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

UNITED STATES OF AMERICA, and the ALLEGHENY COUNTY HEALTH DEPARTMENT, Plaintiffs, v. UNITED STATES STEEL CORPORATION, Defendant.	Civil Action No. 2:22-cv-00729-CRE

MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION TO ENTER CONSENT DECREE

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), respectfully moves for entry of the proposed Consent Decree ("Decree" or "CD") lodged on May 17, 2022 (ECF No. 4-1). The Court's entry of the Decree will resolve civil claims for violations of the Clean Air Act ("CAA") and related regulations against Defendant United States Steel Corporation ("USS") at the Edgar Thomson steel plant ("Facility").

The Court should enter the Decree because it is fair, reasonable, and consistent with the goals of the CAA. The settlement will enhance CAA compliance by requiring USS to study and correct potential defects in its emissions control systems, implement video and in-person monitoring, control and monitor sulfur emissions, and undergo an operations and maintenance audit. USS must also pay a civil penalty of $1,500,000. These terms are the result of years of hard-fought, arms-length negotiations. All parties consent to this motion. *See* CD ¶ 121.

The United States published notice of the proposed Decree in the Federal Register on May 24, 2022, to solicit comments pursuant to Department of Justice policy set forth at 28 C.F.R. § 50.7.

See 87 Fed. Reg. 31,582 (May 24, 2022). The United States received comments from three organizations (Clean Air Council, Citizens for Pennsylvania's Future ("PennFuture"), and the Group Against Smog and Pollution ("GASP")), and 75 comments from individuals, most of which were based on form emails submitted by GASP members. All comments are attached hereto as Exhibits 1 through 6. In light of the above considerations and after considering the public comments, the United States respectfully requests that the Court approve and enter the Decree and thereby resolve this case. Page 61 of the Decree contains a signature page for the Court.

BACKGROUND

A. The Facility, the Applicable CAA Requirements, and the Complaint

The Edgar Thomson Facility, located in Braddock, Pennsylvania, produces steel slabs from raw iron. The Facility's two blast furnaces melt iron ore and coke to produce molten iron, which is collected in a casthouse before being transported to the Basic Oxygen Processing ("BOP") Shop, where a series of reactions transforms the molten iron into molten steel. Both blast furnaces and the BOP Shop have emissions capture systems designed to collect and route emissions to baghouses. *See* Declaration of Bruce Augustine (Ex. 7) ¶¶ 7-9.

The CAA and its implementing regulations impose certain emission limitations and requirements on the Facility. As relevant to this case, the CAA required Pennsylvania to adopt and submit to EPA for approval a State Implementation Plan ("SIP") that provides for the attainment and maintenance of National Ambient Air Quality Standards within the state. The EPA-approved SIP includes federally enforceable air pollution regulations promulgated by the Allegheny County Health Department ("ACHD"). These regulations, which are also incorporated into the Facility's operating permit, require that visible emissions from the Facility must not equal or exceed an opacity of 20% in any one six-minute average period, or 60% at any time. *See* ACHD Article

XXI § 2104.01.a. ACHD's regulations also require USS to take reasonable actions to prevent fugitive air contaminants from becoming air-borne, to properly install, maintain, and operate air pollution control equipment consistent with good air pollution control practices, and to notify ACHD when certain breakdowns occur. *See id.* §§ 2105.03, 2105.49, and 2108.01.c. In addition, EPA's own National Emissions Standards for Hazardous Air Pollutants regulations require USS to prepare and operate in accordance with a written Operations and Maintenance Plan for each capture system or control device at the Facility. *See* 40 C.F.R. § 63.7800(b).

The Complaint alleges USS violated these requirements on various occasions. Count One alleges USS violated opacity limitations set forth in Article XXI § 2104.01.a, based on visible emissions observed at the Facility's blast furnaces and BOP Shop during certain inspections conducted by EPA and ACHD. Complaint ¶ 52 (ECF No. 1). Count Two alleges USS violated fugitive emissions requirements on several occasions, while Count Three alleges USS failed to properly maintain and operate certain baghouse equipment and failed to notify ACHD of certain breakdowns. *Id.* ¶¶ 56, 60, 61. Count Four alleges USS failed to address problems identified in monthly inspections as required by its operations and maintenance plan. *Id.* ¶ 65.

EPA and ACHD initially notified USS of these violations in a Notice of Violation issued in November 2017. *See* Complaint ¶ 10; CD ¶ B. USS denied and continues to deny these violations. Nonetheless, USS, ACHD, and the United States entered into extensive negotiations to try to resolve USS's potential liability at the Facility. The proposed Decree is that settlement.

B. The Proposed Consent Decree

The proposed Decree requires USS to perform a number of actions to ensure the Facility complies with applicable CAA requirements, through various evaluations and improvements of emission controls, enhanced monitoring, and more robust maintenance practices.

First, USS must secure independent engineering evaluations to identify potential improvements covering the areas of the Facility where the alleged opacity exceedances were observed, including the blast furnaces and BOP Shop. CD Section V.A. These evaluations must be performed pursuant to plans approved by EPA and ACHD, and will identify any improvements necessary to ensure compliance with the Facility's emission limitations, which then must be implemented by USS. *See* CD ¶¶ 15-36. To further ensure compliance, the Decree also imposes stipulated penalties if USS violates the Facility's applicable emission limits. *See* CD ¶ 73.

Second, under Section V.B of the Decree, USS must implement enhanced emissions monitoring programs to address opacity issues from the Facility's blast furnaces and BOP Shop, minimize emissions from the Facility's slag pits, and install new emission monitors for the Facility's boilers. These monitoring provisions require USS to install a video camera system to enable its operators to better monitor and react to potential emission events (CD ¶¶ 37-39), as well as implement an enhanced program of scheduled Method 9 visible emissions observations (CD ¶¶ 40-43).[1] Taken together, these requirements will help minimize emissions at the blast furnaces and BOP Shop by providing a real-time process monitoring tool for the Facility's operators, while also establishing an enhanced enforcement record of certified visible emissions readings to ensure the Facility is meeting its emission limitations. At the Facility's slag pits, USS must utilize slag wetting practices to minimize the release of fugitive emissions, and install and operate a new spray system to suppress hydrogen sulfide emissions. CD ¶¶ 45-46. USS also must install and operate new sulfur dioxide Continuous Emissions Monitors at the Facility's boilers. CD ¶ 47.

[1] Method 9 is an EPA-approved method for surveying and identifying the opacity of emissions from stationary sources like the Edgar Thomson Facility. *See* Method 9 – Visual Determination of the Opacity of Emissions from Stationary Sources, 40 C.F.R. Part 60, App. A-4.

Third, pursuant to Section V.C of the Decree, USS must secure a third-party audit to evaluate the Facility's operations and maintenance practices and conduct annual self-audits thereafter. CD ¶¶ 48-56. These audits are designed to ensure that USS's operation and maintenance plan and practices adequately control emissions from the Facility. CD ¶¶ 50-51.

Finally, the Decree requires USS to pay a civil penalty of $1,500,000, consistent with Section 113(e) of the CAA, 42 U.S.C. § 7413(e). The penalty is divided equally between the United States and ACHD. CD ¶¶ 8-13. ACHD has agreed that USS will satisfy the ACHD portion of the penalty by providing $750,000 to the Allegheny County Department of Economic Development to help fund a multimodal trail connection for communities near the Facility, which ACHD has approved as a Supplemental Environmental Project ("ACHD-Only SEP"). CD ¶ 12 and App. A.

In return for USS's agreement to these terms, the Decree resolves the civil claims of the United States and ACHD for the violations alleged in the Complaint, as well as the related notices of violations and administrative orders that preceded the Complaint. CD ¶ 104.

STANDARD OF REVIEW

A district court should enter a consent decree if it is fair, reasonable, and consistent with the purposes of the underlying statute it is intended to serve. *See In Re: Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 210 (3d Cir. 2003); *United States v. Se. Pa. Transp. Auth. (SEPTA)*, 235 F.3d 817, 823 (3d Cir. 2000). Such approval is committed to a district court's sound discretion. *SEPTA*, 235 F.3d at 822. In general, however, this discretion should be exercised in light of the strong public policy favoring the settlement of disputes without litigation, and the Court should thus be guided by the principle that settlements are to be encouraged:

> Voluntary settlement of civil controversies is in high judicial favor . . . . When the effort [to settle] is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial and the preparation and proceedings that must forerun it.

Pennwalt Corp. v. Plough, Inc., 676 F.2d 77, 80 (3d Cir. 1982) (quoting *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969)). This presumption in favor of 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. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991); *see United States v. Cannons Eng'g Corp*., 899 F.2d 79, 84 (1st Cir. 1990).

Consistent with these principles, the scope of the Court's review is limited. While a court "should not blindly accept the terms of a proposed settlement," *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999), it need not "inquire into the precise legal rights of the parties []or reach and resolve the merits of the claims or controversy." *Bragg v. Robertson*, 83 F. Supp. 2d 713, 717 (S.D. W. Va. 2000) (citing *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983)). Rather, a court's review should be narrow in scope and "highly deferential," especially when reviewing a settlement negotiated by the Department of Justice on behalf of an expert agency like EPA. *United States v. Atlas Minerals & Chems., Inc.*, 851 F. Supp. 639, 648 (E.D. Pa. 1994); *see SEPTA*, 235 F.3d at 822; *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 685 (D.N.J. 1989). The standard is not whether the settlement is "one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute." *Cannons*, 899 F.2d at 84 (citations omitted). Ultimately, "the court cannot modify the proposed decree for the parties—it can only approve or reject it." *Atlas Minerals*, 851 F. Supp. at 648; *see Akzo Coatings*, 949 F.2d at 1425.

ARGUMENT

The proposed Decree meets the standard for entry because it is fair, reasonable, and consistent with the goals of the CAA. It is the product of lengthy negotiations and resolves the civil claims of ACHD and the United States in return for extensive provisions enhancing compliance with the CAA. Of course, while the terms of the Decree are strict and enforceable through stipulated penalties, they are also the product of negotiations in which all parties compromised to reach a resolution short of litigation, wherein no party can guarantee the ultimate outcome. Because the Decree meets the applicable standards, it should be approved and entered.

A. The Proposed Consent Decree Is Fair.

The Court's review requires analysis of both procedural and substantive fairness. *See Tutu Water Wells*, 326 F.3d at 207. Procedural fairness is measured by the level of "candor, openness, and bargaining balance" involved in the negotiation process. *Id.* (quoting *Cannons*, 899 F.2d at 86). Substantive fairness encompasses concepts of corrective justice and accountability. *Id.*; *see United States v. Wis. Elec. Power Co.*, 522 F. Supp. 2d 1107, 1112 (E.D. Wis. 2007).

Based on these considerations, the proposed Decree is fair. The settlement is the result of good faith, arms-length negotiations between the clearly adversarial interests of the United States and ACHD on the one hand, and USS on the other. EPA and ACHD are responsible for regulating the Facility, and the parties extensively negotiated the Decree's terms over a period of several years after EPA issued the Notice of Violation. Augustine Decl. (Ex. 7) ¶¶ 11-12; s*ee Rohm & Haas*, 721 F. Supp. at 681 (settlement is presumed valid if it results from "informed, arms-length bargaining by the EPA, an agency with the technical expertise and the statutory mandate to enforce the nation's environmental protection laws, in conjunction with the Department of Justice").

The Decree is also substantively fair. USS must implement injunctive relief designed to address the unlawful conduct alleged in the Complaint. Augustine Decl. (Ex. 7) ¶¶ 12-20. The required engineering evaluations will facilitate compliance by identifying any necessary improvements in areas where EPA and ACHD observed opacity exceedances, CD ¶¶ 19-21, 26-28, 33-35, while the enhanced monitoring and stipulated penalty provisions will ensure a more robust compliance record along with additional financial incentives for compliance. CD ¶¶ 37-47, 73-76. Similarly, the Decree requires USS to take specified actions under prescribed deadlines to properly operate and maintain the Facility. *See* CD § V. These measures are all designed to prevent future violations, thus enhancing compliance and furthering the goal of environmental protection.

B. The Proposed Consent Decree Is Reasonable.

The reasonableness inquiry is pragmatic and does not require precise calculations. *United States v. Charter Int'l Oil Co*., 83 F.3d 510, 521 (1st Cir. 1996). Courts examine several factors, such as the nature of potential hazards; the availability of alternatives to settlement; whether the settlement is technically adequate to accomplish its goals; the goals of the applicable statute; the public interest; and whether the settlement reflects the relative strength or weakness of the case. *Wis. Elec.*, 522 F. Supp. 2d at 1118 (citing cases). Much of the reasonableness evaluation thus coincides with similar considerations underlying the substantive fairness evaluation. *Id*.

The Decree meets the standards for reasonableness. It will require USS to carry out detailed engineering evaluations to ensure compliance with applicable emission limitations. CD ¶¶ 15-35. The goal of the studies, which will be subject to EPA review and approval, is to identify the cause of any visible emissions and any necessary improvements to ensure USS can maintain compliance with applicable regulations. CD ¶¶ 15, 17, 22, 24, 29, 31. The Decree also imposes additional monitoring obligations, with more frequent Method 9 observations. CD ¶¶ 40-41. These Method

9 readings will help ensure the Facility complies with its emission limits, with violations subject to stipulated penalties. CD ¶¶ 73, 75. These measures, like the rest of the injunctive relief discussed above, are all designed specifically to address the unlawful conduct alleged in the Complaint, and have been negotiated by the Department of Justice with input from EPA—an agency with technical expertise and a statutory mandate to enforce the CAA. *See* Augustine Decl. (Ex. 7) ¶¶ 12-20; *Akzo Coatings*, 949 F.2d at 1436; *Rohm & Haas*, 721 F. Supp. at 681.

The Decree is also the product of the parties' complex analysis of liability, litigation risks, and attendant costs. While the United States and ACHD have extensive authority to seek injunctive relief to address CAA violations, obtaining such relief in litigation would depend upon both a finding of liability and a judicial assessment of the necessary relief. In addition to avoiding the uncertainty that comes with any litigation, settlements can achieve results more quickly, with all sides gaining the benefit of immediate resolution while foregoing the opportunity to seek an unmitigated victory. *See Pennwalt*, 676 F.2d at 80. The Decree is reasonable in light of these considerations.

C. The Proposed Consent Decree Is Consistent with the Purposes of the CAA.

A primary purpose of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). The Decree is consistent with this purpose because, as discussed above, it requires measures that will reduce the likelihood of future emission exceedances through a combination of engineering evaluations and improvements, enhanced monitoring, and more robust maintenance practices. Augustine Decl. (Ex. 7) ¶ 13. USS must also pay a significant civil penalty, and will be liable for additional stipulated penalties if violations

recur, which will help deter further violations. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 185 (2000) (civil penalties may deter future violations).

D. The Public Comments Provide No Basis for Rejecting the Consent Decree.

After lodging the Decree, the United States published notice in the Federal Register to solicit public comments pursuant to Department of Justice policy. *See* 87 Fed. Reg. 31,582 (May 24, 2022). The United States received approximately 78 comments, including three comments from the Clean Air Council, PennFuture, and GASP, as well as 75 comments from individual community members. All but two of the comments from individual community members were form emails from GASP members; some of those emails include additional notes from the commenters. Several of the form emails also appear to be duplicates.[2]

The comments generally fall into four categories: (1) whether the civil penalty is adequate; (2) whether the ACHD-Only SEP is appropriate; (3) whether the injunctive relief measures are sufficiently stringent; and (4) whether the public will have access to certain submissions. Pursuant to 28 C.F.R. § 50.7, the proposed Decree reserves the United States' right to withdraw from the Decree if the comments indicate that the settlement is inappropriate, improper, or inadequate. CD ¶ 121. After carefully reviewing and considering each comment, the United States has concluded that the comments do not provide a basis for rejecting the Decree, as further discussed below.

1. *Comments About the Civil Penalty*

Both the Clean Air Council and PennFuture commented on the $1.5 million civil penalty.

***Comment**: Plaintiffs have not shown that the civil penalty is appropriate, proper, or adequate, or that the penalty recoups economic benefit.* [Clean Air Council (Ex. 2 at 8-11); PennFuture (Ex. 3 at 2).]

[2] The form comments are consolidated as Exhibit 1, with the remaining comments attached as Exhibits 2 through 6.

Response: The United States has wide discretion to determine an appropriate civil penalty in a judicial settlement, including whether to seek a penalty at all. *United States v. District of Columbia*, 933 F. Supp. 42, 51 (D.D.C. 1996); *see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 61 (1987) (developing or choosing to forego a penalty is within EPA's discretion). Although a maximum penalty of up to $109,024 per day may be available, 42 U.S.C. § 7413(b) and 40 C.F.R. § 19.4, there has been no finding of liability here and, even if there were, one could not simply assume that the statutory maximum would be achieved or appropriate if this case were litigated. Even after a finding of liability, the CAA gives courts discretion to fashion an appropriate penalty based on a number of factors. 42 U.S.C. § 7413(e)(1); *see United States v. Anthony Dell'Aquilla Enter. & Subsidiaries*, 150 F.3d 329, 337-39 (3d Cir. 1998).[3]

In the settlement context, the United States employs a similar multi-factor analysis reflected in the CAA Stationary Source Civil Penalty Policy ("Penalty Policy"). The Penalty Policy accounts for many of the statutory factors, but also weaves in practical considerations to ensure consistent application of civil penalties as an enforcement tool across the regulated community. U.S. EPA, *Clean Air Act Stationary Source Civil Penalty Policy* (Oct. 25, 1991) (Ex. 8) at 15. To that end, the Penalty Policy incorporates an economic benefit component, calculated by a publicly available computer model known as BEN, and a gravity component. *Id.* at 4.[4] The BEN calculation helps ensure that a penalty eliminates significant economic benefit that a defendant enjoys from noncompliance, while the gravity component ensures the penalty deters future violations. *Id.*

[3] Courts consider the size of the business; the penalty's economic impact; the violator's compliance history and good faith efforts to comply; the duration of the violation; payment of penalties previously assessed; the economic benefit of noncompliance; and the seriousness of the violation; as well as any other factors that justice may require. 42 U.S.C. § 7413(e)(1).

[4] The BEN model is available at U.S. EPA, "Penalty and Financial Models," https://www.epa.gov/enforcement/penalty-and-financial-models (last accessed Oct. 12, 2022).

As with the rest of the settlement, the $1.5 million penalty here is a negotiated compromise for which, "in exchange for the saving of cost and elimination of risk, the parties each [gave] up something they might have won had they proceeded with the litigation." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986). But even in light of that compromise, the penalty reasonably recoups USS's economic benefit. Augustine Decl. (Ex. 7) ¶¶ 21-22. EPA calculated economic benefit using the BEN model. *Id.* ¶ 22. Those calculations included estimates of delayed capital expenditures and operations and maintenance costs. *Id.* The penalty also incorporates an appropriate gravity measure to address other statutory factors, including USS's size as a company. *Id.* Applying those factors in this case, EPA and DOJ concluded that the settlement secures an adequate penalty to hold USS accountable for the violations alleged in the Complaint, while also recognizing the inherent costs and risks of proceeding with litigation.

> ***Comment****: The civil penalty does not account for USS's history of noncompliance and will not deter future violations.* [Clean Air Council (Ex. 2 at 11-18); PennFuture (Ex. 3 at 2)]

Response: These comments do not provide any reasoned basis for a particular amount of penalty that would be appropriate for this case. Rather, they question the penalty's deterrent effect in comparison to penalties assessed for hundreds of violations at a different USS facility known as the Clairton Coke Works. *See* Ex. 2 at 11-18. The comparison is inapt. It ignores that "[a]ll civil penalties have some deterrent effect," *Friends of the Earth*, 528 U.S. at 185, disregards the CAA penalty factors, and overlooks the specific alleged violations that gave rise to—and are resolved by—the proposed Decree. The penalty here also accounts for USS's size and economic benefit, among other factors. Augustine Decl. (Ex. 7) ¶ 22. Moreover, the alleged violations in this case reach back to 2014 and, though significant, fall short of the extent of violations in the various

Clairton enforcement actions. *Compare* Complaint (ECF No. 1). ¶¶ 51-52, 56, 60-61, 65 *with* Ex. 2 at 13-18. These comments thus provide no basis for rejecting the Decree.[5]

2. *Comments About the ACHD-Only SEP*

As summarized in the accompanying declaration from ACHD Air Quality Enforcement Program Manager Allason Holt (Ex. 9), all commenters took issue with the ACHD-Only SEP, including ACHD's decision to use its portion of the civil penalty to help fund a multi-modal trail project developed by the Allegheny County Department of Economic Development. *See* GASP Form Comments (Ex. 1); Clean Air Council (Ex. 2 at 18-19); PennFuture (Ex. 3 at 3-4); GASP (Ex. 4 at 7-8); E. Abeyta (Ex. 5); R. Botts (Ex. 6).

The process governing ACHD's approval of the ACHD-Only SEP is governed by ACHD's Civil Penalty Policy. Holt Decl. (Ex. 9) ¶ 8. Prior to agreeing to the terms of the Decree, ACHD assessed whether the ACHD-SEP was consistent with its penalty policy, and considered the results of a publicly announced feasibility study that had identified public health benefits expected to result from the overall trail project. *Id.* ¶¶ 7-22. While the United States appreciates that the commenters may have preferred a different process or other uses of ACHD's portion of the civil penalty, ACHD has concluded that the ACHD-Only SEP is consistent with its Civil Penalty Policy. Accordingly, as with the other concerns about the civil penalty, these comments do not cause the United States to reconsider its agreement to the proposed Consent Decree. As explained above,

[5] A more appropriate comparison would involve settlements for similar violations at steel mills. The $1.5 million penalty achieved here is generally in line with such civil penalties. *See, e.g.*, 80 Fed. Reg. 30,094 (May 26, 2015) (notice of consent decree in *United States v. AK Steel Corp.*, No. 15-cv-11804 (E.D. Mich.), with a $1,353,126 penalty for alleged violations of opacity limits and operations and maintenance requirements); 81 Fed. Reg. 86,014 (Nov. 26, 2016) (notice of consent decree in *United States v. U.S. Steel Corp.*, No. 12-cv-304 (N.D. Ind.), with $2.2 million penalty and $1.9 million in supplemental projects to resolve violations of emissions limitations and operations and maintenance requirements at three facilities).

the Court's inquiry "is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed Decree is fair, reasonable, and faithful to the objectives of the governing statute." *Cannons*, 899 F.2d at 84.

3. *Comments About the Injunctive Measures*

Nearly all of the comments include concerns about the adequacy of the Decree's injunctive measures. The United States recognizes these comments are borne from concerns regarding excess emissions from the Facility. However, these comments generally overlook critical aspects of the Decree's injunctive measures that will address these concerns and provide substantial environmental benefits to the community surrounding the Facility. As discussed above, all of the injunctive measures are designed to help prevent future violations, thus enhancing compliance with the CAA and furthering the goal of environmental protection. The availability of other possible remedies does not render the Decree inappropriate, improper, or inadequate, and a reviewing court should not second-guess the remedies an agency like EPA has hammered out at the negotiating table. *Cannons Eng'g Corp.*, 899 F.2d at 84. The fact that a court might have fashioned a different—or even a more stringent—remedy after trial does not warrant rejecting the Decree. *Id.* With that background, the United States summarizes below the concerns about the adequacy of the injunctive relief secured, and provides the following more specific responses.

> ***Comment****: It is not clear that the compliance measures will benefit public health and welfare.* [Form Comments (Ex. 1); R. Botts (Ex. 6)]

Response: The Decree will benefit the public and the environment through comprehensive measures designed to ensure the Facility complies with the CAA. The Decree is expected to minimize visible emissions and facilitate compliance through a three-part injunctive relief framework: (1) independent evaluations of emissions controls at key parts of the Facility; (2) increased monitoring practices; and (3) third-party audits of operations and maintenance

practices. CD ¶¶ 15-56; Augustine Decl. (Ex. 7) ¶ 13. These measures were developed and vetted by technical staff for EPA and ACHD who are well-versed with the Facility, as well as a technical consultant with extensive experience in the steel industry. Augustine Decl. (Ex. 7) ¶¶ 6, 12.

> ***Comment****: The compliance measures do not specify a binding emissions limit or a binding deadline for USS's compliance.* [GASP (Ex. 4 at 3-4)]

Response: Contrary to this comment, USS is subject to emission limits and deadlines. The Decree does not itself use numerical limits to specify required emissions reductions simply because those limits are already specified in the applicable regulations.[6] Those laws—as opposed to the Decree itself—impose the binding emissions limitations to which USS must adhere. The point of the injunctive measures imposed by the Decree is to ensure compliance with these already-existing limits. Augustine Decl. (Ex. 7) ¶¶ 13-20. The Decree also imposes stipulated penalties for any additional violations, further ensuring compliance with these emission limits. CD ¶ 73.

Moreover, the injunctive measures must be undertaken on a binding timetable. For the blast furnace engineering study, USS must submit a detailed plan within 30 days of the Decree's entry; complete the study within 120 days of the plan's approval; submit the study and USS's report on any necessary improvements for approval within 90 days of the study's completion; and implement any improvements in accordance with the schedule in the approved plan. CD ¶¶ 15, 17-20. The other studies for the BOP Shop and BOP Shop Scrubber follow similar timelines. CD ¶¶ 24-26, 31-34. To the extent the commenter is concerned USS will present an unreasonable timeline for implementing improvements following these studies, the Decree provides that the plan must be

[6] *See, e.g.*, ACHD Article XXI § 2104.01.a (limiting visible emissions to an opacity of 20% in any one six-minute average period, or 60% at any time); *id* § 2105.3 (USS must prevent fugitive emissions from becoming airborne); *id.* § 2105.49 (air pollution control equipment must be properly installed, maintained, and operated); *id.* § 2108.01.c (USS must notify ACHD when certain breakdowns occur); 40 C.F.R. § 63.7800(b) (requiring an Operations and Maintenance Plan for each capture system or control device at the Facility).

submitted for Plaintiffs' review and approval. CD ¶¶ 19-20, 25-26, 32-33. An unreasonable timeline would not result in an approvable plan.

The monitoring and operations and maintenance requirements likewise specify binding deadlines, including installation of the video system within 180 days (CD ¶ 37), initiation of visible emissions observations within 30 days (CD ¶ 40), suppression of sulfur emissions from the slag pits within 60 days (CD ¶ 46), and an initial maintenance practices audit within 180 days (CD ¶ 51). Like the engineering studies, USS must adhere to the schedule in its approved plan for implementing recommendations from the audit. CD ¶ 52, 53. USS is also subject to stipulated penalties for failing to meet these deadlines, including schedules in approved plans. CD ¶ 75.

> ***Comment****: The Decree should have stronger guarantees of performance given USS's history of noncompliance and past enforcement actions involving the Facility, including a consent decree from 1979.* [GASP (Ex. 4 at 4-5)]

Response: The fact USS was required to perform studies on emissions control systems that existed more than 40 years ago says little, if anything, about the adequacy of the proposed Decree. Engineering studies and audits are common tools in enforcement matters where, as here, additional measures may be necessary to improve existing controls, and as discussed above, the Decree's injunctive measures, which are backed by stipulated penalties, are specifically designed to help ensure the Facility complies with its CAA obligations. Augustine Decl. (Ex. 7) ¶¶ 13, 14, 20.

> ***Comment:*** *The effects of the pre-settlement remedial measures should be quantified.* [GASP (Ex. 4 at 2-3)]

Response: Paragraph 14 of the Decree lists several steps USS took to address EPA's NOV before the Decree was finalized. The steps include upgrades and replacements in various baghouses, improved operations and maintenance protocols, employee training, and installation of an alarm on a door in the BOP Shop from which particulate matter can escape. CD ¶ 14. GASP questions whether these steps were effective because self-reported emissions fluctuated after USS

implemented them. Yet as this comment implicitly concedes, overall emissions are also driven by other factors, including of course how much the plant operates. The actions described in Paragraph 14 were voluntarily performed by USS prior to finalization of the Decree; whether they alone have had a direct and measurable impact on overall emissions does not indicate that the Decree, including all the additional measures USS must perform, should be rejected.

> ***Comment:*** *Video cameras should be used for evidentiary purposes under EPA's "any credible evidence" rule.* [Clean Air Council (Ex. 2 at 22-23)]

Response: This comment, along with four others addressed below, raises specific concerns about the Decree's monitoring requirements, which include the installation of a video surveillance system aimed at key emissions points throughout the Facility, enhanced emissions monitoring using EPA Method 9, and measures to control and monitor fugitive and sulfur emissions. CD ¶¶ 37-47. These measures are an essential part of the Decree. They will allow USS to see and correct visible emissions as soon as they arise, create an enforceable record of visible emissions through Method 9 readings, control fugitive and sulfur emissions from the slag pits, and establish continuous monitoring for sulfur emissions from the Facility's boilers. *Id.*

Contrary to the commenter's concern, the Decree merely recognizes that the video system was not installed to determine compliance with ACHD Article XXI § 2104.01 because the cameras, by definition, do not meet the standard for visual opacity readings under EPA Method 9 or other approved EPA methods. CD ¶ 39. This provision simply states the obvious—under the applicable standards compliance with the Facility's opacity limits is determined visually by a qualified observer under EPA Method 9, not by reviewing footage from the type of video cameras required by the Decree. *See* ACHD Article XXI §§ 2104.01(d)(5), 2107.11; ACHD Source Testing Manual, Chap. 9 (May 5, 2010); Augustine Decl. (Ex. 7) ¶ 16. But the proposed Decree in no way limits Plaintiffs from employing information gleaned from the cameras for investigatory or

evidentiary purposes. EPA's "credible evidence rule," which provides for the use "of any credible evidence or information" to assist in determining compliance with applicable CAA standards, would still apply. 40 C.F.R. § 60.11(g).

> ***Comment:*** *The Decree should consider using digital cameras under EPA Method 82.* [Clean Air Council (Ex. 2 at 23-24)]

Response: EPA Alternative Method 82 (ALT-082) allows for the use of special digital cameras to monitor visible emissions in lieu of human observation under Method 9. *See* 77 Fed. Reg. 8865 (Feb. 15, 2012) ("Sources are not required to employ such a method but may choose to do so in appropriate cases"). The fact that different alternatives like Method 82 exist is not a basis for rejecting the Decree. *Cannons Eng'g Corp.*, 899 F.2d at 84. Nevertheless, the Decree acknowledges that if USS implements a digital camera opacity technique system ("DCOT") under Method 82, it can use DCOT to satisfy its Method 9 obligations under the Decree. CD ¶ 44.

> ***Comment:*** *Visible emissions observations and other inspections should occur over the weekend and at night.* [Clean Air Council (Ex. 2 at 27-29)]

Response: The Decree requires USS to hire a third party to perform multiple weekly visible emissions observations using Method 9. CD ¶¶ 40-41; Augustine Decl. (Ex. 7) ¶¶ 16-17. The third party must conduct observations twice a week until USS has completed the emissions controls studies and any corrective actions. CD ¶ 40. After the studies, the observations increase to four times per week and must continue for 12 months unless USS demonstrates 100 percent compliance for four consecutive months. CD ¶ 41. These provisions will provide a comprehensive and enforceable record of visible emissions, if any, during the Decree's implementation. Contrary to the comment's suggestion, they do not limit Method 9 readings to the work week, nor do they dictate whether or when Plaintiffs could take additional readings. CD ¶¶ 40-41.

The Facility, moreover, must comply with the visible emissions limitations in the ACHD portion of the Pennsylvania SIP. ACHD Article XXI § 2104.01. Those provisions require all visible emissions measurements at the Facility to be performed in accordance with Chapter 9 of ACHD's Source Testing Manual, which, in turn, generally incorporates EPA Method 9. Art. XXI §§ 2104.01(d)(5), 2107.11; ACHD Source Testing Manual, Chap. 9 (May 5, 2010); *see also* 40 C.F.R. Part 60, App. A-4. The visible emissions observations mandated by the Decree are consistent with these requirements. Augustine Decl. (Ex. 7) ¶ 16.

> ***Comment:*** *Unannounced inspections would improve the efficacy of the inspection requirements.* [Clean Air Council (Ex. 2 at 29)]

Response: Scheduled visible emissions observations in the Decree do not foreclose Plaintiffs from performing unannounced inspections or readings. The Decree gives Plaintiffs a right of entry to verify and monitor compliance with the Decree, among other purposes. CD ¶ 99. Plaintiffs also continue to have the authority to take opacity readings and perform inspections outside of the confines of the Decree. CD ¶¶ 103, 105; 42 U.S.C. § 7414(a)(2).

> ***Comment:*** *Video footage should be stored during a longer period than the 30-day rolling period called for in the Decree.* [Clean Air Council (Ex. 2 at 25)]

Response: The Decree requires USS to maintain video recordings for at least 30 days. CD ¶ 38. This comment assumes that the 30-day period will lead to gaps in the recordings. But nothing in the Decree forecloses ACHD from reviewing and requesting video footage on a regular basis to ensure continued coverage. Instead, the Decree spells out a process to allow ACHD to gain timely access to requested video footage. *Id.* In any event, although the United States appreciates that a longer retention period may have been more stringent and burdensome, this comment, like the other concerns about injunctive relief, overlooks the fact that settlements are by

nature compromises, and the potential availability of different remedies is not a reason to reject the Decree. *Cannons Eng'g Corp.*, 899 F.2d at 84.

4. *Comments About Public Access*

All of the comments echoed concerns that information about USS's compliance with the Decree should be available publicly (GASP Form Comments (Ex. 1); Clean Air Council (Ex. 2 at 20-21, 25-26); PennFuture (Ex. 3 at 4); GASP (Ex. 4 at 8); E. Abeyta (Ex. 5); R. Botts (Ex. 6)). Like the comments discussed above, these comments do not indicate that the Decree is inappropriate, improper, or inadequate. Indeed, much of the information requested will already be publicly available. As part of its routine practice, ACHD posts compliance status reports online. Moreover, recognizing the public interest in compliance expressed in the comments, ACHD expects to post to its webpage the semi-annual reports that USS must submit under Paragraph 65 of the Decree. Holt Decl. (Ex. 9) ¶ 23. The semi-annual reports will describe or include, among other details, USS's progress toward implementing the Decree's injunctive measures; all reports, data sheets, and other information associated with required visible emissions observations; any changes to the Facility's operation and maintenance plan; and any non-compliance with the Decree. CD ¶ 65.

CONCLUSION

For the reasons set forth above, the proposed Decree is fair, reasonable, and in the public interest. All parties support its entry. The public comments received do not disclose facts or circumstances that indicate that the proposed judgment is inappropriate, improper, or inadequate. Accordingly, the United States respectfully requests that the Court approve the Consent Decree as lodged by signing it at page 61, and entering it as a final judgment.

Respectfully submitted,

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