BEFORE THE HEARING OFFICER
ALLEGHENY COUNTY HEALTH DEPARTMENT
542 4TH AVENUE
PITTSBURGH, PENNSYLVANIA 15219

UNITED STATES STEEL CORPORATION,	)	
Petitioner,	)	In re Settlement Agreement and Order, executed June 27, 2019 and entered February 10, 2020, resolving Appeals of Enforcement Orders 180601, 190305, and 190501, and Administrative Order 181002
v.	)	
ALLEGHENY COUNTY HEALTH DEPARTMENT,	)	
Respondent.	)	

REQUEST FOR SUMMARY GRANT OF RELIEF

United States Steel Corporation ("U. S. Steel"), by and through its counsel, submits this Request for Summary Grant of Relief. Through this Request, U. S. Steel asks that the Allegheny County Health Department's ("ACHD's") Hearing Officer determine that the ACHD's proposed rulemaking pertaining to coke oven batteries does not comply with the June 27, 2019 Settlement Agreement and Order ("SAO") between U. S. Steel and the ACHD, and enjoin ACHD from further pursuing the proposed rulemaking.

I. Introduction

After extensive litigation involving multiple appeals before the Hearing Officer, U. S. Steel and ACHD negotiated and agreed to the SAO, which went through public comment and was then approved by the Hearing Officer. Both parties agreed to certain requirements under the SAO. U. S. Steel agreed to undertake a series of environmental improvement projects and to be subject to a schedule of stipulated penalties for violations of certain provisions of Article XXI and the Clairton Title V permit. In exchange, ACHD agreed that it would not impose more stringent limits

for coke ovens unless it first determined that the limits were technically feasible based on specific rulemaking criteria in the SAO, and the rulemaking is shown to correlate with a measurable reduction in benzene and hydrogen sulfide at the nearby Liberty ambient air monitor. In its current proposed rule, however, which is the subject of this dispute, ACHD baselessly claims that it can totally disregard its obligations under the SAO.

The SAO is a valid, enforceable agreement that was the product of substantial negotiation, and is consistent with a general policy applied by Pennsylvania courts favoring settlements in lieu of judicial resolution of every dispute. The ACHD is now seeking to benefit from U. S. Steel's performance of its obligations under the SAO, without honoring its end of the bargain. Specifically, ACHD proposed a rulemaking that imposes more stringent limits for coke ovens without complying with the SAO. ACHD cannot ignore the terms of the SAO for several reasons, which are set forth in U. S. Steel's Petition for Dispute Resolution. The Hearing Officer need not consider all of these reasons at this stage in the litigation, however, because ACHD's basis for ignoring the SAO's rulemaking criteria – that it violates public policy because ACHD is obligated by law to impose more stringent limits based on the Pennsylvania Air Pollution Control Act ("APCA") – lacks merit as a matter of law. Even if the APCA required ACHD to impose more stringent limits (it does not), ACHD has not even attempted to do so while also complying with the SAO's rulemaking criteria. ACHD thus cannot satisfy its burden of proving that the SAO violates public policy. Based on this undisputed record, U. S. Steel requests that the Hearing Officer find that ACHD's proposed rulemaking does not comply with the SAO and enjoin ACHD from pursuing the disputed rulemaking any further.

II. Background

U. S. Steel operates 10 coke oven batteries at its Clairton Coke Works, located in Clairton Borough, Allegheny County, Pennsylvania. Petition for Dispute Resolution, Ex. A at p. 2. On June 27, 2019, after what at the time appeared to be good faith negotiations to reach a resolution between the parties, U. S. Steel and ACHD entered into the SAO, which was signed by ACHD's Hearing Officer. Petition for Dispute Resolution, Ex. A at p. 32. The SAO states that its terms "shall apply to, be binding upon, and inure to the benefit of the [Department] and U. S. Steel and upon their respective officers, directors, agents, contractors, employees, servants, successors, and assigns." *Id*. at p. 10. Paragraph 12 of the SAO provides that ACHD may pursue rulemaking to impose more stringent limits on the Clairton Coke Works' coke oven batteries "only if the more stringent limits are determined to be, *inter alia*, technically feasible in accordance with this Paragraph." *Id*. at p. 19. The paragraph goes on to provide criteria that must be fulfilled in order to pursue a rulemaking that imposes more stringent limits (the "SAO's Rulemaking Criteria") including:

1. More stringent standards must be supported by a demonstrated compliance rate of not less than 99% for all regulated emissions points on the Clairton batteries over any consecutive 12-month period during a five-year period on a battery-by-battery basis; and

2. More stringent standards must be supported by a demonstration that the standard correlates with a measurable reduction in hydrogen sulfide and benzene levels at the Liberty Monitor, a Department-run air quality monitor located approximately 1.5 miles north of the Clairton Coke Works.

Id. at pp. 19-20.

In November 2020, ACHD issued proposed amendments to Article XXI of its Rules and Regulations, entitled "Proposed Coke Ovens and Coke Oven Gas Regulation Revision" and "Proposed Revision to Allegheny County's portion of the Pennsylvania State Implementation Plan

for the Attainment and Maintenance of the National Ambient Air Quality Standards" (collectively, the "Proposed Coke Rule"). Petition for Dispute Resolution, Ex. F at Exhibit A. The Proposed Coke Rule seeks to amend Article XXI to impose more stringent limits for hydrogen sulfide concentration in coke oven gas, and for visible emissions from pushing operations and battery topsides. In particular, the Proposed Coke Rule would:

1. Reduce the hydrogen sulfide concentration limit in coke oven gas from 35 grains[1] per hundred dry standard cubic foot (dscf) to either 23 grains per hundred dscf, or a calculated "weighted design capacity" concentration based on coke oven batteries in operation on January 1, 2025 (and thereafter if the battery profile changes), <u>whichever is lower</u>; and revise §§ 2105.21(h) and 2101.20 to add five compounds in addition to hydrogen sulfide (the only compound that is counted under the current regulation) that must be counted to determine compliance with the current hydrogen sulfide limits in 2105.21(h): carbon disulfide, carbonyl sulfide, methyl mercaptan, ethyl mercaptan, and sulfur dioxide;

2. For visible emissions, revise §§ 2101.20 and 2105.21(e) to change the definitions of the terms "pushing", "pushing operation", and "pushing emissions" to include visible emissions that are not included in determining compliance with current pushing visible emissions standards; and add § 2105.21(j), which would impose new prohibitions on topside emissions from the battery at any point other than allowed emissions from charging port seals, offtake piping, and soaking, none of which are currently prohibited.

Id. at pp. 3, 11-14, 16-19.

Promptly after receiving a copy of the Proposed Coke Rule, U. S. Steel informed ACHD that the Proposed Coke Rule violated the SAO. The parties engaged in preliminary discussions to try to resolve the dispute before invoking the dispute resolution framework of the SAO. When the parties reached an initial impasse, on January 20, 2021, U. S. Steel sent a Notice of Dispute to the Department, requesting informal negotiations pursuant to Section XI, Paragraph 25 of the SAO.

[1] Both parties acknowledge that the current effective hydrogen sulfide coke oven gas limit is 35 grains per hundred dscf limit (Department's Position at 9). Accordingly, U. S. Steel does not believe that rulemaking to amend § 2105.21(h)(4) from 40 to 35 grains per hundred dscf would require demonstrating the SAO's Rulemaking Criteria because the 35 grains per hundred dscf limit is already included and required as part of the SO2 State Implementation Plan which has been approved by the Pennsylvania Department of Environmental Protection and the US Environmental Protection Agency.

Petition for Dispute Resolution at Exhibit D. The parties were able to resolve some disputed matters, but were unable to resolve the matters included in U. S. Steel's Petition. On May 4, 2021, U. S. Steel sent a Statement of Position to the Department invoking the formal dispute resolution procedures under Section XI, Paragraph 26 of the SAO. *Id*. at Exhibit E. On May 24, 2021, the Department sent U. S. Steel its Statement of Position, which did not accept U. S. Steel's position on any of the matters in dispute. *Id*. at Exhibit F.

On June 23, 2021, U. S. Steel submitted a Petition for Dispute Resolution, requesting that the Hearing Officer (1) determine that the Proposed Coke Rule does not comply with the SAO, and (2) enjoin ACHD from pursuing the Proposed Coke Rule further.

III. Standard of Review

Pursuant to Paragraph 27 of the SAO, administrative review of disputes under the SAO "shall be governed by applicable provisions of law." Petition for Dispute Resolution Ex. A at p. 26. Under Pennsylvania law, summary relief of a dispute is available "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." Pa. R. Civ P. 1035.2; Pa. R. App. P. 1532(b); *Jubelirer v. Rendell*, 953 A.2d 514, 521 (Pa. 2008) ("An application for summary relief may be granted if a party's right to judgment is clear and no material issues of fact are in dispute"). In addition, Article XI, § 1108 allows for a disposition without a hearing where only legal questions are at issue.

IV. Argument

There is no reasonable dispute that the proposed coke oven gas hydrogen sulfide and pushing and topside visible emission standards are more stringent than the current standards. Moreover, there is no reasonable dispute that the ACHD has not fulfilled the SAO's Rulemaking

Criteria in connection with the Proposed Coke Rule, and the SAO is, as a matter of law, a valid, enforceable, and binding agreement. U. S. Steel is therefore entitled to summary relief.

A. The proposed hydrogen sulfide standard is more stringent than the current standard.

Under the SAO, ACHD may pursue a rulemaking to impose more stringent limits only "if the more stringent limits are determined to be, *inter alia*, technically feasible in accordance with" the SAO's Rulemaking Criteria. Petition for Dispute Resolution, Ex. A at p. 19-20. The Proposed Coke Rule seeks to make the existing hydrogen sulfide standard more stringent by both (1) numerically reducing the permissible limit by over 40%, and (2) including a more expansive universe of compounds, which are not counted under the current standard, that must be counted in determining compliance with the numerically lower limit.

ACHD acknowledges that the current standard for hydrogen sulfide in coke oven gas applicable to the Clairton Coke Works' batteries is 35 grains per hundred dscf. Petition for Dispute Resolution, Ex. F at p. 9 ("Based on this calculation, the ACHD set the standard for sulfur compound concentration at 35 grains per 100 [dscf] of coke oven gas"). It also acknowledges that, under the Proposed Coke Rule, U. S. Steel would have to meet a concentration standard of no more than 23 grains per hundred dscf by January 1, 2025, and that this limit may in fact be lower "in the event that the Clairton Plant retires, shuts down, cold idles, installs, replaces, reconstructs, or performs a major modification of any of the coke oven batteries." *Id*. at 10. A numerically lower limit is, as a matter of law, more stringent than one with a higher limit.[2]

[2] *See e.g*., *Burkholder v. Zoning Hearing Board of Richmond Twp*., 902 A.2d 1006, 1016 (Pa. Comm. Ct. 2006) (holding that an ordinance requiring a setback of 1,500 feet was more stringent than a Pennsylvania regulation requiring a setback distance of 300 feet based on the numeric difference); *Arizona ex rel Darwin v. EPA*, 815 F.3d 519, 538 (9th Cir. 2016) (finding that a nitrogen oxides emissions limit of 0.065 lbs/mmBTU was "of course, very significantly more stringent than the [proposed] 0.32 lb/mmBTU limit" given the numeric difference).

In addition to being numerically lower, the Proposed Coke Rule changes the method for determining compliance with the limit to make it more stringent by including several additional sulfur compounds as part of the determination. Under the current standard, only the concentration of hydrogen sulfide is counted to determine compliance with the limit. Article XXI, § 2105.21.h; Petition for Dispute Resolution, Ex. F at p. 6. The Proposed Coke Rule similarly counts hydrogen sulfide, but it also adds five additional compounds that must be counted together to determine compliance with the limit - carbon disulfide, carbonyl sulfide, methyl mercaptan, ethyl mercaptan, and sulfur dioxide – further making the limit more stringent.

ACHD acknowledged this fact. In its May 24, 2021 Statement of Position, ACHD states:

> It is the [Department's] position that the current version of Article XXI, § 2105.21.h, is less stringent than the Pennsylvania regulations because it only requires the measurement of [hydrogen sulfide] ... [T]he [Department's] regulations cannot be 'less stringent' than the Air Resources regulations. 35 P.S. § 4012(a). Therefore, the [Department] is proposing to revise its regulations to state: 'concentration of measured sulfur compounds, expressed as equivalent hydrogen sulfide,' which is consistent with the Pennsylvania regulations.

Petition for Dispute Resolution, Ex. F at p. 6-7. Based on ACHD's allegation that the current Article XXI standards are *less* stringent than statewide standards,[3] and that the Proposed Coke Rule's provisions are consistent with statewide standards, the Department acknowledges that the Proposed Coke Rule's amendment to the definition of "measured sulfur compounds" is more stringent than the current Article XXI standards.

ACHD's current position about stringency is also contrary to public statements it made at its Board of Health meetings. During the May 2, 2018 ACHD Board of Health meeting, ACHD gave an update on the Proposed Coke Rule. At that time, the ACHD's Deputy Director of

[3] Furthermore, ACHD's assertion that the current H2S standard in Article XXI is "less stringent" than the Pennsylvania statewide standard is illogical since the statewide standard is 50 grains per hundred dscf. *See* 25 Pa. Code § 123.23(b)).

Environmental Health stated, "Allegheny County has the most stringent coke oven regulations in the country." It was not until *after* entering the SAO did ACHD assert for the first time ever that it needed to revise the coke oven regulations because they were not as stringent as Pennsylvania statewide standards. Petition for Dispute Resolution at n. 6.

B. The Proposed Coke Rule's amendments to its pushing and topside visible emissions standards are more stringent than the current Article XXI standards

ACHD has also acknowledged, as it must, that the pushing and topside visible emissions standards in the Proposed Coke Rule are more stringent than the current standards. In its Statement of Position, ACHD states that the existing Article XXI language on pushing and topside emissions is less stringent than statewide standards for coke oven batteries, and thus, the Proposed Coke Rule seeks to adopt the more stringent statewide standards. See Petition for Dispute Resolution, Ex. F at p. 4-5.

C. ACHD has not satisfied the SAO's Rulemaking Criteria in connection with the Proposed Coke Rule.

Pursuant to Paragraph 26 of the SAO, ACHD's May 24, 2021 Statement of Position was required to include "available factual data, analysis, opinion and/or legal arguments supporting ACHD's position along with any supporting affidavits and/or documents relied upon by ACHD." Petition for Dispute Resolution, Ex. A at p. 25. ACHD does not contend in its Statement of Position that the Proposed Coke Rule's amendments to the hydrogen sulfide and visible emission standards satisfy the SAO's Rulemaking Criteria. Rather, its Statement of Position makes clear that it never even attempted to comply. There is no factual dispute, therefore, that ACHD did not satisfy the SAO's Rulemaking Criteria in connection with the Proposed Coke Rule. As such, this issue is ripe for a legal determination.

D. ACHD is bound by the terms and provisions of the SAO.

Pennsylvania courts have recognized a "longstanding public policy which encourages settlements." See, e.g., *Muhammad v. Strassburger et al*, 526 Pa. 541, 546 (1991); *Tribune-Review Publ'g Co. v. Westmoreland County Hous. Auth*., 574 Pa. 661, 676 (2003). Settlement agreements between a private party and a government agency are considered as enforceable and binding contracts where all of the elements of a valid contract are met. *See McDonnell v. Ford Motor Co*., 434 Pa. Super. 439, 643 (1994) ("Where a settlement agreement contains all of the requisites for a valid contract, a court must enforce the terms of the agreement").

In an effort to justify its decision to disregard the SAO's Rulemaking Criteria, ACHD incorrectly contends that the SAO's Rulemaking Criteria are contrary to the APCA and thus unenforceable as contrary to public policy. ACHD has the heavy burden of proving that the SAO's Rulemaking Criteria are contrary to public policy and, pursuant to Paragraph 26 of the SAO, was required to support this position in its Statement of Position with "available factual data, analysis, opinion and/or legal arguments [and] any supporting affidavits and/or documents relied upon by ACHD." Petition for Dispute Resolution, Ex. A at p. 25. ACHD failed to satisfy its burden as a matter of law.

Under Pennsylvania law, "a clear and unambiguous contract provision must be given its plain meaning unless to do so would be contrary to a clearly expressed public policy." *Eichelman v. Nationwide Ins. Co*., 711 A.2d 1006, 1008 (Pa. 1998). "Public policy is more than a vague goal which may be used to circumvent the plain meaning of the contract." *Id*. Accordingly, "a challenger who asserts that clear and unambiguous contract provisions . . . are void as against public policy carries a heavy burden of proof," *Sayles v. Allstate Ins. Co.,* 219 A.3d 1110, 1122-1123 (Pa. 2019), and "only in the clearest cases, therefore, may a court make an alleged public

policy the basis of judicial decision." *Hall v. Amica Mut. Ins. Co*., 648 A.2d 755, 760 (Pa. 1994) (quoting *Mamlin v. Genoe*, 325, 17 A.2d 407, 409 (Pa. 1941)).

For ACHD to establish that a contract provision violates public policy, it must be evident that the "subject of the agreement is specifically proscribed by the statute," *Shafer v. A. I. T. S., Inc.*, 428 A.2d 152, 154 (Pa. Super. Ct. 1981), or that compliance with the contract provision *necessarily* requires an unlawful act. *O'Brien v. O'Brien Steel Const. Co.*, 271 A.2d 254, 256 (Pa. 1970) ("No crime was in fact committed or compounded and no statute was in fact violated by any acts of the parties performed in fulfillment of their respective contractual obligations. . . . If there was indeed such wrongdoing, it *was not required in any way by the contract*.") (emphasis added). Where the agreement can be performed without violating a law, the agreement remains valid and enforceable. *Dippel v. Brunozzi*, 74 A.2d 112, 115 (Pa. 1950) ("If the contract be found to have been [performed without violating the regulation], defendant must then be afforded the right to assert the claim for the alleged breach . . . ."). It is not enough for the party seeking to strike the contract to speculate that the contract may, under some hypothetical circumstances, conflict with a law; it must show that the contract clearly and unquestionably violated law. *See Eichelman*, 711 A.2d at 1010 ("The case *sub judice* is not the clearest of cases, so it is beyond judicial authority to declare the clear and unambiguous ... language in the policies ... to be void as against public policy").

Here, the SAO does not require ACHD to violate the APCA. The APCA does not prohibit ACHD from entering into a settlement agreement that requires future implementation of more stringent limits to be technically feasible based on negotiated criteria. Nor does the SAO preclude ACHD from engaging in rulemaking that is more stringent. Instead, it merely requires ACHD to satisfy the SAO's Rulemaking Criteria as part of such rulemaking, which ACHD has not even

attempted to do. Therefore, ACHD has not, and cannot, satisfy its heavy burden of proving that the SAO's Rulemaking Criteria are contrary to public policy.

To the contrary, allowing the ACHD to sidestep the binding SAO establishes a one-sided policy that would undermine the consideration paid by U. S. Steel as part of the agreement. In particular, in exchange for the establishment of the SAO's Rulemaking Criteria, U. S. Steel agreed to, among other things, perform a series of environmental improvement projects and follow a schedule of stipulated penalties for violations of Article XXI and the Clairton Title V permit. The SAO makes clear that U. S. Steel agreed to these terms in exchange for ACHD agreeing to be bound to the SAO's Rulemaking Criteria. To accept ACHD's attempt to receive consideration from U. S. Steel without honoring its end of the bargain is contrary to Pennsylvania policy favoring these kinds of negotiated resolutions. Moreover, accepting ACHD's position risks undoing the past and future benefits from the heavily negotiated SAO, including all of the litigation that was (and would be) avoided and the significant stipulated penalties and environmental improvements U. S. Steel agreed to in exchange for ACHD's complying with its own settlement obligations, including the Rulemaking Criteria.

ACHD's position also fails because it has not identified any provision of the APCA that it would allegedly *violate* in the event that it were to comply with the SAO. There are none. After decades of approvals of the ACHD's coke oven rules by the Pennsylvania Department of Environmental Protection ("DEP") and the US Environmental Protection Agency ("EPA"), including the hydrogen sulfide standards as currently applicable to the Clairton Plant, ACHD, for the first time ever, now alleges it must revise the coke oven rules to purportedly comply with the APCA. There is no basis for this allegation. In fact, DEP reviews the ACHD air quality program annually (*see* 25 Pa. Code § 133.9). ACHD has not made any claim that the DEP has found the

existing H2S standard as being deficient.[4] The ACHD has unilaterally, and in breach of the SAO, decided that its regulations are less stringent than the state standards after decades of acceptance by EPA and DEP. There is nothing in the APCA that mandates that ACHD revise its regulations as ACHD suggests in its Statement of Position.

The undisputed record demonstrates that ACHD has not satisfied its burden of proving that the SAO's Rulemaking Criteria violate public policy or the APCA. U. S. Steel, therefore, requests summary relief in the form of a determination by the Hearing Officer that, based on the existing case record, ACHD's Proposed Coke Rule does not comply with the SAO and, therefore, ACHD must refrain from pursuing the disputed rulemaking any further.

Respectfully submitted,

/s/ *Mark K. Dausch*_____
Michael H. Winek, Esq. (PA ID# 69464)
Mark K. Dausch, Esq. (PA ID# 205621)
Varun Shekhar (PA ID# 317151)

Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, 6th Floor
Pittsburgh, PA 15222
(412) 394-5400
mwinek@babstcalland.com
mdausch@babstcalland.com
vshekhar@babstcalland.com

David W. Hacker, Esq. (PA ID# 91236)
United States Steel Corporation
600 Grant Street, Suite 1500
Pittsburgh, PA 15219
(412) 433-2919
dwhacker@uss.com

[4] If the Pennsylvania DEP determined that there was a deficiency that could lead to disapproval of ACHD's Air Quality Program (which it has not consistently for decades), it would advise ACHD accordingly and ACHD would be given an opportunity to be heard. (See, generally, 25 Pa. Code § 133.8.)

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UNITED STATES STEEL CORPORATION,	)	
Petitioner,	)	In re Settlement Agreement and Order, executed June 27, 2019 and entered February 10, 2020, resolving Appeals of Enforcement Orders 180601, 190305, and 190501, and Administrative Order 181002
v.	)	
ALLEGHENY COUNTY HEALTH DEPARTMENT,	)	
Respondent.	)	

ORDER

AND NOW, this _____ day of _____, 2021, it is hereby ORDERED that United States Steel Corporation's Request for Summary Grant of Relief is GRANTED. The Allegheny County Health Department's proposed amendments to Article XXI of its Rules and Regulations, entitled "Proposed Coke Ovens and Coke Oven Gas Regulation Revision" and "Proposed Revision to Allegheny County's portion of the Pennsylvania State Implementation Plan for the Attainment and Maintenance of the National Ambient Air Quality Standards" (the "Rulemaking"), do not comply with the June 27, 2019 Settlement Agreement and Order between U. S. Steel and the Department. It is further ORDERED that the Department shall refrain from pursuing the Rulemaking any further.

/s/
Max Slater
Administrative Hearing Officer
Allegheny County Health Department

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed and served via electronic mail this 8th day of September, 2021 upon the following persons:

Max Slater, Esq.
Administrative Hearing Officer
Allegheny County Health Department
542 4th Avenue
Pittsburgh, PA 15219
Max.Slater@AlleghenyCounty.us

Jason Willis, Esq.
Jeff Bailey, Esq.
Allegheny County Health Department
Legal Section
301 39th Street, Bldg. 7
Pittsburgh, PA 15201-1811
Jason.Willis@AlleghenyCounty.us
Jeff.Bailey@AlleghenyCounty.us

/s/ Mark K. Dausch