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

UNITED STATES OF AMERICA, Plaintiff v. DAIRYLAND POWER COOPERATIVE, Defendant.	Civil Action No.: 12-CV-462

SIERRA CLUB, Plaintiff v. DAIRYLAND POWER COOPERATIVE, Defendant.	Civil Action No.: 10-CV-303-bbc

MEMORANDUM IN SUPPORT OF THE UNITED STATES' UNOPPOSED MOTION TO MODIFY CONSENT DECREE

The United States of America (the "United States"), on behalf of the U.S. Environmental Protection Agency ("EPA"), respectfully moves this Court to modify the Consent Decree previously entered by this Court.

The original Consent Decree was entered by this Court in August 2012, and resolved litigation in both of the above-captioned matters. The Consent Decree secures reductions in nitrogen oxides ("NO_x"), sulfur dioxide ("SO_2"), and particulate matter ("PM") pollution from coal-fired power plants owned by Defendant, Dairyland Power Cooperative ("Dairyland"), in return for resolving certain Clean Air Act ("CAA") violations at Dairyland's plants. The proposed Modification, which has been agreed to by all parties, would modify the Consent Decree to provide an eight-month extension of time for Dairyland to install and operate certain pollution controls at its Alma/J.P. Madgett plant. The extension relates to permitting delays encountered by Dairyland during the construction of Decree-mandated pollution controls. In return, the proposed Modification also requires Dairyland to offset additional emissions caused by the delay by reducing overall pollution from the Alma/J.P. Madgett plant beyond the levels currently required in the Consent Decree.

The proposed Modification was lodged by the United States on March 10, 2014, as Docket Entry No. 10 in Civil Action No. 12-CV-462. As explained in this Memorandum, the Court should approve the proposed Modification as an order of this Court because the Modification is fair, reasonable, and consistent with the goals of the CAA. While the Modification provides for a short extension of time for Dairyland to comply with certain Decree-mandated emission reduction requirements, it also requires Dairyland to reduce its overall emissions beyond the levels currently required by the Consent Decree. All parties to both of the above-captioned actions have signed the Modification. Only the United States conditioned its approval of the Modification, and only to allow the public an opportunity to examine the Modification and comment on it, so the United States could consider whether any such comments raised issues that would make approval of the Modification inappropriate.

In accordance with 28 C.F.R. § 50.7, the United States provided the opportunity for public comment by publishing a notice of the lodging of the proposed Modification in the *Federal Register* on March 17, 2014. *See* 79 Fed. Reg. 14,735 (March 17, 2014). The thirty-day period for submission of comments regarding the proposed Modification expired on April 16, 2014. No comments were received. Accordingly, the United States respectfully asks this Court to approve the proposed Modification to the Consent Decree.

BACKGROUND

On August 25, 2012, and on August 27, 2012, this Court entered a Consent Decree resolving all litigation in the above-captioned matters (Civil Action No.: 10-CV-303-bbc and Civil Action No.: 12-CV-462). The Consent Decree covers seven coal-fired electric generating units located at two power plants in Wisconsin owned and operated by Dairyland: (i) the single-unit Genoa Plant, and (ii) the six-unit Alma/J.P. Madgett Plant, which is comprised of Alma Unit Nos. 1-5, and a separate unit referred to as the Madgett Unit. As described more fully in the United States' brief in support of its motion to enter the original Consent Decree (Docket Entry 5 in Civil Action No.: 12-CV-462), the Consent Decree resolves certain violations of the CAA and the State of Wisconsin's CAA Implementation Plan at Dairyland's plants, including New Source Review ("NSR") and related New Source Performance Standard and Title V violations.

The Consent Decree requires, *inter alia*, that Dairyland reduce SO_2, NO_x, and PM emissions at its plants through the installation and operation of pollution control devices, the imposition of stringent pollution limits, and the retirement of certain units. One of Dairyland's obligations is to install and begin operating certain pollution controls at the Madgett Unit located at the Alma/ J.P. Magdett plant. Pursuant to Paragraph 97 of the Consent Decree, Dairyland would be required to install and operate Dry Sorbent Injection ("DSI") controls to reduce SO_2 by

May 1, 2014. However, on March 11, 2013, pursuant to the Force Majeure provisions of the Consent Decree, Dairyland notified the United States and the Sierra Club of potential permitting delays that Dairyland believed could prevent timely compliance with the May 1, 2014 deadline. The Parties thereafter engaged in discussions concerning a potential modification of the Consent Decree that would extend the time for installing DSI at the Madgett Unit in light of permitting delays, while reducing overall emissions under the Consent Decree. After lengthy negotiations, the parties reached such an agreement and, as noted above, lodged the agreement with the Court and sought public comment on its terms. *See* Notice of Lodging (Docket Entry 10); 79 Fed. Reg. at 14,735.

Paragraph 211 of the Consent Decree provides that "[t]he terms of this Consent Decree may be modified only by a subsequent written agreement signed by Plaintiffs and DPC. Where the modification constitutes a material change to any term of this Decree, it shall be effective only upon written approval by the Court." All parties have agreed to and signed the proposed Modification. After soliciting public comment on the terms of the Modificaition and receiving none, the United States respectfully requests that the Court approve the proposed Modification.

TERMS OF MODIFICATION

The proposed Modification was memorialized in a Joint Stipulation that was lodged with the Court on March 10. *See* Docket Entry 10. The terms of the Modification are also memorialized in the proposed order submitted contemporaneously herewith. As set forth in the proposed order, the proposed Modification extends by eight months the time for Dairyland to comply with the Consent Decree's 30-day rolling average SO_2 emission rate for the Madgett Unit at the Alma/J.P. Madgett plant. *See* Proposed Order, ¶ 6 (Modifying Consent Decree ¶ 97). In return, the proposed Modification requires Dairyland to reduce overall pollution from the

Alma/J.P. Madgett plant beyond the levels required in the original Consent Decree. For instance, the proposed Modification requires Dairyland to permanently cease burning coal at Alma Unit 5 and deletes certain alternative compliance options provided by the original Consent Decree, thus ensuring that both Alma Unit 4 and Alma Unit 5 will permanently cease burning coal, rather than just one of the two units. *See* Proposed Order ¶¶ 1-4, 7-9, 11-13. The Proposed Order also significantly reduces the Annual Tonnage Limitations mandated by the original Consent Decree. *See* Proposed Order ¶¶ 5, 10. The final Annual NO_x Tonnage Limitation will be reduced from approximately 3,200 tons per year to approximately 2,300 tons per year under the terms of the proposed Modification, while the final Annual SO_2 Tonnage Limitation will be reduced from approximately 4,600 tons per year to approximately 2,300 tons per year, with additional reductions in the interim years. *See id.*

ARGUMENT

In reviewing a proposed settlement, the Court should consider whether the terms are fair, adequate and reasonable, and consistent with applicable law and the public interest. *See e.g.*, *E.E.O.C.v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1424, 1435 (6th Cir. 1991); *United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997); *see also United States v. Wis. Elec. Power Co.*, 522 F. Supp. 2d 1107, 1111 (E.D. Wis. 2007) (entering and approving a system wide NSR settlement based on similar allegations against an electric utility because the decree secured environmental benefits and was "reasonable, fair, and consistent with the statutory purposes of the Clean Air Act").

A court should generally exercise its discretion in favor of voluntary settlement. *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1984); *Aro Corp. v. Allied Witan Co.*, 531

F.2d 1368, 1372 (6th Cir. 1976). The presumption in favor of voluntary settlement "is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like the EPA which enjoys substantial expertise in the environmental field." *United States v. Azko Coatings of America, Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991); *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1050 (N.D. Ind. 2001); *United States v. NCR Corp.*, No. 10-C-910, 2011 WL 1321365, at *1 (E.D. Wis. Apr. 4, 2011).

As with the original Consent Decree itself, the settlement set forth in the proposed Modification is consistent with the criteria set forth above. The Modification constitutes the parties best efforts to resolve the issues raised by the permitting delays claimed by Dairyland in a full and fair manner consistent with the pollution-reduction goals of the CAA and the Consent Decree. The Modification avoids further proceedings or litigation over the merits and extent of Dairyland's claimed permitting delays, while mitigating the effect of additional pollution during such delay by reducing the overall pollution from the Alma/J.P. Madgett plant as well as Dairyland's coal-fired generating system as a whole. The United States has thus determined that the Modification is fair, reasonable, in the public interest, and consistent with the purposes of the Clean Air Act. Moreover, in accordance with 28 C.F.R. § 50.7, the United States Department of Justice published notice of the proposed Modification in the Federal Register, and provided an opportunity for public comment. *See* 79 Fed. Reg. at 14,735. No comments were received during the comment period.

CONCLUSION

For the aforementioned reasons, the United States respectfully requests that the Court approve the proposed Modification lodged with the Court on March 10, 2014, and enter the Proposed Order submitted herewith.

Dated: April 25, 2014.

Respectfully submitted,

ROBERT G. DREHER
Acting Assistant Attorney General
Environment & Natural Resources Division

/s/ Jason A. Dunn________________________________
JASON A. DUNN
Attorneys
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 514-1111
Facsimile: (202) 616-6583
Jason.Dunn@usdoj.gov

JOHN W. VAUDREUIL
United States Attorney
Western District of Wisconsin
222 West Washington Avenue
Suite 700
Madison, Wisconsin, 53703

/s/ Leslie K. Herje______________________________
LESLIE K. HERJE
Assistant United States Attorney
Chief, Civil Division
Western District of Wisconsin

OF COUNSEL:
SABRINA ARGENTIERI
Associate Regional Counsel
United States Environmental
Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604-3590