UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

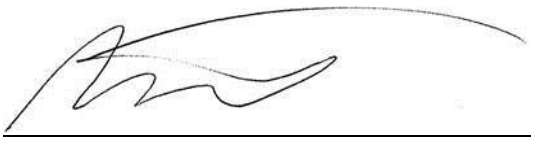
UNITED STATES OF AMERICA, Plaintiff, and SIERRA CLUB, Intervenor-Plaintiff, v. DTE ENERGY COMPANY AND DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

MOTION TO ENTER AGREEMENT BETWEEN SIERRA CLUB AND DTE OR, IN THE ALTERNATIVE, NOTICE OF THAT AGREEMENT

Pursuant to ¶ 121 of the proposed Consent Decree that was lodged with the Court on May 14, 2020, ECF No. 266-1, Sierra Club hereby submits for entry the Separate Agreement between it and Defendants DTE Energy Company and Detroit Edison Company (collectively "DTE"), which is attached as Exhibit 1. The Separate Agreement provides additional air quality and public health benefits to communities in Southeast Michigan that have been heavily impacted by pollution from DTE power plants and other industrial sources.

As detailed in the Memorandum accompanying this Motion, the Separate Agreement appears to qualify as a private settlement agreement, rather than a consent decree, that does not need to be entered or approved by this Court in order for the agreement to take effect and Sierra Club's claims in this matter to be resolved. If the Court, however, concludes otherwise, Sierra Club submits that entry and approval should be granted because the Separate Agreement is fair, reasonable, adequate, and furthers the purposes of the Clean Air Act.

Respectfully submitted this the 22nd day of May 2020,



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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

and

SIERRA CLUB,

Intervenor-Plaintiff,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No. 2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

MEMORANDUM IN SUPPORT OF MOTION TO ENTER AGREEMENT BETWEEN SIERRA CLUB AND DTE OR, IN THE ALTERNATIVE, NOTICE OF THAT AGREEMENT

ISSUES PRESENTED

Pursuant to Local Rule 7.1(d)(2), the issues presented by this motion are:

1. Must a Separate Agreement negotiated by Sierra Club and DTE that does not seek federal enforceability or continuing federal jurisdiction be entered and approved by the Court in order to take effect?

2. If the Court determines that the Separate Agreement must be entered and approved in order to take effect, should the Court enter and approve the agreement where it is fair, reasonable, adequate, and advances the goals of the Clean Air Act?

LEADING AUTHORITY FOR THE RELIEF SOUGHT

Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598 (2001)

Pedreira v. Sunrise Children's Servs., 802 F.3d 865 (6th Cir. 2015)

United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409 (6th Cir. 1991)

INTRODUCTION

On May 14, 2020, the United States lodged with this Court a proposed Consent Decree agreed to by all parties to this proceeding. As a condition of that proposed Consent Decree, ECF No. 266-1 at ¶ 121, Sierra Club hereby submits for entry the attached Separate Agreement between it and Defendants DTE Energy Company and Detroit Edison Company (collectively "DTE"), which provides additional air quality and public health benefits to communities in Southeast Michigan that have been heavily impacted by pollution from DTE power plants. The Separate Agreement is included as Exhibit 1 to this filing.

Pursuant to the Separate Agreement, DTE commits to: (1) funding at least $2 million in community based environmental projects in Ecorse, River Rouge, and the 48217 zip code,[1] (2) carrying out a project to improve energy efficiency and reduce energy use at a public recreation center in the 48217 zip code, (3) satisfying the $5.5 million bus replacement project required under the proposed Consent Decree through the provision of electric buses and related electrification infrastructure in Ecorse, River Rouge, the 48217 zip code, and/or other non-attainment or environmental justice areas in Wayne County, and (4) retiring certain power plants.

[1] The 48217 zip code is an area of southwest Detroit that borders the city of River Rouge.

Typically, such additional relief would have been included in the proposed Consent Decree and been designated as having been negotiated for by only a particular party (here, Sierra Club). For example, when the consent decree settling similar Clean Air Act claims against American Electric Power was modified in 2019, mitigation and power plant retirement commitments negotiated by State and Citizen Plaintiffs, but not the United States, were included in the consent decree modification but clearly designated as being only for State and/or Citizen Plaintiffs. *United States v. American Electric Power Service Corp.*, Civil Action No. C2-99-1250 (S.D. Ohio), July 17, 2019 Order at ¶¶ 127, 128B, and 140, attached as Exhibit 2. That way, all of the terms of the modification were included in the consent decree modification that was subject to the Department of Justice's public review procedures and court review. *Id*. at 4.

Because the additional mitigation and retirement commitments in this proceeding were not included in the proposed Consent Decree, Sierra Club and DTE negotiated those in the Separate Agreement presented to the Court herein. As discussed in Section III below, that Separate Agreement appears to qualify as a private settlement agreement, rather than a consent decree and, therefore, does not need to be entered or approved by this Court in order for the agreement to take effect and Sierra Club's claims in this matter to be resolved. If the Court, however, concludes otherwise, Sierra Club submits that entry and approval should be

granted because the Separate Agreement is fair, reasonable, adequate, and furthers the Clean Air Act's purpose of "protect[ing] and enhanc[ing] the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).

BACKGROUND

This proceeding was initiated on August 5, 2010, when the United States filed a complaint alleging that DTE had violated the Clean Air Act's New Source Review provisions by carrying out major modifications at Unit 2 of its Monroe Power Plant without installing modern pollution controls to reduce sulfur dioxide and nitrogen oxide emissions. On September 28, 2010, Sierra Club moved to intervene in the proceeding, ECF No. 34, pursuant to Federal Rule of Civil Procedure 24 and 42 U.S.C. § 7604(b)(1)(B), which provides for intervention "as a matter of right" in federal enforcement actions such as the present one.[2] A few weeks later, Sierra Club entered into a stipulation with DTE in which DTE agreed it would not oppose intervention because Sierra Club had not brought any claims beyond those asserted by the U.S. ECF No. 42. In that stipulation, however, Sierra Club "expressly reserve[d] [its] right to request different relief for [its]

[2] The Natural Resources Defense Council, which moved for and was granted intervention jointly with Sierra Club, withdrew from this proceeding via a stipulated dismissal of its claims under Federal Rule of Civil Procedure 41(a) on September 6, 2013. ECF No. 185.

claims than the relief requested by the Governmental Plaintiff." ECF No. 42 at ¶ 3. On November 23, 2010, the Court granted intervention to Sierra Club upon consideration of the intervention motion and stipulation. ECF No. 64.

On April 9, 2014, the Court granted motions by the United States and Sierra Club to amend their complaints to allege additional Clean Air Act NSR violations at DTE's Trenton Channel and Belle River Power Plants. ECF No. 202.

Litigation in this proceeding has been stayed since February 2, 2018 pending settlement negotiations. ECF No. 239. While initial negotiations occurred only between the United States and DTE, Sierra Club has been an active participant since it was included in such negotiations starting in June 2018. ECF No. 241. Those negotiations culminated in the proposed Consent Decree, the requirement of which were summarized by the United States in its Notice of Lodging as follows:

> Under the proposed Consent Decree, DTE would be required to reduce emissions at each of its coal-fired electric units. The decree also requires DTE to pay a civil penalty of $1.8 million and perform an environmental mitigation project that replaces municipal buses with lower emissions buses.

ECF No. 266 at 1.

THE DTE-SIERRA CLUB SEPARATE AGREEMENT

Seeing an opportunity to achieve further air quality and public health benefits for communities in Southeast Michigan beyond those provided in the

proposed Consent Decree, DTE and Sierra Club also negotiated the Separate Agreement. That agreement commits DTE to four actions:

- Fund at least $2 million in community based environmental mitigation projects in Ecorse, River Rouge, and the 48217 zip code, which are environmental justice areas that have long borne the brunt of air pollution from DTE's River Rouge Power Plant and other industrial sources. The projects will be proposed by a five-member committee that will include three community residents and will seek to maximize public health and environmental benefits. The Separate Agreement prohibits the projects from providing a direct financial benefit to any committee member, and DTE cannot be the primary beneficiary of any such project.

- Carry out a project to improve energy efficiency and reduce energy use at the Kemeny Recreation Center, which is a City of Detroit community recreation center located in the 48217 zip code.

- Ensure that the "lower emission buses" required under the $5.5 million bus replacement project in the proposed Consent Decree will be electric buses (and related electrification infrastructure). In addition, DTE will prioritize school and public transit buses in River Rouge, Ecorse, the 48217 zip code, and other environmental justice and non-attainment area communities for replacement.

- Retire the River Rouge, St. Clair, and Trenton Channel Power Plants by December 31, 2022, with a possible one-year extension if needed to ensure reliability. The proposed Consent Decree requires only that DTE reduce emissions from those plants by retrofitting them with costly pollution controls, or refueling or repowering such plants.

Unlike the proposed Consent Decree, ECF No. 266-1 at ¶ 105, the Separate Agreement does not call for this Court to retain jurisdiction to enforce compliance with its terms and conditions. Instead, the Separate Agreement provides that any unresolved disputes arising under the agreement would need to be pursued in a "court of competent jurisdiction in Wayne County, Michigan."

Finally, consistent with the agreement in the proposed Consent Decree that the parties shall bear their own costs of this action, including attorneys' fees, ECF No. 266-1 at ¶ 116, the Separate Agreement does not provide for Sierra Club to recover any of its attorneys' fees or costs from the more than ten years of litigation that has occurred in this proceeding.

ARGUMENT

I. THE SEPARATE AGREEMENT IS A PRIVATE SETTLEMENT AGREEMENT, NOT A CONSENT DECREE

Pursuant to Paragraph 121 of the proposed Consent Decree, Sierra Club is submitting the Separate Agreement to this Court for entry if the Court deems such entry necessary. It appears, however, that the Separate Agreement is a private settlement agreement, not a consent decree, that therefore need not be entered and approved by the Court to take effect and resolve Sierra Club's claims in this proceeding.[3]

The U.S. Supreme Court has long distinguished between private settlement agreements and court-ordered consent decrees, with only the latter involving judicial oversight and ongoing jurisdiction to enforce. *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 604 n.7

[3] In the proposed Consent Decree, the United States notes that it "believes" that the Separate Agreement requires entry by the Court. ECF No. 266-1 at ¶ 121. Sierra Club reserves the right to respond to any arguments that the United States may file to support such belief.

(2001). In other words, as the Sixth Circuit has explained, "a consent decree is essentially a settlement agreement subject to continued judicial policing." *Pedreira v. Sunrise Children's Servs.*, 802 F.3d 865, 871 (6th Cir. 2015), *quoting Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). Here, as previously noted, the Separate Agreement does not seek any sort of ongoing federal oversight; instead, Sierra Club or DTE would have to pursue a breach of contract action in state court in the event of a breach. *Pedreira*, 802 F.3d at 871. As such, this Court need not put its "power and prestige . . . behind the compromise struck" by DTE and Sierra Club in the Separate Agreement by entering and approving that agreement. *Id*. Instead, after the entry of the proposed Consent Decree, the Court can simply dismiss this case having taken notice of the Separate Agreement but without incorporating the terms of that agreement into the dismissal. *Id*.

II. THE SEPARATE AGREEMENT IS FAIR, REASONABLE, ADEQUATE, AND FURTHERS THE PURPOSES OF THE CLEAN AIR ACT

If the Court determines that the Separate Agreement must be entered and approved in order to take effect, such entry and approval should be readily granted. In reviewing a proposed consent decree, the Court is charged with determining whether it is fair, reasonable, adequate, and consistent with the statute under which the case being settled was brought. *United States v. Akzo Coatings of Am., Inc.*,

949 F.2d 1409, 1435 (6th Cir. 1991). Such review should be guided by a presumption in favor of voluntary settlements. *Id.* at 1436.

With regard to fairness, the Separate Agreement arose from the more than two years of arms-length, good faith negotiations carried out by parties that are represented by experienced counsel. In addition, settlement avoids the delays, costs, and uncertainties of the lengthy and resource intensive litigation that would be necessary if the case were to proceed. As such, the hallmarks of fairness are easily met here. *See e.g.*, *Akzo Coatings*, 949 F.2d at 1435 (fairness of a decree may take into account "the strength of plaintiff's case, the good faith efforts of the negotiators, the opinions of counsel, and the possible risks involved in the litigation if the settlement is not approved."); *United States v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:07-1056, 2009 WL 690693, at *6 (M.D. Tenn. Mar. 12, 2009) (same).

The reasonableness and adequacy of the Separate Agreement is shown in at least three ways. First is the agreement's "likely effectiveness . . . as a vehicle for cleansing the environment." *Metro. Gov't of Nashville*, 2009 WL 690693 at *6, *citing Akzo Coatings*, 949 F.2d at 1436. Through mitigation projects, provision of electric buses, and power plant retirements, the Separate Agreement will further reduce people's exposure to harmful air pollutants beyond what will be achieved under the proposed Consent Decree. In addition, the Separate Agreement directs

those reductions to the communities that have been especially hard hit by air pollution from DTE's power plants and other industrial sources for decades – the 48217 zip code, River Rouge, and Ecorse. Such direction increases the likely effectiveness of the projects that will be undertaken.

Second, the mitigation projects in the Separate Agreement are plainly in the public interest, as they provide millions of dollars of funding for mitigation projects in economically struggling communities. *Metro. Gov't of Nashville*, 2009 WL 690693 at *6 (citing the provision of $2.8 million in funding for local community projects as support for finding that proposed consent decree served the public interest).

Third, the air quality and public health benefits that will be provided by community environmental mitigation projects, electric buses, and retirement of certain polluting power plants plainly advance the Clean Air Act's goal of "protect[ing] and enhanc[ing] the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1); *see Akzo Coatings*, 949 F.2d at 1439 (noting that proposed consent decree accomplished two principal goals of the environmental statute at issue in that proceeding).

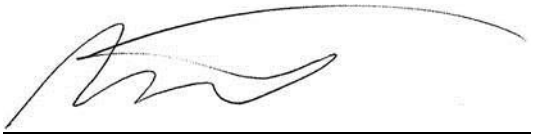
For each of these reasons, entry and approval of the Separate Agreement, if necessary, should be granted.[4]

CONCLUSION

In this proceeding, DTE and Sierra Club negotiated mitigation and retirement commitments that, because they were not included in the proposed Consent Decree, are set forth in a Separate Agreement. Those commitments will provide significant air quality and public health benefits to communities in Southeast Michigan through millions of dollars of mitigation projects targeted to the communities hardest hit by pollution, and a commitment by DTE to retire three highly polluting power plants. Under relevant case law, it appears that the Separate Agreement, which does not seek federal enforcement or continuing Court jurisdiction, is a private settlement agreement that does not need to be entered and approved by the Court. If the Court decides otherwise, however, such entry and approval should be granted to this fair, reasonable, and adequate Separate Agreement that advances the goals of the Clean Air Act.

Respectfully submitted this the 22nd day of May 2020,

[4] In the proposed Consent Decree, the United States "reserves the right to object" to the Separate Agreement. ECF No. 266-1 at ¶ 121. In the event that such objection is filed, Sierra Club reserves the right to respond to any contention by the United States that it has the authority or jurisdiction to object to the Separate Agreement, along with the bases for any such objection.



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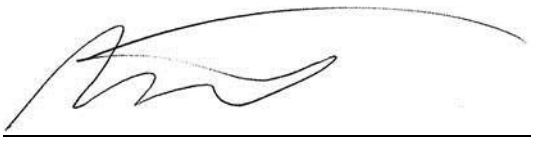
CERTIFICATE OF SERVICE

I certify that this document was filed through the Court's ECF system, which will cause copies to be sent to all counsel of record



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