

US EPA ARCHIVE DOCUMENT

Exhibit 1

Summary and Response to Comments

INTRODUCTION

On March 22, 2013, the United States lodged a Consent Decree with the United States District Court for the Western District of Michigan in Civil Action No. 13-00317, in order to resolve claims by the United States against the defendant, Lake Michigan Trans-Lake Shortcut, Inc. (“LMC”), for alleged violations of Section 301 of the Clean Water Act (“CWA”), 33 U.S.C. § 1311. On March 27, 2013, the Department of Justice published a notice of lodging of the proposed Consent Decree in the Federal Register, and invited the public to submit comments on the settlement for a period of thirty days. *78 Federal Register 18,629* (March 27, 2013). At last count, the United States received 7,932 comments pursuant to the Federal Register Notice. This Responsiveness Summary sets forth the United States’ Responses to the issues raised in the comments. The comments are provided in a DVD filed with this Court as Appendix A hereto. The comments are also publicly available at:
<http://www.epa.gov/r5water/npdestek/badger/#correspondence>.

FORMAT OF THE RESPONSIVENESS SUMMARY

The United States organized the issues raised in the comments by source and topic (as depicted in the topic headings), and summarized individual points in italics, referencing specific comments as examples by Bates numbers. Additionally, the United States provides a rough count of the number of comments which reference each issue.¹ The rough counts are provided in square brackets. To the extent a response is appropriate, the United States provides responses in regular font.

¹ The United States reviewed every comment received and made a good faith effort to categorize each issue raised in each comment. However, 7,932 comments were received and there is the possibility that some comments were not categorized properly, not counted, or double counted.

I. Citizen Comments in Support of Consent Decree

A. The Consent Decree is Fair, Reasonable, and/or in the Public Interest [160]

This is a good balance between the environment and the economy. (002984). It is reasonable to allow a small company some latitude in coming into compliance. (000001). Additional two years with a firm deadline is fair. (000012).

B. Good to Stop the Discharge of Coal Ash [127]

Value the service provided by LMC but important that pollution comes to an end. (000210; 000216).

C. Approve the Consent Decree but No More Extensions [61]

Allowing LMC to continue operation of BADGER is acceptable but should not give any more extensions to LMC for coal ash discharge. (000835).

The United States agrees that LMC must cease discharging coal ash from BADGER. The proposed Consent Decree does not provide an extension of any permit. The terms of the Consent Decree establish a deadline for LMC to cease discharging coal ash from BADGER. These terms are enforceable in court. By reaching an agreement, the parties avoid the costs and potential delay associated with litigation.

II. Citizen Comments Supporting BADGER's Continued Operation

A. BADGER is Important as Part of History and Culture of Great Lakes [647]

BADGER's coal-fired engine is a reminder of the Great Lakes' maritime past and is part of the local culture. (000091; 000046). BADGER should be allowed to continue using coal and dumping coal ash as a lesson on how engines operated in the past. (011637). As the last of its kind, BADGER and its method of operation should be preserved. (002352).

The historical significance of BADGER does not negate the requirement to comply with all federal laws, including the Clean Water Act. Resolution of LMC's Clean Water Act obligations through this Consent Decree will not require LMC to cease the use of coal as a fuel source for BADGER. In fact, LMC has already provided a schedule for the installation of coal ash retention technology in order to meet the requirement that coal ash discharges cease prior to the 2015 operating season. See Exhibit 4. Under this plan, BADGER will no longer discharge coal ash by retaining the coal ash on board for subsequent land disposal. The Consent Decree does not address whether or not BADGER will continue to operate and how the vessel engines will be run. However, LMC has indicated that they will continue to operate BADGER as a coal-fired steam-driven ferry.

B. BADGER's Operations are Important to the Economy and Discontinuation of its Service Would Hurt the Economy [613]

BADGER is important to the local economy, which relies heavily on the visitors brought by BADGER. (000131). When BADGER's service was discontinued for two years, there was an adverse impact on the economies of the port cities. (000655; 002460; 005265). BADGER provides a reliable method for transporting goods such as wind turbine parts manufactured in Wisconsin. (000200; 002631). The operation of BADGER provides jobs both directly and indirectly to the port cities. (000239; 000807; 002124; 000596).

The United States recognizes the importance of BADGER's operations to the port cities and surrounding areas in Wisconsin and Michigan. The United States also recognizes the role that BADGER serves in commerce, transporting freight, wind turbines, and other goods between the states. The proposed Consent Decree will not preclude BADGER from continuing to operate and provide economic benefits to the communities of Ludington, MI and Manitowoc, WI, as well as other communities that rely on the people and goods transported on BADGER.

The CWA, however, makes it unlawful to discharge unpermitted pollutants to waters of the United States and the proposed Consent Decree ensures that BADGER will achieve compliance with this legal obligation without the costs, risks, and delay associated with litigation. In light of all of these considerations, the proposed Consent Decree sets a reasonable schedule to ensure that LMC ceases discharging coal ash from BADGER into Lake Michigan.

C. BADGER is Important to Tourism [451]

BADGER is a major attraction for the area. (005194).

See response to II.B.

D. Losing BADGER Would Be a Hardship [33]

I rely on BADGER to visit family/friends. (000031; 000798). I rely on BADGER as transportation to medical treatment. (003020; 003366).

The United States is sympathetic to people for whom shutting down BADGER would create a hardship. See response to II.B.

E. BADGER is More Convenient Than Driving [444]

Taking BADGER is faster than driving. (002964). Can avoid Chicago and Milwaukee traffic, as well as that of other heavily traveled areas. (002964; 003329). People save money by taking BADGER. (004993).

See response to II.B.

F. BADGER is Important to My Family and/or My Family's History/Traditions [318]

I have many fond family memories taking BADGER. (000046; 000200; 000305). Trip on BADGER is a regular family vacation. (002844; 003198). Visit family via BADGER. (005283; 000640).

See response to II.B.

G. LMC should be left alone

- i. Ash discharge is not bad for the environment or has not hurt Lake Michigan. [245]

Long history of dumping coal ash in Lake Michigan. (000137; 002056). BADGER's discharge contributes less than an ounce of mercury per year. (002782; 003251). Coal ash is an inert, non-polluting substance. (002719; 000091).

The purpose of the CWA's discharge prohibition is to protect the waters of the United States. Under the CWA, it is unlawful to discharge any pollutant, including BADGER's coal ash and all its constituents, from a point source (BADGER) to a water of the United States (Lake Michigan) without authorization, such as an NPDES permit. Liability for violations of the CWA is strict liability. Thus, LMC must comply with this legal obligation regardless of the extent or degree of harm caused or contributed by its unpermitted discharge of pollutants.

- ii. More important environmental problems [197]

Government should focus attention on more important environmental problems. (002396; 002517). Lake Michigan faces threat of Asian carp and other invasive species. (002944). There are much bigger sources of pollution, such as power plants and sewage overflows from Chicago and Milwaukee. (000224; 002427).

The existence of other environmental problems and other potential violations of environmental law does not negate the fact that the United States believes it has cause for an enforcement action in this case.

- iii. BADGER is good for the environment because it takes vehicles off the road and, thus, reduce emissions [143]

Passengers on BADGER would otherwise have to drive around Lake Michigan, causing increased emissions to the air. (002349; 011613). Cargo shipped on BADGER would otherwise have to be trucked around the lake, thus producing more emissions. (005283).

Because this is a case involving CWA violations, alleged air quality benefits from BADGER's operation cannot be the driving force in determining the relief in this case. And while we recognize that having fewer vehicles on the roads is beneficial to the public, no comment has provided any scientific evidence comparing BADGER's emissions with the

emissions saved by cars and trucks using BADGER, nor how this concern relates to the CWA's prohibition against discharges to water. Indeed, other comments, including those of Lake Express (LMC's competitor), claim that the overall emissions from BADGER outweigh any benefit from reduced emissions from road vehicles using BADGER. (002847; 004925). *See also* 000153 (BADGER customer complaining of smoke and coal dust on car); 000192 (Ludington resident complaining of coal ash deposited on boats in marinas and on playground equipment); 002947 (BADGER customer "appalled by the thick black smoke that billowed from the vessel"); 003012 (BADGER customer complaining that "the air around the ship stank of burned ash . . .").

iv. Statements about BADGER's harm are exaggerated or lies [96]

Statements made by LMC competitors and/or Senator Durbin are exaggerated or lies. (000135). These statements are being made to eliminate the competition. (000291; 002998).

The United States, through the proposed Consent Decree, is addressing the facts and law of this case. The motives of other parties are not relevant and only highlight the uncertainty in this case.

v. Should not collect a penalty [7]

LMC had a permit and did nothing that justifies a penalty. (004914).

It is appropriate to seek a penalty in this case because, as alleged in the complaint, the United States has concluded that LMC violated the water quality standards of the 2008 VGP, and, therefore, violated the Clean Water Act. Civil penalties are an important component in settlements involving violations of environmental regulations. Civil penalties not only serve to discourage future violations at the defendant's facility, but also have a deterrent effect on the regulated community at large.

vi. Government should provide funding to BADGER [20]

The Government should assist LMC in its effort to convert BADGER by providing funding or grants. (004914; 000216).

Providing funding to a regulated entity for compliance efforts is not the function of an enforcement action. LMC has the responsibility for complying with the law.

vii. Air pollution from BADGER is not bad [15]

Enforcement is not warranted because BADGER's contributions to air pollution are relatively small and not the cause of air quality problems. (000029; 005041).

This is a CWA case. BADGER's air emissions are not the cause of this enforcement action.

viii. Enforcement action and/or the law go too far [91]

This case is an example of the government exceeding its responsibilities and meddling with a private enterprise. (000148; 000149). This action is misguided. (002692; 011644). This case is a waste of taxpayer money. (000087; 011640).

The CWA and its implementing regulations establish a framework that ensures the protection of our Nation's waters through regulation of sources of water pollution. This enforcement action and settlement are consistent with the CWA.

III. Support from Community Groups/Associations, Civic Leaders, Government Officials, and Local Businesses

During the comment period, the United States received many comments from community groups or associations, civic leaders, religious leaders, and government officials in support of the entry of the Consent Decree. These comments generally echoed the points made by individual citizens in support of entry of the Consent Decree. Following is a list of the community groups/associations, civic leaders, and government officials that submitted letters in support of entry of the Consent Decree:

- A. *Wednesday Night Supper Group of the United Methodist Church* (41 signers), *see* 011624 (BADGER is part of community heritage and tourist related services help sustain local economies).
- B. *Traverse City Convention and Visitors Bureau*, *see* 011665.
- C. *Board of Directors, Holy Family Memorial, Inc.*, *see* 011634 (100,000 passengers/season with a \$35M annual economic impact to region).
- D. *Executive Director/CEO, Ludington Area Convention and Visitors Bureau*, *see* 011638 (“icon in our community” that provides \$21M economic impact in Ludington, MI alone).
- E. *Bill Anderson, Chairman, Ludington/Mason County Cultural Economic Development Task Force*, *see* 011623 (BADGER is “an icon any city would treasure.”).
- F. *President, Manitowoc Area Visitor & Convention Bureau*, *see* 000268 (BADGER is “economic lifeline” to Manitowoc and shutting it down would be devastating).
- G. *Mason County Growth Alliance*, *see* 002769.
- H. *Executive director, South Haven Area Chamber of Commerce*, *see* 002820.
- I. *President, Lakeshore Technical College*, *see* 002949 (Consent Decree provides balance between environmental protection and economic importance of BADGER).

- J. *CEO, Wisconsin Maritime Museum, see* 003045-48 (National treasure that brings people to nature. Lake Express is lobbying blatantly.).
- K. *Kid's Campaign to Save our BADGER* (130 signers), *see* 003322 (“We love BADGER and we want it to sail for a long time. Please help us.”).
- L. *Michigan Works!*, *see* 005248 (\$35M/year in annual economic impact).
- M. *Economic Development Corporation of Manitowoc County, see* 005249 (BADGER operations bring 200 jobs directly and 500 indirectly).
- N. *Washington Island Ferry Line, Inc., see* 005251.
- O. *Mason County Manufacturers Association* (17 members), *see* 005255.
- P. *President and CEO, Ludington and Scottville Area Chamber of Commerce, see* 005258 (Shutting down BADGER “would be devastating to the economic recovery in many communities in the upper Midwest, including the Ludington area.”).
- Q. *Executive Director, The Chamber of Manitowoc County, see* 005259 (BADGER is important to Manitowoc County’s economy. BADGER operations contribute \$14M/year to City of Manitowoc economy).
- R. *President, Mason County Historical Society, see* 003192 (railroad and its carferries were instrumental to the economic and social development of Mason County and the City of Ludington; “imperative to the economic and cultural well-being of this community that the SS Badger continues to run”).
- S. *President, Lake County Historical Society, see* 005255 (Historical significance is important to the nation. Last surviving coal-fired steamship in the United States.).
- T. *Executive Director, Ludington Area Center for the Arts, see* 000760 (BADGER “is a significant, historic vessel and integral to the local culture of Ludington”; BADGER “essential to the local economy”).
- U. *Pastor, Grace Congregational UCC, Two Rivers, Wisconsin, see* 002108 (BADGER is “a vital portion of our community’s economy.”).
- V. *Pastor, St. James Episcopal Church, Pentwater, Michigan, see* 002117 (BADGER is a reputable service; allow passage of the Consent Decree).
- W. *Supervisor, Pere Marquette Charter Township, MI, see* 000189 (Negative environmental effects are overstated.).

- X. *City Manager, City of Ludington, MI, see 001748* (BADGER represents identity of community. It brings 700 direct and indirect jobs to Ludington and 140,000 visitors/year.),
- Y. *U.S. Rep. Bill Huizenga, see 002044* (Consent Decree is best opportunity to end the discharge”).
- Z. *U.S. Rep. Thomas E. Petri, see 002737* (Important transportation link.)
- AA. *Mayor, City of Manitowoc, WI, see 002958.*
- BB. *Common Council, City of Manitowoc, WI, see 002959* (Important to Broadwind Energies, which manufactures wind turbines. Agreement “is in the best interest of all parties involved.”).
- CC. *Resolution, Board of Commissioners, Mason County, MI, see 005213.*
- DD. *U.S. Rep. Dan Benishek, MI, see 005214.*
- EE. *Supervisor, Township of Pentwater, see MI 005215* (“The Carferry provides a unique and alternative traveling experience for visitors and residents of our community Our economy is dependent upon summer recreation opportunities and such transportation services.”).
- FF. *Village President and Village Manager, Village of Pentwater, MI, see 005216* (“Pentwater’s economy would feel a significant negative impact if the S.S. BADGER is forced to stop operating. . . . Ludington has been the home of the S.S. BADGER, as well as many other coal-fired lake ferries and freighters, since 1874. There is NO evidence that Lake Michigan has been harmed by these ships. Fishing is still great!”).
- GG. *Resolution, Mayor and Common Council, City of Manitowoc, WI, see 005218-005221* (Tourism dollars are injected into our community throughout the sailing season.).
- HH. *10 Letters from Council Members and City Manager, City of Two Rivers, WI, see 005222-0000529 & 005416-005417* (BADGER carries large machinery and wind tower components. Consent Decree strikes a fair balance between environmental protection and the economic interests of the region.).

In addition, representatives or employees of the following businesses, among others, supported BADGER’s continued operation:

- The Fitness Store, Manitowoc, WI, see 000008.*
- Captain, FinPower Charters, Inc., Ludington, MI, see 000257.*
- B.S. Metallurgy, Manitowoc, WI, see 000282.*

John C. Persson, D.O., FACOI, Ludington, MI, see 000546.
Anne Rolecki, DDS, and Michael Burghardt, DDS, Ludington, MI, see 000553.
Cartier Mansion Bed and Breakfast & Event Center, Ludington, MI, see 000596.
Robert D. Andrews, Attorney at Law, Ludington, MI, see 000634.
Vista Villa Motel, Ludington, MI, see 000656.
Menasha Packing Co., Neenah, WI, see 000657.
Carolyn Mack Tours, LLC, Portage, MI, see 000706.
Countyline Trucking LLC, Pentwater, MI, see 000794.
WMOM Radio, Ludington, MI, see 000866.
Jack Jones Insurance, Ludington, MI, see 000867.
David F. Betz, Attorney, Ludington, MI, see 000872.
Area Sales Manager, Harris Corporation, MI and WI, see 002124.
Super 8, Manitowoc, WI, see 002128.
Harbor Yacht Sales, Holland, MI, see 002130.
Dooge Veneers, Grand Rapids, MI, see 002162.
JKL Tours LLC, Willououghby, OH, see 002164.
Sales Representative, Spruce Computer Systems, Reedsville, WI, see 002167.
James Street Station Restaurant, Ludington, MI, see 002245.
Lead Brewer, Jamesport Brewing Co., Ludington, MI, see 002379.
Lang Tool Co., Beaverton, MI, see 002693.
Applewood Kennels, Hart, MI, see 002845.
Ludington Gallery and Gifts, Ludington, MI, see 004884.
Todd and Brad Reed Photography, Ludington, MI, see 003285.
Change Parts, Inc., Ludington, MI, see 003314.
Ludington Daily News, Ludington, MI, see 003400.
Cub Radio, Inc. (WCUB, WLTU), Manitowoc, WI, see 005250.
Perkins Restaurant and Bakery, Manitowoc, WI, see 005257.
Viking Arms Inn, Ludington, MI, see 005265.
Thomson-Gordon Group, Burlington, ON, Canada, see 011209.
Captain, SS Badger, Traverse City, MI, see 011631.

IV. Citizen Comments Against the Entry of the Consent Decree

A. The Consent Decree should not be approved [101]

As stated, this comment simply states an opinion without providing a rationale. The Consent Decree ensures that LMC will come into compliance with the CWA and will cease all coal ash discharge to Lake Michigan by the first day of the 2015 operating season. This is a reasonable schedule and likely a faster resolution of this matter than litigation affords.

B. The government should stop the discharge of coal ash now [180]

BADGER should not be allowed to dump more coal ash. (000204). Any agreement should end the discharge now. (005133).

The United States agrees that the discharge of ash should stop. The issue here is whether litigation would result in the cessation of the coal ash discharge more quickly than the schedule established in this settlement. The United States believes that litigation of this matter will not result in a shorter schedule than the one set forth in the Consent Decree. We also believe that the Consent Decree's schedule is the shortest timeframe within which LMC will be able to put in place the technology needed to cease discharges from BADGER.

It is unlikely that a trial on the merits will conclude before the end of the 2014 operating season and the United States believes that the timeline proposed in the Consent Decree is reasonable and a good outcome for the environment.

C. The Consent Decree is bad for the environment [61] or hurts Lake Michigan [118]

Coal ash is polluting Lake Michigan. (002947; 006960). Coal ash is poisoning the fish we eat and the water we drink and swim in. (005246; 009056).

See response to IV.B. Coal ash typically contains a broad range of metals, including arsenic, selenium, mercury, lead, and cadmium. Accordingly, the United States is enforcing, through the proposed Consent Decree, the prohibition on the discharge of pollutants in the CWA. By eliminating the discharge of coal ash from BADGER, the proposed Consent Decree ensures the protection of Lake Michigan.

D. LMC has been dragging its feet on upgrading technology to prevent discharge of coal ash from BADGER and has no intention of complying now. [103]

LMC has not kept its promises. LMC had plenty of time to address discharge of coal ash. (000050; 009059).

See response to IV.B. The purpose of this Consent Decree is to ensure that LMC returns to compliance with the Clean Water Act as quickly as possible. Also, BADGER was allowed to discharge coal ash under the 2008 Vessel General Permit, as long as there was no violation of water quality standards. It is not the role of DOJ or the court in an enforcement action to pass judgment on past permitting decisions.

E. The penalties should be higher [34]

\$25,000 is too low. (005146) The stipulated penalties should be higher to avoid "paying to pollute." (005246).

The United States believes that the alleged violations of the water quality standard for mercury have merit, but a court might disagree. Therefore, the United States must account for litigation risk in determining an appropriate penalty in a settlement. Given the litigation risk, the

\$25,000 penalty is appropriate. However, the penalty only covers violations up to the date of lodging.

The penalty in this case resolves the claims alleged in the complaint, is consistent with the statute's penalty authority and consideration of the statutory factors, was negotiated in good faith, and is in the public interest. The Consent Decree does not extend the 2008 Vessel General Permit's coal ash discharge deadline; nor does the decree modify the 2008 or 2013 Permits. Consent Decree ¶ 42. It expressly preserves the United States' right to seek relief under the CWA. *Id.* ¶ 38. Therefore, the United States retains its discretion on penalties for BADGER's operation from 2013 on.

With respect to the stipulated penalties, the purpose of potential stipulated penalties is to ensure compliance with the Consent Decree. The Court's ability to assess penalties for violation of this court order (contempt), as expressed by the threat of daily stipulated penalties, provides an incentive for LMC to comply with the Consent Decree's schedule to cease discharges. However, the Consent Decree does not limit the United States to seeking a stipulated penalty for discharges. The Consent Decree preserves the United States' right to seek penalties up to \$37,500 per day under the statute for any violations of the CWA that are not identified in the Complaint, including any future discharges of coal ash from BADGER. ¶ 54. Thus, the Consent Decree adds the stipulated penalty option while preserving the full range of statutory enforcement options.

F. Air pollution from BADGER is bad. [31]

(000153; 003012).

The Complaint only alleges a claim under the CWA. Therefore, the Consent Decree only addresses compliance under the CWA. Paragraphs 37 and 38 of the Consent Decree preserves the United States' right to pursue any violations of the law not alleged in the complaint. Thus, the United States would not be prevented from pursuing enforcement against BADGER should it violate the Clean Air Act.

G. The government is not doing its job.

Government is supposed to protect people and yet it is allowing harmful pollution. (011212; 011220; 011227). Instead government is protecting a special, monied interest. (001124).

See responses to IV.A. and IV.B.

H. I have a technology that will prevent the discharge of coal ash from BADGER.
(000847; 011633).

The Consent Decree allows the owner and operator of BADGER to choose the means to comply with the requirement to cease the discharge of coal ash. The United States is not imposing a particular technology on BADGER. Of course, the commenter is free to solicit business from BADGER.

V. Comments from Environmental Groups

A. Website of Environmental Law and Policy Center [875 comments], *see, e.g.*, 001860.

i. Long history of coal ash pollution from BADGER

The purpose of this Consent Decree is to ensure that LMC achieves compliance as quickly as possible. Prior to 2008, BADGER's discharges may have been authorized under the CWA. Furthermore, the United States has not investigated whether any violations occurred prior to 2008 because the 5 year statute of limitations serves as a bar to an enforcement action for penalties during that time period.

ii. Recognize that Consent Decree offers resolution more quickly than other options

iii. Include explicit agreement of no more extensions

The Consent Decree does not grant an extension. It sets a schedule for LMC to return to compliance with the CWA and cease discharges of coal ash to Lake Michigan that is enforceable in court without going through the expense and potential delay of litigation on the merits. Paragraph 29 of the Consent Decree contains an express requirement that LMC "must permanently cease discharging coal ash or coal ash slurry from BADGER into any waters of the United States on and after the first day of the calendar year 2015 Operating Season." If LMC fails to cease discharge from BADGER, the United States will have the right to seek stipulated penalties for violations of this court order, file an enforcement action for violations of the CWA that were not addressed in the Complaint, and seek the court's assistance to order compliance with the CWA and this agreement.

iv. Increase civil penalties for continued pollution

Civil penalties are assessed for violations of the CWA that are alleged in the Complaint. Nothing in the Consent Decree prevents the United States from seeking penalties for later violations. *See* Consent Decree ¶ 37 (Consent Decree resolves only claims alleged in the Complaint and only "through the date of lodging"); ¶ 42 ("The consent decree is not a permit."). The possibility of penalties for future discharges provides a powerful incentive to comply with the Consent Decree. If LMC violates the Consent Decree, the United States has the ability to pursue stipulated penalties set forth in the Consent Decree for violation of this court order AND pursue civil penalties of up to \$37,500 per violation per day. *See* Consent Decree ¶ 54. During the 2013 and 2014 Operating Season, however, the United States is primarily concerned with ensuring that LMC comply with the terms of the Consent Decree, particularly the schedule for installing technology to eliminate the discharge of coal ash.

v. Consider steeper reductions of coal ash over next two years

LMC represents that reductions for 2013 can be achieved by using lower ash content coal and increasing combustion efficiency of the existing coal-fired propulsion system. *See* n.15 and

pages 51-52 of Supplemental NPDES Permit Application, *available at* <http://www.epa.gov/r5water/npdestek/badger/pdfs/application/badger-supplemental-submission-for-npdes-permit.pdf>. For 2014, the Consent Decree requires LMC to further reduce the amount of coal ash discharged (another 15%) and LMC advises that they plan to accomplish this by installing combustion efficiency controls, decreasing the amount of coal burned by sailing less, or retaining a portion of the coal ash on board, or some combination thereof. Although some of the comments suggested it should be easy to stop the discharge immediately or further reduce for the upcoming two years, none of the comments proposed specific and feasible technology that would allow for more significant reductions in the immediate future. 002110 (gas turbines, diesel, or finding another alternative is feasible); 000847 (lower boom and use hydrogen power—see my invention).

vi. Require monthly reporting of coal ash

Paragraph 43 currently requires LMC to submit a report after each operating season that includes a tally of the amount of coal ash and coal ash slurry discharged during the operating season. Additionally, Paragraph 43C of the Amended CD requires LMC to submit reports, after each calendar month, that contain daily entries of the number of trips made between Ludington and Manitowoc on each reporting day, an estimate of the average amount of coal used on each day of the reporting month, and an estimate of the average amount of coal ash discharged per operating day during the reporting month. EPA intends to make these reports available to the public on EPA's website.

B. Website of Alliance for the Great Lakes [154 comments], *see, e.g.*, 002500.

i. Lake Michigan deserves the best protection

See responses to IV.B. and IV.D.

ii. Long history of coal ash pollution

See response to V.A.i.

iii. Coal ash contains mercury and other pollutants that can be consumed by fish and spread throughout Great Lakes

The primary purpose of the CWA is to protect the waters of the United States and this Consent Decree furthers that goal by requiring compliance with the Act's discharge prohibition through a reasonable compliance schedule. Cessation of LMC's coal ash discharges will help protect Lake Michigan from the pollutants identified by the commenters.

iv. Strengthen CD by ensuring against extensions or further exemptions

See response to V.A.iii.

- v. Increase the reductions in ash dumping in next two years

See response to V.A.v.

- vi. Increase penalties to avoid “paying to pollute”

See response to V.A.iv

- vii. Require more frequent reporting

See response to V.A.vi.

C. Website of Sierra Club [5,107 comments], *see, e.g.*, 002943.

- i. Long history of coal ash pollution from BADGER

See response to V.A.i.

- ii. Recognize that Consent Decree offers resolution more quickly than other options

- iii. Include explicit agreement of no more extensions

See response to V.A.iii.

- iv. Increase civil penalties for continued pollution

See response to V.A.iv.

- v. Consider steeper reductions of coal ash over next two years

See response to V.A.v.

- vi. Require monthly reporting of coal ash and make information publicly available on a website

See response to V.A.vi.

D. Save Our Great Lakes, letter, dated April 26, 2013, *see 011647*.

- i. Require legal certification of compliance with MI and WI laws as condition of dumping in 2013-2014; otherwise EPA is circumventing state law

The Consent Decree does not displace state law and compliance with the Consent Decree is not a defense to applicable federal, state, and local laws, regulations, and permits. ¶ 42. Furthermore, the Consent Decree states that LMC is responsible for maintaining compliance with all applicable federal, state, and local laws, regulations and

permits. ¶ 42. Nothing in the Consent Decree prevents the states from seeking penalties, even if BADGER's owner and operator comply completely with the Consent Decree. See ¶ 37 (Consent Decree resolves only claims alleged in the complaint and only "through the date of lodging"); ¶ 42 ("The consent decree is not a permit."). Enforcement of state law, however, is not within federal government's purview.

- ii. Express mandate to end discharge and not seek extensions

See response to V.A.iii.

- iii. Require cessation of lobbying for exemptions or other special regulatory treatment

This Consent Decree resolves alleged violations of the CWA, which does not regulate lobbying activities. Furthermore, the comments have not provided any concrete information suggesting that LMC engaged in any unlawful lobbying activity.

- iv. Increase civil penalties for continued pollution

See response to V.A.iv.

- v. Impose specific reductions for 2013 and increase 15% reduction for 2014; propose 25% reduction for this year and 50% for 2014

See response to V.A.v. The Consent Decree, as amended, prohibits average discharges per operating day during 2013 in excess of average discharges per operating day in 2012 discharges. ¶ 32.

E. Joint Letter from Environmental Groups (20 groups), *see 005541*

- i. Strengthen consent decree to avoid repetition of past

See responses to V.A.i and iii.

- ii. Lake Michigan provides drinking water and recreation

See response to V.B.i.

- iii. Pleased that United States is ending the coal ash discharge

- iv. BADGER dumps more than 500 tons of coal ash annually, which contains mercury and other pollutants

See response to V.B.iii.

- v. Include an explicit agreement for no more extensions

See response to V.A.iii.

- vi. Limit force majeure and dispute resolution provisions to ensure firm deadline

The force majeure and dispute resolution provisions require a heavy burden of proof in order to prevail.

With respect to claiming force majeure, Paragraph 55 requires that the events be beyond the control of LMC and that LMC demonstrate that it took the best efforts to fulfill the obligations of the Consent Decree. Paragraph 55 specifically prevents LMC from claiming financial inability as force majeure. EPA may disagree with LMC's claim of force majeure pursuant to Paragraph 58. LMC must then invoke dispute resolution pursuant to Section X.

The dispute resolution provisions are equally robust, first requiring a period of informal dispute resolution for disagreements. LMC may invoke formal dispute resolution by filing a motion with the Court pursuant to Paragraph 67. The standard of review under Paragraph 69 places the burden of proof on LMC. For matters accorded record review, LMC must prove that the United States' position is arbitrary and capricious or otherwise not in accordance with the law. For other matters, LMC must prove that its position complies with the Consent Decree and further advances its objectives.

The comment provides no specific recommendations on how to further strengthen these two provisions.

- vii. Increase civil and stipulated penalties to avoid incentive of "pay to pollute"

See response to V.A.i.

- viii. BADGER's least cost alternative to remove and landfill ash is \$705,226 over two years

The penalty addresses violations of the CWA alleged in the complaint. The penalty was negotiated in good faith, during arm's length negotiations, and reflects the litigation risks associated with the parties' positions. The fact that some members of the public believe the penalty is too high, while others believe it is too low supports the United States' conclusion that this penalty is in the public interest.

The Consent Decree is not a permit and does not displace federal, state, and local law. Therefore, the United States or another party may seek penalties in the future for BADGER violations. Paragraph 54 of the Consent Decree addresses the concern that BADGER will simply pay the stipulated penalties instead of switching to a technology that eliminates the discharge of coal ash. During the 2013 and 2014 Operating Season, however, the United States is primarily concerned with ensuring that LMC comply with the terms of the Consent Decree, particularly the schedule for installing technology to eliminate the discharge of coal ash.

- ix. Consider greater reductions in coal ash discharge to provide a clearly defined reduction path

See response to V.A.v.

- x. Require monthly reporting by BADGER that is certified by a third party and made available on a website

See response to V.A.vi.

F. Clean Water Action Council, March 30, 2013. *See 000338.*

- i. Opposed to entry of the Consent Decree

See response to IV.A.

- ii. The Consent Decree allows BADGER to continue adding to mercury levels of lake

See response to V.B.iii.

- iii. BADGER has operated for too many years without making effort to meet regulations

See response to V.A.i.

- iv. The Consent Decree is too favorable to BADGER

The comment does not identify specific reasons that the Consent Decree is too favorable to the owner and operator of BADGER. The Consent Decree was negotiated at arm's length between the parties. The Consent Decree ensures a cessation of coal ash discharge by 2015, which is likely faster than if the United States were to proceed with its claims to trial. Finally, the Consent Decree does not displace other applicable law.

G. Credo Action from Working Assets, letter dated April 20, 2013 (claiming 8,271 signatures). *See 000894.*

- i. Opposed to entry of the Consent Decree

See response to IV.A.

- ii. BADGER has had enough time to stop the discharge of coal ash

See response to V.A.i.

- iii. Unacceptable to allow continued dumping

See response to V.B.iii.

H. Midwest Environmental Advocates, letter dated April 26, 2013. *See 005025*

- i. Consent Decree is inappropriate, inadequate, and improper because it purports to approve of coal ash discharge for two more years in violation of Clean Water Act.

Nothing in the Consent Decree purports to displace federal, state, or local law. The Consent Decree specifically states that compliance with the Consent Decree is not a defense to applicable federal, state, and local laws, regulations, and permits. ¶ 42. Furthermore, the Consent Decree states that LMC is responsible for maintaining compliance with all applicable federal, state, and local laws, regulations and permits. ¶ 42. See ¶ 37 (Consent Decree resolves only claims alleged in the complaint and only “through the date of lodging”); ¶ 42 (“The consent decree is not a permit.”).

- ii. The Consent Decree does not address the anticipated ongoing violations of the VGP and, thus, casts doubt on reasonableness and whether the Consent Decree is in the public interest

See response to V.H.i.

- iii. BADGER has a history of continuous non-compliance

This Consent Decree ensures that LMC will return to compliance with the CWA in an appropriate timeframe that considers the amount of time needed to install technology to cease coal ash discharges before the 2015 season.

- iv. Extension will only result in more delay

See response to V.A.iii.

- v. BADGER has had sufficient time to remedy operations but instead chose avoidance.

See response to V.A.i

- vi. BADGER has always used inferior technology, been the subject of environmental complaints, and refused to modernize

The Consent Decree provisions address violations of the CWA as alleged in the Complaint. The provisions, including the penalty assessed, were negotiated in good faith during arms length negotiations, and reflect the litigation risks associated with the parties’ positions.

- vii. Lawmakers in Michigan and Wisconsin allowed exemption from air quality standards for BADGER, which continues to this day

It is not for DOJ or the court in an enforcement case to pass judgment on past regulatory and permitting decisions.

- viii. Since 2001, BADGER has dumped more than 6000 tons of coal ash into the lake

See response to V.B.iii.

- ix. Wisconsin recently awarded a grant to BADGER to convert its operations

The terms of the Consent Decree do not specify how BADGER comes into compliance with the requirement to cease discharging coal ash by the 2015 Operating Season. As such, nothing in the Consent Decree precludes BADGER from converting its coal-fired propulsion system and BADGER may use grant money from Wisconsin for that conversion. If, however, BADGER received a grant from Wisconsin and has not used the grant in accordance with its terms then that is an issue between the State of Wisconsin and BADGER. It is not for the federal government to intervene.

- x. The provision in the 2008 VGP which allowed the discharge of coal ash until December 2012 was based on BADGER's statements

It is not for DOJ or the court in an enforcement case to pass judgment on past regulatory and permitting decisions.

- xi. BADGER halfheartedly considered and dismissed numerous options and is now pursuing natural gas conversion, which is an unattainable and unrealistic option

The comment provides no basis for saying that conversion to natural gas is unattainable. Nor does the comment provide a basis for saying that conversion to natural gas is the only route that LMC is considering. In fact, LMC has submitted a plan and schedule pursuant to the Consent Decree that involves installing coal ash retention technology. *See* Attachment A.

The Consent Decree ultimately leaves the choice of technology up to LMC. If LMC fails to cease discharge, the United States will have the right to pursue additional enforcement action to require compliance with the law.

- xii. BADGER also focused on obtaining exemptions

It is not for DOJ or the court in an enforcement case to pass judgment on past regulatory and permitting decisions. This Consent Decree will ensure compliance with the CWA and does not provide any exemption from the CWA's legal obligations.

- xiii. BADGER squandered time and it is unreasonable to give BADGER more time

It is not for DOJ or the court in an enforcement case to pass judgment on past regulatory and permitting decisions. This enforcement action, in which LMC agrees to the entry of a court order prohibiting discharge of coal ash by 2015, ensures compliance with the CWA.

xiv. It is obvious that BADGER's plan is to simply continue polluting

The comment provides no basis for this assertion. A violation of the Consent Decree would subject LMC to penalties and contempt of court.

xv. \$25,000 penalty is only 2/3 the penalty for a single day and is insufficient given the magnitude of violations by BADGER

See response to V.A.iv.

xvi. BADGER's pattern needs to stop now

See response to V.A.iii.

I. Clean Wisconsin, Inc. *See* 003175.

EPA should encourage BADGER to Stop Burning Coal.

See response to IV.F.

J. Michigan Environmental Council, Great Lakes Environmental Law Center, and Michigan League of Conservation Voters *See* 004891.

i. Company should be required to put money into escrow to fund the retrofits.

The United States does not believe it is necessary to require LMC to place money into escrow because the timeframe within which LMC must retrofit BADGER is short, LMC may need to borrow money to fund the retrofit, and there is no evidence to indicate that LMC must set aside funds now to ensure that funds are available for the retrofit. Stipulated penalties ranging from \$3000 to \$6000 per day, as well as the Court's authority to enforce its injunctions, provide sufficient assurance that BADGER will cease ash discharges.

ii. The company should demonstrate why it cannot complete the required work before 2014.

LMC must obtain approval of proposed modifications to BADGER from the United States Coast Guard and American Bureau of Shipping prior to installation. *See* Exhibit 4. This process can take many months, thus affecting Badger's ability to install the requisite technology prior to the first day of the 2014 Operating Season.

iii. Clarify which Clean Water Act permit BADGER will operate under.

BADGER's discharges incidental to the normal operation of the vessel remain subject to the vessel general permit and LMC must comply with all permits and legal requirements applicable to operations of BADGER, operations on board BADGER, and disposal of waste.

The Consent Decree makes it clear that it does not modify any permits or obligations to obtain a permit.

- iv. The \$25,000 civil penalty and the stipulated penalties for 2013 and 2014 are too low.

See response to IV.E.

- v. Require annual inspections after the retrofit to ensure compliance with Clean Water Act.

Nothing in the Consent Decree prevents EPA from inspecting BADGER in the future.

- vi. Require a plan to control air emissions.

See response to IV.F.

VI. Government Officials Against the Entry of the Consent Decree as Lodged

During the comment period, the United States received comments from eight government officials in opposition to the entry of the Consent Decree as lodged. These comments generally echoed the points made by individual citizens and the environmental groups in opposition to the entry of the Consent Decree as lodged. Following is a list of the government officials that submitted letters opposing the entry of the Consent Decree:

- A. *Tom Barrett, Mayor, City of Milwaukee, see* 003275 (consent decree provides opening for LMC to prolong and challenge federal enforcement; consent decree does not sufficiently address clean water goals).
- B. *Jon Richards, State Representative, and Chris Larson, State Senator, State of Wisconsin, see* 003280 (further exposure to toxins not in the public interest).
- C. *Richard J. Durbin, United States Senate, see* 004910 (“pleased that parties have agreed to a date certain” for ceasing ash discharges; requests strengthening consent decree along lines similar to those proposed by environmental groups).
- D. *Lisa Madigan, Attorney General, State of Illinois, see* 004981 (consent decree should prohibit any extension of the deadline for ceasing ash discharges).
- E. *Gwen Moore, Member of Congress, see* 005421 (consent decree should be strengthened).
- F. *Rick Jones, State Senator, State of Michigan, see* 011626 (consent decree should be submitted to the state for certification of whether it complies with state law).

G. *Marcia Hovey-Wright, State Representative, State of Michigan, see 011657* (consent decree permits BADGER “to continue to break Michigan’s ban on dumping by watercraft”).

VII. Lake Express, LLC, Comments, April 22, 2013, *see 002895*.

A. BADGER’s owners exhibit a long-term pattern of disdain for air and water quality regulations, as evidenced by history of exemptions.

See responses to V.A.i. and V.H.vii.

B. Dumping of ash violates Michigan’s statutes.

See response to V.D.i.

C. BADGER has spent past four years seeking legislative, regulatory, and permitting fixes and should not be allowed an additional two-year extension.

See responses to and V.A.iii and V.H.xii and V.H.xiii.

D. BADGER has an unfair competitive advantage over competitors because it has not upgraded as to comply with “all existing laws and regulations.”

That BADGER has a competitive advantage if it is not in compliance with the CWA supports the entry of this Consent Decree, which requires the installation of technology to cease the discharge of coal ash from BADGER. This settlement agreement, which requires LMC to comply with the CWA and pay a penalty for past violations, is appropriate, was negotiated at arms length, and takes into account the authorization in the Vessel General Permit for coal ash discharges that comply with water quality standards.

E. BADGER’s owners have been underhanded in dealing with government and the public, including breaking promises and lying.

This matter has been extremely controversial and parties have made a number of allegations about motives and methods with respect to both LMC and the owner/operator of the Lake Express. These allegations, however, have not been supported by facts in the comments received.

F. The technology exists and could be installed in six months.

While the technology exists, the requirement in the Consent Decree that LMC install it on BADGER before the 2015 season takes into account the requirement that the Coast Guard approve any modifications to BADGER prior to operation. Furthermore, it is unlikely that litigation could achieve a cessation of the coal ash discharge by 2015.

G. BADGER could have implemented the technology earlier.

See response to VII.F.

H. EPA improperly ignored state law in granting the VGP permit because Michigan and Wisconsin law prohibit discharges from ferries into waterways.

This is an enforcement action and we enforce the permit as written.

I. Delayed and avoided costs are about \$700,000 per year for capturing and land-filling ash.

The identified costs associated with LMC's operations may not be relevant to this enforcement action because LMC may have been able to comply with the water quality standard for mercury without capturing and land-filling all of its ash or installing a diesel engine. See also response to IV.E.

J. Delayed and avoided costs run at about \$1.9 million per year for a diesel engine repower.

See response to VIII.I.

K. Civil penalty is too small.

See response to V.A.iv.

L. BADGER's coal usage and ash discharges have increased since 2008.

This CD achieves compliance and will cease discharges in an appropriate schedule.

M. The stipulated penalty is not sufficient to deter discharging.

See responses to V.A.i and IV.F. The amendments to the Consent Decree double the stipulated penalties from \$3,000 per day to \$6,000 per day for discharges after the first seven days during the 2015 operating season thus providing a stronger disincentive to LMC to discharge after the agreed to and judicially enforceable schedule in the lodged Consent Decree.

VIII. Lake Express, LLC, Comments, April 26, 2013, *see* 004924.

A. BADGER made misleading and false economic impact and job claims in permit application

It is not for DOJ or the court in an enforcement case to pass judgment on regulatory and permitting decisions.

B. BADGER made inconsistent and misleading claims about LMC's employment.

It is not for DOJ or the court in an enforcement case to pass judgment on regulatory and permitting decisions.

C. BADGER made false or misleading claims about reductions in air pollution and non-water quality pollution as the result of its operation.

It is not for DOJ or the court in an enforcement case to pass judgment on regulatory and permitting decisions. This enforcement action addresses CWA violations. The allegations in the complaint are based on independent analyses performed by the United States.

Respectfully submitted,

September 13, 2013

s/ Sumona N. Majumdar
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