

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA**

UNITED STATES OF AMERICA	)	
and the STATE OF INDIANA,	)	
	)	
Plaintiffs,	)	
	)	
CITY OF CHICAGO and the	)	Case No. 2:18-cv-00127
SURFRIDER FOUNDATION,	)	
	)	
Intervenor-Plaintiffs,	)	NATIONAL PARKS CONSERVATION
	)	ASSOCIATION’S [PROPOSED] <i>AMICUS</i>
v.	)	<i>CURIAE</i> BRIEF IN OPPOSITION TO
	)	ENTRY OF REVISED CONSENT
	)	DECREE
UNITED STATES STEEL	)	
CORPORATION,	)	
	)	
Defendant.	)	
	)	
	)	
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**INTRODUCTION**

“National parks are the best idea we ever had. Absolutely American, absolutely democratic, they reflect us at our best rather than our worst.”

Wallace Stegner

United States Steel Corporations (“U.S. Steel”) placed Indiana Dunes National Park and its visitors, which include members of the National Parks Conservation Association (“NPCA”), at risk due to its numerous violations of federal environmental laws. U.S. Steel’s unauthorized industrial wastewater discharges reached their zenith when its Portage, Indiana facility in April 2017 illegally discharged approximately 300 pounds of hexavalent chromium into the Burns Waterway, a small tributary to Lake Michigan that separates the U.S. Steel plant from the Park.



The discharge resulted in multiple Lake Michigan beach closures in the Park and hundreds of thousands of dollars in natural resource damages. Following the April 2017 discharge, both federal and state agencies inspected the facility, discovering numerous other environmental violations, dating back to 2013, many of which U.S. Steel has since admitted. NPCA respectfully submits this *amicus curiae* brief in opposition to the entry of the revised proposed Consent Decree because the Decree fails to account for natural resource damages stemming from U.S. Steel’s long-term and ongoing environmental violations and because it fails to adequately protect Indiana Dunes National Park into the future.

### LEGAL STANDARD

A court “must review a consent decree to assure that it is fair, reasonable, adequate, and consistent with applicable law.” *United States v. B.P. Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1049 (N.D. Ind. 2001). “The underlying purpose of this review is to determine whether the decree adequately protects and is consistent with the public interest.” *Id.* Courts will not approve consent decrees that are contrary to the public good. *Id.* Although courts owe deference to

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government agencies that negotiate and submit proposed consent decrees, a court “must avoid any rubberstamp approval in favor of an independent evaluation.” *Id.* at 1050. Courts also routinely consider commenters and third party objections when evaluating proposed consent decrees. *See id.* (addressing commenters’ prior objections to proposed consent decree).

### ***AMICUS CURIAE* AND ITS INTEREST IN THIS CASE**

National Parks Conservation Association is a non-profit organization founded in 1919 to protect and enhance America’s National Parks for the benefit of present and future generations. NPCA represents over 1.4 million members and supporters who care deeply about America’s shared natural and cultural heritage preserved by the National Park System. NPCA’s headquarters are in Washington, D.C., and it has 27 offices across the country, including a Midwest Regional Office in Chicago, Illinois. NPCA advocates for the protection of national parks at a grass roots level, in the federal courts, and in Congress.

NPCA’s mission has long included the protection and enhancement of Indiana Dunes National Park (“Indiana Dunes” or “Park”), previously known as Indiana Dunes National Lakeshore. NPCA’s work to protect Indiana Dunes spans more than a decade. After seeing the many threats to parklands and water that have arisen over the years, NPCA released a report in 2011 calling for heightened advocacy and cooperation to address comprehensive land management between public and private entities; tighter regulation to protect park waters and wildlife; and immediate steps for long-term protection of eroding shoreline and beaches, among many other issues.<sup>1</sup>

When the April 2017 discharge occurred, NPCA engaged its membership on the issue,

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<sup>1</sup> *See generally* <https://www.npca.org/resources/2344-the-future-of-indiana-dunes-national-lakeshore> (last visited Dec. 19, 2019).

resulting in thousands of NPCA members advocating for a more protective Consent Decree.<sup>2</sup>

NPCA retained an expert engineer and submitted two sets of extensive comments on the initial proposed Consent Decree, pointing out significant procedural and substantive shortcomings. *See* ECF No. 47-5, Att. E, at PDF pages 39–88, 247–259. NPCA now opposes entry of the revised Consent Decree because it is not reasonable, it is against the public interest, and it is not adequate to protect Indiana Dunes National Park from ongoing U.S. Steel violations.

## ARGUMENT

### **I. The Revised Consent Decree Fails to Adequately Account for the Heightened Public Interest in Protecting Indiana Dunes National Park.**

The primary question before this Court is whether the proposed Consent Decree “adequately protects and is consistent with the public interest.” *See B.P. Exploration & Oil Co.*, 167 F. Supp. 2d at 1049. While the public interest encompasses issues beyond Indiana Dunes National Park, *see generally* Plaintiff-Intervenors’ Briefs, ECF Nos. 50 & 52, “[p]reserving national park areas for noncommercial activity, public enjoyment, and wildlife protection is a paramount public interest.” *San Francisco Herring Ass’n v. United States Dep’t of the Interior*, No. 13-CV-01750, 2014 WL 172232, at \*7 (N.D. Cal. Jan. 15, 2014).

Recently, a federal district court in Ohio acknowledged the “paramount public interest” in protecting national parks in a case that presented the same posture as this one. There, Judge Adams, initially denied entry of a consent decree between the United States and the City of Akron, Ohio to resolve Clean Water Act (“CWA”) violations.<sup>3</sup> *See United States v. City of*

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<sup>2</sup> *See* <https://www.npca.org/advocacy/82-stand-up-to-polluters-at-indiana-dunes> (last visited Dec. 20, 2019); *see also* <https://www.npca.org/articles/1802-proposed-legal-deal-leaves-water-quality-protections-for-indiana-dunes> (last visited Dec. 19, 2019).

<sup>3</sup> Also like this case, in the *City of Akron* case, the settling parties took extensive public comments on their initial proposed consent decree after which “the Decree was *slightly modified*”  
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*Akron*, 794 F. Supp. 2d 782, 806 (N.D. Ohio 2011) (finding the consent decree was not in the public interest because it did not adequately abate violations impacting the park). Judge Adams was primarily concerned with ongoing and potential impacts to Cuyahoga Valley National Park. *See id.* at 785–87 (detailing the many amenities of the park that drew by 2009, “over 2.8 million annual visitors, making it the sixth most visited national park in the entire United States.”). Later in the case, over the objections of the settling parties, the court appointed an expert to evaluate the consent decree. *See United States v. City of Akron*, No. 5:09CV272, 2013 WL 999909 at \*8 (N.D. Ohio, March 13, 2013). The court found that increased scrutiny of the proposed Consent Decree was warranted due to an “overriding interest in preserving the [park] for generations to come,” and that such interest “in protecting this sensitive area substantially overwhelms any alleged delay or expense related to appointment of an expert.” *Id.*

Similar paramount and overriding interests apply here. Earlier this year, the Indiana Dunes National Lakeshore was redesignated as America’s sixty-first national park.<sup>4</sup> In addition to being the nation’s newest national park, it is the only one within Indiana and is one of only a handful within the Midwest. Located along the southern shores of Lake Michigan, it is one of the most biologically diverse parks per unit area within the National Park System.<sup>5</sup> The Park is renowned for its bird life and is home to more than 1,100 plant species.<sup>6</sup> The Park also provides year-round public access to fifteen miles of beaches along Lake Michigan.<sup>7</sup> The photograph below shows kayakers in the Burns waterway, which flows between the Park and the U.S. Steel facility, which is visible in the background. The stairway to the water leads to Outfall 004, which

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and resubmitted to the Court.” *City of Akron*, 794 F. Supp.2d at 789 (emphasis added). After holding a hearing, the court denied entry of the modified consent decree. *See id.*

<sup>4</sup> *See* <https://www.nps.gov/indu/index.htm> (last visited Dec. 18, 2019).

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*



was the location of the April 2017 hexavalent chromium discharge.



Originally consisting of 8,330 acres in 1966, Indiana Dunes National Park has expanded to its current size of more than 15,000 acres. In 2017, Indiana Dunes welcomed more than two million visitors,<sup>8</sup> and since its redesignation as a National Park, visitation has significantly increased. By September 2019, “the Park’s visitor center saw more people than it ha[d] in any of the past eight years” and “June and July visitor numbers alone have doubled since last year.”<sup>9</sup> The increased visitation means more tourism income for the area.<sup>10</sup> However, industrial spills have the potential to negatively impact tourism to the Park.<sup>11</sup>

After the April 2017 discharge, to ensure public safety, 5.3 miles of beaches within Indiana Dunes National Park were closed, as well as a public drinking water intake. Plaintiffs’

<sup>8</sup>[https://irma.nps.gov/STATS/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20\(1904%20-%20Last%20Calendar%20Year\)?Park=INDU](https://irma.nps.gov/STATS/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20(1904%20-%20Last%20Calendar%20Year)?Park=INDU) (last visited Dec. 20, 2019).

<sup>9</sup> See <https://www.wbaa.org/post/visitor-numbers-are-indiana-dunes-became-national-park#stream/0> (last visited Dec. 20, 2019).

<sup>10</sup> See <https://www.chicagotribune.com/news/breaking/ct-indiana-dunes-national-park-impact-20190917-q5axnykvire4bcmnaf17wapg4q-story.html> (last visited Dec. 18, 2019).

<sup>11</sup> See <https://www.wbaa.org/post/visitor-numbers-are-indiana-dunes-became-national-park#stream/0> (describing canceled hotel reservations after another nearby industrial spill) (last visited Dec. 18, 2019).

Complaint (“Compl.”), ECF No. 1, ¶ 65. Since that event, as explained in more detail below, U.S. Steel has incurred additional CWA violations and there has been at least one beach closure.



Despite the overriding public interest associated with the Park, other than doing the bare minimum of recovering natural resource damages based on beach closures for the April 2017 discharge only, the Consent Decree does not acknowledge or account for the direct proximity of the Park to the U.S. Steel plant.<sup>12</sup> There is no substantive provision in the Consent Decree regarding potential past impacts to the Park from U.S. Steel’s admitted unauthorized discharges since 2013. Likewise, there is no substantive provision addressing potential future impacts on the Park, either ecological or to Park visitors. Moreover, as discussed below, there is no mechanism for recovering assessment costs and natural resource damages in the event of future unauthorized discharges that negatively impact Park resources.

NPCA urges the Court to review the proposed Consent Decree in light of the strong public interest at stake due to the past and potential future adverse impacts to Indiana Dunes National Park. *See City of Akron*, 794 F. Supp. 2d at 792 (“The purpose in creating the Park

<sup>12</sup> The only small concession made by the settlement parties, after many commenters raised the issue, is the inclusion of the National Park Service in U.S. Steel’s spill notification procedures. Page 7 of 12: NATIONAL PARKS CONSERVATION ASSOCIATION’S PROPOSED *AMICUS CURIAE* BRIEF

parallels the purpose of the Clean Water Act—both were designed to preserve natural resources. Accordingly, the public interest in this matter is extremely high”). When the extremely high public interest in protecting a directly adjacent National Park is weighed against the provisions of the proposed Consent Decree, it is clear the Consent Decree is not sufficiently protective and should not be approved in its current form.

## **II. The Revised Consent Decree Fails to Recover Adequate Past and Future Potential Natural Resource Damages to Indiana Dunes National Park.**

Full and accurate assessment of and recovery for natural resource damages caused to the Park by U.S. Steel’s long-term illegal discharges of industrial pollution is paramount to NPCA and its members. Likewise, ensuring the settlement accounts for natural resource damages caused by future violations occurring during the life of the Consent Decree is critical to protecting the public interest and providing necessary deterrent value. The proposed Consent Decree achieves neither of these important outcomes, which is especially unreasonable given the “extremely high” public interest due to the polluter’s proximity to a National Park.

Although the proposed Consent Decree provides for some damages pursuant to the System Unit Resources Protection Act, 54 U.S.C. §§ 100721 *et seq.*, the amount of damages assessed makes clear that this provision covers the closure days of public beaches for the April 2017 discharge only and not the full range of environmental harm resulting from more than five years of CWA violations. *See* Compl., ¶ 68. Long-term, chronic pollution can cause, in some cases, more environmental harm than acute, one-time events. It appears, however, that the federal and state agencies did not attempt to assess damages from U.S. Steel’s routine CWA violations, and instead focused only the April 2017 event. For example, Dr. Charles Morris of the National Park Service testified that the federal agencies discussed but decided not to collect sediment samples in the aftermath of the April 2017 spill. *See* Exhibit 3 to Response to



Comments, ECF No. 47-4, Att. D at ¶ 12. Dr. Morris justified the decision based on his opinion that hexavalent chromium would quickly disperse and it would be hard to distinguish the April 2017 spill contribution from U.S. Steel’s authorized discharge in the sediment. *Id.* This justification, however, is based on a faulty premise that all of U.S. Steel’s discharges were “authorized,” when the evidence shows that at least some of those discharges since 2013 exceeded U.S. Steel’s CWA permit parameters and thus were not authorized discharges.

Likewise, Dr. Morris appears to have focused on the “imminent risk to natural resources” from the April 2017 spill, determining that because no fish kill was detected, such an imminent risk was not present. *Id.* at ¶ 13. Of course, while evidence of a fish kill would be conclusive proof of natural resource damages, the corollary is not necessarily true—the absence of a fish kill does not prove the lack of natural resource damages. A documented fish kill is not an appropriate proxy for adverse water quality impacts, especially in a sensitive area where so much recreation and human contact with water occurs. This is especially true when there is evidence of chronic permit exceedences, as there is for the U.S. Steel facility.

The proposed Consent Decree also does not account for natural resource damages for future environmental violations during the life of the Decree. This is particularly unreasonable and not in the public interest given the ongoing violations, *even after April 2, 2018, when the settling parties lodged the initial proposed Consent Decree*. Since that time, U.S. Steel has violated its CWA permit multiple times, including as recently as November 20, 2019. *See generally* ECF No. 50 at 7–9. On November 29, 2018, a release of a foamy substance from U.S. Steel’s Outfall 004 resulted in the closure of Park beaches for four days.<sup>13</sup> Thus, while it is likely,

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<sup>13</sup> *See* [https://www.nwitimes.com/news/local/porter/update-portage-lakefront-and-riverwalk-closed-after-foamy-scummy-discharge/article\\_8dbf4442-fcfa-5dd0-bf8d-74b571159619.html](https://www.nwitimes.com/news/local/porter/update-portage-lakefront-and-riverwalk-closed-after-foamy-scummy-discharge/article_8dbf4442-fcfa-5dd0-bf8d-74b571159619.html) (last visited Dec. 20, 2019).

given U.S. Steel's track record, that future violations will occur with the potential to result in Park beach closures, the proposed Consent Decree does not account for them.

U.S. Steel's inability to comply with its CWA permit when it is receiving intense scrutiny from the public and the Court raises questions about its ability to comply in the future. Indeed, U.S. Steel could cause another significant discharge of toxic chemicals into Lake Michigan, resulting in multiple days of National Park beach closures and significant taxpayer resources expended to assess and remediate the environmental damage, and the Consent Decree would only require U.S. Steel to pay \$1,000 in a stipulated penalty for a violation of a daily maximum concentration permit limit. It is neither fair nor in the public interest to have taxpayers foot the bill for assessment and remediation of reasonably foreseeable natural resource damages while the public waits for regulators to initiate another lawsuit, which, as this lawsuit demonstrates, may take years to resolve and for the trust resource agencies to obtain restitution.

### **III. The Proposed Civil Penalty is Insufficient to Create the Deterrent Value Necessary to Protect Indiana Dunes National Park.**

A civil penalty commensurate with U.S. Steel's environmental violations and significant enough to deter future violations and thereby protect Indiana Dunes is a necessary component of any settlement of this case. When assessing a civil penalty, federal agencies and courts should consider the economic benefit a company receives from its noncompliance. U.S. ENVTL. PROT. AGENCY, INTERIM CLEAN WATER ACT PENALTY POLICY ("PENALTY POLICY"), 4 (Mar. 1, 1995); 33 U.S.C. § 1319(d). The economic benefit should be fully recovered to remove any competitive advantage a company may have had over competitors who followed the law; it includes: delayed and avoided costs of capital improvements and repairs; engineering design, purchase, installation, and replacement of equipment; monitoring, sampling, laboratory analysis and reporting costs; and one-time acquisitions delayed. PENALTY POLICY 4–5. U.S. Steel's \$300,621

penalty fails to capture its economic benefit from its years of noncompliance.<sup>14</sup>

NPCA commented on the initial proposed Consent Decree raising concerns regarding the insufficient civil penalty, *see*, ECF No., 47-5 at PDF page 49–61, but its concerns are not adequately addressed in the revised Consent Decree or in the United States’ response to comments. *See* Response to Comments, ECF No. 47-1, Att. A at 33–34. This Court should consider NPCA’s comments and brief because although courts owe deference to agencies that negotiate and submit proposed consent decrees, a court “must avoid any rubberstamp approval in favor of an independent evaluation.” *B.P. Exploration & Oil Co.*, 167 F. Supp. 2d at 1050.

Despite a request from NPCA, *see e.g.*, ECF No. 47-5 at PDF page 52, n.8, the federal government has never made publicly available the information necessary to determine U.S. Steel’s full and complete economic benefit from its non-compliance. In its response to comments, the United States agreed that “U.S. Steel derived some economic benefit,” *see* ECF No. 47-1 at 34, but it fails to quantify that benefit, which is the starting point for interested parties and this Court to determine whether or not the full economic benefit is in fact included within the proposed civil penalty. The United States noted it utilized the Environmental Protection Agency’s “BEN” model to determine U.S. Steel’s economic benefit, but it never provided the estimated benefit or the underlying analysis. With no information regarding how the economic benefit was assessed, the public cannot be sure that all avoided costs were accounted for. NPCA requests this Court require the United States to make the analysis, or at a minimum the estimated amount of U.S. Steel’s economic benefit, publicly available.

Even with the limited information available, NPCA was able to determine that U.S.

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<sup>14</sup> Civil penalties are paid to the United States Treasury, *see Friends of the Earth v. Laidlaw Env’tl. Services (TOC), Inc.*, 528 U.S. 167, 175 (2000); thus, any money paid to the State of Indiana is not a civil penalty under the CWA. However, even if the civil penalty amount included the payments to Indiana, the total penalty is still inexplicably and unreasonably low.  
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Steel's economic benefit was considerable, and thus could not reasonably be captured by the \$300,612 civil penalty. As detailed in NPCA's comment, ECF No. 47-5 at PDF pages 52–53, the Compliance Requirements of the Consent Decree show just a portion of U.S. Steel's avoided and delayed costs, including replacing the entire Chrome Treatment Plant pipe system and repairs to the concrete containment trench. *See* Revised Consent Decree, ECF No. 46-2 at 12–13. All of these costs constitute part of U.S. Steel's total avoided compliance costs over many years, and the Court should ensure they are captured in the civil penalty. Without that assurance, the Consent Decree does not provide for a penalty with enough deterrent value to secure for Indiana Dunes National Park the protection it warrants from U.S. Steel's unauthorized discharges.

### CONCLUSION

For the reasons stated above, NPCA respectfully requests the Court deny the motion to enter the proposed Consent Decree, unless and until the settling parties further strengthen the Consent Decree to adequately account for the heightened public interest in protecting Indiana Dunes National Park, to recover adequate past and future potential natural resource damages related to the Park, and to increase the civil penalty to serve as a deterrent for future violations. NPCA also supports Intervenor-Plaintiff Surfrider's Motion for an Evidentiary Hearing. *See* ECF No. 51, at 2, ¶ 3 (noting Consent Decree's implications for protection of a National Park).

Respectfully submitted on this 26th day of December, 2019

s/ Kevin Cassidy  
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