

US EPA ARCHIVE DOCUMENT

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

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THE UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	1:13-cv-00317
v.	)	
	)	Honorable Janet T. Neff
LAKE MICHIGAN TRANS-LAKE	)	
SHORTCUT, INC., d/b/a LAKE	)	
MICHIGAN CARFERRY SERVICE and	)	
S.S. BADGER	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM IN SUPPORT OF UNOPPOSED  
MOTION TO ENTER CONSENT DECREE AS AMENDED

The defendant operates the coal-burning passenger and vehicle ferry BADGER between Manitowoc, Wisconsin and Ludington, Michigan, during the months from May through December and has discharged its coal ash into Lake Michigan. The Complaint alleges that discharges from BADGER violate the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The proposed Consent Decree will require BADGER to stop discharging coal ash before the 2015 operating season, reduce ash discharges in the meantime, and pay a civil penalty. Thus, the Consent Decree secures compliance with the Clean Water Act. This motion seeks the Court’s approval and entry of the Consent Decree as amended.

**I. STATEMENT OF THE ISSUE**

An environmental consent decree should be approved if it is fair, reasonable, adequate, and in the public interest. In assessing these factors, district courts accord considerable deference to the government’s balancing of the competing interests present in environmental cases. Having carefully considered the practical constraints, potential risks, and costs of

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litigation, the competing public interests present in this case, and public comments, the United States has concluded that the Consent Decree sets forth a favorable resolution of the claim in the Complaint that appropriately balances the competing interests and requests that the Court enter the Consent Decree, as amended.

## II. BACKGROUND

The proposed Consent Decree was lodged with this Court on March 22, 2013 (Doc. No. 2 to 2-1). The Department of Justice published a notice of lodging of the proposed Consent Decree in the Federal Register on March 27th and invited the public to submit comments on the settlement. 78 Fed. Reg. 18,629 (March 27, 2013). During and shortly after the expiration of a thirty-day comment period, the United States received more than 7,900 comments. The comments reflected the diverse and sometimes competing public interests raised in this case. Among other things, the commenters addressed the importance of ceasing the coal ash discharge; the need to protect Lake Michigan; BADGER's contributions to the local and regional economy; the ferry's importance to the travelling public, including residents and tourists; and the ferry's purported historical and cultural significance. Due to the large volume of comments, the United States is providing the Court with a DVD that contains a copy of the public comments received.<sup>1</sup> The comments are also publicly available at: <http://www.epa.gov/r5water/npdestek/badger/#correspondence>. The United States has prepared a Summary and Response to Comments (Responsiveness Summary), attached to this Memorandum as Exhibit 1. After carefully reviewing the comments, the United States has concluded that the Consent Decree, as amended, is fair, reasonable, consistent with the CWA, and in the public interest.

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<sup>1</sup> Subsequent to filing this Motion to Enter, the United States will move for leave to file the DVD manually as Appendix A to Exhibit 1.

### **A. The Clean Water Act's Regulatory Scheme.**

The Clean Water Act (CWA) prohibits the discharge of any pollutant from a point source to waters of the United States except, as pertinent to this case, in compliance with a National Pollutant Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency (EPA) or an authorized State. 33 U.S.C. §§ 1311(a), 1342. Dischargers may seek authority to discharge pollutants to waters of the United States under either a general permit or an individual permit. An NPDES general permit is an NPDES permit issued under 40 C.F.R. § 122.28 that authorizes a category of similar discharges. A general permit applies the same or similar conditions to all dischargers covered under the general permit. An NPDES individual permit is specifically tailored to an individual facility. Pursuant to CWA Section 309(b) and (d), 33 U.S.C. § 1319(b), (d), the United States may enforce the terms of NPDES permits through civil actions for injunctive relief and civil penalties.

### **B. The General Vessel Permit.**

The relevant NPDES permit in this case is the Vessel General Permit (VGP) issued in 2008. The 2008 VGP authorized the discharge of coal-ash slurry from coal-fired propulsion systems on Large Ferries until December 19, 2012, provided the discharges complied with effluent limitations set forth in Part 5.3.2.3 of the permit. 2008 Vessel General Permit § 5.3.1.1 (Exhibit 2, hereto). That section of the 2008 VGP sets forth parameters for the minimization of coal ash slurry discharge, combustion of coal, type of coal used, location and timing of the discharge and sulfur content. *Id.* § 5.3.2.3. The 2008 VGP also requires that any “discharge must be controlled as necessary to meet applicable water quality standards in the receiving

waterbody or another waterbody impacted by [the] discharges.” *Id.* § 2.3.1. The States of Michigan and Wisconsin set the water quality values for the discharge of mercury-containing effluent into Lake Michigan at 1.3 ng/L mercury. MICH. ADMIN. CODE r. 323.1057 (2006); WIS. ADMIN. CODE NR § 105 (2005).

EPA recently issued the 2013 Vessel General Permit, which will replace the 2008 VGP on December 19, 2013. 2013 Vessel General Permit (Exhibit 3, hereto). The 2013 VGP will not authorize the discharge of coal ash. Before the 2008 Vessel General Permit’s December 2012 sunset on coal ash discharges, LMC submitted an application for an individual permit that would authorize BADGER’s continued discharge of coal ash. As a result of this application, LMC has indicated that they believe that the 2008 VGP, which allowed the discharge of coal ash, is arguably administratively extended as to LMC. 5 U.S.C. § 558(c); 40 C.F.R. § 122.6; 2008 VGP § 1.5.2. The application for an individual permit is pending EPA review. BADGER will not require an individual permit once it ceases discharging coal ash.

### **C. BADGER’s Operations.**

BADGER currently operates from the spring to the fall, transporting passengers, vehicles, and occasional freight between Manitowoc and Ludington. The ferry can carry up to 600 passengers plus 180 autos, or a combination of autos, trucks, tour buses, recreational vehicles, motorcycles, and other vehicles. BADGER traverses Lake Michigan approximately 450 times per year.

BADGER is coal-fired and steam-driven. It burns approximately 12,000 tons of coal per year and discharges approximately 770 tons of coal ash per year. Supplemental Submission by Lake Michigan Carferry in Response to February 24, 2012 Letter from Region 5, U.S. Environmental Protection Agency, 5/22/12, at

<http://www.epa.gov/region5/water/npdestek/badger/pdfs/application/badger-supplemental-submission-for-npdes-permit.pdf/>.

#### **D. The United States' Complaint**

On the same day that the United States lodged the Consent Decree, the United States filed a complaint against LMC, alleging one claim for relief. Complaint ¶¶ 42-46. Specifically, the United States alleges that the coal ash discharges from BADGER during 2012 violated the Michigan and Wisconsin water quality standard for mercury and, therefore, LMC violated Section 301 of the CWA, 33 U.S.C. § 1311, by violating the requirements of the 2008 Permit that require the discharge to meet water quality standards. ¶ 45.

### **III. THE PROPOSED CONSENT DECREE**

#### **A. Deadline for the Cessation of Coal Ash Discharges**

The proposed Consent Decree establishes a timeline for BADGER to stop discharging coal ash. This schedule will eliminate the violations as quickly as possible, while providing LMC with sufficient time to determine the appropriate technology, obtain the requisite approval from the United States Coast Guard, and refit the ferry. The deadline set in the Consent Decree to cease discharging coal ash or coal ash slurry from BADGER is the first day of the 2015 operating season. Consent Decree ¶ 29. To ensure that LMC makes progress toward this deadline, LMC must submit by June 1, 2013, a schedule for the design, construction, and installation of the technology to eliminate the discharge. *Id.* ¶ 30. The schedule must, at minimum, set forth deadlines for completing design, construction, and installation. *Id.* LMC agreed to perform duties scheduled to occur prior to the Effective Date of the Consent Decree. *Id.* ¶ 89. LMC has in fact submitted this schedule in a timely manner even though the Consent Decree is not yet entered. Letter, LMC to Government Counsel (May 29, 2013) (Exhibit 4).

The Consent Decree provides no exception from the established deadlines or other requirements, except for instances of force majeure as defined by the Consent Decree. *See* ¶ 55.

### **B. Interim Effluent Limits**

The proposed Consent Decree also establishes interim effluent limitations for the 2013 and 2014 operating seasons. Consent Decree ¶¶ 31-33 (Doc No. 2-1); Amendment to Consent Decree ¶¶ 31-33 (Doc. No. 11-1). For the 2013 operating season, LMC must reduce the average amount of coal combusted per operating day compared to the 2012 Operating Season. Consent Decree ¶ 32 & App. B. For the 2014 operating season, LMC must reduce the amount of coal ash discharged by 15% as compared to operating season 2013. *Id.* ¶ 33 & App. B. The techniques to minimize the discharge of coal ash include the efficient combustion of coal, the use of coal with an ash content not exceeding 9.5%, and the limiting of discharge quantities to those necessary for the safe and efficient operation of BADGER. *Id.* App. B, § II.A.

Additionally, LMC must minimize the sulfur content of the coal ash discharge by using coal with the lowest sulfur concentration technologically feasible and economically practicable and achievable, but in no event greater than a sulfur content of 1.023%. *Id.* App. B, § II.B. LMC must also exercise best efforts to obtain and use coal with an ash content no greater than 6.25% and a mercury content no greater than .05 parts per million.<sup>2</sup> Amendment to Consent Decree, ¶ 33A (Doc. No. 11-1).

Finally, the Consent Decree prohibits the discharge, except in emergency situations, of coal ash and coal ash slurry (a) less than five nautical miles from any shore; (b) in waters less than 100 feet deep; (c) while BADGER is not underway; and (d) while BADGER is underway at a speed less than six knots. *Id.* App. B, § II.C.

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<sup>2</sup> For the 2013 Operating Season, LMC obtained coal with an ash content of 5.86% and a mercury content of .04 parts per million.

### C. Civil Penalty

The proposed Consent Decree requires that LMC pay a \$25,000 civil penalty plus interest from the date of lodging. *Id.* ¶ 34. This penalty resolves only the violation alleged in the complaint through the date of lodging. *Id.* ¶ 37. LMC is also subject to stipulated penalties for any violations of the Consent Decree. *Id.* ¶ 47.

### D. Post-Lodging Amendments

The public comments contain several suggestions for improvements to the Decree that led to amendments of the Decree. The United States identified four suggestions common to over 6,500 comment letters: (1) the United States should consider increasing the stipulated penalties for ash discharges after the 2015 deadline; (2) the United States should consider greater reductions in coal ash discharges; (3) LMC should report monthly on the coal ash it discharges and that information should be readily available to the public; and (4) the Consent Decree should not allow for any extensions of time past the 2015 deadline for elimination of ash discharges. The fourth suggestion is addressed at Section V(A)(iii) of the Responsiveness Summary. The Amendment to Consent Decree responds to the first three suggestions by:

1. doubling the stipulated penalties from \$3,000 per day to \$6,000 per day for any discharges during the 2015 Operating Season after the first seven days (this change provides a stronger incentive to LMC to ensure that no discharge occurs on or after the first day of the 2015 Operating Season, as required by the lodged Consent Decree);
2. requiring LMC to use a lower ash content coal than what is required by the proposed Consent Decree and adding a requirement that limits the mercury content in the coal to 0.05 ppm (as compared to the coal content requirements in the lodged Consent Decree, this change both reduces the amount of coal ash discharged by BADGER per trip and



ensures that the discharge contains low levels of mercury); and

3. requiring LMC to report on a monthly basis an estimate of the average amount of coal ash discharged per operating day during the reporting month.

#### **IV. SUMMARY OF THE ARGUMENT**

The Consent Decree is the result of good faith, arms-length bargaining between the United States and LMC. As a result of this settlement, discharges from BADGER will cease by the first calendar day of the 2015 operating season.

While some of the comments provided suggested alternatives for achieving compliance with the Clean Water Act, none of the public comments presented facts or considerations indicating that the proposed Consent Decree is inappropriate, improper, or inadequate. Rather, as explained below, the proposed Consent Decree, as amended, is fair, reasonable, consistent with the goals of the CWA, and protects the public interest. Thus, the Court should grant the United States' Motion and enter the amended Consent Decree.

#### **V. ARGUMENT**

##### **A. Standard of Review**

As formulated by the Sixth Circuit, the “criteria to be applied” when a court determines whether to approve a proposed consent decree “are whether the decree is ‘fair, adequate, and reasonable, as well as consistent with the public interest.’”<sup>3</sup> This limited standard of review reflects a public policy that strongly favors settlements of disputes without protracted litigation.<sup>4</sup> Settlements conserve the resources of the courts, the litigants, and the taxpayers and “should . . .

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<sup>3</sup> *United States v. Lexington-Fayette Urban County Government*, 591 F.3d 484, 489 (6th Cir. 2010) (quoting *United States v. County of Muskegon*, 298 F.3d 569, 580-81 (6th Cir. 2002)); see *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991).

<sup>4</sup> *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976).

be upheld whenever equitable and policy considerations so permit.”<sup>5</sup> This is particularly true in disputes involving environmental violations “where voluntary compliance by the parties . . . will contribute significantly toward ultimate achievement of statutory goals.”<sup>6</sup>

Approval of a settlement is committed to the informed discretion of the trial court.<sup>7</sup> Courts, however, usually exercise this discretion in a limited and deferential manner. For example, the Court does not have the power to modify a settlement; it may only accept or reject the terms to which the parties have agreed.<sup>8</sup> Further, in reviewing a consent decree, “the controlling criteria is not what might have been agreed upon . . . nor what the district court believes might have been the optimal settlement.”<sup>9</sup> The court determines “not whether the settlement is one which the Court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute.”<sup>10</sup> Finally, the balancing of competing public 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.”<sup>11</sup> 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

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<sup>5</sup> *Id.* at 1372.

<sup>6</sup> *Kelly v. Thomas Solvent Co.*, 717 F. Supp. 507, 516 (W.D. Mich. 1989) (citations omitted).

<sup>7</sup> *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986); *Donovan v. Robbins*, 752 F.2d 1170, 1176-77 (7th Cir. 1985); *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984).

<sup>8</sup> *Jones & Laughlin Steel Corp.*, 804 F.2d at 351; *Akzo Coatings*, 949 F.2d at 1435; *Officers for Justice v. Civil Serv. Comm’n and County of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982).

<sup>9</sup> *United States v. Cannons Eng’g Corp.*, 720 F. Supp. 1027, 1036 (D. Mass. 1989) (citations omitted), *aff’d*, 899 F.2d 79 (1st Cir. 1990).

<sup>10</sup> *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990); *see Officers for Justice*, 688 F.2d at 625, 630; *Thomas Solvent Co.*, 717 F.Supp. at 515.

<sup>11</sup> *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981).

behalf of a federal administrative agency like EPA[,] which enjoys substantial experience in the environmental field.”<sup>12</sup> Thus, where an agency committed to the furtherance of the public interest has negotiated an agreement, there is a presumption of validity.<sup>13</sup>

**B. The Proposed Consent Decree is Fair, Reasonable and Adequate, and Consistent with the CWA and the Public Interest.**

The proposed Consent Decree meets the three-part test for district court approval of a settlement: The decree is fair, reasonable and adequate, and consistent with the CWA and the public interest. Accordingly, the Court should enter the Decree. This part of the brief addresses the public comments as part of the analysis of whether the proposed Decree meets the three-part test. A more detailed summary of the public comments and responses to the specific issues raised in the comments are set forth in the Responsiveness Summary, Ex. 1.

1. The Proposed Consent Decree is Fair.

To determine whether a proposed settlement is procedurally and substantively fair, courts look to factors such as “the strength of the plaintiff’s case, the good faith efforts of the negotiators, the opinions of counsel, and the possible risks involved in litigation if the settlement is not approved.”<sup>14</sup> Generally speaking, courts find procedural fairness where the settlement was negotiated at arm’s length among experienced counsel.<sup>15</sup>

In this case, the settlement is the result of good faith, arms-length bargaining between the plaintiff and the defendant. Throughout the settlement process, EPA and the Department of

<sup>12</sup> *Lexington-Fayette*, 591 F.3d at 490-91 (quoting *Akzo Coatings*, 949 F.2d at 1436).

<sup>13</sup> See *United States v. City of Miami, Fla.*, 614 F.2d 1322, 1333 (5th Cir. 1980); *Williams v. City of New Orleans*, 729 F.2d 1554, 1582 (5th Cir. 1984); *E.E.O.C. v. Wildwood Industries, Inc.*, No. 08-cv-1256, 2009 WL 3614330 at \* 1 (C.D. Ill. Oct. 28, 2009)(“A consent decree entered into by the EEOC, the federal agency charged with enforcement of Title VII, is entitled to a presumption of validity.”).

<sup>14</sup> *Akzo Coating*, 949 F.2d 1435 (citation omitted).

<sup>15</sup> See, e.g., *United States v. Grand Rapids*, 166 F. Supp.2d 1213, 1219-22 (W.D. Mich. 2000); *United States v. Montrose Chemical Corp. of California*, 827 F. Supp.1453, 1458 (C.D. Cal. 1993).

Justice engaged in vigorous negotiations with LMC's attorneys, who are sophisticated and experienced environmental counsel. The negotiations were technically detailed, focusing on a realistic schedule for eliminating all coal ash and coal ash slurry discharge from BADGER as quickly as possible. A considerable amount of the negotiation also dealt with the feasibility of reducing coal ash and coal ash slurry discharge in the 2013 and 2014 operating seasons. The negotiations involved sharing of information and exchanges of draft settlement documents, resulting in a mutually acceptable final document. Those robust negotiations provide ample support for the good faith efforts of the parties.

Further, the Decree reflects the United States' careful and informed assessment of the merits of the government's claims; the costs, risks, and delays that litigation would entail; and the benefits that will accrue (in fact are already accruing) by the reduction and eventual elimination of BADGER's coal ash and coal ash slurry discharges. Although the United States believes that it would ultimately prevail on the claims alleged in the Complaint, litigation always involves risk. Moreover, even if the United States were to prevail on the claims in the Complaint, it is doubtful that litigation would achieve cessation of the coal ash discharges from BADGER any sooner than now required by the Consent Decree. In fact, LMC has already begun complying with the terms of the Consent Decree by, among other things, submitting a schedule for the design, construction, and installation of coal ash retention technology to eliminate the discharge of coal ash and coal ash slurry from BADGER. Exhibit 4.

Also, in evaluating a settlement under environmental statutes, fairness should be considered in light of the effect of the decree on non-signatories—in this case, the public and LMC's competitors. *Akzo Coatings*, 949 F.2d at 1435. The citizens of Ludington and Manitowoc, as well as citizens of other communities surrounding Lake Michigan, will benefit

from the settlement because LMC will be required to cease discharging coal ash and coal ash slurry to this important water resource, while still providing its services to these communities. The cessation of discharge will improve the water quality of Lake Michigan. Many comments addressed the economic benefit provided by BADGER to the local communities as well as the need for the services provided by the ferry. *See e.g.*, 000655; 000239; 003020; *see also* Responsiveness Summary Part III (listing comments from civic leaders, government officials, and businesses). Because the Consent Decree will not disrupt these services, the communities will continue to accrue the benefits derived from BADGER's operations. Furthermore, the elimination of the ash discharge will ensure that LMC gains no competitive advantage by violating the CWA. The schedule specified in and required under the Decree is reasonable and appropriate, and, as noted, compliance with the Decree is already underway.

The comments questioning the Consent Decree's fairness focused largely on LMC's past conduct rather than on what is feasible going forward. For instance, one set of comments suggested that LMC's alleged past success in obtaining exemptions from regulatory requirements should disqualify LMC from any extension of the 2008 VGP's December 2012 limit on Large Ferries' authority to discharge coal ash. *See e.g.*, 005025. Comments also argued that exemptions granted to LMC in the past give LMC an unfair advantage over its competitor, another ferry, and evince a general strategy by LMC to continue to avoid regulation of its discharges. *See e.g.*, 004925. The Consent Decree, however, does not extend the 2008 Vessel General Permit's December 2012 limit; nor does the Decree modify the 2008 or 2013 Permits in any way. Consent Decree ¶ 42. It also expressly preserves the United States' right to seek relief under the Clean Water Act for any violations not stated in the Complaint. *Id.* ¶ 38. Rather, the Decree requires the cessation of coal ash and coal ash slurry discharges, provides for severe

consequences (stipulated penalties) should LMC fail to comply, and assesses a penalty for past violation. Furthermore, the Consent Decree does not displace federal, state or local law. *Id.* ¶ 42. And compliance with the terms of the Consent Decree does not constitute a defense to applicable environmental laws. *Id.* For example, the \$25,000 civil penalty only covers the violation alleged in the Complaint through the date the proposed Consent Decree was lodged with the Court. *Id.* ¶ 37.

Finally, it is not for the United States or this Court to rehash the 2008 VGP's authorization of the discharge of coal ash and coal ash slurry from BADGER until December 2012.<sup>16</sup> That permit was issued years ago and was subject to judicial review then. The Consent Decree's injunctive relief addresses LMC's future conduct under the facts presented here and now.

A second set of comments also focused on the past, suggesting that LMC received special treatment from regulators and therefore must be receiving special treatment from the government now. These comments argue that LMC should be treated more harshly in this case. Some even suggest that BADGER should be forced to stop operating immediately. *See, e.g.*, 000048. None of the comments cite evidence of improper dealing between LMC and EPA in the past, or between LMC, EPA, and the Justice Department now. Rather, the comments draw conclusions based on the fact that LMC has in the past obtained permitting and regulatory exemptions that allowed for the continued discharge of coal ash, and were in the commenters' view unduly favorable to LMC. *See, e.g.*, 0011646. As noted above, this is neither the forum nor the correct proceeding to challenge regulatory decisions made years ago. And, as to the proposed Consent

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<sup>16</sup> *See Natural Resources Defense Council v. Outboard Marine Corp.*, 702 F. Supp. 690, 694 (N.D. Ill. 1988); *see also United States v. Southern Union Co.*, 630 F.3d 17 (1st Cir. 2010) (holding that defendant may not use enforcement action as venue to seek judicial review of government's authority to issue regulation).

Decree, the terms were the product of negotiations conducted at arm's length between parties with sharply conflicting interests.

Finally, a third set of comments related to fairness suggests that this enforcement case unfairly targets LMC. Some of these comments suggest that the settlement is too harsh, *see, e.g.*, 004914, with some going so far as to say that the United States should have not taken any enforcement action at all. *See, e.g.*, 011640. Others strenuously object to any requirement that would change BADGER's operation. *See, e.g.*, 011637, 002759. The reasons offered for these suggestions vary widely. For example, some comments argue that the environmental harm from BADGER's coal ash is minute compared to other sources of pollution in Lake Michigan (such as power plants and wastewater treatment plants). *See, e.g.*, 011644. Others voice a general objection to governmental regulations of private enterprise. *See, e.g.*, 000127. Still others speculate that the enforcement action reflects the alleged undue influence of BADGER's competitor over elected and other government officials. *See, e.g.*, 000291. None of these comments merit withholding approval of the Consent Decree.

The relative harm from the BADGER compared to other sources does not negate the fact that BADGER contributes to pollution in Lake Michigan. Coal ash is a mercury-containing pollutant. It is well within the United States' enforcement discretion to pursue this action despite the possibility that LMC's violations may be smaller in scale and frequency than those of other sources.<sup>17</sup> With respect to the over-regulation arguments, it is the duty of the government to enforce the laws as written. With respect to the competitor's influence, none of the comments

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<sup>17</sup> *See, e.g., Sierra Club v. Whitman*, 268 F.3d 898, 903 (9th Cir. 2001) ("To leave enforcement decisions to the discretion of the Administrator is not to relieve the EPA of its mission to achieve compliance with the Act; it simply means that the EPA must decide, within the limits set by Congress, the most effective way to accomplish the objectives of the Act as a whole."); *Dubois v. Thomas*, 820 F.2d 943, 946-47 (8th Cir. 1987) (holding that EPA has discretion in allocating its resources to the investigation and pursuit of enforcement actions). *See also Ohio Public Interest Group, Inc. v. Whitman*, 386 F.3d 792, 797 (6th Cir. 2004) (citing *Sierra Club v. Whitman*, 268 F.3d 898, 900-903 (9th Cir. 2001), for the proposition that EPA has discretion in the use of its enforcement authority).

has provided credible evidence of inappropriate considerations influencing the conduct of this case. In fact, the Consent Decree was negotiated at arm's length between attorneys for EPA, the Department of Justice, and LMC. In sum, the decision to pursue this action, and whether taking action against some other hypothetical violator would be a better use of resources, are not appropriate questions for this Court's review here.<sup>18</sup>

2. The Proposed Consent Decree is Reasonable and Adequate

The most important criterion for the Court to consider in determining whether the Consent Decree is reasonable is its "likely effectiveness as a vehicle for cleansing the [environment]." *Akzo Coatings*, 949 F.2d at 1437. The proposed Consent Decree requires that LMC cease discharges of coal ash and coal ash slurry from BADGER by the first day of the calendar year 2015 operating season.

Putting an end to the ash discharge will be good for the environment. While the United States is confident in its case, some litigation risk always exists. Moreover, it is not at all clear that litigation would result in the cessation of discharge as quickly as the proposed Consent Decree. The same goes for the 15% reduction in 2014 discharges and the other interim discharge limits.

In addition, LMC has applied for an individual permit to continue its coal ash discharges. The terms of this settlement agreement require LMC to cease these discharges in approximately 20 months. If BADGER ceases the discharge of coal ash, LMC will not need an individual permit. In the meantime, the decision on LMC's permit application is still pending and LMC has indicated that they believe that, arguably, the 2008 VGP, which allowed the discharge of coal ash,

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<sup>18</sup> *Heckler v. Chaney*, 470 U.S. 821, (1985) (agency's refusal to undertake enforcement is presumptively unreviewable); *Friends of Cowlitz v. F.E.R.C.*, 253 F.3d 1161, 1170-71 (9th Cir. 2001) ("[D]ecisions not to enforce are typically committed to the agency's absolute discretion, such that a court would have no meaningful standard against which to judge the agency's exercise of discretion.") (internal citations omitted).



is administratively extended by LMC's application for the individual permit. Some comments suggested that EPA could cease the discharges immediately by simply denying LMC's permit application. *See, e.g.*, 003177. However, LMC would have the opportunity to appeal a decision to deny its application. Litigating the permit decisions could consume a tremendous amount of the parties' (and the Court's) limited resources over several years. The resolution in this settlement—which precludes the need for a permit, eliminates discharges in a short timeframe, and minimizes discharges in the interim—is in the public interest because it will achieve a better and more timely resolution of this matter while reducing the impact on government resources.

3. The Proposed Consent Decree is Consistent with the Clean Water Act and the Public Interest

The Consent Decree is consistent with the CWA. As explained above, the overarching goal of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). This Decree furthers that goal by requiring LMC to come into compliance with the Act and cease discharging coal ash and coal ash slurry from BADGER. The terms are set forth in an enforceable mechanism with appropriate deadlines, stipulated penalties for non-compliance with the Consent Decree, and dispute resolution provisions to ensure full and timely compliance with its terms.

The Sixth Circuit has sometimes articulated the third prong of a court's evaluation of a consent decree as whether the decree is “consistent with the public interest.”<sup>19</sup> In assessing whether a proposed settlement is in the public interest:

The court should . . . bear in mind the flexibility of the public interest inquiry: the 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

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<sup>19</sup> *See United States v. County of Muskegon*, 298 F.3d 569, 580-81 (6th Cir. 2002).

confirm that the resulting settlement is “within the reaches of the public interest.”<sup>20</sup>

Requiring the cessation of discharge before the 2015 operating season strikes a reasonable balance in light of the competing interests and circumstances in this case, including the practical litigation considerations discussed above; the lead time needed to modify BADGER to cease the ash discharge;<sup>21</sup> and the potential loss of the economic and other benefits that BADGER provides to the regions surrounding the port towns of Manitowoc and Ludington, *see, e.g.*, 000320, travelers, *see, e.g.*, 000031, 005289, and the shipping industry. *See, e.g.*, 000794.

A number of comments expressed concern that the Consent Decree might not be in the public interest because it allows for the continued discharge of coal ash and coal ash slurry during the operating seasons of 2013 and 2014. *See, e.g.*, 000007, 002947. The basis for this concern is the harm caused to Lake Michigan by coal ash, which contains, among other things, mercury. The United States recognizes this concern and agrees that the discharge should stop and has negotiated, in good faith, to cease these discharges as soon as reasonably practical. The Consent Decree serves the public interest in the many ways discussed above, by requiring LMC to cease the discharge of coal ash and coal ash slurry from BADGER before the 2015 operating season, minimize discharges in the interim, pay a penalty for past violations, and ensure compliance with the CWA. Accordingly, the Decree more than meets the requirement that it be “within the reaches of the public interest.”<sup>22</sup>

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<sup>20</sup> *United States v. Microsoft Corp.*, 56 F.3d 1448, 1460 (D.C. Cir. 1995) (citations omitted).

<sup>21</sup> Letter, LMC to EPA Region 5 (August 16, 2012) (Exhibit 5); Exhibit 4.

<sup>22</sup> *Microsoft Corp.*, 56 F.3d at 1461-62.

**VI. CONCLUSION**

The Consent Decree, as amended, strikes an appropriate balance of the public interests, and provides for the timely end of coal ash discharges from BADGER. The settlement is fair, reasonable, consistent with the Clean Water Act, and protective of the public interest. The United States respectfully requests that the Court approve and enter the proposed Consent Decree, as amended.

Respectfully submitted,

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September 13, 2013

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Unopposed Motion to Enter Consent Decree as Amended was served on the following individuals on this date, by electronic mail and first class U.S. Mail, in accordance with Section XIII of the proposed Consent Decree in this case:

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