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

UNITED STATES STEEL CORPORATION, a Delaware corporation, Appellant, v. ALLEGHENY COUNTY HEALTH DEPARTMENT, Air Quality Program Appellee.	)	Enforcement Order #180601

UNITED STATES STEEL CORPORATION'S SUR-REPLY BRIEF

This appeal is to the point where the Department all but concedes that it failed to follow the same environmental regulations upon which it relied to impose extreme penalties on United States Steel Corporation ("U.S. Steel"). The Enforcement Order at issue is not supported by the law or the evidence, so the Department is left in a position where it tries to distance itself from both. The Department's arguments and allegations in its Reply Brief further solidify that the Department failed to satisfy its evidentiary burden and failed to follow the law.

U.S. Steel submits this brief in response to select issues raised by the Department in its Reply Brief and reaffirms its request that the Enforcement Order be vacated in its entirety.

I. The Department has not proven any violations because its inspections failed to follow proper test methods

The Department agrees that inspection methods are important and exist so that inspections are done in a standard, reliable, consistent and correct manner. (Department Reply Brief, p. 1. n 1) (agreeing with U.S. Steel's FOF 64). The Department does not, and cannot, dispute the wealth

of case law that requires agencies to follow prescribed methods in order to use inspections to prove violations. (*See* U.S. Steel Post-Hearing Brief at 17-19). Faced with the established law on inspection methods, and the evidence demonstrating that the Department did not follow the required methods, the Department advances several inconsistent positions, all of which lack merit.

Article XXI and U.S. Steel's permits establish the methods the Department must follow for coke oven inspections in making compliance determinations. If the applicable coke battery regulation or permit condition specifies an inspection method, the Department must use that method. (Article XXI § 2107.07; § 2103.12.i(1)-(2) (permits must identify applicable test methods).[1] If the applicable regulation or permit condition does not specify an inspection method, then Article XXI requires the Department to use the methods provided in Chapter 109 of the Source Testing Manual ("STM"). (Article XXI § 2107.07). The Department created this regulatory scheme and then failed to follow it.

A. Method 9 is different than Chapter 9 of the Source Testing Manual

The Department was required to use Method 9 inspections to determine compliance with soaking and door opacity limits. (U.S. Steel's Post-Hearing Brief, pp. 20-23). The Department cannot dispute that its opacity inspections did not comply with Method 9 (*see* FOF 76-81), so it now argues that these inspections were consistent with Chapter 9 in the STM, which is different than Method 9 in that it does not apply Method 9's averaging provisions. (Ex. 22, Ch. 9). Chapter 9 was never discussed at the hearing in this case, nor does it apply. (Department's Reply, pp. 2-4). Article XXI unambiguously requires that Method 9 be used for soaking inspections and U.S.

[1] For example, Article XXI § 2105.21.i governs soaking opacity and specifically requires that Method 9 be used as the inspection method for determining compliance with this regulation. Article XXI § 2105.21.i ("Compliance with this standard shall be determined … in accordance with Method 9").

Steel's Title V Permit requires that Method 9 be used for door opacity inspections. (Article XXI § 2105.21.i; *see*, e.g., Ex. 30, Condition V.A.3.b.1 (p. 51); U.S. Steel's Post-Hearing Brief, pp. 20-23).[2] The Department's inspectors repeatedly testified that Method 9 was the applicable opacity inspection method and never once referenced Chapter 9 of the STM. (FOF 70, 76). The Department's failure to follow the applicable inspection method, Method 9, precludes it from meeting is burden of proving liability.

B. The Department considered but never finalized inspection methods allowing for shorter-term instantaneous opacity readings

The Department presents a new argument that Method 9 is impractical for assessing compliance with an opacity standard for intermittent sources, including coke ovens, quoting an EPA guidance document. (Department Reply Brief, pp. 2-3). The Department further states that the EPA guidance document notes that "states may adopt modified techniques for visible emission observations." *Id.* As discussed above, the Department did publish Chapter 9, which is a modified method for assessing compliance with certain opacity standards that are not at issue in this appeal. However, the Department did not adopt any modified method for the opacity standards applicable to soaking or doors. To the contrary, the Department promulgated regulations and issued a permit requiring that Method 9 be used. Any concerns the Department has with the test methods that it adopts can be addressed solely by the Department.

[2] In contrast, Article XXI provides that Chapter 9 of the STM is a proper inspection method for other types of inspections that are not at issue in this case, such as coke battery combustion stack opacity inspections. *See, e.g.,* Article XXI, § 2105.21.f, §2107.11 ("Measurements of visible emission shall be performed . . . as specified in Chapter 9 of the Allegheny County Source Testing Manual."). Chapter 9 is appropriate for a "time-exception" opacity standard such as 2105.21.f.3 or 2104.01.

There is no dispute that the Department can adopt different methods for visible emissions observations and that alternative methods exist. U.S. Steel presented evidence as to one of those alternative methods, Method 203C. (Tr. 940-43; Ex, 39). The Department should be aware of Method 203C because the Department listed a proposed version of EPA Method 203C in its STM, which is specifically designed for states with "instantaneous" emissions standards. (Ex. 22 at p. 97; 58 Fed. Reg. 61640 (1993)). Under Method 203C, the observer takes the average of 12 individual readings at 5-second intervals. This compressed averaging was designed specifically to "balance the desired short time period implied by an instantaneous limitation with the improved accuracy achieved by multiple readings." *Id*. at 61642. Notwithstanding that the Department was aware of a distinct inspection method that was designed for instantaneous emissions standards (but still requires averaging individual opacity readings), it never amended the soaking or door opacity standards in Article XXI, U.S. Steel's permits, or the STM to specify anything other than Method 9 as the applicable compliance determination method.

C. The Department cannot ignore the inspection requirements it created

Citing no legal authority, the Department contends that it did not have to comply with Method 9's record keeping requirements because the Department believes the record keeping requirements are unnecessary. (Department Reply Brief, p 12). Method 9's record keeping requirements are not optional. (*See* Ex. 38). Rather, Method 9 makes clear that these requirements are vital to establishing that the inspections are done in a reliable manner and can be used for compliance determinations. (Ex. 38, p. 2) ("The validity of the [visible emissions] determinations used for compliance or noncompliance demonstration purposes depends to a great extent on how well the field observations are documented on the [visible emissions] Observation Form.").

The Department also claims that it does not need to follow Method 109 (40 CFR 61), which sets forth detailed inspection requirements that are required pursuant to the STM, because Method 109 was never issued as a final rule. (Department Reply Brief, p. 13). The Department overlooks that it drafted the STM and required that Method 109 be followed notwithstanding that it was never issued as a final rule.

The Department cannot ignore the inspection methods that are required in the regulations it created and then use improper inspections to issue an extreme and punitive enforcement order. The law applies equally to both the Department and U.S. Steel. The Department's failure to follow required test methods precludes it from proving liability. *North American Coal Corp. v. Commonwealth*, 279 A.2d 356 (Pa. Commw. Ct. 1971); *Bortz Coal Co. v. Commonwealth*, 279 A.2d 388 (Pa. Commw. Ct. 1971); *PQ Corp. v. Dept. of Envtl. Prot.*, 2017 EHB 975. [3]

The Department also advances arguments about inspection methods that are not based on any evidence in the record. Notwithstanding that the record contains no evidence of how the Department conducted inspections prior to the time period at issue, the Department argues: "the fact that inspections have been consistent over the span of a decade or more lends credence to their accuracy." (Department Reply, p. 4). If the Department has failed to follow proper inspection methods for more than a decade, its consistent failure to follow the law does not make its inspections proper. *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 746 (6th Cir. 2012) ("an agency

[3] To the extent the Department is requesting that the Hearing Officer invalidate Article XXI § 2107.07 because it improperly makes the STM a regulation, (*See* Department's Opening Brief at 14), the result would be that the required test methods are only in the text of Article XXI or in U.S. Steel's Title V Permit. As detailed in U.S. Steel's Post-Hearing Brief, the Department failed to follow these test methods, when a test method was specified. If § 2017.07 is invalidated, the Department would be left with no method for determining compliance or proving a violation for regulations that do not include a specified test method.

may not insulate itself from correction merely because it has not been corrected soon enough, for a longstanding error is still an error."); *Rapanos v. US*, 547 U.S. 715, 752 (2006) (a regulatory agency's 30-year failure to apply plain statutory text does not insulate it from judicial review merely based on the agency's longstanding practice). The Department's failure to follow required inspection methods makes the entire Enforcement Order unlawful.

II. The Department has not satisfied its burden of proving violations

There are additional reasons why the Department did not satisfy its burden of proving liability. In fact, the Department's post-hearing briefs make clear that the Department is not even sure of the exact number of violations it is still alleging in this case. There is no dispute that certain alleged violations were found to be calculation errors prior to the hearing. (FOF 88). There is also no dispute that, during the hearing, the Department conceded there were additional calculation errors. (FOF 89).[4] Given the unknown number of errors, the Department resorts to estimating that there are "over 300" or "no less than 300" violations at issue, demonstrating that even the Department does not know the number of alleged violations that were based on calculation errors. (Department Reply, pp. 2, 16). It is not the Hearing Officer's job to pour through stacks of inspection reports and perform complex calculations in order to satisfy the Department's burden of proving violations. The Department has the burden of proof and it failed to meet it. Article XI § 1105(C)(7)(a).

In addition, the Department overstated the number of alleged violations for charging, door leaks, door opacity and lids (charging ports) at issue in the Enforcement Order. (U.S. Steel Post-Hearing Brief, pp. 29-30). The applicable regulations clearly and unambiguously apply to "any

[4] The fact that the Department admitted to errors and conceded that some alleged violations were not actually violations necessitates that the Hearing Officer cannot affirm the Enforcement Order as requested by the Department.

battery of coke ovens," not to individual coke ovens. The Department, however, alleged separate violations for the individual coke ovens (and sometimes multiple violations for a single oven), which ignores the plain and unambiguous language in the regulations and overstates the alleged violations at issue. *Id*. Without referencing any language in the regulations, the Department baldly contends that the Hearing Officer should defer to the Department's interpretation and allow it to find separate violations at individual coke ovens. (Department Reply, p. 14)[5]. In essence, the Department attempts to enforce its regulations as if they were rewritten to say: "No person shall operate, or allow to be operated, any ~~battery of~~ [individual] coke ovens in such manner that..." This position lack merit.

The Department's interpretation is not entitled to any deference in this case because the regulation is clear and unambiguous and the Department's interpretation is inconsistent with the applicable language. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Christensen v. Harris Cnty*., 529 U.S. 576, 588 (2000). Allowing for deference to the agency where the language of the regulation is clear would allow "the agency, under the guise of interpreting a regulation, to create de facto a new regulation," which is exactly what the Department is attempting to do. *Id.*; *see also Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012) (EPA's regulatory interpretation was not entitled to deference because it was contrary to the plain meaning of the term as appeared in the regulation). If the Department does not like the rules that it wrote, it can change them through appropriate notice and comment rulemaking instead of making unsupportable arguments

[5] The Department cites *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which is inapplicable in this case. *Chevron* deals with agency interpretations of statutes, not regulations.

in an enforcement matter. The Department's failure to follow the law with respect to the number of violations at issue provides an additional reason to vacate the Enforcement Order.

III. The Battery B door leak standard is unlawful

There are several reasons why the Battery B door leak standard is unlawful.

A. The Department's after-the-fact reliance on § 2109.04 is impermissible

The Enforcement Order specifically identified the sections of Article XXI upon which the different sections of the Enforcement Order are based. For example, the section of the Enforcement Order that includes the Battery B door leak standard is based on "the authority granted to ACHD by Article XXI § 2109.03.a.1 and the Local Health Administration Law, 19 P.S. § 12010." (Ex. 1, p. 26).[6] After issuing the Enforcement Order, the Department apparently realized that it cannot support its new B Battery door leak standard under the authority on which it relied. In response, the Department now seeks to rely on a different regulation, Article XXI § 2109.04, which is not referenced anywhere in the Enforcement Order. Again, the Department provides no legal support for its contention that it can ignore what it stated in its Enforcement Order and rely on different regulatory authority. The Department's position is not the law.

An agency "must defend its actions on the basis on which they were originally taken, not on some new basis that is developed in litigation to justify the decision." *Nat'l Oilseed Processor Ass'n v. Browner,* 924 F. Supp. 1193 (D.D.C. 1996); *see also Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012) (reference to supporting authority after-the-fact could not be considered). This law is consistent with the regulations governing appeals before the Hearing Officer. An appealing party

[6] There is no statutory provision at 19 P.S. § 12010. To the extent the Department is referring to 16 P.S. § 12010, rulemaking-type standards such as the Enforcement's Order's Battery B door leak standard must satisfy the procedural requirements under the Local Health Administration Law in Section 12011, which did not occur.

is required to file a notice of appeal that sets forth with particularity the manner in which the party is aggrieved by the Department's action and, at the final hearing, the Hearing Officer must only admit testimony and evidence that is relevant to the issues raised in the notice of appeal. Article XXI § 1104(A); § 1105(C)(8). If the Department could make its basis for issuing an order a moving target and rely on regulations that were never included in the order at issue, as it suggests it can, this would frustrate the regulations governing appeals. Appellants could not rely on the text of an enforcement order to understand its alleged basis, which would prevent appellants from being able to prepare complete notices of appeal. The Hearing Officer, in turn, would be unable to determine what is or is not relevant to a case because the Department could repeatedly change its position. Because the Enforcement Order did not identify § 2109.04 as the basis for the Battery B door leak standard, the Department cannot properly rely on that section as a basis to support the standard.

B. The Department failed to demonstrate that emissions from the Battery B coke side doors posed any endangerment to public health

In addition to failing to cite to § 2109.04 as the basis for the Battery B door leak standard, the Department did not satisfy the regulatory requirements. The Department attempts to support the more stringent Battery B standard pursuant to § 2109.04 by claiming that the emissions at issue are anticipated to endanger the public health. (Department Reply Brief, pp. 6-7). Despite having the burden of proof on this highly-complex issue, the Department did not introduce any evidence of the amount of each pollutant that is necessary to cause health effects, any evidence that the door leak emissions at issue contained or exceeded that amount, any evidence of the level of risk to public health, or the level of emissions that would be protective of public health. Instead, it argues that the Hearing Officer can *presume* public health harm because door leak violations increased, which the Department assumes resulted in increased emissions containing some unknown level of

SO2 and BTEX. (Department Opening Brief, pp. 29-30; Department Reply Brief, pp. 6-7). This evidence falls far short of satisfying the Department's burden of proving public health effects. *See, e.g., Betz v. Pneumo Abex LLC,* 44 A.3d 27, 30 (Pa. 2012) (it is improper to presume that "each and every exposure … no matter how small" causes adverse health effects.).

In contrast to the Department's presumptions, U.S. Steel offered actual evidence that the levels of SO2 and BTEX at issue were insufficient to cause public health effects. This evidence showed that SO2 from door leak emissions are insignificant. (FOF 56). It also showed that EPA performed rigorous scientific and risk-based studies of hazardous air pollutants (including BTEX) from coke oven door leaks and, based on these studies, set NESHAP limits that were protective of public health with an ample margin of safety. (FOF 17-22; 56-59). The Department is well aware of the analysis and effort that went into creating the NESHAP coke battery standards because it participated in the rulemaking. (FOF 19). It is undisputed that U.S. Steel is 100% compliant with these NESHAP limits, demonstrating that the Battery B door leak standard is not addressing emissions that are anticipated to endanger the public health. (FOF 58). The Battery B door leak standard is unlawful. (FOF 58).

C. The Department's action in regulating HAP emissions from the B Battery coke side doors is in direct contravention of both the Pennsylvania Air Pollution Control Act and the federal Clean Air Act

The Department's after-the-fact attempt to support the B Battery door standard by arguing that HAP emissions from the doors endanger public health is unlawful for an additional reason. The Pennsylvania Air Pollution Control Act ("APCA") and the Clean Air Act ("CAA") prohibit the establishment of standards for HAPs, like the B Battery standard, that are more stringent than the NESHAPs for those coke batteries meeting LAER standards (which the U.S. Steel batteries are) until 2020, unless a specific health risk-based analyses is performed and a rulemaking is

conducted. 35 P.S. § 4006.6(d)(2); (FOF 21, 62). The Department did not conduct any health risk-based assessment and did not attempt to promulgate any rule. The Department acted in contravention of the APCA and CAA.

The Department argues that the APCA's restrictions on HAP limits for coke ovens only applies to the Pennsylvania Department of Environmental Protection. (Department Reply, p. 7). The Department overlooks that Article XXI requires the Department to "establish an air pollution control program which is *consistent with the requirements of the APCA and the CAA*." (Article XXI § 2101.02.c.9). Given that the CAA and APCA allow for a more stringent door leak standard *only* if it is justified by rigorous scientific and risk-based studies of risk and only via a rulemaking, the Department's creation of the Battery B door leak standard without any studies is inconsistent with the CAA, APCA and Article XXI. (FOF 58-62). This provides an additional reason why the Battery B door standard is unlawful.[7]

IV. The Hot Idling Sanction is Excessive and Unlawful

The Department makes little of its Enforcement Order's provision to hot idle two batteries, claiming that there is no testimony suggesting that U.S. Steel would incur the expense of installing a replacement battery due to hot idling. The Department is incorrect. U.S. Steel provided testimony from its plant manager that the costs of hot idling would be up to $570 million. (FOF 40-41). This cost estimate included $170 million attributable to the cost of replacement coke due to lost production. (*Id.).* This cost estimate also included the estimated $400 million it would cost to replace older batteries which would not be able to withstand a hot idle. (*Id.*). This evidence is undisputed.

[7] The Department's position that it can ignore the provisions in the APCA and CAA raises significant concerns as to the DEP's approval of the Department's air pollution control program under section 12 of the APCA. *See* 35 P.S. §4012 and 25 Pa. Code Chapter 133.

In fact, the Department acknowledged the gravity of hot idling and its witnesses acknowledge that an order to hot idle Batteries 1, 2, or 3 could lead to permanent destruction of those batteries. (FOF 40). The Department ignores this evidence and incorrectly portrays hot idling as a trivial sanction.

In short, testimony and the evidence show that U.S. Steel would incur significant loss and exorbitant costs of replacing coke and damaged batteries in the event of a hot idle to two batteries. The Department has pointed to no evidence or testimony to the contrary because there is none. It has failed to meet its burden of proving the reasonableness of its Enforcement Order.

V. Conclusion

Perhaps recognizing that it did not satisfy its burden of proof, the Department asks whether U.S. Steel will continue improving compliance regardless of the legal arguments raised in this appeal. The evidence in this case shows that U.S. Steel has and will. The question for the Department is whether it will hold itself to the same standards as the regulated public and begin complying with the same regulations it is tasked to enforce.

For the reasons contained herein and in U.S. Steel's Post-Hearing Brief, U.S. Steel requests that the Department's Enforcement Order be vacated in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic mail this 29th day of March, 2019 upon the following persons:

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