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

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| GROUP AGAINST SMOG AND POLLUTION ("GASP"), a Pennsylvania Nonprofit Corporation, On Behalf of Itself and Its Members, | ) | Civil Action No. 96-322 |
| Plaintiff, | ) | Judge Donald E. Ziegler<br>Magistrate Robert C. Mitchell |
| v. | ) | |
| CAROL M. BROWNER, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| Defendant, | ) | |
| v. | ) | |
| U. S. STEEL GROUP, a Unit of USX Corporation, | ) | |
| Intervenor/Defendant. | ) | |

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

The U. S. Steel Group, a Unit of USX Corporation ("U. S. Steel"), respectfully submits this Memorandum of Points and Authorities In Support of its Motion for Leave to Intervene and states as follows:

## PROCEDURAL HISTORY

The plaintiffs, Group Against Smog and Pollution ("GASP"), filed this complaint on February 21, 1996, alleging that the United States Environmental

Protection Agency ("EPA") failed "to perform nondiscretionary acts or duties" under the Clean Air Act including the failure to decide whether to reclassify the "Liberty Borough Area" of Allegheny County as "serious nonattainment" for $PM_{10}$ and approve or disapprove a State Implementation Plan ("SIP") for Particulate Matter ("$PM_{10}$") in the "Liberty Borough Area." The Liberty Borough Area consists of five communities: Glassport, Clairton, Port Vue, Lincoln and Liberty Boroughs. "Particulate Matter" is any material, except water in uncombined form, that is or has been airborne and exists as a liquid or a solid at standard conditions. "$PM_{10}$" refers to particles with an aerodynamic diameter less than or equal to a nominal ten micrometers. 40 C.F.R. § 50.6.

EPA filed its answer on April 23, 1996. No discovery has begun.

## FACTUAL HISTORY

On November 15, 1990, the Liberty Borough Area was declared a moderate nonattainment area for $PM_{10}$. An area classified as moderate attainment must install Reasonably Available Control Measures. If an area is classified as a serious nonattainment area, then more stringent Best Available Control Measures ("BACM") are applicable. The adoption and implementation of BACM may result in additional millions of dollars for industrial pollution controls and many more millions of dollars for municipalities for road-dust control activities. Because of the ramifications of a serious nonattainment classification, U. S. Steel is an active participant in the process of determining the classification of the Liberty Borough Area and the development of any applicable SIP requirements.

Allegheny County began working on the required State Implementation Plan or "SIP" with the intention of meeting the statutory deadline of November



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15, 1991. Input into the Allegheny County SIP was provided by citizens groups, academia, consultants, industry and regulatory officials. Because of the complex terrain, sources and meteorology, the SIP took longer than expected to develop and was submitted to EPA by the Commonwealth of Pennsylvania in January, 1994. On April 11, 1995, EPA published notice in the Federal Register of its proposed approval of the SIP. On September 19, 1995, the EPA published notice of a proposed reclassification of the Liberty Borough Area from moderate to serious nonattainment in the Federal Register. GASP and U. S. Steel filed comments on the proposed reclassification. (Exhibit A - November 16, 1995 letter to EPA and Exhibit B - November 17, 1995 comments on Reclassification Proposal). However, the proposed reclassification and its potential impact are of interest throughout the Greater Pittsburgh area. (Exhibits C-D - various newspaper articles).

SIPs are the keystone to EPA's air pollution control effort. Notwithstanding the SIP which EPA previously proposed to approve, a new SIP would have to be developed if the Liberty Borough Area was reclassified as serious nonattainment. Early involvement by U. S. Steel in these proceedings is essential when a SIP and reclassification is under consideration by EPA. The Supreme Court of the United States has held that industry challenges to the technological and economic feasibility of the emission limitations contained in a SIP should be heard at the State level. Union Electric Co. v. EPA, 427 U. S. 246, 96 S. Ct. 2518, 49 L.Ed. 2d 474 (1976). The same is true of a challenge to the allocation among various sources - precisely the problem U. S. Steel is facing here. Train v. NRDC, 421 U. S. 60, 95 S. Ct. 1470, 43 L.Ed. 2d 731 (1975).



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## ARGUMENT

### I. U. S. STEEL HAS A RIGHT TO MANDATORY INTERVENTION

A party seeking to intervene as of right must satisfy four requirements: (1) the application must be timely; (2) the applicant must have an interest relating to the property or transaction that is the subject of this action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit. Mountain Top Condominium Association v. Dave Stabbert Master Builder, Inc., 72 F. 3d 361, 369 (3rd Cir. 1995). U. S. Steel satisfies all four elements.

#### 1. The Application Must Be Timely.

This motion has been filed within two weeks of the filing of EPA's Answer. In re Fine Paper Antitrust Litigation, 695 F. 2d 494, 500 (3rd Cir. 1982). Since this motion is filed at the outset of this litigation, it is timely. Sierra Club v. U. S. EPA, 995 F. 2d 1478, 1481 (9th Cir. 1993). Under these circumstances, there is no prejudice to the current parties. Sierra Club v. Espy, 18 F. 3d 1202, 1204-05 (5th Cir. 1994).

#### 2. U. S. Steel Has a Direct Interest in This Transaction.

U.S. Steel has a direct interest in the transaction at issue. Mountain Top Condominium Association v. Dave Stabbert Master Builder, Inc., 72 F. 3d 361, 366 (3rd Cir. 1995). The interest must be one that is "significantly protectable." Donaldson v. United States, 400 U. S. 517, 531, 91 S. Ct. 534, 542, 27 L.Ed. 2d 580, 589 (1971). The applicant must demonstrate that there is a tangible threat



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to a legally cognizable interest to have the right to intervene. Harris v. Pernsley, 820 F. 2d 592, 601 (3rd Cir. 1987).

Here, the "transaction or interest" is the proposed reclassification as "serious nonattainment." If the Liberty Borough Area is reclassified as "serious nonattainment," U. S. Steel will be significantly affected. In fact, U. S. Steel will probably be affected the most by such a reclassification since it is the largest industry and employer in the Liberty Borough Area and, because of the magnitude of the Clairton Works' operations, it is the largest industrial source of $PM_{10}$ in the area. U. S. Steel has spent over $200 million at Clairton Works to help control $PM_{10}$ and other emissions (Exhibit B - U. S. Steel Comments on Reclassification Proposal - pages 8-9). A reclassification to nonattainment could result in U. S. Steel having to spend even substantially larger amounts for additional $PM_{10}$ controls in order to maintain its current level of operations. Further, the reclassification of the Liberty Borough Area as "serious nonattainment" would significantly effect U. S. Steel's ability to comply with air permit requirements at Clairton Works. U. S. Steel has a sufficient interest in protecting its rights as permittee in the implementation of its central strategies to comply with the SIP. A permittee's rights are those traditionally protected by law. Sierra Club v. US-EPA, 995 F. 2d 1478, 1482 (9th Cir. 1993). In terms of costs and jobs, the impact will be significant (Exhibit D)("[t]he Allegheny Institute for Public Policy released a report that found up to 2,700 jobs, primarily in manufacturing, could be affected by reclassification . . ."). The costs to U. S. Steel, in a worst case, may reach $100 million per year. (Exhibit B - pages 33-34). These costs will have a dramatic impact on the manufacture of coke and the long-term viability of the Clairton Works. As a result, U. S. Steel's interest is direct, substantial and legally protectable.



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3. U. S. Steel's Interest Will Be Impaired If It Cannot Protect Its Interest.

U. S. Steel is so situated that the disposition of this action will as a practical matter impair or impede its ability to protect its interest. United States v. Alcan Aluminum, Inc., 25 F. 3d 1174, 1185 (3rd. Cir. 1994)("The rule that emerges from these cases is that a party has more than an economic interest where it is the real party in interest and where the applicant would have standing to raise the claim."). This Court's judgment will ultimately determine whether the Liberty Borough Area will be designated as a "moderate attainment" area or a "serious nonattainment" area. A rule which would result in the Liberty Borough Area being reclassified under Section 188(b)(2) of the Clean Air Act, 42 U.S.C.A. § 7513 (b)(2), as a serious nonattainment area would have severe consequences to the economic viability of the Clairton Works because of the potentially significant expenditures which may be required to comply with BACM limits. Courts have generally recognized that, for the purposes of seeking mandatory intervention, a party's ability to protect its interest is sufficiently impaired where it faces the prospect of being bound by the pending suit. Grumman Flxible Corp. v. Dole, 102 F. R. D. 36, 38 (D. D. C. 1983) (party allowed to intervene as of right where it would face the prospect of being bound by the existing action). See also, Triax Co. v. TRW, Inc., 724 F. 2d 1224, 1227 (6th Cir. 1984). Because U. S. Steel will be bound by the outcome of this action by virtue of the Clairton Works' location in the Liberty Borough Area, the ability to protect its interest is sufficiently at risk to justify intervention.

4. U. S. Steel Is Not Adequately Protected by EPA.

U. S. Steel's interest is not adequately protected by EPA. To demonstrate a right to intervene, it is sufficient that the intervenor show that its interest "may



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be" inadequately represented. Trbovich v. United Mine Workers of America, 404 U. S. 528, 538n.10, 92 S. Ct. 630, 30 L.Ed. 2d 686, 694n.10 (1972). The burden of showing inadequate representation "should be treated as minimal." Id.

Here, GASP seeks to force EPA's hand to reclassify the Liberty Borough Area as serious nonattainment for $PM_{10}$. The effect of this designation has serious and economical impact to the five communities and the industries located in those communities. The implications of a reclassification to EPA are significantly different than the implications to U. S. Steel of such a reclassification. The EPA represents the broad public interest, not the specific concerns of industry in the Liberty Borough Area. Sierra Club v. Espy, 18 F. 3d 1202, 1208 (5th Cir. 1994). EPA is not in a position to discuss the arguments that U. S. Steel seeks to present, including the placement of a monitor, which is not demographically or meteorological representative; unusual combinations of upslope winds; temperature inversions; and, extremely low mixing heights.

EPA cannot cite in sufficient detail those portions of the administrative record that specifically pertain to U. S. Steel. For example, U. S. Steel does not expect the EPA to discuss the evidence in the record that demonstrates, because of improper placement, the data from the Lincoln High Volume monitor is an aberration. Simple comparisons to the other monitors in the area which demonstrate attainment supports this argument. EPA's inability to fully present the case for U. S. Steel is understandable.

Through its intervention, U. S. Steel does not intend to repeat unnecessarily the arguments offered by EPA; it merely seeks the opportunity to present fully those arguments and portions of the administrative record that pertain to the Lincoln High Volume monitor. In short, U. S. Steel seeks to add a



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necessary element to the proceedings which would not be covered by the original parties to the suit. Blake v. Pallan, 554 F. 2d 947, 955 (9th Cir. 1977). EPA's emphasis and approach in this action must necessarily differ from U. S. Steel. U. S. Steel's participation will add arguments and information not advanced by the existing parties. Therefore, U. S. Steel more than satisfies the minimal burden of showing inadequate representation. Even more fundamental, U. S. Steel's intervention is necessary to assure that any accommodation the original parties may try to reach does not adversely affect other interests without at least being cognizant and appreciative of these interests. Since EPA cannot adequately protect U. S. Steel's interests, U. S. Steel must be permitted to intervene. Philadelphia Recycling & Transfer Station, Inc. v. City of Philadelphia, 1995 U. S. Dist. LEXIS 12773 (E.D. Pa 1995).

U. S. Steel satisfies all the elements required by the Federal Rules Of Civil Procedure 24(a). It has a direct interest in the matter being litigated; its ability to protect this interest may be impaired by virtue of the suit brought against the EPA and compromises that EPA may make that would result in reclassification as serious nonattainment; and it is not adequately represented by EPA. U. S. Steel must, therefore, be allowed to intervene as a matter of right in this action.

## II. U. S. STEEL SHOULD BE GRANTED PERMISSIVE INTERVENTION

Alternatively, U. S. Steel seeks permissive intervention in this lawsuit. A party may obtain permissive intervention under Federal Rules Of Civil Procedure 24(b) by showing that it has a direct interest in the lawsuit and there is a question of law or fact in common and the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Securities and Exchange



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Commission v. Byers, 109 F.R.D. 299, 300 (W.D. Pa. 1985); Harris v. Pernsley, 820 F. 2d 592, 600 (3rd Cir. 1987); See also, FTC v. American Idea Management Corporation, 1992 U. S. Dist. LEXIS 21135 (W.D. Pa. 1992).

A person has sufficiently "direct interest" for purposes of obtaining permissive intervention where the judgment in the action of itself adds to or detracts from his legal rights. Pennsylvania Railroad Company v. Hughart, 222 A. 2d 736, 738, 422 Pa. 615 (1966); See also, Pennsylvania Rule of Civil Procedure, § 2327(4). An intervenor's interest need not be such that he will inevitably be affected by the judgment. It is enough that there be a substantial probability that his interest will be so affected. Commonwealth v. Raneri, 509 A. 2d 939, 940 n.5, 97 Pa. Cmwlth. 352 (1986).

U. S. Steel's long-term ability to make coke at Clairton Works falls within the possible impacts of this lawsuit. A serious nonattainment classification will adversely affect U. S. Steel's presence in the coke market and potentially cause USX to spend hundreds of millions of dollars to meet more stringent requirements. It is particularly troubling to U. S. Steel because U. S. Steel believes the proposed reclassification is based upon the improper placement of a single monitor. U. S. Steel, therefore, possesses the requisite interest in the outcome of this litigation to warrant intervention. EPA's ultimate decision will directly impair U. S. Steel's contract rights since EPA could effectively change the way Clairton Works does business. Further, the reclassification could result in enforcement actions against U. S. Steel and expose U. S. Steel to the risk of noncompliance with future regulations. National Wildlife Federation v. Hodel, 661 F. Supp. 473, 474 (E.D. Ky. 1987).



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The overarching issue in this litigation is whether EPA acted within its statutory authority to properly review a proposed nonattainment classification. This is precisely the same issue and comment raised by U. S. Steel. Even with U. S. Steel's intervention, the resolution of this issue will be based on the same general legal standards and the same evidentiary record already involved in this action. U. S. Steel seeks merely to present fully - within the scope of issues - arguments and information about those standards that affect its coke making facility at Clairton. The fact that GASP and U. S. Steel have both filed comments to this reclassification evidences common issues of fact and law. Borkowski v. FOP, Philadelphia Lodge No. 5, 155 F.R.D. 105,111 (E.D. Pa. 1994). Therefore, U. S. Steel's presence will not expand the scope of this action. United States v. United States Steel Corporation, 87 F.R.D. 709 (W.D. Pa. 1980).

Finally, the reason for U. S. Steel's intervention outweighs the parties' right to litigate under their own terms. U. S. Steel's reasons for intervention are compelling. This action will directly affect the economic and social viability of Clairton Works whose fate will be ultimately bound by the judgment rendered in this case. Continental Casualty Company v. SSM Group, Inc., 1995 U. S. Dist. LEXIS 9739 (E.D. Pa. 1995). Because U. S. Steel is operating within the scope of issues and evidentiary record, U. S. Steel's presence will represent minimal, if any, interference with the parties right to litigate according to their own terms. Furthermore, this intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Under these circumstances, U. S. Steel should be permitted to intervene.



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## CONCLUSION

For all the foregoing reasons, the USX Motion for Leave to Intervene should be granted.

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## CERTIFICATE OF SERVICE

I hereby certify that on May 3, 1996 a true copy of the foregoing was sent via certified mail to the following counsel of record:

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