments also indicates the Consent Decree is procedurally fair. *United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 373 (7th Cir. 2011); *Akzo*, 949 F.2d at 1435.

Finally, the governments issued a fact sheet at the time the Modification was lodged which noticed a public meeting regarding the Modification. *See* Fact Sheet, attached hereto as Exhibit 3. The public meeting was held virtually on November 8, 2023, and during it the governments explained the Modification, its genesis, and the public comment process, and answered questions from attendees.

Schaufelberger Decl. ¶ 18. The governments thus clearly satisfied the procedural fairness requirement with respect to the Modification.

**B. The Modification is Substantively Fair**

The Modification is also substantively fair. Substantive fairness concerns "concepts of corrective justice and accountability" and that a party should bear the cost of the harm for which it is legally responsible." *Cannons*, 899 F.2d at 87. In addition, in assessing substantive fairness, courts consider the strengths of the plaintiffs' case and risks involved in litigation if the case were not settled. *See Azko*, 949 F.2d at 1435; *United States v. City of Alexandria*, 614 F.2d 1358, 1364 (5th Cir. 1980). Such consideration includes "the probable outcome in the event of litigation, the relative advantages and disadvantages . . . as well as the avoidance of wasteful litigation and expense. . . . All [plaintiff] must do is establish . . . that, all things considered, it is prudent to eliminate the risks of litigation to achieve specific certainty though admittedly it might be considerably less (or more) than were the case fought to the bitter end." *Allegheny-Ludlum*, 517 F.2d at 849–50 (citations and quotations omitted). In a substantively fair settlement, each side benefits from immediate resolution while foregoing the opportunity to achieve an unmitigated victory." *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) (citing *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)).

This Modification reflects a resolution of a dispute over compliance with the 2015 CD. In addition to conducting visible emissions observations, the Facility also has a COMS that measures opacity. Schaufelberger Decl. ¶ 7. The 2015 CD requires Cleveland-Cliffs to evaluate COMS data showing exceedances of the opacity limit, determine their cause, and then select and implement corrective measures. *See* 2015 CD ¶¶ 20-21. If the governments disagree with selected corrective measures they can obligate Cleveland-Cliffs to implement alternative measures unless it invokes dispute resolution. *Id.* ¶ 22. In 2019, high opacity exceedances reflected by COMS data began to occur with increasing frequency, although the Facility's Method 9 readings continued to show compliance with applicable opacity limits. Modification at 3. The Facility completed some annual maintenance, but COMS readings continued to be high. *Id.* As a corrective measure, Cleveland-Cliffs proposed additional ESP repairs. Schaufelberger Decl. ¶ 8. In December of 2019 the governments advised Cleveland-Cliffs that they disagreed with this approach based on the information Cleveland-Cliffs had provided. *Id.* ¶ 9. Cleveland-Cliffs thereafter invoked dispute resolution. *Id.* ¶ 10. The Modification requires the ESP Rebuild Project to resolve this dispute.

The Modification clearly exhibits substantive fairness. By requiring the ESP rebuild to correct the opacity issues demonstrated by COMS data, it holds Cleveland-Cliffs accountable and requires it to bear "the cost of the harm for which

it is legally responsible." *See Cannons*, 899 F.2d at 87. It avoids litigation in which the governments would have likely sought this precise remedy. Moreover, this remedy was not delayed by either negotiation of the Modification nor prospective litigation because Cleveland-Cliffs began (and completed) rebuilding the ESP before lodging this Modification. Accordingly, the Modification, which obtained certainty and expediency in implementing the remedy – and accordingly protecting the public health – is a prudent choice. *See United States v. BP Expl. & Oil Co.*, 167 F. Supp. 2d 1045, 1054 (N.D. Ind. 2001) (a consent decree that settles an environmental enforcement action may reflect a completely appropriate strategic election by the government to negotiate for "extensive relief without the burden of proving its case."); *Akzo*, 949 F.2d at 1436.

## II. <u>THE MODIFICATION IS ADEQUATE AND REASONABLE</u>

The second prong of the Court's inquiry regarding a proposed consent decree is whether it is reasonable and adequate. The Court's reasonableness inquiry considers "the nature and extent of the potential hazards; the degree to which the remedy will adequately address the hazards; possible alternatives for remedying hazards; and the extent to which the decree furthers the goals of the statute." *Akzo*, 949 F.2d at 1436; *3M Co.*, 2014 WL 1872914, at *6; *Cannons*, 899 F.2d at 89-90 (in assessing reasonableness the court looks to "the decree's likely efficaciousness as a vehicle for cleansing the environment.").

The Modification is clearly reasonable and adequate. The ESP rebuild satisfies the requirement in Paragraph 22 of the 2015 CD that Cleveland-Cliffs undertake measures to address opacity exceedances demonstrated by COMS data. The performance tests Cleveland-Cliffs performed since the rebuild was completed demonstrates vastly improved compliance with applicable limits as does the COMS data reported since the rebuild.[3] Moreover, the Modification imposes additional requirements – enhanced performance testing, monitoring, and setting operational standards which further assure the efficacy of the ESP Rebuild Project. The Modification retains Paragraphs 21-22 which enable governments to require Cleveland-Cliffs to implement additional actions if opacity exceedances resume.

Finally, the Modification requires Cleveland-Cliffs to implement a state SEP consisting of the purchase and delivery of air purifier units to over 1,000 residential units near the Facility (Modification ¶ 13, redlined CD ¶¶ 27-35). The SEP will cost Cleveland-Cliffs $244,000, which reduced the cash penalty Cleveland-Cliffs will pay the state for its violations of the lead and manganese limits to $81,380. Thus, the total amount that Cleveland-Cliffs is required to pay, for the state only violations is $325,380. Thus, the proposed Consent Decree is an

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[3] As previously discussed, Cleveland-Cliffs failed one test in August 2023 for manganese, and subsequently retested in compliance.

effective "vehicle for cleansing the environment." *See Cannons*, 899 F.2d at 89-90; *Azko*, 949 F.2d at 1436.

## III. THE PROPOSED MODIFICATION IS CONSISTENT WITH THE CAA

The Modification is consistent with the environmental laws at issue in this case and in the public interest. In assessing whether a proposed settlement is in the public interest, a court's function "is not to determine whether the resulting array of rights and liabilities is the one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1460 (D.C. Cir. 1995). The Modification is certainly "within the reaches of the public interest." *Id.* at 1461-62.

One of the primary purposes of the CAA is to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population. 42 U.S.C. § 7401(b); *BP Expl. & Oil*, 167 F. Supp. 2d at 1054. The Modification does so by reducing opacity, and particulate emissions, including lead and manganese. As noted above, performance testing and recent COMS data has already confirmed the efficacy of the measures in the Modification in reducing emissions. Schaufelberger Decl. ¶¶ 13, 14. To resolve the lead and manganese violations, the Modification assesses a cash penalty and requires Cleveland Cliffs to expend money on implementing the SEP. The SEP furthers the public interest by purifying the indoor air that nearby

residents breathe. The combined costs of the penalty and SEP will also deter further violations by Cleveland-Cliffs and similarly situated regulated entities and thereby promotes the goals of the CAA. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 184 (2000) ("Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay [compliance]; they also deter future violations"). Thus, the Modification furthers the statutory goals of the CAA to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare. 42 U.S.C. § 7401(b)(1).

The Modification is also consistent with the CAA because it secures compliance with applicable law and conserves the parties' and Court's limited resources, which can instead, for Cleveland-Cliffs, be devoted to preventing future violations, and for the governments, be used towards the detection of violators and enforcement of environmental requirements in other cases. This settlement thereby furthers CAA's goals and should be approved. *See City of Jackson*, 519 F.2d at 1151 (where the government is a party to the settlement, a consent decree "maximizes the effectiveness of limited law enforcement resources."); *Allegheny-Ludlum*, 517 F.2d at 851 (Courts are sensitive to the "resources consumed by the federal agencies in negotiating these decrees, as well as the chance justly to finalize a matter that otherwise would burden agencies and courts."); *BP Expl. &*

*Oil*, 167 F. Supp. 2d at 1053 ("the only likely alternative to the decree appears to be complex and lengthy litigation which would expend limited Government resources not to mention valuable judicial resources"). Thus, entry of the Modification would go far to improving the environment in the near future and beyond, and thus is consistent with the goals of the CAA and the public interest. *See Akzo*, 949 F.2d at 1435.

## IV. THE COMMENT DOES NOT SUGGEST THAT THE MODIFICATION IS INAPPROPRIATE, IMPROPER OR INADEQUATE

The Modification provides that the United States may withdraw its consent if comments received indicate that the Modification is inappropriate, improper, or inadequate. Modification ¶ 26. The governments have reviewed the comment from GLELC and concluded that it does not indicate that the Modification is inappropriate, improper, or inadequate.

Notably, the GLELC comment does not take issue with any of the relief in the Modification or its likely effectiveness. Rather, it states that "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 . . . ." Exhibit 3 at 2.

The GLELC comment emphasizes the impacts of the excess emissions on the surrounding vulnerable community. Exhibit 3 at 3-6. The governments agree

that the area surrounding the plant is an overburdened community and that the excess emissions pose unacceptable risks of harm to that community. The Modification addresses this risk by requiring the ESP Rebuild Project and other relief.

The GLELC comment states that the Modification "impedes" the use of COMS in determining compliance regarding visible emission standards" which is "a primary means of "provid[ing] assurance that a facility is not emitting pollutants in excess of its standards." *Id.* at 2-3. This statement is incorrect. The Modification does not alter Paragraph 22 of the 2015 CD which requires Cleveland-Cliff to evaluate and implement corrective actions if opacity exceeds the applicable limits based on COMS data. This Modification and the ESP Rebuild Project occurred precisely because of this requirement. Thus, the Modification retains the governments' ability to enforce the opacity standard based on COMS data and the circumstances giving rise to the Modification show the governments' willingness to do so.

Finally, the comment contends that the amount Cleveland-Cliffs will pay in combined cash penalty and SEP is too low considering the violations. As a preliminary matter, the comment suggests that EPA should have required a larger penalty. *See, e.g.,* Exhibit 3 at 2 ("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.”). First, for clarification, the EPA did not assess this penalty. Instead, EGLE assessed the penalty for the state violations in accordance with EPA’s policy on such penalties.

EGLE used EPA’s CAA Stationary Source Civil Penalty Policy (Penalty Policy)[4] to calculate the penalty, which comports with this policy. The Penalty Policy sets out a methodology for calculating a civil penalty based on the statutory penalty factors in 42 U.S.C. § 7413(d), including the gravity of the alleged violations, the length of time the violations occurred, the size of violator, aggravating and mitigating factors such as cooperation, history of noncompliance, and degree of culpability. The first section of the Penalty Policy assesses the actual and potential harm by calculating what percentage the violations were over the applicable limit and assessing a corresponding monetary fine for different percent ranges. EGLE applied those ranges for the permit’s lead and manganese and roof monitor opacity violations. EGLE also used the Penalty Policy criteria assessing the toxicity of the pollutants applying the amounts associated with hazardous air pollutants which include lead and manganese. In terms of the duration of the violations, the commentor states that the violations occurred for

[4] https://www.epa.gov/sites/default/files/documents/penpol.pdf

over a decade but under the Penalty Policy maximum length of time is five years, which is what EGLE used.[5]

The commentor states that the penalty did not remove any significant economic benefit resulting from the noncompliance. The ESP rebuild, although necessary to address opacity, may not have been necessary to comply with the lead and manganese emission limits. *See* Modification at 5. As a result, EGLE did not include economic benefit in the calculation of the penalty. This was a rational choice since a dispute over this issue would have delayed the ESP Project, resulting in increased emissions in the community. Finally, Cleveland-Cliffs is subject to additional penalties under the Modification if future violations of the applicable emission limits occur (¶¶ 16-17, redlined CD ¶ 17.e and f).

## CONCLUSION

For the reasons explained herein, the governments respectfully request that the Court enter the Modification as a judicial order.

Respectfully submitted,

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[5] In any event, violations prior to 2015 are foreclosed by the resolution of liability in the 2015 CD and the five-year CAA statute of limitations.

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Certificate of Service

I, Elizabeth L. Loeb, hereby certify that a copy of the foregoing Memorandum in Support of the Motion to Enter the First Material Modification of the Consent Decree was served upon counsel of record through the Court's electronic filing system.

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