

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

UNITED STATES,	)	Civil Action Number:
PLAINTIFF, and the	)	02-CV-3793 JEL/RLE
	)	
STATE OF MINNESOTA,	)	
Plaintiff-Intervenor,	)	
	)	
v.	)	
	)	
GOPHER STATE ETHANOL L.L.C.,	)	
Defendant.	)	

**MEMORANDUM IN SUPPORT OF  
MOTION TO ENTER AMENDED CONSENT DECREE**

The United States, on behalf of the Environmental Protection Agency ("EPA"), moves for entry of the proposed Amended Consent Decree lodged with this Court on June 5, 2003, in the above-styled action. This is an environmental settlement with Gopher State Ethanol, Inc. ("Gopher State"), to resolve claims against the owners and operators of an ethanol dry mill in St. Paul, Minnesota, pursuant to Section 113(b) of the Clean Air Act ("Act"), 42 U.S.C. § 7413(b) (1983), amended by, 42 U.S.C. § 7413(b) (Supp. 1991). The Minnesota Pollution Control Agency ("MPCA") has filed a Complaint-in-Intervention and has joined in this settlement as a signatory to the original Consent Decree and the Amendment.

The United States' Complaint, filed on October 2, 2002 simultaneously with the lodging of the original Consent Decree, sought injunctive relief and civil penalties for Gopher State's alleged violations of the Prevention of Significant Deterioration ("PSD") provisions of the Act and regulations promulgated thereunder. In addition, the Complaint alleged that the plant is in violation of the New Source Performance Standards ("NSPS"), 40 C.F.R. Part 60, Subparts Db, Dc, Kb, and VV; National Emission Standards for Hazardous Air Pollutants ("NESHAP"), 40 C.F.R. Part 63, pursuant to Sections 112(d) and 112(g) of the Act; and the Minnesota state implementation plan ("SIP") which incorporates and/or implements the above-listed federal regulations.

In October 2002, the parties reached a proposed settlement of these claims (the "Original Consent Decree") which required Gopher State to install and operate air pollution control technology to comply with new, more stringent, emission limits, and to modify its operating permit. In accordance with Department of Justice rules for civil environmental settlements, the Department published notice of the Original Consent Decree in the Federal Register and provided a thirty-day period for public comments. In response to concerns voiced by citizens living near the Gopher

State facility, the Department extended the comment period through January 24, 2003, and EPA, MPCA and Department of Justice officials held a meeting with citizen representatives.

As a result of the citizen comments, the United States and the State conducted further negotiations with Gopher State and reached agreement on the Amended Consent Decree which is now before the Court. Notice of the Amended Consent Decree was published in the Federal Register, and a second opportunity for public comments was provided. Several further comments were received during this second public comment period. This motion addresses those comments, as well as comments received on the Original Consent Decree that did not lead to specific changes in the Amended Consent Decree. Because the United States believes that the Amended Consent Decree is a fair, reasonable resolution of the claims in this case and that none of the comments provides grounds for withdrawal from or rejection of this settlement, the United States requests that the Court approve and enter the Amended Consent Decree.

## **I. BACKGROUND AND PROCEDURE**

### **A. Factual Background**

Gopher State is a small facility located in St. Paul, Minnesota, that began ethanol production in mid-2000, and has produced less than 10 million gallons of ethanol annually since startup. In the manufacture of ethanol, Gopher State receives whole corn which is then milled, cooked, and fermented. After fermentation, the raw product is distilled to produce ethanol. Distillation separates the liquid ethanol from the corn meal, which Gopher State may dry or sell as wet mash or "cake" for animal feed. The ethanol manufacturing process results in emissions of significant quantities of regulated air pollutants, including nitrogen oxides ("NOx"), carbon monoxide ("CO"), particulate matter ("PM" and "PM<sub>10</sub>"), sulfur dioxide ("SO<sub>2</sub>"), volatile organic compounds ("VOCs") and hazardous air pollutants ("HAPs"). The primary sources of these emissions are the feed dryers, fermentation units, gas boilers, cooling cyclones, ethanol load-out systems, and fugitive dust emissions from facility operations, including roads.

Gopher State was the first Minnesota ethanol dry mill to install a thermal oxidizer for control of VOC emissions. On December 11, 2000, Gopher State applied for an amendment to its MPCA permit in order to install the equipment as a means of reducing odor from the plant. On February 21, 2001, the

MPCA amended Gopher State's permit allowing the installation of the thermal oxidizer, and it was installed in June, 2001, at a cost of approximately \$1.2 million. However, the first thermal oxidizer installed had operational problems and ultimately had to be replaced with a new unit.

On February 7, 2002, MPCA met with representatives of the ethanol plants in Minnesota, including Gopher State, to discuss the results of emissions testing of VOC's and other pollutants being emitted from the plants, and related compliance issues. The MPCA advised the plants that VOC emissions were thought to be much higher than originally estimated and that the plant emissions were in excess of permitted amounts. The MPCA determined that the plants would have to install air pollution control technology to reduce emissions and modify their permits.

On June 21, 2002, Gopher State executed a letter of commitment to negotiate with MPCA and the United States to address alleged violations of its permit and the PSD regulations. Since that time, Gopher State has worked cooperatively with Plaintiffs regarding the alleged non-compliance and has executed the proposed Amended Consent Decree to resolve past violations.

**B. Statutory and Regulatory Framework**

(1). **PSD Regulatory Program.** - Section 109 of the Act, 42 U.S.C. § 7409, requires the Administrator of EPA to promulgate regulations establishing primary and secondary national ambient air quality standards ("NAAQS" or "ambient air quality standards") for certain criteria air pollutants. The primary NAAQS are to be adequate to protect the public health, and the secondary NAAQS are to be adequate to protect the public welfare, from any known or anticipated adverse effects associated with the presence of the air pollutant in the ambient air.

Section 110 of the Act, 42 U.S.C. § 7410, requires each state to adopt and submit to EPA for approval a SIP that provides for the attainment and maintenance of the NAAQS.

Under Section 107(d) of the Act, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. These designations have been approved by EPA and are located at 40 C.F.R. Part 81. An area that meets the NAAQS for a particular pollutant is classified as an "attainment" area; one that does not is classified as a "non-attainment" area. The Gopher

State facility is located in an attainment area for all applicable NAAQS.

Part C of Title I of the Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration of air quality in those areas designated as attaining the NAAQS standards. These requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision-making process. These provisions are generally referred to as the Prevention of Significant Deterioration ("PSD") Program.

Section 165(a) of the Act, 42 U.S.C. § 7475(a), prohibits the construction and subsequent operation of a major emitting facility in an area designated as attainment unless a PSD permit has been issued and air pollution control equipment is installed and operated. Section 169(1) of the CAA, 42 U.S.C. § 7479(1), defines "major emitting facility" for certain listed stationary sources, such as chemical manufacturing plants, as a source with the potential to emit 100 tons per year ("TPY") or more of any criteria air pollutant. EPA considers an

ethanol plant to be a "chemical manufacturing facility" for purposes of the Clean Air Act, so an ethanol plant that has the potential to emit 100 tpy or more of any criteria pollutant is subject to PSD.

As set forth at 40 C.F.R. § 52.21(i), any major emitting source in an attainment area that intends to construct a major modification must first obtain a PSD permit and must install and operate best available air pollution control technology. "Major modification" is defined at 40 C.F.R. § 52.21(b)(2)(i) as meaning any physical change in or change in the method of operation of a major stationary source that would result in a significant net emission increase of any criteria pollutant subject to regulation under the Act. "Significant" is defined at 40 C.F.R. § 52.21(b)(23)(i) in reference to a net emissions increase or the potential of a source to emit any of the following criteria pollutants, at a rate of emissions that would equal or exceed any of the following: for ozone, 40 TPY of VOC; 100 TPY for CO; 40 TPY for NO<sub>x</sub>; 100 TPY for SO<sub>2</sub>, 25 TPY for PM, and for particulate matter at or below 10 microns ("PM<sub>10</sub>"), 10 TPY, (hereinafter "criteria pollutants").

As set forth at 40 C.F.R. § 52.21(j), a new major stationary source or a major modification in an attainment area shall install and operate best available control

technology ("BACT") for each pollutant subject to regulation under the Act that it would have the potential to emit in significant quantities.

(2). **New Source Performance Standards**. - Section 111 of the CAA, 42 U.S.C. § 7411, requires EPA to promulgate standards of performance for certain categories of new air pollution sources ("New Source Performance Standards" or "NSPS"). Pursuant to Section 111(b), 42 U.S.C. § 7411(b), EPA promulgated general regulations applicable to all NSPS source categories. Those general regulations are set forth at 40 C.F.R. Part 60 Subpart A.

EPA's NSPS regulations applicable to the Gopher State ethanol plant are contained in 40 C.F.R. Part 60, Subparts Db, Dc, Kb, and VV.

(3). **National Emission Standards for Hazardous Air Pollutants ("NESHAP")**. - The Act requires EPA to establish emission standards for each category or subcategory of major sources of hazardous air pollutants ("HAPs") listed for regulation pursuant to Section 112(b)(1), 42 U.S.C. § 7412(b)(1). Under Section 112(a)(1) of the CAA, 42 U.S.C. § 7412(a)(1), a source is "major" for HAPs if it has the potential to emit, in the aggregate, 10 TPY or more of any single HAP or 25 TPY or more of any combination of HAPs.

Ethanol plants may be "major sources" for purposes of the NESHAP because they have the potential to emit several HAPs, including: acetaldehyde, methanol, acrolein, formaldehyde, lactic and acetic acid, at levels which may exceed 25 TPY. Major sources of HAPs are required to reduce emissions by the application of maximum achievable control technology ("MACT") for the control of emissions. 42 U.S.C. §112(2) and (3).

**(4). Civil Penalty Provisions.** - Pursuant to Section 113(b) of the Clean Air Act, 42 U.S.C. §7413(b), EPA may commence a civil action for injunctive relief and civil penalties for violations of the Act, not to exceed \$25,000 per day of violation. Pursuant to Pub. L. 104-134 and 61 Fed. Reg. 69369, civil penalties of up to \$27,500 per day per violation may be assessed for violations occurring on or after January 30, 1997.

### **III. THE PROPOSED AMENDED CONSENT DECREE**

#### **A. The Settlement Before the Court.**

The Amended Consent Decree addresses allegations that VOC, PM and CO emissions from Gopher State's feed dryers, cooling cyclones and fuel loading operations have historically been underestimated. Recent testing of similar units in other Minnesota ethanol plants indicates that the emissions are well

in excess of the 100 tons per year that is the threshold for "major sources" to be regulated under the PSD provisions of the Clean Air Act. Since the Gopher State facility is a chemical manufacturing facility with the potential to emit over 100 TPY of VOC, it is considered to be a major source, and, as such, it is required to install best available control technology on all units that are significant sources of pollution throughout the plant.

**(1). Control Measures.**

Under the proposed settlement, Gopher State will be required to achieve 95% removal of VOC emissions from feed dryers as demonstrated by compliance testing for each controlled unit and parametric, periodic or continuous emission monitoring. Gopher State must demonstrate compliance with all emission limits after installation of the controls.

The proposed Amended Consent Decree also requires Gopher State to meet NSPS emission limits, and comply with monitoring, recordkeeping and reporting requirements. In addition, Gopher State will capture and control ethanol loadout emissions or ensure that trucks and railcars are dedicated to ethanol shipment, and not used in gasoline transport. (Trucks and railcars that have previously carried gasoline contain benzene-laden vapors that will be forced out

when the trucks and railcars are filled with ethanol.)  
Finally, the plant will be required to meet plant-wide  
emission limits on HAPs to ensure that it does not exceed the  
major source emission levels of 10 TPY and 25 TPY. (2).

**Permitting.**

In general, the settlement terms allow the Gopher State  
facility to choose whether to continue to be regulated as a  
major source or to accept an emissions cap that would keep the  
facility at "synthetic minor" levels.<sup>1</sup> Gopher State believes  
that, once the BACT limits required by this settlement are  
met, it will be able to remain under its 95 TPY limit. After  
the termination of the Amended Consent Decree, Gopher State  
will be subject to a continuing 95 TPY cap for all pollutants,  
as a condition to being eligible to resume minor source  
status. For the effective period of the Decree, however,  
Gopher State will be subject to PSD regulations for major  
modifications as if it were a major source, and will be  
required to apply for and obtain Minnesota operating permits

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<sup>1</sup> As a synthetic minor source, a facility would not have to  
account for modifications that increase emissions so long they  
did not cause total emissions to exceed the significance  
threshold of 100 TPY. In addition, sources under 100 TPY  
would not have to apply for Title V operating permits.

that incorporate the 95 TPY emission cap and other relevant terms of the Amended Consent Decree.

**(3). Compliance Monitoring.**

As noted above, Gopher State is required to conduct a compliance test of the control equipment installed pursuant to the Amended Consent Decree in order to demonstrate that the equipment achieved the required emission reductions. In addition, Gopher State is also required to propose an appropriate monitoring program as part of the federally enforceable permit required under the Decree. Such monitoring shall include parametric, periodic and continuous emission monitoring as determined appropriate by MPCA, subject to EPA approval of all monitoring provisions.

In addition to the injunctive relief to reduce emissions and correct permitting, Gopher State will pay a civil penalty of \$18,904 upon entry of the Decree, 50% of which will be paid to the State of Minnesota.

**B. Changes to the Original Consent Decree in Response to Comments.**

As noted above, the United States received written comments from a number of citizens and met with neighborhood representatives who voiced their concern about the original

Consent Decree.<sup>2</sup> In a June 19, 2003, letter to Assistant Attorney General Thomas L. Sansonetti, U.S. Department of Justice, Michael Unger, counsel for the a number of individuals in the Gopher State plant expressed praise for the governments' effort to address the citizens' concerns. Mr. Unger stated, "As a first matter, please let me commend the federal officials who took time to meet with a group of concerned residents and local officials in January of this year. I am delighted to see that some of the comments and input received in those meetings were considered and has produced some changes to the Consent Decree. Most significantly, I am pleased to see that the [Amended] Consent Decree now addresses the troublesome area of wet cake emission operations at this plant. It also appears to have addressed some omissions dealing with the cooling cyclone, though it is unclear whether the solution proposed is adequate." The following is a summary of the comments received and the changes made to the original Consent Decree.

**(1). Emissions Attributable to "Wet Cake" Production**

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<sup>2</sup> See, Public Comments, Attachments 1 through 59 to this Memorandum.

The primary concern raised by the citizen's in written comments and during the public meeting relates to Gopher State's sporadic "wet cake" operations. As part of the ethanol manufacturing process, a waste product is created from the fermented corn mash referred to as "wet cake". Most operations run the mash or wet cake through a dryer and then sell the dried product as animal feed. Alternatively, there is a limited market for the wet mash which can also be used for animal feed if shipped quickly. Organic compounds (VOCs) contained in the wet cake will volatilize when exposed to the ambient air. Such emission have been difficult to quantify.

Gopher State's normal operations involve running the dryer and operating a thermal oxidizer to control emissions from the dryer. As stated above, Gopher State was the first plant in Minnesota to install a thermal oxidizer on its dryer, initially for the control of odors from the drying process. In July, 2002, Gopher State's thermal oxidizer began to experience operational problems, and the equipment eventually had to be replaced. A new thermal oxidizer was installed in December, 2002. During the time that Gopher State's thermal oxidizer was inoperable, the company continued to operate in "wet cake" mode. The wet cake was loaded into trucks and transported off site.

The citizens who live in the area around the Gopher State plant expressed concern that the wet cake operation was resulting in significant emissions of VOCs and HAPs. They commented that the Consent Decree should address the emissions from wet cake. To address these citizen concerns, we have amended the Consent Decree to add a new provision, Paragraph 15(k). This new injunctive relief provision restricts Gopher State's wet cake production to periods of dryer system upset, breakdown or malfunction. During such periods of upset, breakdown or malfunction, wet cake production may only take place if emissions will not exceed the source-wide emission cap of 95 TPY or the source-wide allowable emission caps of 9.0 TPY for any single HAP or 24.0 TPY for all HAPs.

Gopher State must quantify its emissions using an emissions measurement method agreed to by EPA and MPCA to demonstrate that emissions from wet cake production will not exceed the source-wide caps. If Gopher State's wet cake emissions have not been quantified, wet cake production is limited to the completion of the ethanol in process at the time of the upset, breakdown or malfunction and no new fermentation can be initiated until the dryer control technology is fully operational.

**(2). Compliance Schedule.**

Under the original Decree, Gopher State had 18 months to submit the results of a feasibility study to determine if further controls are needed for VOCs from the cooling cyclone and to set an emission limit. Several of the commenters expressed concern that 18 months was too long a period for Gopher State to evaluate controls for this unit. Under the Amended Consent Decree, Gopher State will install a baghouse for additional control of PM on the cooling cyclone. Due to the baghouse installation, Gopher State will now be testing the cooling cyclone and performing the feasibility study within 90 days of the initial startup. The new requirement for baghouse installation is in the modified Control Technology Plant ("CTP").

**(3). Odor and Noise Abatement.**

A final issue raised during the comment period relates to Gopher State's responsibilities under state and local ordinances relating to odor and noise abatement. The citizen's were concerned that the proposed Decree would somehow relieve Gopher State from having to comply with city and state regulations and/or agreements. While the Decree stated that Gopher State had an obligation to comply with all applicable laws, Plaintiffs agreed to add specific language to

emphasize that the Amended Consent Decree does not relieve Gopher State from having to comply with city ordinances governing odor and noise or any agreements entered into between the City and Gopher State. This new provision appears in Paragraph 59 ("Other Laws") of the Amended Decree.

**(4). Correction to "WHEREAS" Clause.**

The original Consent Decree stated in a WHEREAS clause that Gopher State's thermal oxidizer has operated continuously since installation. Several commenters indicated that this statement was erroneous, pointing out that the thermal oxidizer was inoperable for a period of time. Accordingly, the Amended Consent Decree deleted the original language regarding "continuous operation".

**IV. ARGUMENT**

**A. The Amended Consent Decree is Fair, Reasonable and Consistent with the Federal and State Environmental Statutes.**

The standard applied by courts in reviewing a settlement is whether the proposed settlement fairly and reasonably resolves the controversy in a manner consistent with the public interest. Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983), cert. denied,

467 U.S. 1219 (1984); United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990) (before approving consent Decree, district court must be satisfied that Decree is fundamentally fair, adequate and reasonable, and in conformity with applicable laws), cert. denied, 501 U.S. 1250 (1991); United States v. St. Louis Sewer Dist., 952 F.2d 1040, 1044 (8th Cir. 1992); accord United States v. Microsoft Corp., 56 F.3d 1448, 1458 (D.C. Cir. 1995) (standard for review of Sherman Act settlement pursuant to the Tunney Act, 15 U.S.C. § 16(e). In making its determination regarding a proposed settlement, the court should "pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment." SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984).

Approval of a settlement is a judicial act that is committed to the informed discretion of the trial court. Donovan v. Robbins, 752 F.2d 1170, 1176-77 (7th Cir. 1985); United States v. Jones & Laughlin Steel Corp., 804 F.2d 348, 351 (6th Cir. 1986). The Court, however, does not have the power to modify a settlement; it may only accept or reject the terms to which the parties have agreed. United States v. Akzo Coatings of America, 949 F.2d 1409, 1435 (6th Cir. 1991);

Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 630 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983).

In general, public policy strongly favors settlements of disputes without litigation. Donovan v. Robbins, 752 F.2d at 1177; Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir.), cert. denied, 429 U.S. 862 (1976). Settlements conserve the resources of the courts, the litigants, and the taxpayers and "should . . . be upheld whenever equitable and policy considerations so permit." Allied Witan, 531 F.2d at 1372; E.E.O.C. v. Hiram Walker & Sons, Inc., 768 F.2d 884, 888-89 (7th Cir. 1985), cert. denied, 478 U.S. 1004 (1986).

Broad deference should be afforded to EPA's expertise in determining an appropriate settlement and to the voluntary agreement of the parties in proposing the settlement. In re Cuyahoga Equip. Corp., 980 F.2d 110, 118 (2nd Cir. 1992), citing Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-44 (1984). See also United States v. Vertac Chem. Corp., 756 F. Supp. 1215, 1218-19 (E.D. Ark. 1991), aff'd sub nom. United States v. Hercules, Inc., 961 F.2d 796 (8th Cir. 1992); United States v. Cannons Eng'g, 899 F.2d 79, 87 (1st Cir. 1990).

As demonstrated below, the proposed Decree meets the three-part test for district court approval of a settlement: the settlement is fair, reasonable, and in the public

interest. Accordingly, the Court should sign and enter the Decree.

**1. The Decree is Procedurally and Substantively Fair.**

To determine whether a proposed settlement is procedurally and substantively fair, courts look to factors such as the good-faith efforts of the negotiators, the opinions of counsel, and the possible risks involved in litigation if the settlement is not approved. Hooker Chem. & Plastics Corp., 540 F. Supp. at 1072.

In this case, the settlement embodied in the Amended Consent Decree is the product of procedural fairness, exemplified by a process that began with EPA's and MPCA's investigation of the ethanol industry in Minnesota, including the Gopher State facility, and culminated in the development of an injunctive relief program for each individual plant that addresses the violations alleged and furthers the objectives of the laws on which the Complaints were based. The touchstone of procedural fairness is good-faith, arms-length bargaining among the parties. Between April 30, 2002 and the filing of this case on October 2, 2002, the parties engaged in vigorous and extensive negotiations. Though the settlements were achieved over a compressed period of time, the parties devoted hundreds of hours to the process to ensure that the

concerns of all parties were addressed. The Amended Decree reflects the parties' careful and informed assessment of the relative merits of each other's claims while taking into consideration the costs and risks associated with litigation. It also embodies a measure of compromise on both sides, but easily meets the standards for substantive fairness, as required for approval by this Court, in that the effect of the settlement (the claims released), measure up to and conform with the scope of Gopher State's obligations under the Decree.

As with any fair settlement, the parties gain the benefit of immediate resolution of the litigation and some measure of vindication for their respective positions, while foregoing the opportunity to achieve an unmitigated victory. Hiram Walker & Sons Inc., 768 F.2d. at 889.

In evaluating a settlement under remedial statutes, such as the Clean Air Act, fairness may also be considered in light of the effect of the Amended Decree on the public. Specifically, the Amended Decree protects public health and the environment by requiring Gopher State to control its air emissions, correct all permits, and achieve compliance with NSPS Subparts Db, Dc, Kb, and VV. These improvements will result in the reductions of harmful air emissions by 95%,

reductions which translate into measurable benefits for public health and the environment.

The citizens of St. Paul, Minnesota, and the public at large have a right to expect that health and environmental concerns will be adequately addressed in any settlement under the Clean Air Act and that the Gopher State facility will comply with all applicable laws. The proposed Amended Consent Decree has more than met these expectations, and exceeds both the procedural and the substantive "fairness" standards required for entry. Further, expeditious steps toward compliance will begin immediately, and will not be delayed by lengthy and complex litigation.

## **2. The Amended Consent Decree is Reasonable.**

The "reasonableness" of the Decree may be determined in light of whether it is technically adequate, fully compensates the public for the alleged violations, and takes into consideration the risks of litigation. U.S. v. Telluride Company, 849 F.Supp. 1400, 1403 (D.Col. 1994). Applying the Telluride standard here, the Court should find that the Decree represents a reasonable settlement of the alleged statutory violations. As discussed above, the Decree is more than technically adequate in that it contains specific, tailored

relief that addresses the compliance deficiencies alleged in the Plaintiffs' Complaints and accomplishes broad relief in furtherance of the laws upon which the Complaints were based. It obtains this compliance in a far shorter time than if the parties had litigated the action, and requires payment of a civil penalty that is appropriate in light of the violations alleged.

**3. The Amended Consent Decree Is In the Public Interest and Is Consistent with Applicable Environmental Goals.**

A primary role of the Court in reviewing an environmental settlement is to determine "whether the Decree comports with the goals of Congress." Sierra Club v. COCA-COLA Corp., 673 F. Supp. 1555, 1556 (M.D. Fla. 1987). This Amended Consent Decree with Gopher State furthers the statutory goals of the Clean Air Act to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare. CAA Section 101(b)(1), 42 U.S.C. § 7401(b)(1). The settlement achieves, without litigation delays or costs, substantial environmental benefits by requiring Gopher State to reduce its air pollution, to enhance its monitoring and control of fugitive emissions, and to accept restrictive

emission limits at its facility, which will ensure ongoing Clean Air Act compliance.

The D.C. Circuit has recently reiterated its view of how a district court should assess whether a proposed settlement is in the public interest:

The court should also bear in mind the flexibility of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is the one that will best serve society," but only to confirm that the resulting settlement is "'within the reaches of the public interest.'"

Microsoft Corp., 56 F.3d at 1460, citing United States v. Western Elec. Co., 900 F.2d 283 (D.C. Cir. 1990) (additional citations omitted). This settlement serves the public interest and the goals of each of the environmental programs at issue, and easily meets the Microsoft standard.

**B. The Public Comments Do Not Provide A Basis to Disapprove the Amended Consent Decree.**

Here we summarize and respond to (1) the comments received with respect to the Original Consent Decree that were not specifically addressed in the proposed amendments to the Consent Decree; and (2) the comments received that are unique to the Amended Decree.

(1). **Comments on the Consent Decree that Did Not Warrant Changes.**

The following is a summary of the comments and concerns raised by the citizens which, though considered by the Plaintiffs, did not warrant further change to the Gopher State settlement.

**A. Odor/Nuisance.**

Many of the commenters complain about the odor and noise from the Gopher State facility and are concerned that the settlement may not be adequate to address these issues. The United States believes that the emission reductions required by the Amended Consent Decree will greatly reduce the odor associated with the ethanol manufacturing process. While the Clean Air Act does not provide for the direct regulation of "odor", EPA and MPCA believe that the uncontrolled VOC emissions from the ethanol process contribute significantly to the odor, and a reduction of 95% of these emissions should result in a substantial improvement in odor, as well as to the air quality in the community. The Amended Consent Decree has no requirements for noise abatement since the Clean Air Act does not regulate noise. The residents of St. Paul will have to look to state or local nuisance ordinances to address noise levels at the plant.

**B. Compliance period.**

Several commenters expressed concern that Gopher State's period for operation and demonstration of compliance under the Consent Decree is not long enough. They state that the 24-month compliance period as a condition of termination of the Decree is too short given the nature and extent of past operating problems to ensure long term compliance, and urge that emission caps under the Decree remain in effect after termination of the Decree.

This comment illustrates a misunderstanding by the citizens as to what is required of Gopher State. The two-year period of required operation under the Decree is not really a "compliance period" but the minimum length of time that the source must operate in order to be considered a "minor source" under federal and state regulations for NSR and NESHAP. The Consent Decree requires that the emission caps be incorporated in a permit, as required under Paragraph 17, no later than 180 days after the last piece of control equipment is installed. Gopher State must have its thermal oxidizer in place and operating in compliance for a period of 24 months, which is anticipated to allow enough time for MPCA to issue the minor source permit with 95 TPY limits. Once the permit is issued,

the permit, rather than the Consent Decree, will be the means of enforcing Gopher State's compliance for the long-term.

Similarly, Gopher States' demonstration of compliance with the emissions cap is not limited to the two emissions tests required under the Decree. Rather, Gopher State will be operating under an MPCA permit and will be governed by MPCA policy regarding emissions and periodic demonstrations of compliance for as long as the facility is operational.

**C. Regulation of Fugitive Emissions.**

Some commenters asserted that the Consent Decree does not address all fugitive emissions nor does it address all emission points. This is an area that the Plaintiffs believe is adequately covered under the existing regulations. Ethanol plants are considered to be chemical manufacturing plants which are "listed sources" under Section 169 of the Clean Air Act. 42 U.S.C. §7479. As a listed source, an ethanol plant must account for all emissions from its operation, including fugitives emissions. Moreover, the Consent Decree requires that Gopher State stay under the 95 TPY emission cap set forth in the Consent Decree and under the Minnesota SIP. Gopher State has the burden to accounting for and quantifying its emissions in order to maintain compliance with the cap.

Finally, all emission points will be covered by Gopher States' federally-enforceable operating permit, and Gopher State will be required to consider and account for all emissions as part of its facility-wide 95 tpy cap.

**D. Health risks**

\_\_\_\_\_A concern voiced by all the commenters is the potential for health risks and/or health effects as a result of exposure to air emissions from the ethanol manufacturing process. Far from being a ground for objection to the Consent Decree, however, concern about health risks favors prompt entry of the Decree because it embodies the toughest remedy available for Gopher State's emissions under the Clean Air Act.

The Clean Air Act requires that the National Ambient Air Quality Standards ("NAAQS") be set at limits which are protective of human health for certain "criteria" pollutants, including those pollutants that are emitted from the Gopher State facility. Each airshed in the nation is required to attain and maintain compliance with these national air quality standards. The City of St. Paul, and the entire state of Minnesota is classified as an attainment area for compliance with the NAAQS. The emission limits established for Gopher State's operations under the Consent Decree are set at levels consistent with all applicable air quality standards

and, if those levels are met, the plant's operations should not contribute to violations of the NAAQS.

**E. Public involvement in the negotiations.**

Several citizens commented that the community should have been involved in the negotiations with Gopher State. As this motion illustrates, citizen involvement through public notice and opportunity for comment on proposed settlements is a hallmark of environmental enforcement. As the commenters acknowledge, the settlement negotiations were conducted pursuant to a confidentiality agreement among the parties and were also protected under Rule 408 of the Federal Rules of Evidence which encourages settlement of disputes without resort to litigation as a matter of public policy. Settlement discussions are generally protected under Rule 408 to promote the free and open exchange of information among the parties during settlement discussions.

Although the negotiations themselves were conducted in confidence, the public is afforded an effective role in the settlement process pursuant to Department of Justice regulations which provide for notice and comment after the Consent Decree is lodged and before it can become final. See 28 C.F.R. §50.7. These citizens availed themselves of the opportunity to review the proposed Consent Decree as well as

the proposed Amendment, and to comment on all aspects of the settlement. Moreover, the Plaintiffs took the extra step here of conducting a meeting with residents and representatives of the City of St. Paul to discuss the settlement. That the comments were meaningful is demonstrated by the fact that the parties made changes to the original Consent Decree to reflect the concerns of the citizens. Finally, through this motion, the Court will have the opportunity to perform an independent review of the settlement in light of the public comments received.

**F. Reliability of the thermal oxidizer.**

Several citizens commented that the Consent Decree should address the reliability of the thermal oxidizer. The Consent Decree takes a different approach, however. By requiring that the TO meet specific emission limits, it is incumbent upon Gopher State to ensure that the engineering design criteria results in installation of control equipment that ensures compliance with the required emission limits.

Several commenters also suggested that the thermal oxidizer is not a proven technology in the ethanol industry. In fact, incineration technology is a proven control method for destruction of VOC emissions from many industrial sources and have been widely used since the 1980's. Though this

technology has only recently begun to be used in the ethanol industry, EPA believes that extensive experience with such controls supports its effectiveness in this application, moreover, the Consent Decree requires Gopher State to meet emission limits without regard to the technology. Under the proposed settlement, Gopher State must take additional measures to comply, including, if necessary, the installation of additional control technology to ensure that it will meet the required emission limits.

**G. Civil Penalty amount.**

Several commenters suggest that the civil penalty amount assessed in this case is too low. The Plaintiffs disagree. We believe that the penalties required here are appropriate and are consistent with the Clean Air Act mandate to consider certain factors in determining the appropriate civil penalty in any enforcement action. These factors include the size of violator, economic impact on the source, economic benefits to the source, the cost of compliance, the seriousness of the violation, the potential for harm, any history of noncompliance, and all other factors as justice would require. The civil penalty agreed to under this settlement takes all of these statutory factors into consideration and also recognizes

that Gopher State will be spending a great deal of money on air pollution control technology to reduce its emissions.

(2). The United States received comments from five (5) individual residents of the community of St. Paul, Minnesota, regarding the proposed Amended Consent Decree. See, Public Comments, Attachments 60 through 64 to this Memorandum. To the extent that the comments on the Amended Decree were similar to comments received on the original Consent Decree, they have already been addressed above.

Comment: *EPA and MPCA should order Gopher State to stop operation of the plant until it can demonstrate compliance with the emission limits set forth in the Amended Decree.*

Response: EPA and MPCA have authority under the Clean Air Act to close a source of air pollution if there is evidence that the source presents an imminent and substantial endangerment to the public health or the environment. See, Clean Air Act § 303, 42 U.S.C. § 7603. We have no evidence at this time that Gopher State's operation rises to the level of an "imminent and substantial endangerment" to the public. However, the Amended Consent Decree in no way constrains EPA's or MPCA's authority to bring an action for closure under Section 303 (Emergency Powers) at any time if the evidence supports it.

*Comment: Emissions of glycerol from the Gopher State plant should be included and monitored under the settlement and that EPA should study the health effects associated with glycerol emissions.*

*Response: Under the Amended Consent Decree Gopher State is required to measure glycerol emissions as a component of total VOC. Glycerol is not itself a regulated pollutant since it is neither a HAP nor a criteria pollutant under the Clean Air Act and implementing regulations. However, glycerol is a VOC and Gopher State is required to test for it. Prior tests conducted at Gopher State using acceptable test methods for VOC measurement, EPA Reference Methods 25 and 18, include analysis of glycerol emissions.*

*Comment: The Gopher State Amended Consent Decree should require the preparation of a malfunction/breakdown plan that will identify the procedures proposed by Gopher State to quantify and limit associated emission increases from affected process and control equipment (i.e. dryer, thermal oxidizer, fermentation stack scrubber, distillation scrubber, and all future control devices.)*

*Response: The preparation of a malfunction/breakdown plan is a statutory requirement under Clean Air Act § 112(r)(7)(A),*

42 U.S.C. § 7412(r) (7) (A) (Accident Prevention) and the Emergency Planning and Community Right-to-Know Act ("EPCRA"). 42 U.S.C. § 11001 et seq. Gopher State has such a plan and is in compliance with these requirements. Minnesota regulations also require Gopher State to report any shutdown, breakdown, and malfunction that increases emissions.

*Comment: Gopher State's emissions monitoring data should be deemed a matter of "public record" and made available to the public.*

Response: All emissions data under the Clean Air Act and the Minnesota SIP is considered public record and may be shared with the community upon request.

*Comment: The stack of the Gopher State thermal oxidizer is too low and Gopher State's geographic location has not been taken into consideration in allowing the source to operate at its current location.*

Response: MPCA is required to consider the impact of Gopher State's emissions on the NAAQS as part of the permitting process. One consideration in this evaluation is the stack height and location of all sources in the airshed and the dispersion of pollutants. Where MPCA determines that the source's emissions will have a significant impact on air quality, it may require the source to conduct ambient air

modeling to ensure that pollutants being emitted are adequately dispersed and do not violate the NAAQS. The Amended Consent Decree does not affect MPCA's authority to order such modeling and to require Gopher State to increase its stack height, if modeling indicates that pollutants are not being adequately dispersed.

The remaining comments received on the Amended Consent Decree are similar to those on the original Decree and have been addressed above. In summary, the citizens of St. Paul have a right to expect that Gopher State will be required to comply with the Clean Air Act and the terms of the Amended Consent Decree. We believe the proposed settlement accomplishes that. The Amended Consent Decree provides regulators with the tools to secure emission reductions at this facility. It is incumbent on EPA and MPCA to make use of these tools to ensure that Gopher State continues to operate in compliance.

### III. Conclusion

The Amended Consent Decree presented to this Court for entry is a fair and just resolution of the state and federal claims in this action. The Decree provides for comprehensive remedial action that is protective of public health and the

environment. The comments received do not provide a basis for rejection or further modification of the Amended Decree. Entry of the Amended Decree is supported by a long and unbroken line of case law which requires deference to EPA's discretion in interpreting and applying highly technical regulations, and to the sophistication of the parties who negotiated in good faith to achieve an expeditious resolution of the governments' claims. For all the reasons set forth above, this Court should sign and enter the proposed Amended Consent Decree.

Respectfully submitted,

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