IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA, **and** **THE STATE OF INDIANA,** **Plaintiffs** **v.** **INDIANAPOLIS POWER & LIGHT COMPANY,** **Defendant.**	**Civil Action No. 3:20-cv-202-RLY-MPB**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ENTRY OF PROPOSED CONSENT DECREE

The United States, on behalf of the U.S. Environmental Protection Agency (EPA), and the State of Indiana (Indiana or State), on behalf of the Indiana Department of Environmental Management (collectively, the Plaintiffs or Governments), jointly file this Memorandum (Memorandum) in Support of Plaintiffs' Motion For Entry (Motion) of Proposed Consent Decree (Consent Decree or Decree) with Indianapolis Power & Light Company (IPL).

Plaintiffs jointly filed a Notice of Lodging of Proposed Decree with the Court on August 31, 2020 (ECF No. 3), after which the proposed Decree was published in the Federal Register for a 30-day notice and comment period. Simultaneously with the lodging of the proposed Decree, the Plaintiffs filed a Complaint in this action against IPL, alleging violations of the Clean Air Act and related state claims at IPL's Petersburg Generating Station (Facility), located in Pike County, Indiana. *See* Complaint, ECF No. 1. The Complaint seeks injunctive relief and civil penalties.

The proposed Consent Decree, for which Plaintiffs now seek entry, will remedy the Complaint's alleged violations. Under the proposed Decree, as explained more fully below, IPL will reduce pollutant emissions by 1) installing a new pollutant control system, although IPL is released from that obligation if it retires two of its fossil fuel-fired units prior to the scheduled installation date; and 2) continuously operate the Facility's existing pollutant control systems to meet reduced emission rates. Also, IPL will pay a civil penalty to the United States and to Indiana; perform an on-site Environmental Mitigation Project; and perform a State-Only Environmentally Beneficial Project.

At the time of lodging the proposed Consent Decree, the Governments asked the Court to defer action on the Decree while the United States submitted the proposed settlement for public review and comment pursuant to 28 C.F.R. § 50.7. On September 8, 2020, the Department of Justice published notice of the proposed Consent Decree in the Federal Register. 85 Fed. Reg. 55,497 (September 8, 2020). The United States received two sets of public comments on the Decree.

The first set of comments, an October 8, 2020, letter submitted by the State of Wisconsin Department of Natural Resources (Wisconsin DNR), assert that the Decree should not be finalized as proposed until an alternative agreement is developed that addresses the several concerns – mostly of a technical nature – in the letter. The second set of comments, an October 8, 2020, letter jointly submitted by the Sierra Club, the Environmental Law & Policy Center, the Hoosier Environmental Council and the Citizens Action Coalition of Indiana (hereinafter, Sierra Club), object to the Environmental Mitigation Project and/or propose revisions to it. Also, while welcoming the State-Only Environmentally Beneficial Project, Sierra Club requests that the agreed-upon funding for such project be increased. The two sets of comments and the United States' responses to such comments are discussed in Part II.E., below. The comments themselves are attached as Exhibit 1 hereto, and the United States' Response to Comments (U.S. Resp.), along with a declaration from EPA engineer Ethan Chatfield, are attached as Exhibit 2.

The United States, in consultation with Indiana, has carefully considered the public comments received on the proposed Consent Decree. Plaintiffs believe the proposed Consent Decree to be fair, reasonable, consistent with the Clean Air Act (Act) and applicable state laws, and in the public interest. The comments do not disclose facts or considerations leading the Governments to believe that the Consent Decree is inappropriate, improper, or inadequate. *See* Decree ¶ 130. Accordingly, the Governments respectfully request approval, signature and entry of the proposed Consent Decree by this Court. IPL has agreed to entry of the proposed Consent Decree by virtue of signing the Decree, *id.*, and therefore does not oppose the Motion.

I. BACKGROUND

A. The Facility and the Alleged Violations

IPL, a subsidiary of AES Corporation, owns the Petersburg Station, a fossil fuel-fired steam electric plant consisting of four coal-fired boilers and corresponding turbines (hereinafter, Units) for electricity generation. Units 1 through 4 are "electric steam generating units" with net generating capacities of 229, 412, 540, and 530 megawatts, respectively. The Facility has in place various pollution control equipment designed to reduce pollutant emissions. All four Units contain wet flue gas desulfurization (FGD) for sulfur dioxide (SO_2) control and three of the four Units have low-nitrogen oxide burners with over-fire air systems for nitrogen oxides (NOx) control. Also, Units 2 and 3 have Selective Catalytic Reduction (SCR) Systems for NOx control. For particulate matter (PM) controls, Units 1 and 4 have electrostatic precipitators (ESPs), Unit 2 has a baghouse, and Unit 3 has an ESP with a baghouse. All four Units have sulfuric acid (H_2SO_4) mist controls. Historically, the Facility's pollutant exceedances have been caused by IPL's failure to continuously run the Facility's FGDs, SCRs and H_2SO_4 systems.

The Complaint alleges that IPL modified several Units at the Facility, failed to obtain the necessary permits and failed to install the controls necessary under the Act to sufficiently reduce

SO_2, NO_X, PM and/or H_2SO_4 emissions, in violation of the Prevention of Significant Deterioration and the Nonattainment New Source Review provisions of the Act. The Complaint also alleges that IPL violated and continues to violate the Indiana State Implementation Plan, the Act's New Source Performance Standards and/or the Facility's Title V Permit by exceeding opacity limitations and emitting SO_2 and/or PM (including in some cases bypassing its SO_2 controls) in excess of the applicable opacity limits.

B. The Proposed Consent Decree

The proposed Consent Decree requires IPL to reduce its Facility's emissions of NOx, SO_2, PM and H_2SO_4. IPL will install a pollution control device known as a Selective Non-Catalytic Reduction System (SNCR) on one of the plant's coal-fired Units, improve its sulfuric acid mitigation system, and continuously operate all of its pollution control equipment to meet levels that will achieve reductions in NOx, SO_2, PM and H_2SO_4 emissions. Decree ¶¶ 6, 8, 14, 18-19, and 25-27. Also, the agreement recognizes that IPL may permanently retire two of its four Petersburg coal-fired Units (Units 1 and 2). IPL may forego installing the SNCR if it in fact permanently retires the two coal-fired Units prior to July 1, 2023, the deadline under the Decree by which IPL must install the SNCR. Decree ¶ 7.

Further, IPL will pay a total civil penalty of $1.525 million, of which $925,000 will go to the United States and $600,000 to the State of Indiana. Decree ¶ 58. IPL will also undertake an Environmental Mitigation Project costing $5 million to mitigate some of the harm to the environment caused by the Facility's excess emissions over the years. IPL will submit a proposal to EPA and the State to construct and operate a system that will provide a new, non-emitting source of power at an on-site location known as the auxiliary electrical system. The new source of power is expected over time to reduce emissions of SO_2, NOx and PM in the

vicinity of the Facility. Decree ¶¶ 50 and 57, and Appendix A. In addition, at the request of Indiana, IPL agrees to expend $325,000 to undertake a State-Only Environmentally Beneficial Project designed to acquire, restore and preserve some ecologically significant parcels of land near the Facility. Decree ¶¶ 61-62, and Appendix B.

The proposed Consent Decree also contains detailed record-keeping, reporting and notice requirements, as well as multiple enforcement mechanisms and incentives for compliance, including stipulated penalties for non-compliance, force majeure and dispute resolution provisions, and provisions for resolution of claims. Decree, e.g., ¶¶ 68-69, 74-76, 79, 81, 83-84, 89-90, 93, and 98.

As explained more fully below, none of the public comments received on the proposed Decree discloses facts or considerations indicating that the proposed Decree is inappropriate, improper, or inadequate. The Court should therefore enter the Decree, so that the settlement's environmental and community benefits can be realized without delay.

II. ARGUMENT

A. Standard of Review

As the Seventh Circuit and this Court (and other courts) have emphasized, in considering an environmental settlement proposed by the government, a court "must defer to the expertise of the agency and to the federal policy encouraging settlement" and "must approve a consent decree if it is reasonable, consistent with [the statute]'s goals, and substantively and procedurally fair." *United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1424, 1426 (6th Cir. 1991); *United States v. City of Evansville, Ind.*, No. 09-128, 2011 WL 2470670, at *4 (S.D. Ind. June 20, 2011). Both the Seventh Circuit and this Court have cautioned that a district court should be "chary of

disapproving a consent decree," and may not deny approval unless the decree "is unfair, unreasonable, or inadequate." *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889-90 (7th Cir. 1985); *United States v. First Merchants Bank*, No. 19-2365, 2019 WL 3779768, at *2 (S.D. Ind. Aug. 12, 2019). Put another way, a court should approve a consent decree if it is "fair, adequate, reasonable, and appropriate under the particular facts and that there has been valid consent by the concerned parties." *Duncanson v. Wine and Canvas IP Holdings, LLC*, No. 16-788, 2020 WL 2840010, at *2 (S.D. Ind. May 29, 2020) (*quoting Bass v. Fed. Sav. & Loan Ins. Corp.*, 698 F.2d 328, 330 (7th Cir. 1983).

In its review, the Court must keep in mind the "strong policy favoring voluntary settlement of litigation," and "[t]his presumption is particularly strong where a consent decree [sic] has been negotiated by the Department of Justice on behalf of a federal agency, like the [EPA], which enjoys substantial expertise in the environmental field." *Evansville*, 2011 WL 2470670, at *4 (quoting from *United States v. BP Expl. & Oil Co.*, 167 F. Supp. 2d 1045, 1049-50 (N.D. Ind. 2001) (omitting citations); *see also Whiting Paper*, 644 F.3d at 372. This Court further summarized the standard:

> The underlying purpose of this review is to determine whether the decree adequately protects and is consistent with the public interest. In other words, a consent decree will not be approved where the agreement is illegal, a product of collusion, inequitable, or contrary to the public good. In reviewing a consent decree, this Court need not inquire into the precise legal rights of the parties, nor reach and resolve the merits of the parties' claims. Rather, it is ordinarily sufficient if this Court determines whether the consent decree is appropriate under the particular facts of the case.

Evansville, 2011 WL 2470670, at *4 (quoting from *BP Expl. & Oil Co.*, 167 F. Supp. 2d at 1049-50) (omitting citations), noting also that "the test is not whether this Court would have fashioned the same remedy nor whether it is the best possible settlement." Nor should the Court "substitute

its judgment for that of the parties nor conduct the type of detailed investigation required if the parties were actually trying the case." *Id*.

B. The Consent Decree is Procedurally and Substantively Fair

In assessing the "fairness" of a proposed Consent Decree, courts examine whether a decree is both procedurally and substantively fair. *Whiting Paper*, 644 F.3d at 372; *United States v. Cannons Eng'g Corp*., 899 F.2d 79, 86-87 (1st Cir. 1990); *Evansville*, 2011 WL 2470670, at *4. 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." *Akzo Coatings*, 949 F.2d at 1435 (citation omitted).

Generally speaking, courts find procedural fairness where the settlement was negotiated at arm's length among experienced counsel. *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207, 209 (3d Cir. 2003). *See also United States v. BP Prods. N. Am., Inc.*, No. 12-207, 2012 WL 5411713, at *2 (N.D. Ind. Nov. 6, 2012). If the decree was the product of good faith, arms' length negotiations, it is presumptively valid. *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990); *see also United States v. Comunidades Unidas Contra La Contaminacion ("CUCCo")*, 204 F.3d 275, 281 (1st Cir. 2000); *Evansville*, 2011 WL 2470670, at *5 (noting that there is "absolutely no indication that the negotiations were anything other than arms-length…"). Here, the Consent Decree is the result of good faith and arm's length bargaining between experienced environmental counsel over the course of several years. As was the case in

Evansville, there is absolutely no indication in this matter that the negotiations were anything other than arms' length, and nothing in the public comments suggests otherwise.[1]

A decree's substantive fairness has been characterized as involving "concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." *Evansville*, 2011 WL 2470670, at *7 (quoting from *CUCCo*, 204 F.3d at 281). As this Court further noted, "[i]n environmental cases, EPA's expertise must be given the benefit of the doubt when weighing substantive fairness." *Id* (quoting from *CUCCo* at 281). As discussed above, included as part of the United States' Response to Comments is a declaration by Ethan Chatfield, EPA Environmental Engineer with the EPA Region 5 office (Chatfield Decl.), explaining how the relief provided by the proposed Decree -- in particular the provisions for the new control device, reduced emission rates, emission tonnage caps and requirement to continuously operate the pollutant controls -- as well as the Environmental Mitigation Project will result in reduced pollutant emissions and will benefit the environment. Chatfield Decl. ¶¶ 10, 13-15, and 20-22. The Court should defer to EPA's expertise to conclude that the Decree's compliance measures, as well as the Environmental Mitigation Project and State-Only Environmentally Beneficial Project, are substantively fair and appropriate resolutions of IPL's liability for the violations alleged in the Complaint.[2]

[1] The Governments' willingness to thoroughly consider and respond to all public comments further demonstrates procedural fairness. *See United States v. Lexington–Fayette Urban Cty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010) ("The United States' good faith is further evidenced by its manifested willingness . . . to thoroughly consider all oral and written comments made with regard to the proposed decree" (internal quotation marks and citation omitted)).

[2] The Court should similarly defer to EPA's and DOJ's expertise in determining the appropriate penalty amount in this matter, which is not challenged by the commenters.

C. The Consent Decree is Reasonable.

The reasonableness of a consent decree is basically "a question of technical adequacy, primarily concerned with the probable effectiveness of proposed remedial responses." *Cannons Eng'g*, 899 F.2d at 89-90; *see also Akzo Coatings*, 949 F.2d at 1436. A proposed Consent Decree is reasonable if it includes stringent and detailed requirements related to the operation and maintenance of the Facility, as well as extensive reporting requirements, which will accomplish the goal of cleaning the environment. *See CUCCo* 204 F.3d at 281. *See also First Merchants Bank*, 2019 WL 3779768, at *2 (upholding a settlement agreement as reasonable because, among other things, "[i]t details specific policies that address the allegations contained in the complaint and provides for extensive review and reporting to assure any future problems are promptly discovered and remedied").

Based on a consideration of the above-referenced factors, the proposed Consent Decree is reasonable. The comprehensive injunctive relief that IPL will perform will improve air quality, protect the environment, and address the hazards of its alleged non-compliance. The Decree requires that IPL install a new control device (unless it permanently retires two of its four coal-fired Units beforehand) and continuously operate its existing control devices to meet reduced emission rates, all of which will improve compliance and help eliminate excess pollution. *See* U.S. Resp., Response Nos. 1-3. The Decree provides an incentive for IPL to permanently retire the two Units, which would reduce pollutant emissions from the Facility even more than if IPL installed the new control device. *Id.*, Response No. 2; Chatfield Decl. ¶ 15.

Following entry and/or improvements at the Facility, IPL will be responsible for strict compliance, at the risk of stipulated penalties, with the applicable standards set forth in the agreement. In addition, the extensive reporting requirements will improve the accuracy of

information about the nature and extent of the company's compliance with the Clean Air Act and other applicable state laws and permits. All of these measures will help clean the environment and help assure that any future problems are promptly discovered and remedied.

D. The Consent Decree is Consistent with the Goals of the Clean Air Act and Applicable State Laws, and Serves the Public Interest

In evaluating a proposed consent decree's consistency with the Clean Air Act, courts consider the extent to which it comports with the goals of Congress. *See BP Expl. & Oil*, 167 F.Supp.2d at 1054. "Of necessity, consideration of the extent to which consent decrees are consistent with Congress' discerned intent involves matters implicating fairness and reasonableness" and "cannot be viewed in majestic isolation." *Cannons Eng'g*, 899 F.2d at 90.

The injunctive relief required by the proposed Consent Decree, including installation of a new pollution control device (unless Units 1 and 2 are permanently shut down beforehand) and continuous operation of the existing pollution control systems to meet reduced pollutant rates, is anticipated to result in significant emissions reductions of SO_2, NOx, PM and H_2SO_4. *See* U.S. Resp., Response Nos.1-3; Chatfield Decl. ¶¶ 13-15, and 20-21. As such, the relief will "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" -- the Clean Air Act's primary purpose. *See* 42 U.S.C. § 7401(b)(1); Chatfield Decl. ¶ 21.

IPL will take further steps to improve the environment by undertaking an Environmental Mitigation Project (Project) to help mitigate the harm to the environment in the close proximity of the Facility. Within six months following entry of the Decree, IPL will submit a proposal for EPA's and the State's approval to install and operate a new, non-emitting source of energy on a portion of the site that would serve the Facility's internal load. Such new energy source, which IPL must maintain for at least 10 years and up to 25 years, is anticipated to reduce hazardous

emissions on site. *See* Decree, Appendix A, Parts I.C and G and II.B; U.S. Resp., Response Nos. 5-6; Chatfield Decl. ¶ 22.

In addition, IPL will pay a substantial penalty for its non-compliance, which will further deter future Clean Air Act (and applicable state law) violations at the Facility, as well as at other regulated facilities across the nation. *See* Decree, Section XVIII (Stipulated Penalties).

Finally, IPL will conduct a State-Only Environmentally Beneficial Project in which IPL will acquire lands near the Facility that will result in much needed ecological preservation and restoration of such lands. *See* Decree ¶¶ 61-67, and Appendix B, Part I.A. Among other benefits, the State-Only project will help ameliorate and restore past detrimental effects to plant life and vegetation in the vicinity of the electric plant that can be attributed to high levels of SO_2, ozone and PM 2.5 emissions. Decree, Appendix B, Part I.B. Given that Indiana proposed such a project in response to concerns raised over the years by residents in the proximity of the IPL Facility about potential deforestation and the lack of restoration and/or preservation of ecologically significant parcels of land in the area, the State-Only project is expected not only to ameliorate environmental hazards but also to benefit the local community and promote the public interest. *See* Decree ¶ 61, and Appendix B, Part I.A and B.

Entry of the proposed Consent Decree would further serve the public interest by providing environmental benefits more quickly and at less cost than could be achieved through litigation. "The only likely alternative to the Consent Decree would be complex and potentially protracted litigation that would expend limited governmental and judicial resources -- a risky proposition with uncertain results." *BP Prods. N. Am., Inc.*, 2012 WL 5411713, at *4. Accordingly, the proposed Consent Decree is in the public interest, as well as a reasonable settlement. *See First Merchants Bank*, 2019 WL 3779768, at *2.

In short, the proposed Consent Decree accomplishes the goal of cleaning the environment, provides significant environmental benefits, furthers the goals of the Clean Air Act and applicable state laws, and is in the public interest. *See BP Prods. N. Am., Inc.*, 2012 WL 5411713, at *3-4; *BP Expl. & Oil Co.*, 167 F. Supp. 2d at 1053.

E. Public Comments have not Disclosed Facts or Considerations Indicating that the Proposed Consent Decree is Inappropriate, Improper or Inadequate

1. Comments submitted by the Wisconsin DNR do not warrant rejection of the Decree

No comments submitted by the Wisconsin DNR suggest that the proposed Decree should not be approved. One of Wisconsin DNR's comments opines that the Decree should have required IPL to install on Unit 4 an SCR rather than an SNCR to reduce NOx emissions. Wisconsin DNR asserts that an SCR is more widely used and effective in reducing pollution emissions than an SNCR. U.S. Resp., Comment No. 1. The United States' Response, while acknowledging that an SCR is a common and effective control device to limit NOx emissions, explains that an SNCR, like an SCR, is also designed to result in significant NOx emission reductions. U.S. Resp., Response No. 1. Based on good faith negotiations, the parties agreed that an SNCR is an appropriate device to control emissions at Unit 4. EPA anticipates that an SNCR-controlled Unit 4 will contribute to a substantial reduction in NOx emissions at the Facility. The Response also notes that the Decree requires the NOx controls on all four Units to be operated continuously, and that compliance with those requirements, along with the Decree's NOx tonnage limits, is expected to substantially reduce IPL's NOx emissions at the Facility. *Id*.

Wisconsin DNR's comments also suggest that the Decree's recognition that IPL may retire two of its Units early (allowing IPL to forego installation of the SNCR) is meaningless, because IPL already announced its intention to retire Units 1 and 2 by 2023. U.S. Resp., Comment No 2. While the United States agrees that IPL officially announced its intention in

December 2019 to retire the two Units early, nothing in its announcement compels IPL to retire either or both of those Units early. In contrast, by concretizing IPL's intention in the Decree to retire Units 1 and 2 by 2023 and tying such early retirement to IPL's obligation to install an SNCR on Unit 4 by that date, the proposed Decree creates a strong incentive for IPL to follow through with its expressed intention to retire the two units by 2023, even if circumstances should change. Further, the retirement must be permanent (i.e., IPL cannot ever restart the Units) and must comply with all relevant federal and state requirements. U.S. Resp., Response No. 2.

Finally, Wisconsin DNR asserts that the 30-day rolling average NOx emission rates in the proposed Consent Decree are too high and do not reflect the emission rates that can actually be achieved with proper operation of available control technologies. U.S. Resp., Comment No. 3. The United States' Response explains that the negotiated NOx rates for the controls at Units 1 through 4, which are based on a more stringent averaging basis (30-day rolling) than the current averaging basis (annual), are consistent with rates expected to be practically achievable by those controls. Coupled with the Decree's requirements to operate all controls continuously, and the Decree's annual NOx tonnage limitations, the United States avers that the negotiated NOx rates for all four Units are anticipated to substantially reduce NOx emissions at the Facility. U.S. Resp., Response No. 3.

Plaintiffs concede that the negotiated NOx rates are not the lowest rates achievable. The Governments, however, cannot impose such rates unilaterally. Were the Decree disapproved on that basis and the parties forced to go back to the drawing board, Plaintiffs would not be assured of obtaining IPL's agreement to lower rates. Further, any effort to renegotiate the rates would take time and delay the deadlines for IPL's compliance with the many other significant Decree requirements intended to reduce pollutant emissions at the Facility. And, of course, there is no

guarantee of success, which in the end could lead not to a negotiated agreement but rather to lengthy and uncertain litigation. U.S. Resp., Response No. 3.

2. Comments submitted by the Sierra Club do not warrant rejection of the Decree

Appendix A of the Decree, which requires IPL to propose for approval an Environmental Mitigation Project involving a new, non-emitting source of energy to power the internal load at the Petersburg Facility, was negotiated in good faith by the Governments and IPL as part of the overall comprehensive relief package of the proposed Decree. As mentioned above, such Project is expected to provide meaningful environmental benefits that are tailored to redressing a portion of the harm caused by IPL's alleged violations. Sierra Club requests that the parties cancel the Project in exchange for setting up a Community Environmental Action Committee (Committee) to assist IPL in selecting and implementing other projects providing certain benefits to the local community, and redirect IPL's $5 million obligation for the Project to fund other projects recommended in the future by the Committee. U.S. Resp., Comment No. 4.

In response, the United States explains that Sierra Club's proposal, among other things, lacks specificity and substantive criteria for any hypothetical future projects, and stands in stark contrast to the detailed terms and requirements set forth in Appendix A for the negotiated Environmental Mitigation Project. That project is specifically tailored to redressing a portion of the harm caused by the alleged violations in this matter, and will benefit the local community. U.S. Resp., Response Nos. 4 and 5; Chatfield Decl. ¶ 22. In contrast, Sierra Club's vague, open-ended process, that may or may not produce valuable and mutually agreed-upon projects in the future, is neither practical nor in the public interest. U.S. Resp., Response No. 4; *See United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003) (in evaluating equitable relief such as remediation or restoration proposals in a Clean Water Act case, courts consider three factors:

"(1) whether the proposal 'would confer maximum environmental benefits,' (2) whether it is 'achievable as a practical matter,' and (3) whether it bears 'an equitable relationship to the degree and kind of wrong it is intended to remedy,'" (citations omitted)). S*ee also United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055, 1060-61 (S.D. Ind. 2008) (asserting relevance of the *Deaton* holding to the Clean Air Act).

In a second comment, Sierra Club argues that the Project will increase, not decrease, pollution, because the new source of power will allow the Facility's coal-fired boilers to operate more frequently than they otherwise would and therefore would increase the pollution in the local community, as well as enrich IPL. U.S. Resp., Comment No. 5. In response, the United States notes that Sierra Club has not provided any substantiation for its position. Rather, the new, non-emitting source of power would consist of a renewable energy source, such as solar or wind energy, free of generating pollutants (including SO_2 and NOx) that are currently being emitted from the burning of fossil fuels. Energy produced from such a "clean" source would likely offset energy that otherwise would be generated by the coal-fired boilers to serve IPL's internal load, thereby reducing pollutant emissions at the Facility and benefitting the local community. U.S. Resp., Response No. 5.

Sierra Club's third comment recommends that the Project should be modified in two ways: 1) instead of providing power to the Facility's internal load, the on-site non-emitting resources should be connected to the local grid, so that the Project would provide power to the local communities and not IPL's customers in Indianapolis; and 2) the language should be revised to state that IPL will operate and maintain the non-emitting source only as long as the Facility's coal units remain in operation, as opposed to being maintained for a full ten-year period as mandated by Appendix A. U.S. Resp., Comment No. 6. In response to the

commenter's first concern, the United States explains that if the power were provided to the local grid, which is operated by Duke Energy, the plant's internal load would not be reduced; further, it is not known what emission reductions would result, if any, or where they might occur. U.S. Resp., Response No. 6. In response to the comment's second concern, although it is true that Appendix A provides for the Project to be operated for at least ten years, should IPL decide to retire its entire Facility prior to the ten-year period (which is not its current intention), the parties can make alternative arrangements within the parameters of the agreement, including via the Modification provisions in Section XXVI of the Decree. *Id*

When crafting any negotiated agreement, no side has a crystal ball and can possibly foresee all potential scenarios that may arise in the future. Thus, no agreement, including this one, is prescient and can possibly address all future potentialities. Appendix A addresses the current, real need (and the Governments' claims) for mitigating a portion of the harm caused by IPL's violations, and, once the Decree is entered and the Project implemented, will provide environmental benefits to the local community for years to come. And as mentioned above, the Decree contains mechanisms that can be utilized to address, if necessary, changed circumstances should they arise in the future. U.S. Resp., Response No. 6.

In a final comment, Sierra Club welcomes the State-Only Environmentally Beneficial Project, in which IPL will acquire lands near the Facility, resulting in much needed ecological preservation and restoration of such lands. Sierra Club, however, requests that IPL expend at least $500,000 on the State-only project, to address several other ecological needs that Sierra Club identifies in the way of additional proposals. U.S. Resp., Comment No. 7. In response, the United States explains that the agreed-upon amount of $325,000 for the State-only project was the result of good-faith negotiations, which took into account the "big picture" of the settlement

package in resolving the Governments' claims. While Indiana does not agree that the negotiated amount for the State-only project amount needs to be increased, it acknowledges that there remain additional needs to conserve and restore ecologically significant land in the area, and for other important, related projects. Indiana appreciates Sierra Club's helpful suggestions for additional proposals and will keep them in mind when considering similar projects in the future. U.S. Resp., Response No. 7.

* * * * * *

In short, none of the public comments discloses facts or considerations indicating that the proposed Consent Decree is inappropriate, improper or inadequate. Withholding approval of the Decree based on the commenters' objections and/or proposed revisions would require the parties to go back to the drawing board, with no certainty that an improved project, or any amended agreement for that matter, would result. At the very least, any effort to renegotiate the Decree's compliance provisions, the Environmental Mitigation Project and/or the State-Only Environmentally Beneficial Project would take significant time and delay the deadlines for IPL's compliance with the Decree provisions intended to reduce pollutant emissions at the Facility and benefit the local community. As such, the proposed Decree should be entered without delay.

III. CONCLUSION

For the reasons outlined above, under the judicial standards applicable to approving consent decrees, the Court should determine that the proposed Consent Decree is fair, reasonable, consistent with the goals of the Clean Air Act and applicable state laws, and is in the

public interest. Accordingly, the Court should grant Plaintiffs' Motion and approve, sign and enter the proposed Decree as a judgment of the Court.

Respectfully submitted,

FOR THE UNITED STATES

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October 8, 2020

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Subject: Proposed Consent Decree in *United States and State of Indiana v. Indianapolis Power & Light Company,* D.J. Ref. No. 90–5–2–1–09897/1

Dear Mr. Clark:

This letter is in reference to the proposed consent decree in *U.S. and State of Indiana v. Indianapolis Power & Light Company*. For reasons described below, this consent decree should not be finalized in its present form.

The consent decree is being proposed to resolve complaints that Indianapolis Power & Light (IPL) modified units at its Petersburg Station and failed to obtain the necessary permits and install the controls necessary under the Clean Air Act to reduce sulfur dioxide (SO_2), nitrogen oxides (NOx) and particulate matter (PM) emissions. The proposed consent decree requires IPL to install selective non-catalytic reduction (SNCR) controls at Petersburg Unit 4 by July 1, 2023. However, IPL is released from this obligation if IPL retires Petersburg Units 1 and 2 before the SNCR is installed in Unit 4.

Air quality in Wisconsin is heavily impacted by emissions originating from out of state. Specifically, modeling has long demonstrated how the elevated ozone concentrations measured in Wisconsin are the direct result of emissions of NOx and VOCs in states located to the south, including Indiana. Therefore, Wisconsin has a direct interest in ensuring emissions for Indiana sources are properly controlled, and in the matters covered by this proposed consent decree.

Wisconsin has identified several significant problems with this proposed consent decree:

1. Petersburg Units 1 and 2 are already scheduled to be retired, in 2021 and 2023, respectfully. This can be confirmed by Energy Information Administration information. These retirements have also been included by Indiana in the Eastern Regional Technical Advisory Committee (ERTAC) electricity generating unit (EGU) emission projection tool that used to forecast future emissions for regional ozone modeling purposes. This consent decree, therefore, does not involve or require the early retirement of any units.
2. The proposed consent decree requires only an SNCR to be installed on Unit 4, rather than selective catalytic reduction (SCR), which is widely used and more effective at reducing emissions.
3. The 30-day rolling average emission rates for NOx for all units at Petersburg are too high and do not reflect the emission rates that can be achieved with proper operation of available control technologies.

For these reasons, this consent decree should not be finalized as written. Instead, parties should develop an alternate agreement that addresses the problems identified above, ensures meaningful emissions reductions beyond a business-as-usual scenario, and fully meets Clean Air Act requirements.

Sincerely,

DocuSigned by:
Gail E. Good
9AA91D46A40C4A3...

10/8/2020 | 12:09 PM CDT

Gail Good
Director
Air Management Program

cc: Cheryl Heilman, LS/8
James Bridges, LS/8
David Bizot, AM/7

October 8, 2020

Via Email

Assistant Attorney General
U.S. DOJ-ENRD
P.O. Box 7611
Washington, D.C. 20044-7611
pubcomment-ees.enrd@usdoj.gov

Re: Notice of Lodging of Proposed Consent Decree under the Clean Air Act in *United States and State of Indiana* v. *Indianapolis Power & Light Company*, D.J. Ref. No. 90–5–2–1–09897/1.

To Whom It May Concern:

On behalf of Sierra Club, Environmental Law & Policy Center, Hoosier Environmental Council, and Citizens Action Coalition of Indiana, we submit these comments[1] on the proposed Consent Decree lodged on August 31, 2020 in the United States District Court for the Southern District of Indiana in *United States and State of Indiana* v. *Indianapolis Power & Light Company*, Civil Action No. 3:20–cv–202 (D.J. Ref. No. 90–5–2–1–09897/1).[2] On the same day as they lodged the proposed Consent Decree, the United States and State of Indiana filed a complaint against Indianapolis Power & Light Company ("IPL") alleging 1) violations of the Clean Air Act's New Source Review provisions triggering new permit requirements for major modification at two boilers of the Petersburg plant and 2) violations of the plant's Title V permit limitations for opacity and sulfur dioxide (SO_2) emissions.[3]

[1] These comments are timely filed within 30 days of publication of notice in the Federal Register. *See* 85 Fed. Reg. 55,497 (Sept. 8, 2020).
[2] *See United States and State of Indiana v. Indianapolis Power & Light Company*, Civil Action No. 3:20–cv–202 (S.D. Ind. filed Aug. 31, 2020) (ECF Doc. No. 3) (proposed Consent Decree), *available at* https://www.epa.gov/enforcement/indianapolis-power-light-company-consent-decree.
[3] *See United States and State of Indiana v. Indianapolis Power & Light Company*, Civil Action No. 3:20–cv–202 (S.D. Ind. filed Aug. 31, 2020) (ECF Doc. No. 1) (Complaint).

We suggest revisions to the proposed Consent Decree that would improve the settlement from the perspective of the local communities that continue to suffer under pollution from the Petersburg coal-burning power plant. The Petersburg plant is one of the worst polluters in the State of Indiana.

The proposed Consent Decree currently offers paltry benefits for the community. Unless IPL abandons its current plan of retiring units 1 and 2 in 2021 and 2023, respectively, the Consent Decree does not require the installation of any new pollution control technologies. Nor is there any program to ensure that the funds IPL will pay under the proposed Consent Decree are directed to benefit the community.

I. The Consent Decree Should Be Revised to Include the Creation of a Community Environmental Action Committee to Assure Community Benefits.

We ask that the Consent Decree be revised to include the creation of a Community Environmental Action Committee tasked with ensuring that the Consent Decree's funds and projects benefit the local community impacted by pollution from the plant. The charge of the Community Environmental Action Committee should be to assist IPL in selecting and implementing projects that provide real benefits to the local community near the Petersburg plant.

As has been done under at least one other Clean Air Act settlement,[4] we ask that the Community Environmental Action Committee be staffed by one representative of the utility, one representative from an academic institution with a focus on public health and/or the environment, and three community members who reside in Pike County, Indiana, the location of the power plant. The projects recommended by the Committee should seek to maximize public health and environmental benefits in Pike County and might include, without limitation:

- Community solar arrays;
- Installation of air filtration systems in public schools and homes;
- Creation of new public parks;
- Health and safety retrofits for low-income customers;
- Reducing energy use and overall energy cost burden;
- Replacing school buses and municipal vehicles with electric-powered vehicles; and,
- Replacing outdoor wood boilers with renewable energy systems, such as solar heating or geothermal systems.

All of these projected would mitigate air pollution in the vicinity of Petersburg, Indiana. The Committee should be tasked with recommending projects on a rolling basis, and should recommend projects totaling at least $5 million no later than December 31, 2021 or some other pre-determined reasonable, near-term date certain. To provide funding for these Committee projects, we ask that, as explained further below, the "environmental mitigation project"

[4] *See* Settlement Agreement Between Sierra Club and DTE Energy Company and Detroit Edison Company, Civil Action No. 2:10-cv-13101-BAF-RSW (E.D. Mich. filed May 22, 2020) (provided as Attachment A).

currently included in the proposed Consent Decree be cancelled and that the associated funds be directed to the Committee instead.

II. The "Environmental Mitigation Project" Should Be Removed From the Consent Decree Because It Primarily Benefits IPL—Not the Community.

We ask that the "environmental mitigation project" be removed from the Consent Decree so as to focus benefits on the local community—and not to IPL, the polluter. Under the proposed Consent Decree's "environmental mitigation project," IPL is required to spend $5 million to build a "non-emitting source of power" on the property of the Petersburg plant with a nameplate capacity of 3 megawatts "to provide power for the internal Petersburg Station load."[5] This proposal does not provide sufficient benefits to the local community and actually will increase air pollution, while enriching IPL. This project should be cancelled and the funds directed to purposes that provide benefits to the community.

The "non-emitting source of power," likely solar panels, will reduce the parasitic load of the Petersburg power plant, i.e., the power required to operate the plant. By reducing the operating cost of the coal-fired boilers at Petersburg, the "non-emitting source of power," would have the effect of increasing the competitiveness of the Petersburg coal boilers in the regional electric energy market. Simply put, adding a power source that *only* provides power for the plant will allow the coal boilers to operate more frequently than they otherwise would and therefore would increase the pollution in the local community compared to the status quo at the power plant.

This mitigation project does not serve the community but will solely benefit IPL.[6] On days when the Petersburg plants' coal boilers are not operating, the non-emitting resource on site would provide no benefits to the public as it is only meant to serve the plant and IPL does not intend to connect it to the local electric grid. More fundamentally, to mitigate air pollution negatively impacting the community—some of the SO_2 violations at issue in the Complaint occurred when Pike County was designated nonattainment under the SO_2 NAAQS—it is inappropriate to allow the polluter to build a "mitigation" project that solely benefits itself by making its power plant more competitive while doing nothing to actually mitigate community harm.

III. If the United States Retains the Proposed "Environmental Mitigation Project"—Which It Should Not—It Should At Least Modify the Project to Minimize Harm to the Environment.

As explained above, instead of allowing IPL to spend $5 million to benefit itself under the guise of an environmental mitigation project, these funds should instead be directed toward the community most impacted by the pollution. Alternatively, if the United States goes forward

[5] Proposed Consent Decree at pp. 26-28 and Appendix A.

[6] If the United States intended to provide a benefit to IPL's customers, it should have required a solar project in Indianapolis, where IPL's electric load is. But we are not recommending this change because the Consent Decree should seek to benefit the community most impacted by the pollution from the Petersburg plant.

with allowing IPL to build itself a generation resource as a mitigation project, then, at a minimum, the project should be modified in two fundamental ways.

First, instead of providing power to the internal load of the Petersburg power plant, the on-site non-emitting resources should be connected to the local grid, so that it would provide power to the local communities and not IPL's customers in distant Indianapolis.

Second, the terms of the project should be aligned with the operational life of the coal-burning plant. In the proposed Consent Decree, IPL is directed to "own, operate and maintain the [non-emitting generation] System to serve the internal load at the Petersburg Station for not less than 10 years (as measured from the day that power is first provided from the [non-emitting generation])."[7] We ask that this language be revised to account for the possibility that the Petersburg power plant may be retired within the next ten years, as IPL is already planning to retire two of the four units in the next few years. If this System is retained in the final Consent Decree—though, again, we urge its removal and the re-direction of these funds to the community—the language should be revised to state that IPL should operate and maintain the non-emitting generation so long as the Petersburg coal units remain in operation (unless the project is revised to serve the local grid, and not the power plant).

IPL should not be *required* to operate this System for ten years or any defined period of time and instead should retire the System when it retires the coal boilers. For one thing, the United States does not have the legal authority to *require* IPL to operate its coal-burning plant longer than it otherwise intends to.

IV. The State-Only Environmentally-Beneficial Project Funding Should Be Increased.

As the only provision that provides direct benefits to the community, the proposed Consent Decree includes a provision that requires IPL to spend up to $325,000 on the acquisition of ecologically significant land near the Petersburg plant for the benefit of the public.[8] We welcome this provision and ask that the funded amount be increased to at least $500,000. Acquisition and restoration of ecologically significant land in the Petersburg area could include floodplain lands along the East Fork White River, and wetlands or upland forests in the area, which could be added to the Patoka River National Wildlife Refuge, Pike State Forest, or a new state outdoor property. Expanding tree cover in the vicinity of the Petersburg area would enable the absorption of more local air pollution and therefore provide direct benefits to the community. Another project idea for consideration is the removal or modification of the Williams Dam, to allow the endangered Lake Sturgeon to expand its range farther upstream in the East Fork.

* * *

If you have any questions or would otherwise like to discuss this letter, please do not hesitate to contact us. Thank you for your consideration.

[7] Proposed Consent Decree at Appendix A.
[8] Proposed Consent Decree at pp. 30-32 and Appendix B.

Sincerely,

Tony Mendoza
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415-977-5589
tony.mendoza@sierraclub.org

Wendy Bredhold
Senior Campaign Representative, Indiana and Kentucky, Sierra Club
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Attachment A

AGREEMENT BETWEEN SIERRA CLUB
AND DTE ENERGY COMPANY AND DETROIT EDISON COMPANY

The Parties to this Agreement ("Agreement") are Sierra Club on the one hand and DTE Energy Company and Detroit Edison Company (collectively, "Detroit Edison") on the other.

RECITALS

WHEREAS, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), filed a complaint against Detroit Edison on August 5, 2010, and Sierra Club subsequently intervened. *United States, et al. v. DTE Energy Company, et al.*, No. 2:10-cv-13101-BAF-RSW (E.D. Mich.).

WHEREAS, the United States and Sierra Club were later granted leave to amend their complaints ("Complaints") and thereafter filed amended complaints ("Amended Complaints"), which alleged violations of the Clean Air Act ("CAA" or "the Act") against Detroit Edison. Sierra Club, however, was denied leave to assert certain additional claims in its Amended Complaint.

WHEREAS, Detroit Edison does not admit any liability arising out of the transactions or occurrences alleged in the Complaints.

WHEREAS, the United States, Sierra Club, and Detroit Edison have executed and are lodging a Consent Decree (hereinafter "US Consent Decree").

WHEREAS, in light of this and other ongoing matters in which Sierra Club and Detroit Edison have been involved, they desire to foster a spirit of cooperation and to work together for the benefit of the local community by undertaking the projects as described in Appendix A to the Agreement. They therefore have separately agreed to the terms of this Agreement as further consideration to resolve certain disputes between Sierra Club and Detroit Edison under federal

law, including but not limited to claims that the Court denied Sierra Club leave to assert in its Amended Complaint, as described further herein.

WHEREAS, the Parties recognize that this Agreement has been negotiated in good faith and that their settlement will avoid the expense and uncertainty of continued or potential litigation.

NOW, THEREFORE, without admission of any violation of law or liability by Detroit Edison, the Parties agree to the following:

APPLICABILITY

1. The provisions of this Agreement shall apply to and be binding upon the Sierra Club and upon Detroit Edison and their respective successors, assigns, or other entities or persons otherwise bound by law. This Agreement may be assigned by Detroit Edison to another entity in connection with the sale or transfer of the River Rouge, Trenton Channel, or St. Clair power plants, and Detroit Edison shall be relieved of its obligations hereunder with respect to River Rouge, Trenton Channel, or St. Clair power plants if any of those plants are sold, transferred, or assigned, on and after such sale, transfer, or assignment provided that the purchaser, transferee, or assignee executes an assignment agreement as a condition of the sale, transfer, or assignment and agrees in writing to be bound by and liable for all of Detroit Edison's requirements in this Agreement being assumed. This Agreement is not assignable by the Sierra Club.

2. Detroit Edison shall expressly condition the sale or transfer of its River Rouge, Trenton Channel, or St. Clair power plants on any current or future buyer's or transferee's express acceptance of the retirement requirements set forth in this Agreement.

DEFINITIONS

3. The Definitions and other provisions set forth in Section III of the US Consent Decree are hereby incorporated herein as if fully set forth in (and shall be deemed to be part of) this Agreement.

COMPLIANCE REQUIREMENTS

4. By no later than the specific dates set forth below, Detroit Edison shall Retire the following Units:

Unit Name	Compliance Deadline (For Each Individual Unit)
River Rouge Unit 3	December 31, 2022
St. Clair Units 2-3 and 6-7	December 31, 2022
Trenton Channel Unit 9	December 31, 2022

5. Notwithstanding the deadlines in Paragraph 4 above, if the Retrofit, Refuel, Repower deadlines set forth in Paragraph 7 of the US Consent Decree for River Rouge Unit 3, St. Clair Units 2-3 and 6-7, or Trenton Channel Unit 9 are extended pursuant to that Paragraph or pursuant to the Force Majeure provisions of the US Consent Decree, the Retirement dates of these Units shall be extended to the same extent.

6. The provisions set forth in Section V (Prohibition on Netting Credits or Offsets) of the US Consent Decree apply to the emission reductions that result from Detroit Edison's compliance with the requirements of Paragraph 4 above, and such provisions are hereby incorporated herein as if fully set forth in (and shall be deemed to be part of) this Agreement.

ENVIRONMENTAL MITIGATION PROJECTS

7. Detroit Edison shall implement the Environmental Mitigation Projects ("Projects") described in Appendix A to this Agreement.

8. Detroit Edison shall maintain, and present to Sierra Club upon request, documents to substantiate the completion of the Project described in Appendix A, and shall provide these documents to Sierra Club within 30 Days following such request.

9. Detroit Edison shall use good faith efforts to secure as much environmental benefit as possible for each of the Projects, consistent with the applicable requirements and limits of this Agreement.

10. Within 60 Days following the completion of each Project required under this Agreement (including any applicable periods of demonstration or testing), Detroit Edison shall submit to Sierra Club a report that documents the date that the Project was completed and the Project Dollars expended by Detroit Edison in implementing the Project.

11. In connection with any communication to the public or to shareholders regarding Detroit Edison' actions or expenditures relating in any way to the Environmental Mitigation Projects set forth in Appendix A, Detroit Edison shall include prominently in the communication the information that the actions and expenditures were required by this Agreement.

REMEDIES

12. The Parties agree that neither Party will be responsible or liable for monetary damages (direct, indirect, consequential, etc.) as a result of any breach of this Agreement. The Parties acknowledge and agree that monetary damages are not available as a remedy in the event the obligations of this Agreement are breached. The Parties agree that monetary damages would

not be an adequate remedy for material breach of this Agreement, and that no adequate remedy at law exists for noncompliance with the terms of this Agreement.

13. Accordingly, the Parties expressly agree that an award of injunctive relief is the appropriate remedy for a material breach of the obligations under this Agreement, provided the reviewing court has followed appropriate procedures for issuing injunctive relief. The Parties also agree that should either Party commence any legal action to enforce this Agreement, that neither Party will seek any remedy except specific performance.

RELEASE

14. In consideration of the terms of this Agreement and other good and valuable consideration, receipt of which is hereby acknowledged, Sierra Club hereby remises, releases, and forever discharges Detroit Edison, its successors, assigns, subsidiaries, and affiliates, and each of their respective employees, representatives, officers, directors and shareholders of and from any and all claims that Sierra Club made or could have made against Detroit Edison that arose, directly or indirectly, from any modifications commenced at any System Unit prior to the Effective Date of this Agreement, including but not limited to those set forth in its Amended Complaint and related to the System Units and those that the Court denied Sierra Club leave to include in its Amended Complaint, under any or all of the following federal CAA provisions: (a) Part C or D of Subchapter I of the CAA, 42 U.S.C. §§ 7470-7492, 7501-7515, and the implementing PSD and Nonattainment NSR provisions of the Michigan SIP; (b) Section 111 of the CAA, 42 U.S.C. § 7411, and 40 C.F.R. Section 60.14; and (c) Title V of the CAA, 42 U.S.C. §§ 7661-7661f. Notwithstanding any foregoing provisions to the contrary, Sierra Club reserves its rights to enforce Detroit Edison's obligations under this Agreement pursuant to paragraphs

12, 13, 15, and 21 of this Agreement, and under the US Consent Decree pursuant to the terms of that Consent Decree.

DISPUTE RESOLUTION

15. Before commencing any legal action to enforce this Agreement for a Party's material breach of this Agreement, a Party must: i) notify the other Party in writing of such material breach providing details regarding the nature of the breach, so that the other Party could explore whether it could cure such material breach through diligence and ii) take at least 30 days before filing any such action, during which period the Parties will undertake all reasonable efforts to resolve the matter, provided, further, if the non-performing Party is working to diligently cure the material breach, and the non-performing Party cannot reasonably cure in 30 days, such Party, provided it exercises diligence to cure the breach, will be given more time to cure the breach before an action is filed.

SALES OR TRANSFERS OF OPERATIONAL OR OWNERSHIP INTERESTS

16. At least 60 Days prior to any transfer of ownership or operation of any System Unit, Detroit Edison shall provide a copy of this Agreement to the proposed transferee and shall simultaneously provide written notice of the prospective transfer to Sierra Club. No transfer of ownership or operation of a System Unit, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Detroit Edison of the obligation to ensure that the terms of this Agreement are implemented, unless and until:

a. the transferee agrees, in writing, to undertake the obligations required by this Agreement with respect to that System Unit(s);

b. Sierra Club consents, in writing, to relieve Detroit Edison of its Consent Decree obligations applicable to such System Unit(s); and

c. the transferee becomes a party to this Agreement with respect to the System Unit(s), pursuant to Paragraph 20 below (Modification).

17. Any attempt to transfer ownership or operation of any of the System Units or any portion thereof, without complying with Paragraph 16 above constitutes a breach of this Agreement.

NOTICES

18. Notices to Sierra Club or Detroit Edison related to this Agreement shall be made as follows:

As to the Sierra Club:

Shannon Fisk
Earthjustice
1617 John F. Kennedy Blvd. Suite 1130
Philadelphia, PA 19103
sfisk@earthjustice.org

As to Detroit Edison:

DTE Energy Company
Office of the General Counsel
One Energy Plaza
Detroit, MI 48226

Attn: DTE Electric General Counsel

With copy to:

DTE Energy Company
Environmental Management & Resources
One Energy Plaza 2455 WCB
Detroit, MI 48226

Attn: Vice President

EFFECTIVE DATE

19. The effective date of this Agreement shall be the date following the date on which the District Court for the Eastern District of Michigan enters the US Consent Decree and dismisses the Amended Complaints filed by the United States and Sierra Club.

MODIFICATION

20. The terms of this Agreement may be modified only by a subsequent written agreement signed by the Parties to this Agreement.

CHOICE OF LAW

21. This Agreement will be construed and governed in all respects by the laws of the State of Michigan, without regard to the principles of conflicts of law. A Party seeking to resolve a dispute arising over the terms and conditions contained in this Agreement must seek relief from a court of competent jurisdiction located in Wayne County, Michigan.

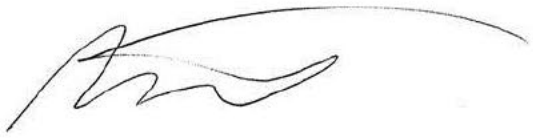
SIGNATORIES AND SERVICE

22. The undersigned representative of Detroit Edison and Sierra Club certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind to this document the Party he or she represents.

23. This Agreement may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.

FOR SIERRA CLUB

By its Counsel:



5/11/20
Date

Shannon Fisk
Managing Attorney
Earthjustice
1617 John F. Kennedy Blvd. Suite 1130
Philadelphia, PA 19103

FOR DTE ENERGY CO. AND DETROIT EDISON CO.

Date

Randall L. Rutkofske
Vice President & Deputy General Counsel DTE Energy
General Counsel DTE Electric Company
One Energy Plaza, 2335 WCB, Detroit MI 48226

FOR SIERRA CLUB

By its Counsel:

Date

Shannon Fisk
Managing Attorney
Earthjustice
1617 John F. Kennedy Blvd. Suite 1130
Philadelphia, PA 19103

FOR DTE ENERGY CO. AND DETROIT EDISON CO.

May 5, 2020
Date

Randall L. Rutkofske
Vice President & Deputy General Counsel DTE Energy
General Counsel DTE Electric Company
One Energy Plaza, 2335 WCB, Detroit MI 48226

APPENDIX A

ENVIRONMENTAL MITIGATION PROJECTS FOR AGREEMENT BETWEEN PLAINTIFF SIERRA CLUB AND DEFENDANTS DTE ENERGY COMPANY AND DETROIT EDISON COMPANY

1. Defendants shall comply with the requirements of this Appendix and Paragraphs 7 through 11 (Environmental Mitigation Projects) of the Agreement to implement and secure the benefits of each of the projects described in this Appendix.

A. Bus Replacement Project - Electrification

2. For purposes of carrying out the Bus Replacement Project set forth in Appendix A to the US Consent Decree, Defendants shall propose and implement a plan to replace school buses and/or municipal transit buses with electric buses and related electrification infrastructure. Defendants shall seek and prioritize making such bus replacements in Ecorse, River Rouge, the 48217 zip code, and/or other non-attainment and/or environmental justice areas within Wayne County.

B. Community Based Environmental Projects (no less than $ 2 million)

3. DTE will establish, within 120 days of the effective date of the Agreement, a Community Environmental Action Committee ("Committee") that will assist DTE in selecting and implementing projects within Ecorse, River Rouge, and the 48217 zip code.

4. The Committee will be made up of five members: One DTE representative; one representative from an academic institution with a focus on public health and/or the environment; and three community members who reside in Ecorse, River Rouge, or the 48217

zip code. DTE shall consult with Sierra Club to identify a list of community members to serve on the Committee.

5. DTE is responsible for convening the committee as necessary, but no less than once a quarter for the first year after its establishment, to consider and recommend community based environmental projects. The projects recommended by the Committee will seek to maximize public health and environmental benefits in Ecorse, River Rouge, and/or the 48217 zip code, and may include urban solar arrays, installation of air filtration systems in public schools and homes, urban forestation, health and safety retrofits for low-income customers, and reducing energy use and overall energy cost burden. The Committee will make project recommendations by majority vote of all members. The Committee may recommend projects on a rolling basis, and shall recommend projects totaling at least $2 million no later than June 30, 2021.

6. The Committee shall not propose, and DTE will not fund, any project that would provide a direct financial benefit to any Committee member, or for which the entity or entities that selected such members would be the primary beneficiary of a project. DTE will not be deemed the primary beneficiary of a project solely because it is the owner, operator, seller, or purchaser of electricity or renewable energy credits from projects recommended by the committee, or because of good will generated as a result of DTE funding such projects.

7. Committee members filling the three "community member" seats on the committee will be eligible for a per-meeting stipend of $300 for all in-person meetings, and a $100 stipend for all meetings conducted through remote participation. DTE will pay the stipends from funds outside the settlement. The stipend does not create a legal, financial, or fiduciary relationship between DTE and the community members of the Committee, and should not be used as any evidence of a conflict of interest.

8. DTE shall fund and/or implement one or more of the projects recommended by the Committee and complete such project or projects no later than June 30, 2023. DTE shall spend no less than $2 million on these projects.

9. DTE will inform the Committee of progress on the projects on a semi-annual basis after each project is selected.

10. In all communications to the public or shareholders about the projects recommended by the Committee and formally selected by DTE, Defendants shall include prominently in the communication that the projects were required by the Agreement and the Committee's role in selecting the project.

C. Energy Efficiency Improvement Project at Kemeny Recreation Center

11. DTE will work with Kemeny Recreation Center, located at 2260 S. Fort St., in the Boynton community in Detroit, Michigan, to improve energy efficiency and reduce overall energy use at the facility, DTE will fund at least one project to advance such energy efficiency and use goals at the Center.

12. DTE will inform Sierra Club when DTE selects a project and when it has completed the project. Such project shall be selected within one year, and completed within three years, of the effective date of the Agreement.

EXHIBIT 2

UNITED STATES' RESPONSE TO COMMENTS

1. Comment:

The Wisconsin Department of Natural Resources (Wisconsin DNR) opines that the Decree should have required that IPL install on Unit 4 a Selective Catalytic Reduction (SCR) device as opposed to a Selective Non-Catalytic Reduction (SNCR) device, because it asserts that an SCR is more widely used and more effective at reducing emissions than an SNCR.

Response:

The commenter is correct that an SCR is a common, effective control device to limit NOx emissions. In fact, emissions from Petersburg Units 2 and 3, two of the four boiler units comprising IPL's Petersburg Facility (Facility), are currently controlled with an SCR. Declaration of Ethan Chatfield (Chatfield Decl.), at ¶ 13 (attached). An SNCR, however, which the Consent Decree (Decree) requires IPL to install on Petersburg Unit 4, is also designed to result in significant NOx emission reductions. *Id*. Based on good-faith negotiations, the parties agreed, as one of the comprehensive compliance measures in the Decree, that IPL would install an SNCR on Petersburg Unit 4. EPA anticipates that an SNCR-controlled Unit 4 will contribute to a substantial reduction in NOx emissions at the Facility.[1] *Id*.

Further, the proposed Decree requires that all NOx controls on all four of the Petersburg Units be operated continuously, as defined in Paragraph 5(g) of the Decree, at emission rates reduced from current permitted levels, and sets forth annual NOx tonnage limitations. Compliance with those requirements is expected to substantially reduce IPL's NOx emissions at the Facility. Chatfield Decl. ¶ 14.

2. Comment:

Wisconsin DNR asserts that the Decree does not involve or require the early retirement of any of the Facility's Units because Units 1 and 2 are already scheduled to be retired in 2021 and 2023, respectively – suggesting that the Decree's provision acknowledging IPL's intention to retire the two Units early is meaningless. In support of its comment, Wisconsin DNR cites Energy Information Administration information and Indiana's Eastern Regional Technical Advisory Committee electricity generating unit emission projection tool, noting IPL's intention to voluntarily retire Unit 1 in 2021 and Unit 2 in 2023.

Response:

Wisconsin DNR is correct that the Decree is not the first and only forum in which IPL signified its intention to retire Petersburg Units 1 and 2 early. In December 2019, IPL filed its triennial Integrated Resource Plan (IRP) with the Indiana Utility Regulatory Commission,

[1] As noted in the Decree at Paragraph 7 and discussed further below, if IPL permanently retires Petersburg Units 1 and 2 prior to the deadline for installing the SNCR, IPL is relieved of the requirement to install the SNCR on Petersburg Unit 4.

officially announcing its intention to retire Petersburg Unit 1 by 2021 and Petersburg Unit 2 by 2023, and to make a transition to cleaner resources.[2]

As IPL explained in the IRP:

> Based on extensive modeling, IPL has determined that the cost of operating Petersburg Units 1 and 2 exceeds the value customers receive compared to alternative resources. Retirement of these units allows the company to cost-effectively diversify the portfolio and transition to cleaner, more affordable resources while maintaining a reliable system.

IPL's 2019 IRP's Non-Technical Summary, at 6.

As Wisconsin DNR pointed out, the Energy Information Administration (part of the U.S. Department of Energy), in a report filed the first quarter of 2020, noted IPL's intention to retire the two units early, relying on information provided by IPL based on IPL's 2019 IRP.

Significantly, the IRP is only an expression of intention regarding the company's future. IPL retains the authority to decide to keep one or both of the Units, because the 2019 IRP and other filings do not compel IPL to retire either or both of them. As IPL, in the IRP, put it:

> The Integrated Resource Plan is viewed as a guide for future resource decisions made at a snapshot in time. Resource decisions, particularly those beyond the five-year horizon, are subject to change based on future analyses and regulatory filings.

IPL's 2019 IRP's Non-Technical Summary, at 2.

In contrast, by concretizing IPL's intention in the Consent Decree to retire Petersburg Units 1 and 2 by 2023 and tying it to IPL's obligation to install an SNCR on Unit 4 by that date, the proposed Decree creates a strong incentive for IPL to follow through with its expressed intention, even if circumstances should change. Knowing that the deadline for complying with the Decree's requirement to install an SNCR is approaching relatively soon, and that the company will be excused from such obligation should it retire Petersburg Units 1 and 2 prior to that deadline, IPL is less likely than otherwise to revise its stated plans to retire those Units by

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[2] According to the Indiana Utility Regulatory Commission website, jurisdictional electric utilities, including IPL, are required to submit IRPs every three years in accordance with Indiana Code § 8-1-8.5-3(e)(2). As explained on the website:

> The IRPs are subject to a rigorous stakeholder process. IRPs describe how the utility plans to deliver safe, reliable, and efficient electricity at just and reasonable rates. Further, these plans must be in the public interest and consistent with state energy and environmental policies. Each utility's IRP explains how it will use existing and future resources to meet customer demand. When selecting these resources, the utility must consider a broad range of potential future conditions and variables and select a combination that would provide reliable service in an efficient and cost-effective manner.

https://www.in.gov/iurc/2630.htm.

2023. Retirement of Petersburg Units 1 and 2 by 2023 is expected to result in a much larger decrease in pollutant emissions, especially NOx, than would be expected from installing an SNCR on Unit 4. Chatfield Decl. ¶ 15.

Further, under the Decree, "retire" means to "permanently shut down and cease to operate the Unit, and to comply with applicable state and federal requirements for permanently ceasing operation of the Unit, including removing the Unit from Indiana's air emissions inventory, and amending all applicable permits so as to reflect the permanent shutdown status of such Unit." Decree ¶ 5(mm). Thus, if the Consent Decree is approved and IPL retires Petersburg Units 1 and 2 prior to the deadline for installing the SNCR, the retirement must be permanent and comply with all relevant federal and state requirements. By way of contrast, even if IPL stops operating the two Units, the IRP, in itself, does not prohibit IPL from restarting either Unit. Plaintiffs' ability to enforce IPL's decision to permanently retire those Units in accordance with the terms of the Consent Decree further highlights the benefits of concretizing IPL's plans in the context of an enforceable agreement.

3. Comment:

Wisconsin DNR asserts that the 30-day rolling average NOx emission rates in the proposed Consent Decree are too high and do not reflect the emission rates that can actually be achieved with proper operation of available control technologies.

Response:

Wisconsin DNR does not provide any clarity as to what it means by "NOx emission rates in the proposed Consent Decree are too high" -- for example, which NOx emission rates in the proposed Decree are too high, and what is meant by "too high" (as opposed to what the commenter believes the rate should be). For that matter, the commenter does not identify which Units it is concerned about, and which "available control technologies" it believes will result in lower rates. Finally, the commenter does not explain what it means by "proper" operation. All such gaps make a thoughtful response to the comment difficult. Nevertheless, the United States' best effort to answer these concerns follows.

IPL has SCRs on Petersburg Units 2 and 3, installed in 2004. EPA, however, determined that IPL, prior to receiving EPA's Notice of Violation in February 2016, was operating those SCRs inconsistently. In the Complaint, the Governments alleged that IPL, at Petersburg Units 1 and 2, was out of compliance with the Prevention of Significant Deterioration (PSD) and/or Non-Attainment New Source Review (NSR) requirements of the Clean Air Act and the Indiana State Implementation Plan. Complaint ¶ 64. As a result, among other things, IPL should have obtained a PSD and/or Non-Attainment NSR permit for each of those two Units from the State. Complaint ¶ 65. A PSD or Non-Attainment NSR permit would have likely required IPL to operate each of the control devices on those Units continuously. Chatfield Decl. ¶ 16. Thus, as part of the overall relief in settlement of this matter, the proposed Decree requires that IPL

operate the SCR at Petersburg Unit 2 on a continuous basis, as if Unit 2 were operating under a PSD or Non-Attainment NSR permit.[3]

Further, although during the last several years (2017 through 2019) Petersburg Unit 2 was achieving a reported NOx *annual* emission rate of between 0.08 to 0.09 lb/mmBtu, the proposed Decree's requirement for a 0.100 lb/mmBtu NOx emission rate is based on a *30-day rolling average basis* -- a more stringent averaging period. Chatfield Decl. ¶ 17. Thus, given the Decree's requirement that IPL meet a NOx limit at Petersburg Unit 2 based on a 30-day rolling average, the negotiated rate of 0.100 lb/mmBtu is in effect an equivalent if not lower NOx emission rate than IPL's current .08-.09 lb/mmBtu rate based on an annual averaging period. *Id*. Coupled with the Decree's requirement to operate the SCR continuously, and the Decree's annual NOx tonnage limitation for Petersburg Unit 2, the Decree's 0.100 lb/mmBtu NOx rate based on a 30-day rolling averaging period is a reasonable resolution of the alleged claim related to increased NOx emissions at Unit 2.

The negotiated NOx rate for Unit 4 of 0.190 lb/mmBtu once IPL installs the SNCR, and the negotiated NOx rate for the current Low NOx Burner/Overfired Air (LNB/OFA) at Petersburg Unit 4 of 0.260 lb/mmBtu – both rates based on a 30-day rolling average basis – are consistent with rates expected to be practically achievable by those controls. *Id*. at ¶ 18. Similarly, the negotiated NOx rates for Petersburg Units 1 and 3, for which the Governments have made no claims related to increased NOx emissions, are appropriate. Specifically, the negotiated NOx rate of 0.100 lb/mmBTU for the SCR at Petersburg Unit 3, and the negotiated NOx rate of 0.220 for the LNB/OFA at Petersburg Unit 1 -- both based on a 30-day rolling average -- are consistent with rates expected to be practically achievable by those controls. *Id*. at ¶ 19. Coupled with the Decree's requirements to operate all controls continuously, and the Decree's annual NOx tonnage limitations, the negotiated NOx rates for Units 1, 3 and 4 are anticipated to substantially reduce NOx emissions at the Facility. *Id*. at ¶ 20.

Wisconsin DNR's comment suggests that the Consent Decree should not be approved because the negotiated NOx rates are not the lowest possible rates. The Governments concede that the negotiated NOx rates are not the lowest rates achievable, but the Governments cannot impose such rates unilaterally. Were the Decree disapproved on that basis and the parties forced to go back to the drawing board, the Governments are not assured of obtaining IPL's agreement to lower rates. Further, any effort to renegotiate the rates would take time and delay the deadlines for IPL's compliance with the many other significant Decree requirements intended to

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[3] "'Continuous Operation'" and "'Continuously Operate'" in the Decree mean that when a pollution control technology or combustion control is required to be used at a Unit pursuant to this Consent Decree (including, but not limited to, a Baghouse, ESP, FGD system, LNB, OFA, Selective Catalytic Reduction device, Selective Non-Catalytic Reduction device and Sulfuric Acid Mitigation System), it shall be operated at all times that the Unit it serves is in operation, consistent with the technological limitations, manufacturers' specifications, good engineering and maintenance practices, and good air pollution control practices for minimizing emissions (as defined in 40 C.F.R. § 60.11(d)) for such equipment and the Unit." Decree, ¶ 5(g).

reduce pollutant emissions at the Facility. And, of course, there is no guarantee of success, which in the end could lead to lengthy and uncertain litigation rather than a negotiated agreement.

In any event, as explained in the Memorandum in Support of Plaintiffs' Motion for Entry, the standard for approval of a consent decree is not whether the settlement produces the best possible result, but rather whether the settlement overall is fair, reasonable, consistent with the underlying statutes and in the public interest.

4. Comment:

Comments provided by a coalition of citizen groups including the Sierra Club, the Environmental Law & Policy Center, the Hoosier Environmental Council and the Citizens Action Coalition of Indiana (hereinafter, Sierra Club) request that the Decree be revised to include the creation of what it calls a Community Environmental Action Committee (Committee) to assure community benefits. Sierra Club asserts that the Committee's charge would be to assist IPL in selecting and implementing projects that provide certain benefits to the local community near the Petersburg plant. Seven examples of such projects are enumerated. Sierra Club asks that the current Environmental Mitigation Project described in Appendix A of the Decree be cancelled, and that funds intended to be spent on that project be redirected to fund new projects to be recommended by the Committee in the amount of at least $5 million.

Response:

The Environmental Mitigation Project described in the Decree's Appendix A, in which IPL will propose for approval a project involving a new, non-emitting source of energy to power the internal load at the Petersburg Facility, was negotiated in good faith by the Governments and IPL as part of the overall comprehensive relief package of the proposed Decree. During the negotiations, a number of different proposals for a mitigation project were discussed. Ultimately, the parties determined that the one agreed to in Appendix A, discussed in more detail below, would provide meaningful environmental benefits that are tailored to redressing a portion of the harm caused by the alleged violations, and was the preferred choice of the parties. Sierra Club's request to cancel this well-thought out, diligently-negotiated project in exchange for a vague, open-ended process that may or not produce a mutually-agreed upon, valuable mitigation project (or projects) in the future is not acceptable.

Specifically, Sierra Club's proposal to form the Committee, which contemplates a plurality of community members who may well represent special interests and harbor possible conflicts of interest, does little to ensure that IPL's money is not spent on wasteful or inefficient projects designed more to generate good will than to achieve meaningful improvements in the environment. In particular, the proposal's absence of specificity or substantive criteria for the hypothetical future projects stands in stark contrast to the detailed terms and requirements set forth in Appendix A for the negotiated Environmental Mitigation Project. At the very least, Sierra Club's proposal would do away with a known, agreed-upon mitigation project redressing a portion of the harm caused by the alleged violations, benefiting the public and enforceable by the Governments, in favor of a set of unknown, to-be-determined projects -- assuming any agreement on them can ever be reached -- for which the Governments will have little or no input.

In short, the Governments reject Sierra Club's proposal as neither practical nor in the public interest.[4] In any event, the comment does not disclose facts or considerations indicating that the proposed Consent Decree is inappropriate, improper, or inadequate. Decree ¶ 130.

5. Comment:

Sierra Club argues that Environmental Mitigation Project (Project) should be removed from the Consent Decree on the grounds that it does not directly benefit the community. Specifically, Sierra Club opines that the Project will increase, not decrease, pollution, because the new source of power will allow the Facility's coal-fired boilers to operate more frequently than they otherwise would and therefore would increase the pollution in the local community. Sierra Club further argues that the project will enrich IPL, because the new source will reduce the operating cost of the coal-fired boilers and therefore have the effect of increasing the competitiveness of those boilers in the regional electric energy market.

Response:

The proposed Project mandated by Appendix A is designed to address the need to mitigate the harm over the years caused by IPL's alleged excess pollutant emissions in a way that will environmentally benefit the local community. The Project requires IPL to submit for EPA's and the State's approval a new, non-emitting (i.e., "clean") source of power with a rated nameplate capacity of 3.0 MW, to be connected into the Petersburg Station auxiliary electrical system in order to provide power for the internal station load. Decree, Appendix A, Parts I.B. and II.A.

Sierra Club does not provide any substantiation for its statement that, if IPL implements the Project by installing a new, non-emitting source of power to fuel the plant's internal load, IPL would operate its boilers more frequently than it otherwise would and therefore increase pollutant emissions and enrich IPL. The facts suggest otherwise. Currently, the energy that is generated for the Facility's internal load is derived from burning fossil fuels, which emits pollutants including SO_2 and NOx. Complaint ¶ 57. The new, non-emitting source of power for this load would consist of a renewable energy source, such as solar or wind energy, which does not generate such pollutants. Energy produced from such a "clean" source would likely offset energy that otherwise would be generated by the coal-fired boilers to serve the internal load, thereby reducing pollutant emissions at the Facility and benefitting the local community. Chatfield Decl. ¶ 22. Such environmental benefits are expected to accrue and be realized primarily over an extended length of time, which is why the proposed Decree requires that IPL operate the new, clean energy source for at least 10 years. *Id*.

[4] In its comment, Sierra Club states that a similar proposal was made in another Clean Air Act settlement, referencing "Settlement Agreement Between Sierra Club and DTE Energy Company and Detroit Edison Company, Civil Action No. 2:10-cv-13101-BAF-RSW (E.D. Mich.), filed May 22, 2020." That settlement agreement is a separate matter reached between Sierra Club and DTE Energy Co., to which the United States was not a party (and to which the United States objected).

6. Comment:

Sierra Club asserts that, if the Governments keep the Environmental Mitigation Project as part of the settlement, the Project should be modified in two ways. First, Sierra Club suggests that, instead of providing power to the plant's internal load, the on-site non-emitting resources should be connected to the local grid, so that the Project would provide power to the local communities and not IPL's customers in Indianapolis. Second, Sierra Club avers that the language should be revised to state that IPL will operate and maintain the non-emitting generation only as long as the plant's coal Units remain in operation, as opposed to being maintained for a full ten-year period as mandated by Appendix A. Sierra Club argues that its second suggested revision accounts for the possibility that the Facility may be retired within the next ten years, given that IPL is already planning to retire half of its Units, i.e., Petersburg Units 1 and 2, by 2023. In the absence of making this change, Sierra Club suggests that the language of Appendix A actually *requires* IPL to continue operating the Facility for at least ten years.

Response:

Given the pollutant emission reductions expected to result from replacing 3 MW of the current, coal-produced energy with the new, non-emitting power source, it is the local community, not IPL's customers in Indianapolis, who will benefit over time from the decreased emissions and cleaner air. If, as recommended by Sierra Club, the power were provided to the local grid, which is operated by Duke Energy, the Facility's internal load would not be reduced, and it is not known what emission reductions would result, if any, or where they might occur.

Sierra Club's additional suggestion, that the Project should be amended to remove the requirement that IPL operate the new, clean power source for at least 10 years, is based on a speculative scenario that IPL may retire its entire Facility before the end of that time period. Though IPL, as discussed above, has made public via its 2019 IRP its intention to retire Units 1 and 2 by 2023, the IRP gives no indication that IPL intends to retire the entire plant within the next ten years. In the event that IPL alters its current intention and decides to retire the entire Facility within the next ten years, the parties can make alternative arrangements within the parameters of the Decree. In particular, the parties could seek to modify the settlement under the Modification Section of the Decree, in ways that are mutually agreeable to all parties. *See* Decree ¶ 119. For example, the potential modification could include acceleration of Appendix A's requirement that is meant to take effect between the 10-year and 25-year operation period, namely, obligating IPL to "use good faith efforts to ensure that the [new, clean energy source] is connected to the grid and that ownership is transferred to a third party who would thereafter assume sole responsibility to operate and maintain the [new, clean energy source] to provide energy for the remainder of the 25 year period." Decree, Appendix A, Part II.B.

In any event, Sierra Club's implication that the language in Appendix A actually requires IPL to operate the coal-burning Units at the Facility for at least ten years has no basis in the terms and/or conditions of the settlement. As Sierra Club correctly notes, the Governments do not have the legal authority to require IPL to operate the Facility longer than it intends to, and nothing in the language of Appendix A or the Decree as a whole so requires.

When crafting any negotiated agreement, no side has a crystal ball and can possibly foresee all potential scenarios that may arise in the future. Thus, no agreement, including this one, is prescient and can possibly address all future potentialities. Appendix A addresses the current, real need (and the Governments' claims) for mitigating a portion of the harm caused by IPL's violations, and, once the Decree is entered and the Project implemented, will provide environmental benefits to the local community for years to come. *See* Chatfield Decl. ¶ 22. And as discussed above, both Appendix A and the Decree as a whole provide mechanisms that can be utilized to address, if necessary, changed circumstances should they arise in the future.

In short, none of the Sierra Club's comments discloses facts or considerations indicating that the proposed Consent Decree is inappropriate, improper, or inadequate. Decree ¶ 130. Sierra Club's requests to remove the Project entirely and/or modify it would require the parties to go back to the drawing board, with no certainty that an improved project, or any amended agreement for that matter, would result. And any effort to renegotiate the Project or any other aspect of the settlement would take time and delay the deadlines for IPL's compliance with the many significant Decree provisions intended to reduce pollutant emissions at the Facility and benefit the local community.

7. Comment:

Sierra Club does not challenge, but rather welcomes, the State-Only Environmentally Beneficial Project described in Appendix B, requiring IPL to acquire and restore ecologically significant land near the Facility. Sierra Club, however, asks that the negotiated sum of $325,000 for the State-only project be increased to at least $500,000, and suggests a number of other types of lands that could be acquired and donated to the Patoka River National Wildlife Refuge and other public areas. The commenter also suggests additional, related projects that IPL could undertake if the negotiated amount is increased to $500,000.

Response:

The State-Only Environmentally Beneficial Project is designed, among other things, to "help ameliorate and restore past detrimental effects to plant life and vegetation in the vicinity that can be attributed to high levels of sulfur dioxide, ozone and PM 2.5 emissions." Decree, Appendix B, Part I.B. Like all components of the settlement, the agreed-upon amount of $325,000 for the State-only project was the result of good-faith negotiations, which took into account the "big picture" of the settlement package in resolving the Governments' claims, including the Decree's comprehensive compliance measures, civil penalty amount shared between the United States and the State, and amount for the Environmental Mitigation Project. Indiana believes that IPL's agreement to fund the State-only project in the amount of $325,000 is very favorable and will benefit the local public and the environment to a considerable degree.

At the same time, Indiana acknowledges that there remain additional needs to conserve and restore ecologically significant land in the area, and for other important, related projects. Indiana appreciates Sierra Club's suggestions for other proposals in this regard, and will keep them in mind when considering similar projects in the future.

ATTACHMENT TO UNITED STATES' RESPONSE TO COMMENTS
DECLARATION OF ETHAN CHATFIELD

I, Ethan Chatfield, hereby declare that:

1. The statements in this Declaration are based upon my 17 years of experience working at the U.S. Environmental Protection Agency (EPA) Region 5 office.

2. For the past 13 years I have worked as an Environmental Engineer in the Air Enforcement and Compliance Assurance Branch in Region 5 where my primary responsibilities include conducting Clean Air Act (CAA) inspections, sending CAA information requests, performing compliance monitoring, drafting and issuing Notices and Findings of Violations and assessing the compliance of stationary emission sources (such as power plants) with various CAA requirements. Prior to my work at EPA, I worked as an environmental engineer with an environmental consulting company in Virginia.

3. I received a Bachelor of Science Degree from the University of Michigan School of Natural Resource and Environment in December 1997 and a Master of Science in Civil Engineering from the University of Colorado at Boulder in August 2000.

4. I am one of EPA Region 5's senior engineers responsible for inspecting and investigating coal-fired utilities for CAA compliance. My additional duties in this role consist of identifying sources of potential violations at coal-fired power plants; reviewing and analyzing case files, including information obtained from CAA Section 114 information requests; and calculating emission increases from various construction projects (or major modifications) using data obtained from Generation Availability Data System (GADS)[1] and Clean Air Markets Acid Rain Program continuous emissions monitoring system (CEMS), among other information. I have either conducted or participated in the investigation, development, and settlement of over 10 major investigations/cases against coal-fired electric utilities, including but not limited to DTE Energy Company, Dominion Energy, Hoosier Energy, Minnesota Power, SIGECO, Wisconsin Power & Light Company, Wisconsin Public Service Corporation, and the instant matter with Indianapolis Power & Light Co. (IPL).

5. I am very familiar with the New Source Review (NSR) permitting program.[2] Generally, NSR is a preconstruction permitting program that requires an owner or operator of a Major Stationary Source to, among other things, obtain a construction permit and install appropriate pollution controls known as best available control technology (BACT) prior to commencing construction of a Major Modification. A Major Modification is defined as "any physical change in or change in the method of operation of a major stationary source that would

[1] GADS is a collection of operating information reported by utilities with the purpose of improving the performance of electric generating units.

[2] NSR consists of two programs, Prevention of Significant Deterioration ("PSD") and Non-attainment New Source Review, depending on whether the area is in attainment with the applicable National Ambient Air Quality Standard. Both programs are applicable here. For the purposes of this Declaration, the programs are similar enough that I cite only to the PSD requirements.

result in: a significant emissions increase . . . of a regulated NSR pollutant . . .; and a significant net emissions increase of that pollutant from the major stationary source." See 40 C.F.R. § 52.21(b)(2)(i). Basically, for electric steam generating units, an emission increase is determined by comparing the selected 24-month baseline period from the five years prior to the commencement of a physical change with the post-project projected actual emissions. If the difference in the emissions for an individual pollutant exceeds the significance thresholds listed in the regulations, there is a significant emissions increase.

6. I am familiar with the Petersburg Generating Station fossil fuel-fired steam electric plant (plant or Facility) owned and operated by IPL. The Facility consists of four fossil fuel-fired boilers and corresponding turbines (hereinafter, Units) for electricity generation. Units 1 through 4 are "electric steam generating units" with net generating capacities of approximately 229, 412, 540, and 530 megawatts, respectively. The Facility has in place various equipment designed to reduce pollutant emissions. All four Units contain wet flue gas desulfurization (FGD) for sulfur dioxide (SO_2) control and three of the four units have low-nitrogen oxide burners with over-fire air systems for nitrogen oxides (NOx) control. Additionally, Units 2 and 3 have Selective Catalytic Reduction (SCR) Systems for NOx control. For particulate matter (PM) controls, Units 1 and 4 have electrostatic precipitators (ESPs), Unit 2 has a baghouse, and Unit 3 has an ESP with a baghouse. All four Units also have sulfuric acid mist (H_2SO_4) controls. Historically, the Facility's pollutant exceedances have been caused by IPL's failure to continuously run the Facility's FGDs, SCRs and the H_2SO_4 mitigation systems.

7. On July 14, 2015, I conducted a CAA inspection of the Facility (Inspection). During the Inspection, I conducted EPA Method 9 Visible Emissions Observations at the Facility.

8. On August 13, 2015, I assisted with drafting and sending a CAA Section 114 information request (Request) to the Facility.

9. Based on information obtained during the Inspection and from the IPL's response to the Request, EPA sent a Notice and Finding of Violation (NOV) to IPL on September 23, 2015, and a second one on February 5, 2016. Allegations in these NOVs form the bases of the violations alleged in the Complaint. The Complaint alleges that IPL modified several Units at the Facility, failed to obtain the necessary permits and failed to install BACT controls necessary to sufficiently reduce SO_2, NO_X, PM and/or H_2SO_4 emissions, in violation of the NSR provisions of the Act. The Complaint also alleges that IPL violated and continues to violate the Indiana State Implementation Plan, the CAA's New Source Performance Standards and/or the Facility's Title V Permit by exceeding opacity limitations and emitting SO_2 and/or PM (including in some cases bypassing its SO_2 controls) in excess of the applicable emission limits.

10. The proposed Consent Decree requires IPL to reduce its Facility's emissions of NOx, SO_2, PM and H_2SO_4. In order to do so, IPL will install a pollution control device known as a Selective Non-Catalytic Reduction System (SNCR) on one of the Facility's Units (Unit 4), improve its sulfuric acid mitigation system, and continuously operate all of its pollution control

equipment to meet levels that will achieve reductions in NOx, SO_2, PM and H_2SO_4 emissions. Also, the agreement recognizes that IPL may permanently retire Petersburg Units 1 and 2. IPL may forego installing the SNCR device on Unit 4 if it in fact retires the two coal-fired Units 1 and 2 prior to July 1, 2023, the deadline under the Consent Decree by which IPL must install the SNCR.

11. As discussed further below, other Decree compliance measures require IPL to propose and fund a mitigation project to redress some of the harm caused by IPL's excess emissions in order to benefit the local community, and a State-only environmentally beneficial project designed to acquire, restore and preserve some ecologically significant parcels of land near the plant.

12. I reviewed the public comments received regarding the proposed Consent Decree, which question several of the Decree's compliance measures and, in some cases, recommend changes to them. Below I discuss the technical concerns raised by the commenters regarding those compliance measures.

13. An SCR is a common, effective control device to limit NOx emissions, and, in fact, emissions from Units 2 and 3 are currently controlled with an SCR. An SNCR, which the Decree requires IPL to install on Unit 4, is also designed to result in significant NOx emission reductions. Based on good-faith negotiations, the parties agreed, as one of the many comprehensive compliance measures in the Decree, that IPL would install an SNCR on Unit 4. EPA anticipates that an SNCR-controlled Unit 4 will contribute to a substantial reduction in NOx emissions at the Facility.

14. The Decree requires that all NOx controls on all four units be operated continuously (as defined in the Decree), at emission rates reduced from current permitted levels, and sets forth annual NOx tonnage limitations. Compliance with these requirements is expected to substantially reduce IPL's NOx emissions at the plant.

15. The Decree notes that, if IPL permanently retires Units 1 and 2 prior to the deadline for installing the SNCR (July 1, 2023), IPL is relieved of the requirement to install the SNCR on Unit 4. Permanent retirement of those two units is expected to result in a much greater reduction of pollutant emissions, especially NOx, at the plant than emission reductions expected from installing an SNCR on Unit 4. (Even were IPL to install an SCR, rather than an SNCR, on Unit 4, permanent retirement of Units 1 and 2 prior to July 1, 2023 is expected to result in a larger reduction of NOx emissions at the Facility than emission reductions anticipated from installing an SCR on Unit 4.)

16. If IPL were to have applied for and obtained an NSR permit for each of Units 1 and 2, the permits would have likely required IPL to operate the control devices on those units continuously.

17. During the last several years (2017 through 2019), Unit 2 was achieving a reported NOx annual emission rate of between 0.08 to 0.09 lb/mmBtu. The proposed Decree's requirement that IPL meet a 0.100 lb/mmBtu NOx emission rate for Unit 2 is based on a 30-day rolling average basis, a more stringent averaging period than an annual averaging period. Thus, given the Decree's requirement that IPL meet a NOx limit at Unit 2 based on a 30-day rolling average, the negotiated rate of 0.100 lb/mmBtu is, in effect, equivalent to, if not lower than, IPL's current NOx emission rate of .08-.09 lb/mmBtu rate based on an annual averaging period.

18. The Decree's negotiated NOx rate for Unit 4 of 0.190 lb/mmBtu once IPL installs the SNCR, and the negotiated NOx rate for the current Low NOx Burner/Overfired Air (LNB/OFA) at Unit 4 of 0.260 lb/mmBtu, are based on a 30-day rolling average basis. Both rates are consistent with rates expected to be practically achievable by those controls.

19. The Decree's negotiated NOx rate of 0.100 lb/mmBTU for the SCR at Unit 3, and the negotiated NOx rate of 0.220 for the LNB/OFA at Unit 1, are based on a 30-day rolling average basis. Both rates are consistent with rates expected to be practically achievable by those controls.

20. Coupled with the Decree requirements to operate all controls continuously, and the Decree's annual NOx tonnage limitations, the negotiated NOx rates for Units 1, 3 and 4 are anticipated to substantially reduce NOx emissions at the plant.

21. In sum, the injunctive relief required by the proposed Decree, including installation of a new pollution control device (unless Units 1 and 2 are permanently shut down beforehand) and continuous operation of the existing pollution control systems to meet reduced pollutant rates, is anticipated to result in significant emissions reductions of SO_2, NOx, PM and H_2SO_4. As such, the relief will "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" -- the Clean Air Act's primary purpose. 42 U.S.C. § 7401(b)(1).

22. One of the commenters raised several concerns regarding the proposed mitigation project in Appendix A, which requires IPL to submit for EPA and State approval a new, non-emitting (i.e., "clean") source of power with a rated nameplate capacity of 3.0 MW, to be connected into the Facility's auxiliary electrical system in order to provide power for the internal station load. That new, non-emitting source of power is likely to offset the current, coal-burning source of energy and therefore reduce pollutant emissions at the plant, benefitting the local community. Such environmental benefits are expected to accrue and be realized primarily over an extended length of time, which is why the proposed Decree requires that IPL operate the new, clean energy source for at least 10 years.

I hereby declare under penalty of perjury that the foregoing is true and correct.
Dated this 12 day of January, 2021.

Ethan Chatfield
Environmental Engineer/Inspector
U.S. EPA Region 5