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

UNITED STATES OF AMERICA and the MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, Plaintiff, v. R.J. TORCHING, INC, Defendant.	Case No. 2:23-cv-13056-MAG-KGA Hon. Mark A. Goldsmith

PLAINTIFFS' JOINT UNOPPOSED
MOTION FOR ENTRY OF CONSENT DECREE

The Plaintiffs, the United States and the Michigan Department of Environment, Great Lakes, and Energy ("EGLE") respectfully request that the Court approve and enter the proposed Consent Decree that would resolve the claims set forth in the Plaintiffs' Complaint filed on December 4, 2023. PageID.1.

The United States lodged the proposed Consent Decree on December 4, 2023 (PageID. 85-168 including Appendices A through C) but asked the Court to defer action on it while the proposed settlement was made available for public review and comment. The Department of Justice gave notice of the proposed

Consent Decree in the Federal Register and solicited public comment during a 54-day period that commenced upon publication of the notice. 88 Fed. Reg. 85654 (Dec. 8, 2023). Two comments were submitted; one from an individual residing in British Columbia, Canada, and another from Earthjustice and the Great Lakes Environmental Law Center on behalf of several Flint community groups, organizations, and local leaders. The United States and EGLE have carefully reviewed the comments received and continue to believe that the Consent Decree is fair, adequate, reasonable, and consistent with the Clean Air Act. Accordingly, Plaintiffs request that the Court enter the Consent Decree. No proposed order is attached because the Consent Decree contains a signature line for the Court at PageID.151

Respectfully Submitted,

FOR THE UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I, Steven D. Ellis, hereby certify that a copy of the foregoing Plaintiffs' Joint Unopposed Motion for Entry of Consent Decree was served upon counsel of record through the Court's electronic filing system.

/s/ Steven D. Ellis
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IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA and the MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, Plaintiff, v. R.J. TORCHING, INC, Defendant.	Case No. 2:23-cv-13056-MAG-KGA Hon. Mark A. Goldsmith

BRIEF IN SUPPORT OF PLAINTIFFS' JOINT UNOPPOSED MOTION FOR ENTRY OF CONSENT DECREE

This Brief supports the United States' and the Michigan Department of Environment, Great Lakes, and Energy's ("EGLE") Joint Motion to Enter the proposed Consent Decree that was lodged in this case on December 4, 2023. *See* PageID.85. The issue for the Court to decide is whether the proposed Consent Decree is fair, reasonable, and consistent with the public interest and the goals of the Clean Air Act. *See United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010).

If approved and entered by this Court, the Consent Decree would conclude

this case on the terms and conditions set forth in that settlement agreement. The Defendant in this lawsuit—R.J. Torching, Inc. ("R.J. Torching" or "Defendant")—has co-signed the proposed Consent Decree and supports its approval and entry as a final judgment in this case. Consent Decree, ¶ 85, PageID.60-61. The Motion is ripe for decision.

Background and Introduction

Defendant processes metal scrap and waste materials at a facility in Flint, Michigan ("Flint Facility"). Defendant uses high-powered torches fueled by oxygen and propane to cut metal components that are too large to cut and process with shears or other methods. Defendant performed the same type of business at a facility in Battle Creek, Michigan ("Battle Creek Facility"), but permanently closed that Facility in March 2020.

On December 4, 2023, the United States and EGLE ("Plaintiffs") filed a Complaint (PageID.1) in this action seeking civil penalties and injunctive relief for alleged violations of the Clean Air Act, 42 U.S.C. §§ 7401-7671q, and the Michigan State Implementation Plan ("Michigan SIP"), including violations of the Michigan SIP opacity limitations, open burning prohibitions, and a requirement to operate air pollution control devices in a satisfactory manner. *See* Rules 301, 310, and 910 of Michigan's Air Pollution Control Rules, Mich. Admin. Code, R 336.1301 (Standards for Density of Emissions), R 336.1310 (Open Burning), and

R 336.1910 (Air-Cleaning Devices). The Plaintiffs also allege in the Complaint that Defendant violated a 2015 Administrative Consent Order between EPA and Defendant at the Flint and Battle Creek Facilities. PageID.25.

The proposed Consent Decree would require that Defendant: (1) implement appropriate injunctive relief to control air pollutant emissions from its torch-cutting operations; (2) undertake additional mitigation measures to help offset past excess emissions; and (3) pay a $150,000 civil penalty to the United States and EGLE, based upon the Defendant's ability to pay civil penalties after accounting for the costs of injunctive relief.

Pursuant to Department of Justice policy codified at 28 C.F.R. § 50.7, the United States published notice of the lodging of the proposed Consent Decree in the Federal Register, which commenced a 54-day public comment period ending on January 31, 2024. The 54-day comment period was longer than the usual 30-day period for such settlements to give the public additional time to review and comment on the proposed Consent Decree. 88 Fed. Reg. 85,654 (Dec. 8, 2023). On January 18, EGLE held a public meeting to provide information about the proposed settlement and to answer questions. The meeting was accessible through Zoom and at least 29 members of the public attended. Declaration of David Sutlin, Exh. C at ⁋ 16. The Justice Department received two sets of public comments: one from an individual residing in British Columbia, Canada, and another from

Earthjustice and the Great Lakes Environmental Law Center on behalf of several Flint community groups, organizations, and local leaders ("Earthjustice comments"). The comments are attached as Exhibits A and B to this Brief.

The individual commenter notes that "[a]ny amount of air pollution is harmful and even deadly," and urges the United States to require Defendant to relocate its operations to an "airshed" that would not "jeopardize public and/or environmental health." Exhibit A at 1.

The Earthjustice comments assert that the proposed Consent Decree "does not adequately mitigate harm" or sufficiently address environmental justice concerns, among other points. Exhibit B at 2.

After considering the points made by the commenters, the United States and EGLE respectfully request that the Court approve and enter the Consent Decree. The comments do not "disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate." Consent Decree, ¶ 85. The proposed Consent Decree should be approved because the settlement that it embodies is fair, reasonable, and consistent with the public interest and the goals of the Clean Air Act. *See Lexington-Fayette*, 591 F.3d at 489 (6th Cir. 2010).[1]

[1] Although the commenters are not parties to this lawsuit, courtesy copies of this Brief will be sent to the lawyers who signed the comments. The commenters have not sought leave to intervene or file any briefs in this case. Thus, the United States

Section 1 of this Brief outlines the legal standards for judicial review and approval of an environmental settlement negotiated by the federal government. Section 2 demonstrates that the proposed Consent Decree satisfies those standards. Section 3 shows that the points made by the commenters do not justify renegotiation, withdrawal, or rejection of the proposed Consent Decree.

Discussion

1. Standard of Review

As the Supreme Court has recognized:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms . . . . Naturally, the agreement reached normally embodies a compromise; 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. Armour & Co., 402 U.S. 673, 681-82 (1971). 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." *United States v. BP Expl. & Oil Co.,* 167 F. Supp. 2d 1045, 1054 (N.D. Ind. 2001).

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does not expect that any other briefs will be submitted in response to this Motion and requests that the Court consider the Motion without delay based on this Brief and the related case filings.

As one court of appeals explained in affirming a district court's approval of a major Clean Water Act consent decree:

> Even the most diligent litigator may conclude that settlement is the best option—if only because it frees up enforcement resources for use elsewhere—and to achieve a settlement a litigant must accept something less than its most favored outcome.

United States v. Metro. Water Reclamation Dist. of Greater Chicago, 792 F.3d 821, 825 (7th Cir. 2015) (cited hereinafter as "*MWRD*").

A district court should approve an environmental settlement like this one if the government shows it is both procedurally and substantively fair, reasonable, and consistent with the public interest and the goals of the applicable law. *See Lexington-Fayette*, 591 F.3d at 489; *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1424 (6th Cir. 1991); *United States v. George A. Whiting Paper*, 644 F.3d 368, 372 (7th Cir. 2011); *BP Expl.*, 167 F. Supp. 2d at 1049. "Procedural fairness concerns the negotiations process, *i.e.*, whether it was open and at arms-length" while "[s]ubstantive fairness concerns concepts of corrective justice and accountability." *BP Expl.*, 167 F. Supp. 2d at 1051. In assessing an environmental settlement's reasonableness and consistency with law, "one of the most important considerations . . . is the decree's likely effectiveness as a vehicle for cleansing the environment." *Lexington-Fayette*, 591 F.3d at 489 (internal quotations omitted). In other words, a settlement should include appropriate relief chosen from among

the "realistically available options" to target the particular environmental problems at issue in the lawsuit. *MWRD*, 792 F.3d at 827.

When considering settlements negotiated by the Department of Justice on behalf of EPA, courts exercise judicial review in a limited and deferential manner. Like other courts, the Sixth Circuit recognizes a strong "presumption in favor of voluntary settlements." *Akzo Coatings*, 949 F.2d at 1436; *accord Whiting Paper*, 644 F.3d at 372. And the argument in favor of judicial deference is "particularly strong" in a case like this because the 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 Coatings*, 949 F.2d at 1436). Thus, "[t]he test is not whether this court would have fashioned the same remedy nor whether it is the best possible settlement." *BP Expl.*, 167 F. Supp. 2d at 1050; *Bd. of Ed. of Shelby Co. v. Memphis City Bd. of Ed.*, No. 11-2101, 2011 WL 13130644, at *2 (W.D. Tenn. Sept. 28, 2011) (citing and quoting *BP Expl.*).[2]

[2] An evidentiary hearing is *not* required in order to evaluate a proposed settlement of an environmental enforcement action. *See United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994) ("requests for evidentiary hearings are, for the most part, routinely denied—and properly so—at the consent decree stage in environmental cases"); *United States v. Metro. St. Louis Sewer Dist.*, 952 F.2d 1040 (8th Cir. 1992).

2. The Proposed Consent Decree Meets the Standards for Judicial Approval.

The Court should approve and enter the proposed Consent Decree because it is fair, reasonable, and consistent with the public interest and the purposes of the Clean Air Act and the Michigan SIP.

A. The Consent Decree is procedurally and substantively fair.

To determine whether a proposed settlement is procedurally and substantively fair, courts look to factors such as "the strength of plaintiff's case, the good faith efforts of the negotiators, the opinions of counsel, and the possible risks involved in the litigation if the settlement is not approved." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d at 1435 (citation omitted).

Generally speaking, courts find procedural fairness where the settlement was negotiated at arms-length among experienced counsel. *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003). In this case, the settlement was the product of over two years of arms-length negotiations by counsel with expertise in environmental law and with substantial assistance from experienced technical representatives from EPA and EGLE, and Defendant, in addition to expert consultants. The Consent Decree contains negotiated compromises by all parties.

The Consent Decree is also substantively fair. The final negotiated

compromise reflects the Plaintiffs' strong case alleging Clean Air Act and Michigan SIP violations, while also acknowledging the risks and costs of litigation. The Decree incorporates the concepts of "corrective justice and accountability" because it requires Defendant to pay a penalty based on its ability to pay and to construct and install the Capture and Control System, as described further below. *See BP Expl.*, 167 F. Supp. 2d at 1051. Furthermore, there is no certainty that the Plaintiffs could obtain a better outcome if the claims were litigated to judgment. This settlement would have the benefit of resolving the governments' claims without protracted litigation, thereby avoiding a potentially significant devotion of time and resources by the Court and the parties. *See Id*. at 1053.

B. The Consent Decree is Reasonable, Consistent with the Goals of the Environmental Statutes, and in the Public Interest.

"[A] district court's reasonableness inquiry, like that of fairness, is a pragmatic one, not requiring precise calculation." *United States v. Charter Int'l Oil Co.*, 83 F.3d 510, 521 (1st Cir.1996). The reasonableness of a consent decree is basically "a question of technical adequacy . . . ." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 89-90 (1st Cir. 1990); *see also Akzo Coatings*, 949 F.2d at 1436. The Consent Decree is reasonable and consistent with the purposes of the Clean Air Act because it requires Defendant to adopt compliance measures that will reduce air pollutant emissions from its torch-cutting operations at its Flint

Facility and are designed to achieve compliance with the relevant SIP provisions, and hold Defendant accountable for its past noncompliance at both the Flint Facility and the Battle Creek Facility.

Torch-cutting emits pollutants in the form of particulate matter ("PM") emissions escaping into the air. Exh. C, Decl. of David Sutlin at ¶ 7. The Complaint and Consent Decree address Defendant's noncompliance with Clean Air Act emission control requirements imposed by the Michigan SIP, which regulates PM through a limit on the "opacity" of visible emissions.[3] The Michigan SIP prohibits Defendant from discharging visible emissions with a density greater than a six-minute average of 20 percent opacity, except for one six-minute average per hour of not more than 27 percent opacity. Mich. Admin. Code, R 336.1301(1). The Consent Decree also addresses Defendant's noncompliance with prohibitions on open burning and requires Defendant to install, maintain, and operate an air-cleaning device in a satisfactory manner. Mich. Admin. Code R 336.1310; R 336.1910.

[3] Opacity is a measure (by percentage) of the amount of light attenuated by PM emissions. Fully transparent stack emissions that do not attenuate light have an opacity of zero percent and opaque stack emissions that block all visible light have an opacity of 100 percent. *Id*.

The injunctive relief provisions in the Consent Decree address Defendant's noncompliance by requiring construction of an air pollution Capture and Control System within seven months following entry of the Decree. Consent Decree, ⁋ 15.a, PageID.102. The Consent Decree sets forth the plans and specifications of the Capture and Control System, which includes an enclosure Defendant constructed in late 2019. The system also includes a pollution control system incorporated into and attached to the enclosure. The pollution control system will use a fan that pulls the gasses containing PM through fabric filters (such as in a baghouse) to trap the PM. It will then discharge the separated PM into containers for collection and proper disposal. Consent Decree, Appendix 1, Plans and Specifications, PageID.156-66. The enclosure sits on a set of railroad tracks so it can move, allowing Defendant to place large metal objects where the torch-cutting will take place, at which point the enclosure can return to its original position to enclose the torch-cutting operation. Consent Decree, ⁋ 14, PageID.166. Sutlin Decl., Exh. C at ⁋ 10.

Until the Capture and Control System is complete, a performance test is satisfactorily completed, and EPA has approved an Operations, Maintenance, and Monitoring Plan ("OM&M Plan") described below, the proposed Decree imposes interim measures to ensure compliance. Defendant must comply with the opacity limitations and open burning prohibition of the Michigan SIP in its torch-cutting

activities and can torch-cut only in the existing enclosure. Consent Decree at ⁋⁋ 13, 14(b). PageID.100-01. In addition, the Decree requires Defendant to: (a) limit torch-cutting to carbon steel, which produces less PM than, for example, cast iron; (b) limit torch-cutting to a single ten-hour shift each day and certain set hours to prioritize torch-cutting during daylight hours; (c) operate a water mist cannon when feasible (such as when temperatures are above freezing), or an equal or greater dust suppression device to suppress any emissions that escape the enclosure; and (d) limit torch-cutting operations to no more than two torch-cutters working simultaneously. If opacity readings demonstrate noncompliance with the 20 percent SIP opacity limit, Defendant must further limit production to one torch-cutter at a time. Consent Decree, ⁋ 14, PageID.101-02; ⁋ 17, PageID.106.

Once the Capture and Control System is completed, the Consent Decree requires Defendant to test its performance, and, following a successful test, submit a performance test report and OM&M Plan for EPA approval. Consent Decree, ⁋ 17, PageID.106. The Decree lists in detail the items to be included in the OM&M Plan.[4] Once the OM&M Plan is approved, Defendant must comply with its terms.

[4] The OM&M Plan must include a description of safety practices; all monitoring requirements; inspection and maintenance schedules for the Capture and Control system; requirements to submit semi-annual reports to EPA and EGLE that will include all opacity readings and other measurements to evaluate system

In addition to these compliance measures, the Consent Decree is also reasonable and in the public interest because it requires Defendant to mitigate excess pollution caused by its past violations. Once the OM&M Plan is approved, Defendant is prohibited from exceeding a six-minute average of 10 percent opacity, which is half of the current SIP limitation of a six-minute average of 20 percent. This extra-stringent 10 percent opacity limitation is further described in Part 3 below. Other operational restrictions include limiting the number of torch-cutters Defendant may use at any one time to no more than the number of torch-cutters used during the performance test, limiting hours of torch-cutting to prioritize torch-cutting during daylight hours to maximize the ability to measure the opacity of Defendant's torch-cutting operation, and requiring Defendant to operate at all times consistent with safety and good air pollution control practices. Consent Decree, ¶ 17(a)-(e), PageID.107-08.

In addition to accepting these forward-looking obligations, the Decree requires Defendant to pay a $150,000 civil penalty for its past non-compliance. This amount is based upon an expert's ability-to-pay analysis of Defendant's financial information. Sutlin Decl., Exh. C at ¶ 9. The proposed Consent Decree also includes typical features to ensure consistent compliance, such as stipulated

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performance; and operational restrictions. *Id*. at PageID.106-07.

penalties for specified violations and a retention of jurisdiction to allow judicial resolution of disputes over Consent Decree compliance, if necessary.

3. The Points Made by the Comments Do Not Justify Withdrawal or Rejection of the Consent Decree.

The United States received two sets of comments. The first was from a British Columbia resident who stated that "[t]he public interest demands air free of anthropogenic pollution, and "[a]ny amount of air pollution is harmful and even deadly." The commenter opined that "the only effective remedy for this would be to order the Defendant to relocate Defendant's facility. . . ." Exhibit A. The comment did not address site-specific matters and its demand for Defendant to relocate is not reasonable, or cost-effective, nor is it required by the Clean Air Act. The comment does not justify withdrawal or rejection of the settlement.

The second set of comments, submitted by Earthjustice, claims that more must be done to strengthen the proposed Consent Decree. The Earthjustice comments proceed in several parts under two main themes: (1) that R.J. Torching's torch-cutting emissions have harmed and continue to harm public health in an environmental justice community of concern, disproportionately burdened by pollution, and (2) the Consent Decree needs to be further strengthened by: (a) shortening the time to complete construction and installation of the Capture and Control System and imposing tighter limitations upon Defendant until the Capture

and Control System is completed; (b) tightening enforcement mechanisms if the company exceeds emissions standards; (c) improving opportunities for public participation and transparency; (d) making requirements to mitigate past harms caused by Defendant's emissions exceedances permanent rather than limited to the term of the Consent Decree; and (e) requiring Defendant to perform certain supplemental environmental projects not otherwise required by law.

a. Environmental Justice

The United States and EGLE agree that the area surrounding the Flint Facility is an area with environmental justice concerns and that air pollution may have the potential to contribute to public health problems. But the United States and EGLE disagree with the commenters' general assertion that the Plaintiffs do not take environmental justice concerns into account and that the settlement does not adequately mitigate harm.

Environmental justice can be advanced "by implementing and enforcing the Nation's environmental and civil rights laws, preventing pollution, addressing climate change and its effects, and working to clean up legacy pollution that is harming human health and the environment." Executive Order 25251, "Revitalizing Our Nation's Commitment to Environmental Justice for All," 80 Fed. Reg. 25,251 (April 26, 2023). The Executive Order notes that "meaningful engagement and collaboration with underserved and overburdened communities to

address the adverse conditions they experience and ensure they do not face additional disproportionate burdens or underinvestment" could advance environmental justice. *Id*.

The United States and EGLE have worked to advance principles of environmental justice by enforcing the violations of the Clean Air Act alleged in the Complaint and resolving those violations with strong injunctive relief provisions in the Consent Decree designed to protect the affected community. In addition, during its enforcement work and settlement of this case, the United States and EGLE have engaged frequently with the local community, including through the following actions:

- In February 2023, EPA distributed a fact sheet informing the community about actions EPA and EGLE were taking to address Defendant's violations. Exh. D. The fact sheet was distributed to over 40 individuals associated with community groups, non-profits, corporations, private organizations, hospitals, and governmental entities and provided contact information to answer questions about the Decree. Sutlin Decl., Exh. C at ⁋ 13. *See* Exh. D.

- On the day after the proposed Consent Decree was lodged, EPA issued a press release describing the settlement, posted the Decree on its website, and emailed it to many recipients, including Detroit and Flint press contacts and local environmental advisory groups. Sutlin Decl., Exh. C at ⁋ 14. *See* Exh. E.

- On December 6, 2023, EGLE published a fact sheet and issued a press release. EGLE distributed the fact sheet and press release to the same people and organizations that EPA had sent the previous fact sheet to and provided contact information to answer questions. EGLE posted the documents on its web site. Sutlin Decl., Exh. C at ⁋ 15. See Exh. F.

- On December 8, 2023, the Department of Justice published notice of the proposed Consent Decree, posted the Decree on its website, and invited public comment. 88 Fed. Reg. 85654. The United States extended the public comment period to allow additional time for the community to participate.

- On January 22, 2024, EGLE held a public meeting, in which EGLE and the United States explained the terms of the proposed Consent Decree, answered questions, and discussed how to submit a public comment. Following the public meeting, EGLE updated its Fact Sheet and posted a recording of the meeting on YouTube. Sutlin Decl., Exh. C at ⁋ 16.

The Consent Decree's injunctive relief and mitigation requirements, along with the governments' engagement with the public, demonstrate that the United States and EGLE have worked toward environmental justice principles in this case.

b. Interim Compliance Measures

The commenters argue that the Consent Decree should prohibit Defendant from torch-cutting at the Flint Facility until the Capture and Control System is complete and Defendant has demonstrated that it has met the applicable regulatory requirements for torch-cutting. (Exh. B at 7). The suggestion targets all emissions, not just emissions that exceed the 20 percent opacity regulation. Such a shutdown of the key component of Defendant's business would go well beyond all applicable requirements and would likely result in significant economic harm to Defendant at the time it is required to spend money to construct the Capture and Control System. Instead, the Consent Decree contains the carefully crafted limitations and requirements described above to ensure that the 20 percent opacity limitation is

met throughout the interim period. Consent Decree, ⁋ 14, PageID.101-02.

The commenters next argue that if Defendant is allowed to torch-cut during the interim period, then the deadline to construct the Capture and Control System should be shortened. *See* Exh. B at 8-9. The proposed Consent Decree's requirement that the Capture and Control system be completed and installed within seven months from the Effective Date was the subject of substantial negotiations. Sutlin Decl., Exh. C at ⁋ 12. *See* Consent Decree, ⁋ 15.a, PageID 102. After understanding the steps that Defendant must take to purchase the components, the time required for the components to be constructed by the manufacturer and shipped to Defendant, the time required to install the completed Capture and Control System, and the possibility of supply interruptions and other factors, Plaintiffs are convinced that a seven-month period following Consent Decree entry to complete construction and installation is reasonable. Exh. C at ⁋ 11.

The commenters also recommend that the Consent Decree be changed to limit Defendant to five hours of operation during summer months and to allow no more than one torch-cutter at a time—regardless of whether Defendant is complying with the opacity standard—as opposed to the Consent Decree's interim restriction of no more than two operators at a time. Exhibit B at 8. The Consent Decree's provisions are reasonable and do not require alteration. As to the first point, Paragraph 14.d limits "torch-cutting to a single 10-hour shift per day and

set[s] hours of torch-cutting to begin no earlier than 6:00 am and end as close as possible to sunset to prioritize torch-cutting during daylight hours" to prevent Defendant from torch-cutting when opacity cannot be ascertained. Consent Decree, ⁋ 14.d, PageID.101.

In addition, the Consent Decree's provision allowing two torch-cutters to work at the same time contains a powerful inducement for Defendant to prevent exceedances of the six-minute average of 20 percent opacity limit, because if that limit is exceeded, Defendant can only use a single torch-cutter at any one time.

The proposed Consent Decree's provisions governing the interim period also require Defendant to operate a water mist cannon when feasible or to employ an equal or greater dust suppression device to suppress any emissions that escape the enclosure. Consent Decree, ⁋ 14.e, PageID.101. Earthjustice's recommendation to use non-toxic chemical stabilizers as dust suppressants when misting is not feasible due to freezing temperatures does not accomplish the purpose of preventing particulate matter emissions to escape from the enclosure. Earthjustice relies upon an internal City of Detroit document that addresses only the use of chemical stabilizers as dust suppressants for solid bulk materials, such as piles of materials being transported in pickup trucks or otherwise stored. Such stabilizers are not designed to control uncaptured emissions from such processes as torch-cutting. Sutlin Decl., Exh. C at ⁋ 17.

c. Corrective Action

Earthjustice notes that throughout the Consent Decree, Defendant is required to take corrective action if a Consent Decree violation occurs. Earthjustice states that the Consent Decree should define what corrective action needs to be taken in response to a violation to ensure that "such action focuses solely on stopping illegal emissions[,]" and that extensions of time to implement corrective action should be denied "unless there is a demonstrable and reasonable justification for delay." Exh. B at 9.

In response, corrective actions and corrective action plans (required in Paragraph 16.d of the Decree and which require EPA approval) are meant to correct failures to meet the opacity standards required by the Decree. Such failures may vary from operational mistakes to a need to adjust the existing control system. Prejudging a solution might prevent Defendant from implementing or proposing a more effective action to resolve a specific problem that caused an exceedance. As the agencies responsible for administering the Clean Air Act, EPA and EGLE have the expertise (and the ability to consult with independent experts, if necessary) to make sure that any corrective action plan will be tailored to resolve problems leading to a Consent Decree violation. Sutlin Decl., Exh. C at ¶ 18. The only provision allowing for an extension of time to complete a corrective action is Paragraph 18.g(5), which authorizes EPA to extend time for a corrective action,

but only "where additional time is necessary to procure parts, material, or labor." Consent Decree, ¶ 18.g, PageID.111.

d. Public Transparency Recommendations

Earthjustice offers three recommendations to improve public transparency, none of which justify rejection of the Consent Decree. First, as a generalized comment not directed to this case, Earthjustice recommends continued public information sessions in communities of environmental justice concern on enforcement and other air quality actions. In this case, EPA and EGLE informed the public in a variety of ways to provide the community with information about the proposed settlement and an opportunity for public input.

Second, Earthjustice recommends that EPA provide the public with at least a 30-day public comment period and a public information session with Flint residents before deciding whether to approve Defendant's OM&M Plan. Such a meeting is not required by law, and in this case, it would be burdensome and cause unnecessary delay. The interim torch-cutting restrictions are replaced by the permanent operating requirements of the Consent Decree only after the OM&M Plan is approved, so quick and efficient review of the Plan is important and in the public interest. Employing their expertise, EPA and EGLE representatives crafted Consent Decree language with detailed requirements for the OM&M Plan. And there were no comments during the public comment period expressing concerns

about the specific requirements in the Consent Decree for an acceptable OM&M Plan.

Third, Earthjustice suggests that monitoring and reporting information regarding the Flint Facility be available to the public. As part of its normal activities, EGLE plans to post on its Air Quality Division's website, Michigan.gov/Air, the following information related to the Flint Facility: the Consent Decree; Inspection Reports; Stack Test Report Executive Summaries; Violation Notices, Responses to Violation Notices and Stipulated Penalty Demands, if any; the final, approved OM&M Plan; and the semi-annual reports Defendant is required to submit under the Decree, including reporting all opacity readings for the pertinent six-month period and other compliance information. Consent Decree, ¶ 17.d., PageID.107. And EGLE intends to directly notify all known interested parties, including those who provided comments during the public comment period and those who attended the public meeting on January 18, when new postings are made. These measures will keep the community well-informed about Defendant's actions under the Consent Decree.

e. Mitigation and Supplemental Environmental Projects

Earthjustice closes its public comments with recommendations for supplemental environmental projects and additional mitigation. Mitigation of past health or environmental harm caused by Clean Air Act violations is a form of

injunctive relief authorized by the Section 113(b) of the Clean Air Act, 40 U.S.C. § 7413(b). *See U.S. v. Cinergy Corp.*, 582 F.Supp.2d 1055, 1061-63 (S.D. Ind. 2008). EPA considers "[l]imiting the amount of future pollutants emitted or discharged (more stringently than legal limits) to address past excesses" as a form of mitigation. U.S. EPA, Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements at 2. (2d Ed., Nov. 14, 2012).[5] The Consent Decree requires mitigation by limiting Defendant's emissions to no more than a six-minute average of 10 percent opacity. Earthjustice is "pleased to see" this limitation, which is half of the applicable SIP limitation of 20 percent, but wants the 10 percent opacity standard be made permanent and remain in effect after the Consent Decree is terminated. However, after the Consent Decree is terminated, the applicable legal requirement will be the 20 percent opacity standard in the Michigan SIP. This standard is both a Michigan regulation and part of the SIP approved by EPA, and it can be changed only by a change in the regulation and approval by EPA as a change in the SIP. *See*: 5 U.S.C. § 553(b)-(d); Mich. Comp. Laws § 24.231, *et seq*. Most importantly, EPA and EGLA are satisfied that the

[5] https://www.epa.gov/enforcement/securing-mitigation-injunctive-relief-certain-civil-enforcement-settlements-2nd-edition.

injunctive relief in the Consent Decree, including applying the 10 percent opacity limit prior to Consent Decree termination will result in real air pollution reductions that mitigate harm from Defendant's past violations.

Earthjustice also recommends that some or all of the $150,000 penalty required by the Consent Decree, which is based upon the Defendant's ability to pay, should be used instead for a Supplemental Environmental Project ("SEP"). A SEP "is an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action." *2015 Update to the 1998 Environmental Protection Agency Supplemental Environmental Projects Policy* at 1.[6] But a settlement with a civil penalty based upon a defendant's ability to pay generally cannot include a SEP due to applicable criteria that are not satisfied here. *Id*. at 33.

In the final analysis, it is important to note that the United States and EGLE cannot impose new or different Consent Decree requirements unilaterally. Any potential change may lead to other compromises, so the overall quality of the settlement would not necessarily be improved. And any effort to renegotiate the

[6] https://www.epa.gov/enforcement/2015-update-1998-us-epa-supplemental-environmental-projects-policy.

settlement would take time and delay the deadlines, such as for the implementation of Defendant's Capture and Control System, which are tied to the date the Consent Decree is entered by the Court. The Court should approve and enter the proposed Consent Decree that the parties negotiated without delay.

Conclusion

For these reasons, the Plaintiffs respectfully request that the Court approve the proposed Consent Decree and enter it as a final judgment in this case.

Respectfully Submitted,

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FOR THE MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES,
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CERTIFICATE OF SERVICE

I, Steven D. Ellis, hereby certify that a copy of the foregoing Brief in Support of Plaintiffs' Joint Unopposed Motion for Entry of Consent Decree was served upon counsel of record through the Court's electronic filing system.

/s/ Steven D. Ellis
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Exhibits:

A. Public Comment – David Pedersen comment
B. Public Comment – Earthjustice comment
C. Sutlin Declaration
D. EPA Fact Sheet (February 2023)
E. EPA Press Release (December 2023)
F. EGLE Press Release and Fact Sheets