



GROUP AGAINST SMOG & POLLUTION

**1133 South Braddock Ave., Suite 1A
Pittsburgh, PA 15218
412-924-0604
gasp-pgh.org**

July 31, 2019

VIA EMAIL (aqcomments@alleghenycounty.us)

Allegheny County Health Department
Air Quality Program
301 39th Street – Building 7
Pittsburgh, PA 15201

Re: Comments on ACHD-USS Settlement Agreement and Order

To Whom it Concerns:

Kindly accept the attached comments of the Group Against Smog and Pollution regarding the ACHD-USS Settlement Agreement and Order.

Thank you in advance for your consideration of these comments.

Very truly yours,

/s/ Ned Mulcahy _____

Ned Mulcahy, MPH
Staff Attorney

attachment

**COMMENTS OF THE GROUP AGAINST SMOG AND POLLUTION
REGARDING THE JUNE 28, 2019 SETTLEMENT AGREEMENT AND ORDER
BETWEEN THE ALLEGHENY COUNTY HEALTH DEPARTMENT AND
THE UNITED STATES STEEL CORPORATION**

On June 28, 2019, U.S. Steel and the Allegheny County Health Department (“ACHD”) (collectively, “Parties”) published a draft Settlement Agreement and Order (the “Agreement”)¹ to resolve appeals of three Enforcement Orders and one Administrative Order (collectively, “Orders”) pending before the Allegheny County Health Department Hearing Officer.² Group Against Smog and Pollution (“GASP”) submits the following comments pursuant to the Notice published on the ACHD website inviting public feedback on the Agreement.³

I. THE CIVIL PENALTIES ARE ACCEPTABLE; THE TERMS OF THE COMMUNITY BENEFITS TRUST ARE NOT

GASP agrees with the calculated total penalty amount of \$2,732,504. ACHD appears to have applied its 2018 Civil Penalty Policy (“CPP” or “Penalty Policy”) in calculating the fines,⁴ lawfully exercised a reasonable amount of discretion in doing so, and should be lauded for not lowering the amounts originally levied in the four Orders other than to account for an actual calculation error.⁵

¹ Press Release, Allegheny Cty. Health Dep’t, Draft Agreement with U.S. Steel Requires Compliance with Improvement Criteria, Repair and Transparency Requirements, Community Benefit (June 28, 2019). *See* Agreement, https://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/Legal/Docket/USS-ACHD-Settlement-Agreement-and-Order-190604.pdf.

² Agreement at 1. *See also* Notices of Appeal, *U.S. Steel Corp. v. Allegheny Cty. Health Dep’t Air Quality Program*, Nos. 18-015, 18-063, 19-012, and 19-021 (ACHD Appeals Docket, July 27, 2018 (*amended* Aug. 27, 2018); Dec. 12, 2018; Apr. 25, 2019; and June 4, 2019), <https://www.alleghenycounty.us/Health-Department/Resources/Legal/Docket.aspx>.

³ *See* <https://www.alleghenycounty.us/Health-Department/Programs/Air-Quality/Public-Comment-Notices.aspx>.

⁴ *See* Allegheny County Health Department’s Brief in Support of Enforcement Order #180601 (Post Hearing Brief) at 16-17, *U.S. Steel Corp. v. Allegheny Cty. Health Dep’t Air Quality Program*, No. 18-051 (ACHD Appeals Docket, Feb. 15, 2019). *See also* AIR QUALITY PROGRAM, ALLEGHENY CTY. HEALTH DEP’T, POLICY & PROCEDURE HPA #363, CIVIL PENALTY POLICY (Jan. 10, 2018).

⁵ Agreement ¶ 9 (“This civil penalty represents the amounts calculated and imposed by the ACHD in the Orders, minus \$18,400 that the Department acknowledges was assessed in error based on evidence proffered at the hearing on the appeal of Enforcement Order #180601.”).

GASP further supports the Agreement’s proposal to split this figure between a deposit of \$273,250.40 into the Clean Air Fund and \$2,459,253.60 to be used as the corpus of a fund or trust for community benefits.⁶ GASP generally agrees with the Parties’ position that “supplemental projects benefitting the local communities or environment are a preferred mechanism for offsetting a significant portion of the civil penalties.”⁷

Unfortunately, failing to include clear, defined, and enforceable details regarding how the “local communities” and / or the “Adjacent Communities” will receive those benefits is a critical flaw in the Agreement. The proposed Community Benefit Trust (“Trust” or “CBT”) lacks specificity such that meaningful commentary on it is nearly impossible; interested parties cannot offer informed remarks on a mere promise to finance future, undefined acts. Additionally, this lack of detail risks the viability and effectiveness of beneficial projects proposed to be funded by the Trust. Precise, detailed projects do not need be spelled out at this point but structural features of the CBT must be defined in a revised or amended Agreement to ensure that the Adjacent Communities receive the promised \$2.4 million in benefits.

1. The Agreement must define the intended instrument that will control the funds as well as guiding principles for distributing those funds.

GASP recognizes that Article XXI provides ACHD with broad discretion to bring, and thus settle, enforcement actions.⁸ In addition, as a policy statement, ACHD’s CPP “does not establish a binding norm but announces the agency’s tentative future intentions, and provides the agency with the flexibility to follow the announced policy or modify it if the circumstances are

⁶ Agreement ¶ 9 provides for a total penalty of \$2,732,504. Agreement ¶ 9(A) states that 90% of that figure will go to the trust and Agreement ¶ 9(B) states that 10% will go to the Clean Air Fund. The calculations used herein are as follows: $2,732,504 \times 0.90 = 2,459,253.60$ and $2,732,504 \times 0.10 = 273,250.40$

⁷ Agreement ¶ 9(A).

⁸ See generally Article XXI §§ 2109.02 – 2109.07.

appropriate.”⁹ But even within the wide latitude afforded ACHD in resolving this matter, the Parties cannot forget that “settlement agreements are governed by contract law principles” and thus discretion cannot include ambiguity in drafting.¹⁰

“The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties. In cases of a written contract, the intent of the parties is the writing itself.”¹¹ Given the Agreement is a written document, “where language is clear and unambiguous, the focus of interpretation is upon the terms of the agreement as *manifestly expressed*, rather than as, perhaps, silently intended.”¹²

As applied to the Agreement, the text of Paragraph 9(A) falls well short of manifestly expressing any definite terms regarding the structure or scope of the Trust. Moreover, options for deciphering what the Parties might have “silently intended” are extremely limited. The public does not and will not have access to details of confidential settlement negotiations that might have addressed the Trust.¹³ In addition, even among the Parties, “[n]o prior or contemporaneous communications or prior drafts [of the Agreement] shall be relevant or admissible for the purposes of determining the meaning or intent of any provisions herein in any litigation or other proceeding.”¹⁴ Thus, the only fact the public can glean from Paragraph 9(A) is that it contains a term requiring U.S. Steel to deposit over \$2.4 million into some form of trust agreement with five municipalities named as beneficiaries.

⁹ *Mid-Atlantic Power Supply Ass'n v. Pa. Pub. Util. Comm'n*, 746 A.2d 1196, 1201 (Pa. Commw. Ct. 2000) (citing *Dep't of Env'tl. Res. v. Rushton Mining Co.*, 591 A.2d 1168 (Pa. Commw. Ct. 1991)).

¹⁰ *Lesko v. Frankford Hosp.-Bucks Cty.*, 15 A.3d 337, 341-42 (Pa. 2011) (citing *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999)).

¹¹ *Id.* at 342 (quoting *Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 905 A.2d 462, 468 (Pa. 2006)).

¹² *Id.* (citing *Steuart v. McChesney*, 444 A.2d 659, 661 (Pa. 1982) (emphasis in original)).

¹³ *See* Penalty Policy § I(E).

¹⁴ Agreement ¶ 21.

- a. In lieu of a trust document, the Agreement must at least define how the \$2.4 million corpus will be held and disbursed.

For the Agreement to be enforceable and allow the public to provide meaningful commentary, the planned structure of the Trust must be defined. Paragraph 9(A) states that a “Community Benefits Trust” will be the mechanism by which “supplemental projects” will be financed and delivered to the “Adjacent Communities.” Capitalizing the phrase “Community Benefits Trust” suggests it is a proper noun, but it is neither expressly defined within the Agreement nor a common legal term or expression. Considering this lack of clarity and the interpretative limitations noted *supra*, the phrase “Community Benefits Trust” is virtually meaningless.

Even if the terms of the CBT or its structural equivalent are not finalized, the public must at least be given a chance to comment on a likely form or format. If the CBT truly will be set up as a trust organized under the laws of Pennsylvania with specific beneficiaries and trustee(s), the Agreement must state that fact. There will be particular advantages and disadvantages to that form. If the corpus will be used to set up some sort of fund to be administered by a foundation, likewise, the Agreement must make that clear. Again, there will be particular advantages and disadvantages to that form. To the extent the format is still undecided, GASP suggests that the CBT should be administered by one of the foundations that already operate in the local area to avoid or minimize administrative expenses.

- b. In lieu of defined beneficial projects, the Agreement must provide some framework for allowable expenditures and projects.

The Parties’ agreeing “that supplemental projects benefitting the local communities or environment are a preferred mechanism for offsetting a significant portion of the civil penalties”

is inspiring but does not create an enforceable standard for projects the Trust might fund.¹⁵

Adding to the ambiguity is that the phrase “supplemental projects” could be a reference to ACHD’s guidance on “Supplemental Environmental Projects” contained in its Penalty Policy but that connection is not expressly stated or cited in the Agreement.

Irrespective of the ultimate form of the CBT, proposing that \$2.4 million go into a Trust with no additional limitations or guidance is potentially unenforceable and invites abuse. An additional, practical consideration is that taking and weighing public input absent any guidelines could elicit a dizzying array of suggestions for and disagreement over beneficial projects; \$2.4 million could “benefit” the five listed “Adjacent Communities” in countless ways. Even if the CBT or its equivalent are not finalized, the Agreement must limit the scope of potential projects under it and provide those limitations for public comment.

The simplest, effective method of defining the scope of the “benefits” would be to expressly limit projects funded by the Trust to the SEP guidance in the CPP.¹⁶ Although this guidance states, “SEP[s] need not be air quality-related, as long as an environmental and/or public health benefit can be recognized,” GASP believes that the specified uses of funds from the Trust should focus on measures that will reduce air pollution in the communities most impacted by the Clairton facility’s emissions and that will improve the health of individuals in those communities who have been adversely impacted by air pollution.¹⁷ Still, given the CPP’s recent

¹⁵ Agreement ¶ 9(A).

¹⁶ Penalty Policy §§ IV(A) and IV(C) (Subsection B addresses calculating a penalty offset; GASP supports the proposed penalty division in principle, which renders Subsection B moot for the purpose of this comment).

¹⁷ See U.S. ENVTL. PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 2015 UPDATE (March 10, 2015) at 8, <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf> (“Projects must relate to the underlying violation(s) at issue in the enforcement action.” (emphasis in original)).

revisions, clear guidelines, and flexibility to mold the terms to the present matter, GASP believes that the Parties should consider expressly incorporating this guidance into the Agreement.

At the same time, GASP also strongly believes prudence dictates that when traveling through new or uncharted territory, one should follow guidance from others who have made the trek before. As this suggestion relates to the Agreement, U.S. EPA has guidance on using beneficial projects in settlement agreements that includes far greater detail than the CPP.¹⁸

GASP acknowledges that the Parties are not legally bound to follow this or any policy but GASP also believes refusing to consider the expertise and experience of the EPA would be patently irresponsible and contrary to the future beneficiaries' best interest.

- c. The Agreement and the final CBT or its equivalent should include several details not mentioned in the Agreement.

ACHD and EPA guidance on SEPs list several other details not covered above that should be made part of the Agreement to ensure the CBT delivers the promised benefits in a timely, transparent, and enforceable matter. They are as follows:

- i. The Agreement does not specify when the Trust will begin paying benefits or set an annual distribution goal. ACHD's SEP guidance states "schedules and interim reporting schedules, shall be agreed to by all parties and be made a part of the legally enforceable settlement document."¹⁹ Although this guidance appears to be addressing a single SEP and the Trust may fund multiple SEPs, the underlying rationale is the same in either case: there must be enforceable deadlines, targets, and schedules for projects, distributions, and reporting. GASP believes the Agreement should require that the money initially deposited in the Trust be distributed to beneficiaries within the next few years. Community outreach and project review should not be cut short but moving expeditiously will ensure the Trust has an immediate impact on the communities.

¹⁸ See generally *id.*, noting that in addition to the body of the document, Appendix B lists twenty-one prior memoranda and policy statements dating to 1998.

¹⁹ Penalty Policy § IV(C)(5).

- ii. The Agreement includes stipulated penalties for noncompliance with many terms but not for failure to ensure projects funded by the Trust (e.g., SEPs) are completed timely and correctly.²⁰ Tellingly, both EPA and ACHD guidance expressly recommend that stipulated penalties be used to ensure compliance with the SEP terms.²¹ GASP believes stipulated penalties are warranted and appropriate to ensure the Trust fulfills its mission.
- iii. Over time, funds in the CBT will run low but the Agreement includes stipulated penalties that would be deposited into the Trust.²² A firm end-date might not be practical but some method of winding up the CBT must be spelled out.

2. The Agreement must more clearly define the parties within the Affected Communities who will be eligible to benefit from the Trust.

It is not clear from the Agreement whether individuals from the “Adjacent Communities” may receive benefits from the trust, or, alternatively, whether benefits are limited to the “Adjacent Communities” themselves, meaning the municipalities of Clairton, Glassport, Liberty, Lincoln, and Port Vue.²³ Other potential beneficiaries in the “Adjacent Communities” could include school districts, health care providers, private for-profit enterprises, and community-based non-profit organizations. As has become a running theme throughout these comments, GASP believes that this aspect of the Agreement must be clarified.

II. THE AGREEMENT SHOULD NOT LIMIT ACHD’S RULEMAKING AUTHORITY

The Agreement is the latest in a long list of settlements, enforcement orders, and notices of violation stretching back to 1972 that were intended to solve emissions problems at the Clairton Works.²⁴ GASP is hopeful that the Environmental Improvement Projects required by

²⁰ Agreement ¶ 14.

²¹ Penalty Policy § IV(C)(5); EPA SEP 2015 Update, at 28.

²² Agreement ¶ 14

²³ Agreement ¶ 9(A).

²⁴ For perspective, the following are examples of negotiated settlements of air quality violations at the Clairton Coke facility that pre-date ACHD’s Title V Permit Program: **Consent Decree**, *Commonwealth of Pa. and Cty. of*

Paragraph 8 of the Agreement will improve the facility's compliance with applicable regulations and reduce emissions. However, history teaches us not to expect that the Clairton Works will achieve full compliance even if the Environmental Improvement Projects are fully implemented. Indeed, the Orders and record fines that ACHD imposed on U.S. Steel in 2018 and 2019 demonstrate just how far short the Parties' past attempts to ensure compliance have fallen. Therefore, it is imperative that the Agreement not limit ACHD's authority to impose new emission limits to respond to violations or other conditions that might occur in the future. GASP believes that Paragraph 12 of the Agreement, which places conditions on ACHD's power to "pursue a rulemaking to impose more stringent limits on the coke batteries," may be construed to do just that. Paragraph 12 should be amended to remove any conditions it places on ACHD's rulemaking authority.

III. THE COMMUNITY ADVISORY PANEL SHOULD INCLUDE A REPRESENTATIVE FROM ACHD AND REPRESENTATIVES FROM EACH ADJACENT COMMUNITY

The Agreement's designation of the members of the Community Advisory Panel required by Paragraph 13 is confusing. Although Paragraph 13 states that the purpose of the Community Advisory Panel is "to ensure open and transparent communication between the parties and the nearby communities," one of the parties, ACHD, is not required to be a member of the panel. We believe that a representative of ACHD should be included on the panel.

It is also unclear from which "nearby communities" the panel is to draw its membership; the Agreement does not define the term "nearby communities." GASP believes that the citizen

Allegheny v. U.S. Steel Corp., 1550 April Term 1972 In Equity (Allegheny Cty. Ct. Com. Pl., Sept. 25, 1972); **Consent Decree**, *Commonwealth of Pa. and Cty. of Allegheny v. U.S. Steel Corp.*, 1550 April Term 1972 In Equity (Allegheny Cty. Ct. Com. Pl., Dec. 30, 1976); **Consent Decree**, *Commonwealth of Pa. Dep't of Env'tl. Res. and Cty. of Allegheny v. U.S. Steel Corp.*, Civil Action No. 79-709 (W.D. Pa., July 10, 1979); and **Second Consent Decree**, *USA v. USX Corp.*, Civil Action No. 91-329 (W.D. Pa., June 25, 1993).

and local official representatives should come from the five “Adjacent Communities” of Clairton, Glassport, Liberty, Lincoln, and Port Vue, that are named as beneficiaries of the Trust.

Finally, Paragraph 13 states that “a local citizen and government official” from the nearby communities be included on the panel. GASP believes that a broader membership would better promote the stated purposes of the panel, and suggest that one local citizen and government official from each of the five “Adjacent Communities” that the Agreement names as beneficiaries of the Trust be members of the panel.

IV. SO₂ AND H₂S STIPULATED PENALTIES ARE TOO VAGUE TO ENFORCE

The table under Paragraph 14(C) lists a stipulated penalty for a “short term ambient exceedance [of] H₂S or SO₂.” The Agreement must clarify the definition of “short term ambient exceedance” or cite to an actual standard. There is a primary National Ambient Air Quality Standard (“NAAQS”) for SO₂ as well as a secondary NAAQS, both of which are relatively “short term” in nature.²⁵ Likewise, there are two standards for H₂S that are not particularly long-term.²⁶

²⁵ The Primary SO₂ NAAQS is a limit of 75 ppb averaged over one hour and the Secondary NAAQS is a limit of 0.5 ppm averaged over three hours. *See* 40 C.F.R. Part 50.

²⁶ 25 Pa. Code § 131.3 imposes an H₂S limit of 0.005 ppm averaged over twenty-four hours and a second limit of 0.1 ppm averaged over one hour.