

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED

DEC 1- 1988

STATE OF OHIO,

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF ENERGY, et al.,

Defendants.

KENNETH J. MURPHY, Clerk
CINCINNATI, OHIO

Civil Action No. C-1-86-0217
Judge Spiegel

CONSENT DECREE

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STATE OF OHIO,)	
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Plaintiff,)	
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v.)	Civil Action No. C-1-86-0217
)	Judge Spiegel
UNITED STATES DEPARTMENT OF ENERGY, et al.,)	
)	
Defendants.)	

CONSENT DECREE

WHEREAS, on March 11, 1986, the State of Ohio filed a complaint in the above-captioned case against the United States Department of Energy ("DOE"), NLO, Inc. ("NLO") and NL Industries, Inc. ("NLI");

WHEREAS, Ohio alleges that DOE, NLO, and NLI have violated various provisions of Federal and Ohio law and regulations, and DOE, NLO, and NLI deny any violation of and any liability under any federal or state statute, regulation or common law;

WHEREAS, the parties wish to ensure the safe and environmentally sound handling of mixed and hazardous waste at the FMPC;

WHEREAS, the parties agree that the Federal and Ohio hazardous waste regulations as presently drawn do not impose dissimilar requirements;

WHEREAS, DOE on July 18, 1986 entered into an Agreement with U.S. EPA (hereinafter the agreement as amended shall be referred to

as the "7/18/86 Agreement") pursuant to Executive Order 12088, 43 F.R. 47707 (October 13, 1978), and is currently carrying out a Remedial Investigation and Feasibility Study (hereinafter "RI/FS") pursuant to the 7/18/86 Agreement and the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §§ 9601-9657 (hereinafter "CERCLA");

WHEREAS, the parties wish to resolve Count One and Counts Three through Twenty-Seven of this action without litigation to the extent set forth in Sections V and VII below, and have, therefore, agreed to entry of this Consent Decree without the admission or adjudication of any issue of fact or law.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed as follows:

I. JURISDICTION

The Court has jurisdiction over the matters resolved in this Consent Decree and the parties to the decree.

II. GENERAL PROVISIONS

For purposes of this Consent Decree, the following words and abbreviations have the meanings provided below:

2.1 "DOE" means the United States Department of Energy and its officers, agents, employees, and contractors;

2.2 "Ohio EPA" means Ohio Environmental Protection Agency and its representatives, including any contractor(s) retained by Ohio EPA to perform any monitoring, observation, testing, or other activities related to this Consent Decree;

2.3 "NLO" means NLO, Inc., an Ohio corporation which was the prime contractor at the FMPC through December 31, 1985.

2.4 "NLI" means NL Industries, Inc., a New Jersey corporation.

2.5 Each of the terms "State", "State of Ohio", and "Ohio", includes all agencies and officers of the State of Ohio;

2.6 "FMPC" means the Feed Materials Production Center owned by DOE and located near Fernald, Ohio;

2.7 "C.F.R." means Code of Federal Regulations;

2.8 "OAC" means Ohio Administrative Code;

2.9 "Hazardous waste" means a solid waste which is defined as a hazardous waste in 40 C.F.R. § 261 or OAC § 3745-51-03, but does not include source, special nuclear, or by-product material. For purposes of convenience in the wording of this Consent Decree only (and not binding on the parties outside of this Decree and not for use as a general definition outside of this Decree), the term "hazardous waste" does not include "mixed waste".

2.10 "Mixed waste" means all waste containing both radioactive waste subject to the Atomic Energy Act and hazardous waste.

2.11 "Treatment", "storage", and "disposal" have the same meanings as the definitions provided therefor in 40 C.F.R. § 260.10 and OAC § 3745-50-10.

III. HAZARDOUS WASTE REQUIREMENTS

3.1 DOE shall conduct its current and future treatment, storage, and disposal of all hazardous and mixed waste at the FMPC

in accordance with Federal and Ohio hazardous waste laws and hazardous waste regulations, including but not limited to the permit requirements of these laws and regulations. However, DOE is not required to comply with the above requirements, with regard to mixed waste, where compliance will increase the risk to human safety and health or the environment, or, with respect to hazardous or mixed waste, where the requirements would be inapplicable due to the restrictions of 42 U.S.C. § 6905(a). Should DOE not be required to comply with a hazardous waste requirement due to any of the circumstances described in the preceding sentence, DOE in consultation with Ohio EPA shall instead handle the hazardous or mixed waste in a manner as protective of human safety and health and the environment as if the hazardous waste requirement had been applied. However, should any of the above referenced requirements conflict with any remedy ultimately selected by U.S. E.P.A. pursuant to CERCLA, such conflicts shall be subject to the provisions of Sections V and XII of this Consent Decree.

3.2 DOE has submitted to Ohio EPA Part A and Part B of the application for an Ohio hazardous waste facility installation and operation permit for the FMPC. Until such time as the Ohio Hazardous Waste Facility Board acts on the permit application for the FMPC, DOE shall not store or dispose of hazardous or mixed waste at any FMPC locations, or treat any such waste at FMPC in any devices, not included in the permit application or subsequent revisions submitted to Ohio EPA. No hazardous or mixed waste from an off-site source not already listed in the FMPC Part B Permit

Application, or a revision as of the date of entry of this Consent Decree, shall be stored, disposed of or treated at the FMPC without the prior approval of the State of Ohio. After the Ohio Hazardous Waste Facility Board acts on the permit application for such a facility, DOE shall not store, dispose of, or treat mixed waste at the FMPC except in accordance with an Ohio hazardous waste facility installation and operation permit. Nothing in this Consent Decree shall be construed to preclude DOE from exercising any right it has to appeal an action on the permit application nor shall the Consent Decree be interpreted to predetermine the results of the deliberations of the Ohio Hazardous Waste Facilities Board on the permit application.

3.3 DOE shall store all drums and other containers holding hazardous waste and/or mixed waste in a manner which complies with the containment storage system requirements set forth in 40 C.F.R. § 264.175 and OAC § 3745-55-75.

3.4 DOE shall conduct and document inspections of hazardous waste and mixed waste facilities at FMPC, including container or tank storage areas, landfills, and surface impoundments, in accordance with 40 C.F.R. § 264.15, 40 C.F.R. § 265.15, OAC § 3745-54-15 and OAC § 3745-65-15.¹ These inspections shall be conducted at a frequency sufficient to comply with these rules, but in no event shall they be conducted at a frequency of

¹40 C.F.R. § 265.15 applies until U.S. EPA approval of DOE's Part B hazardous waste application, and 40 C.F.R. § 264.15 applies thereafter. OAC § 3745-65-15 applies until Ohio Hazardous Waste Facility Board approval of DOE's Part B hazardous waste application, and OAC § 3745-54-15 applies thereafter.

less than once per week. Upon discovery of any leaks or spills of hazardous or mixed waste from container or tank storage or treatment areas, DOE shall immediately thereafter initiate efforts to stop the spills or leaks, take all appropriate actions necessary to prevent further spills or leaks of hazardous or mixed wastes, and take all appropriate actions possible to contain and recover all spilled and leaked hazardous or mixed waste. Should the groundwater monitoring program reveal the presence of a hazardous or mixed waste, then a groundwater quality assessment will be initiated, and shall be performed consistent with RCRA guidelines and Ohio and Federal law.

3.5 Within ninety (90) days after entry of this Consent Decree, DOE shall complete and submit to Ohio EPA analyses of all hazardous or mixed waste streams produced or received at FMPC. These analyses shall contain the information required by 40 C.F.R. § 265.13 and OAC § 3745-65-13, as well as the radiological characteristics of the waste streams, a description of the process streams producing the wastes, and any applicable EPA hazardous waste number. If any additional hazardous or mixed waste stream is identified at the FMPC after the entry of this Consent Decree, DOE shall complete and submit these analyses and/or characteristics, consistent with 40 C.F.R. § 265.13 and OAC § 3745-65-13², within ninety (90) days after identifying the waste stream on-site; if any

² 40 C.F.R. § 265.13 applies until U.S. EPA approval of DOE's Part B hazardous waste application, and 40 C.F.R. § 264.13 applies thereafter. OAC § 3745-65-13 applies until Ohio Hazardous Waste Facility Board approval of DOE's Part B hazardous waste application and OAC § 3745-54-13 applies thereafter.

additional hazardous or mixed waste stream is to be received at the FMPC from an off-site source, or is to be produced at the FMPC, DOE shall complete and submit such analyses and/or characteristics before receiving the waste stream from off-site or producing the waste stream on-site.

3.6 DOE shall keep a written operating record at FMPC which contains the information required by 40 C.F.R. § 264.73, 40 C.F.R. § 265.73, OAC § 3745-54-73 and OAC § 3745-65-73.³ The operating record shall include this information for all hazardous waste and mixed waste which was stored at the FMPC prior to the entry of this Consent Decree (unless it has been since removed from FMPC) and shall be updated whenever additional hazardous or mixed waste is stored there in the future.

3.7 DOE has submitted to Ohio EPA for review and approval a groundwater quality assessment program plan. Ohio EPA has reviewed this plan and identified deficiencies in it. DOE shall correct these deficiencies and re-submit the plan to Ohio EPA within forty-five (45) days after receiving Ohio EPA's comments. DOE shall implement the plan in accordance with the approved timetable.

3.8 The specific requirements spelled out in paragraphs 3.3 through 3.7 above do not replace or supersede any additional requirements which may be contained in the regulations cited in

³40 C.F.R. § 265.73 applies until U.S. EPA approval of DOE's Part B hazardous waste application, and 40 C.F.R. § 264.73 applies thereafter. OAC § 3745-65-73 applies until Ohio Hazardous Waste Facility Board approval of DOE's Part B hazardous waste application, and OAC § 3745-54-73 applies thereafter.

those paragraphs or in other hazardous waste laws or regulations, to the extent not inconsistent with the Atomic Energy Act.

IV. CONTROL OF WASTEWATER AND RUNOFF

4.1 Upon entry of this Consent Decree, no "sewage," "industrial waste" or "other wastes," as those terms are defined by Ohio Revised Code Section 6111.01, shall be discharged or placed into Waste Pit #5 or the clear well at the FMPC without prior written approval of Ohio EPA. The only exception to this order is the storm water runoff currently being collected in the waste pit area.

4.2 No water from Waste Pits Number 4, 5, or 6, the biodenitrification surge lagoon, the biodenitrification surge lagoon underdrains, or storm water retention basin underdrains shall be discharged or placed into Paddy's Run, unless prior written approval is obtained from Ohio EPA.

4.3 On or about July 27, 1988, DOE completed a characterization study within the coal storage area and coal storage runoff collection basin area to characterize the existing underlying soil. On or before November 4, 1988, DOE shall submit a report which contains the results of the characterization study including the determined permeability coefficient of the soil core samples and, if necessary, the steps required to modify the existing soil conditions to provide groundwater protection equivalent to that provided by three (3) feet of clay with a permeability coefficient no greater than 1×10^{-7} centimeters per second. Ohio EPA agrees to provide a written response to DOE

within thirty (30) days of receipt of the report as to whether or not a liner is needed.

[A]. In the event Ohio EPA determines a liner is required for the coal pile storage area and/or the coal pile run off collection basin, DOE shall submit a PTI application and install the liner in accordance with schedules approved by Ohio EPA.

[B] In the event that Ohio EPA determines a liner is not required, DOE shall submit a PTI application describing the existing coal pile storage area and coal pile runoff collection and treatment system within ninety (90) days of Ohio EPA's written response to the report.

4.4 DOE has submitted a current, complete NPDES permit renewal application. Until Ohio EPA issues a new NPDES permit for FMPC, DOE shall make every effort to manage its wastewater in such a way as to comply with the biochemical oxygen demand, suspended solids, and fecal coliform limitations of its present NPDES permit. Until Ohio EPA issues a new NPDES permit for FMPC, DOE shall comply with all other terms (excluding part I.B), conditions and effluent limitations of its present NPDES permit. DOE shall comply with all terms, conditions, and effluent limitations of its new NPDES permit by the dates specified in the permit. The date for final compliance shall in no case be later than one (1) year after issuance of the Ohio EPA Permit to Install for the biodenitrification effluent treatment system.

4.5 Within one hundred and eighty (180) days of issuance of a new FMPC NPDES permit, DOE shall submit to Ohio EPA a new Permit to Install application, including detail plans, for a biodenitrification effluent treatment system designed to meet the biochemical oxygen demand and suspended solids limitations of the new FMPC NPDES permit.

4.6 By October 1, 1989, DOE shall submit to Ohio EPA a new Permit to Install application, including detail plans, for the full-scale biodenitrification facility. These plans must include all temporary as well as permanent collection, storage, and treatment system components.

4.7 DOE has begun construction of a storm water retention basin, and shall complete construction by December 31, 1988, in accordance with the detail plans approved by Ohio EPA on November 18, 1987 (PTI 05-1043). DOE shall thereafter operate the storm water retention system in accordance with the approved plans.

4.8 DOE has submitted to Ohio EPA a contingency plan which describes the actions DOE will take to investigate the environmental impact of any future surface water leakage, overflow or bypass from the storm water retention system into the environment, including Paddy's Run. Ohio EPA has identified deficiencies in the plan and will transmit these to DOE. DOE shall, within sixty (60) days after receiving notice of these deficiencies, correct these deficiencies and submit a revised plan to Ohio EPA. DOE shall implement the provisions of the approved

contingency plan if surface water leaks from, overflows, or bypasses the storm water retention system.

4.9 Sediments accumulating in the bionitrification surge lagoon and storm water retention basins shall be removed and disposed of in accordance with the maintenance schedules approved in Permits to Install #05-2872 and #05-1043.

4.10 DOE shall contain any process area spills and divert the spills for adequate treatment and/or disposal, in accordance with the Spill Prevention and Control Countermeasures Plan to be submitted to Ohio EPA for review and approval within thirty (30) days of the entry of this Consent Decree.

4.11 Pursuant to Ohio EPA Director's Findings and Orders dated June 26, 1987, DOE has submitted to Ohio EPA for review and comment a best management practices (BMP) plan for the control of industrial wastes and other wastes that may be discharged from the FMPC. For the purpose of this section, "industrial wastes" and "other wastes" have the meaning set forth in Ohio Revised Code Section 6111.01(C) and (D). The BMP Plan establishes procedures for inspections, monitoring, preventive maintenance, employee training, material inventory, security and other activities to prevent pollution of surface waters and groundwater in the event of equipment failure, improper operation, precipitation and other natural phenomena, stormwater runoff and discharges, and other causes.

[A] DOE shall implement the BMP plan upon notification of approval of the plan by Ohio EPA. In the event

that Ohio EPA does not approve the BMP plan in its entirety, DOE shall implement those portions of the plan approved by Ohio EPA, correct any deficiencies in the plan noted by Ohio EPA, and resubmit a revised plan for review by Ohio EPA not later than sixty (60) days from notification by Ohio EPA.

[B] DOE shall maintain the BMP plan at the FMPC and shall make it available to Ohio EPA upon request.

[C] DOE shall amend the BMP plan whenever there is a change in facility design, construction, operation, or maintenance which materially affects the facility's potential for discharge of industrial wastes or other wastes into the waters of the State.

[D] If Ohio EPA determines that the BMP plan is ineffective in achieving the general objective of preventing the release of industrial wastes or other wastes to the waters of the State, the BMP plan shall be modified by DOE in consultation with Ohio EPA within forty-five (45) days of notification to DOE.

4.12 Pursuant to Ohio EPA Director's Findings and Orders issued June 26, 1987, DOE has submitted to Ohio EPA a report which incorporates a study of the discharge from the FMPC which currently flows from Manhole 175 (Outfall 001) through a pipe to the Great Miami River. This study was conducted to determine whether or not the discharge pipe is a potential source of

groundwater contamination. Should Ohio EPA request changes and/or additions in the report of this study, including any of the recommended alternatives or schedules, DOE shall submit these changes and/or additions to Ohio EPA within thirty (30) days after receiving these requests. All actions and alternatives recommended by the report of the study required in this Paragraph 4.12 and approved by Ohio EPA shall be implemented in accordance with the schedules approved by Ohio EPA.

4.13 By the twentieth (20th) day of every second month, DOE shall submit a bi-monthly technical progress report to Ohio EPA describing the progress made to comply with this Section IV of the Consent Decree during the previous two months. DOE may combine this report with its ongoing reports being submitted pursuant to the Director's Findings and Orders issued June 4, 1987.

4.14 DOE is enjoined to comply with any permits issued to DOE pursuant to OAC § 6111.03(J) and, with regard to sewage, industrial wastes or other wastes, to comply with OAC § 3745-31-02 and any permits issued pursuant to OAC § 3745-31-02.

**V. RESERVATION OF RIGHTS
CONCERNING REMEDIAL ACTION**

5.1 DOE is currently proceeding with an RI/FS pursuant to the 7/18/86 Agreement. Included within the scope of the RI/FS are workplans, which contain, but are not limited to, the following:

[A] actions which will be taken to determine the locations of hazardous and mixed waste at the FMPC, if any, including but not limited to investigation

- of the storage pits, the liquid waste incinerator, solid waste incinerator, and the general sump;
- [B] actions which will be taken to analyze such waste, including the identification of the analyses to be performed;
 - [C] actions which will be taken to determine whether hazardous constituents are being released or have the potential to be released from the storage pits into the environment;
 - [D] actions which will be taken to assess the feasibility of all alternatives available for the permanent disposal of such waste as well as a proposed schedule for each available alternative;
 - [E] actions which will be taken, if a release of hazardous constituent(s) into the environment is discovered, to assess the feasibility of all alternatives available for remedying contamination of the environment, if any, including a proposed schedule for implementation of each alternative;
 - [F] a timetable for performing each of the actions described in A through E above and submitting the information obtained from performing these actions;
 - [G] alternatives for permanent disposal of any hazardous and mixed waste in the storage pits;
 - [H] a work plan and timetable for studying the sources, nature and extent of groundwater contamination, if

any, with nitrates, fluorides, sulfates, chlorides, and other "industrial wastes" and "other wastes," as those terms are defined by Ohio Revised Code Section 6111.01(C) and (D), including, if contamination is discovered, an assessment of the exposure and potential exposure of the public and the environment to these contaminants and compilation of data necessary to develop and select alternatives for abating the sources of contamination and to develop and select cleanup alternatives.

5.2 The activities described in paragraph 5.1 above are also the subject matter of injunctive relief which Ohio has requested against DOE for alleged violations of the Resource Conservation and Recovery Act (hereinafter "RCRA"), Ohio Revised Code Chapter 3734, the Clean Water Act, and Ohio Revised Code Chapter 6111. These alleged violations are contained in Counts Three through Eight and Count Twenty-Five of the Complaint.

5.3 Pursuant to the 7/18/86 Agreement, remedial alternatives will be developed by DOE and selected to address, *inter alia*, the matters described in paragraph 5.1 above.

5.4 It is DOE's position that Ohio EPA is limited to the review and comment provisions and provisions for judicial review set forth in sections 120 and 121 of CERCLA if the state has any disagreement with any matter under the RI/FS, including cleanup standards, investigation methods, timetables and the remedial alternative selected by US EPA. It is Ohio's position that the

state has the authority to determine these matters pursuant to Ohio law and RCRA, and to obtain injunctive relief against DOE pertaining to these issues pursuant to Counts Three through Eight and Count Twenty-Five of the Complaint and the statutes invoked by these counts. DOE and the State specifically do not resolve this dispute in this Consent Decree. Each party specifically reserves the right to reopen this action for further litigation for the purpose of resolving any disagreement which Ohio may have with any of these matters under the RI/FS, including, but not limited to, cleanup standards, investigation methods, timetables, or the final remedial action chosen by US EPA under the 7/18/86 Agreement. Ohio reserves the right to request further injunctive relief against DOE pursuant to Counts Three through Eight and Count Twenty-Five of the Complaint should Ohio at any time become dissatisfied with the manner or timeliness of actions or study taken pursuant to the RI/FS or the manner or timeliness of remedial action occurring after completion of the RI/FS. Each party reserves its rights to assert and defend its respective legal position should the action be reopened for these purposes.

VI. SITE ACCESS

DOE shall provide access to the FMPC to Ohio EPA for the purpose of monitoring, sampling and observing activities carried out under this Consent Decree. Ohio EPA agrees that it will comply with all statutes, rules and regulations for personnel safety and site security. This paragraph shall not be construed to eliminate

or restrict any State access to the FMPC which it may otherwise have under Federal or State law.

**VII. RECOVERY OF RESPONSE COSTS AND
SETTLEMENT OF OTHER MONETARY CLAIMS**

7.1 "Response costs" as used in this section means all costs of "removal" or "remedial action," as defined by Section 101(23), (24), and (25) of CERCLA, 42 U.S.C. § 9601 (23), (24), and (25).

7.2 By March 1, preceding each federal fiscal year during which the State expects to incur response costs, the State shall provide DOE with a written estimate of response costs expected to be incurred during the two subsequent fiscal years, based upon the state's best knowledge at the time. By February 1 of each year DOE shall send Ohio EPA a notice requesting this estimate.

7.3 Following the end of each federal fiscal year, the State shall submit to DOE an accounting of response costs incurred during that previous fiscal year. These accountings will specify the manner in which the payment shall be made.

7.4 Except as allowed by Paragraph 7.5 below, within ninety (90) days of receipt of the accounting provided pursuant to Paragraph 7.3, DOE shall reimburse the State in the amounts set forth in the accounting. Payment shall be made by wire transfer or by check in the manner described in the State's accounting.

7.5 In the event that DOE disputes any amounts set forth in the State accounting, DOE may contest the disputed costs by invoking the dispute resolution procedures of Section XII. DOE

may contest a cost only on the grounds that the cost is unsupported by the State's documentation, is not a "response cost" under CERCLA, or is inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"). DOE shall bear the burden of demonstrating that the cost is inconsistent with the NCP.

7.6 Should DOE contest a portion of the costs set forth in an accounting but not all of the costs, the uncontested costs shall be paid by the deadline provided by paragraph 7.4 above. Any costs which DOE must pay as a result of dispute resolution shall be paid within ninety (90) days after resolution of the dispute.

7.7 Not later than thirty (30) days after the entry of this Consent Decree, NLO shall pay to the State of Ohio in full and final settlement of disputed claims brought by the State of Ohio against NLO in this action under Count One and Counts Three through Twenty-seven, the sum of Two Hundred Seventy-Five Thousand Dollars (\$ 275,000) by certified check or by wire transfer payable to the order of "Treasurer, State of Ohio", for deposit into the "Hazardous Waste Cleanup Fund".

7.8 Not later than thirty (30) days after the entry of this Consent Decree, DOE shall pay to the State of Ohio in full and final settlement of disputed claims brought by the State of Ohio against DOE for all past response costs in this action incurred by the state through September 30, 1988, the sum of Three Hundred Thirty-Five Thousand Dollars (\$ 335,000) by certified check or by wire transfer payable to the order of "Treasurer, State of Ohio",

for deposit into the "Hazardous Waste Cleanup Fund", and the sum of Eighty Thousand Dollars (\$ 80,000) for litigation costs by certified check or wire transfer to the order of "Ohio Attorney General".

7.9 With regard to the State of Ohio's claims against DOE for civil penalties, the Court has separately granted DOE's Motion to certify for interlocutory appeal the Order Denying Motion to Dismiss issued by the Court on March 18, 1988, which held that the United States has waived sovereign immunity under RCRA and the CWA for the imposition of civil penalties and that DOE could be liable for such penalties in this case. The parties have entered into a stipulation settling the amount of civil penalties to be assessed against DOE, if, after exhaustion of all appellate rights by DOE, the ultimate decision in this case is that a waiver of Federal sovereign immunity has been made by RCRA or the CWA with regard to any of the State's civil penalty claims. In such a case, judgment will be entered in accordance with the stipulation. If, after exhaustion of all appellate rights by the State the ultimate decision in this case is that no waiver of Federal sovereign immunity has been made by RCRA or the CWA with regard to any of the State's civil penalty claims, judgment shall be entered on these issues in accordance with the ultimate decision.

VIII. RELEASES

8.1 Except as specified below, the State hereby releases, covenants not to sue and not to bring any action, whether civil, criminal or for administrative findings and orders,

against NLO, NLI, the United States or any department or agency thereof, or any past or present officer, director, official, employee, agent, or contractor (and any past or present official, officer, director, employee, agent or sub-contractor of such contractor), of NLO, NLI, or the United States, with respect to the claims contained in Count One and Counts Three through Twenty-Seven of the Complaint filed in this action.

8.2 The parties recognize that this Consent Decree does not address any of the claims contained in Count Two of the Complaint. This Count is stayed until completion of the RI/FS, and thus remains pending. This Consent Decree also does not resolve the matters reserved in Section V.

8.3 By executing this Consent Decree, the State of Ohio expressly reserves for further action or enforcement and does not discharge, release, or in any way affect any right, demand, claim, or cause of action which it has, or may have, against any person or entity not released in paragraph 8.1 above.

8.4 The parties agree to cooperate with each other in identifying other potential sources of contamination which may affect the FMPC or the surrounding area.

IX. COMPLIANCE

Except as specifically set forth in this Consent Decree, DOE shall not be excused from compliance with any applicable federal and state laws in carrying out the provisions of this Consent Decree. DOE agrees to advise the State of Ohio of its efforts to obtain the appropriated funding necessary to implement

this Consent Decree. The State of Ohio and DOE agree that in any judicial proceeding seeking to enforce the terms of this Consent Decree and/or to find DOE in contempt for failure to comply or for delay in compliance with such terms, DOE may raise as a defense that its failure or delay was caused by circumstances beyond its control or that such failure or delay was caused by the unavailability of appropriated funds. While the State of Ohio disagrees that such defenses exist, the parties do agree and stipulate that it is premature at this time to raise and adjudicate the existence of such defenses.

X. PERMITS AND APPROVALS

The State of Ohio will use its best efforts to review in a timely manner, following DOE application, any permits necessary for DOE to carry out the work required pursuant to this Consent Decree.

XI. USE OF DECREE

This Consent Decree was negotiated and executed by the parties in good faith to avoid expensive and protracted litigation and is a settlement of claims which were vigorously contested, denied and disputed as to validity and amount. The execution of this Consent Decree is not an admission of liability with regard to any issue dealt with in this Consent Decree. Accordingly, it is the intention of the parties, the parties hereby agree, and the Court Orders, that with the exception of this proceeding, any proceeding to adjudicate a permit application (but only to the extent necessary to prove the requirements of the Consent Decree),

any proceeding reserved under Section V, and any other proceeding brought by the parties to enforce this Consent Decree, this Consent Decree shall not be admissible in any judicial or administrative proceeding whether civil or criminal, or in state or federal court, and regardless of whether the gravamen of such action or proceeding is based in tort, contract or statute.

XII. RESOLUTION OF DISPUTES

12.1 Should Ohio or DOE have a good faith dispute over the interpretation of this Consent Decree, over whether a term of this Consent Decree has been violated, or over the amount of response costs paid pursuant to Section VII, or if the actions or requirements imposed on DOE by Ohio pursuant to this Consent Decree conflict with actions or requirements imposed on DOE by U.S. EPA pursuant to the 7/18/86 Agreement, the procedures of this section shall apply except as specifically set forth elsewhere in this Consent Decree. Because Ohio and DOE disagree over whether actions or requirements imposed on DOE by Ohio pursuant to this Consent Decree take precedence over actions or requirements imposed on DOE by U.S. EPA pursuant to the 7/18/86 Agreement in the event of a conflict between the two, this Consent Decree shall not be construed to establish the authority of one over the other. Each party reserves its right to assert and defend its respective legal position on this issue should such a conflict not be resolved by the parties pursuant to this section of the Consent Decree.

12.2 If either Ohio or DOE believes that a dispute is not a good faith dispute, or that a delay would pose or increase a

threat of harm to the public or the environment, either party may petition the Court for relief without following the dispute resolution procedures of this section.

12.3 During the pendency of any dispute, Ohio and DOE agree that they shall continue to implement those portions of this Consent Decree which are not in dispute and which Ohio determines can be reasonably implemented pending final resolution of the issue(s) in dispute. If Ohio determines that all or part of those portions of work which are affected by the dispute should stop during the pendency of the dispute, DOE shall discontinue implementing those portions of the work. Ohio and DOE agree they shall make reasonable efforts to informally resolve all disputes.

12.4 DOE shall, within fifteen (15) days of any action by Ohio which it is disputing, provide Ohio with a written notice of dispute. DOE shall, within thirty (30) days of any such action by Ohio which it is disputing, provide Ohio with a written statement of dispute setting forth the nature of the dispute, DOE's position with respect to the dispute and the information DOE is relying upon to support its position. If DOE does not provide such written notice within the fifteen (15) day period, or after such notice fails to provide a written statement to Ohio within the thirty (30) day period, DOE shall be deemed to have agreed to the position taken by Ohio.

12.5 Upon receipt of the written statement of dispute, Ohio and DOE shall engage in dispute resolution among the project coordinators. The project coordinators shall have fourteen (14)

days from the receipt by Ohio of the written statement of dispute to resolve the dispute. During this period the project coordinators shall meet or confer by telephone as many times as necessary to discuss and attempt resolution of the dispute. If a resolution cannot be reached on any issue within this fourteen (14) day period, either Ohio or DOE may, by written notice, elevate the dispute to the Dispute Resolution Committee (DRC) for resolution.

12.6 DOE and Ohio shall each designate one individual to serve on the DRC. The individuals designated to serve on the DRC shall be those designated in Subparagraph 12.7, or their delegate authorized to serve on the DRC on behalf of such designated individual, for the purposes of dispute resolution under this Consent Decree. The DRC will serve as a forum for resolution of disputes for which agreement has not been reached pursuant to paragraph 12.5. If both designated members of the DRC do not agree on a resolution of the dispute within thirty (30) days, either party may institute an action in this Court to resolve the dispute under this Consent Decree.

12.7 The Ohio designated member of the DRC is the Chief, Division of Solid and Hazardous Waste Management, Ohio EPA. The DOE designated member is the DOE Site Manager. Notice of any delegation of authority from a Party's designated member on the DRC shall be provided to all other Parties.

12.8 The pendency of any dispute under this Part shall not affect DOE's responsibility for timely performance of the work required by this Consent Decree, except that the time period for

completion of work affected by such dispute shall be extended for a period of time not to exceed the actual time taken to resolve any good faith dispute in accordance with the procedures specified herein if the parties agree that the performance of such work could not reasonably continue during the pendency of such dispute. All elements of the work required by this Consent Decree which are not affected by the dispute shall continue and be completed in accordance with the work plan schedule.

12.9 Within fourteen (14) days of resolution of any dispute, DOE shall incorporate the resolution and final determination into the appropriate plan, schedule or procedures and proceed to implement this Consent Decree according to the amended plan, schedule or procedures.

12.10 Resolution of a dispute pursuant to this section of the Consent Decree constitutes a final resolution of any dispute arising under this Consent Decree.

12.11 In the case of a dispute which is referred to the DRC and which involves any potential conflict with DOE's actions under the RI/FS or the 7/18/86 Agreement (including but not limited to cleanup standards, investigation methods, timetables and remedial actions), an appropriate representative from U.S. EPA shall be invited to participate in the deliberations of the DRC. If the DRC is unable to resolve the dispute, Ohio and DOE retain the rights described in Section V of this Consent Decree.

12.12 In any dispute subject to dispute resolution, the parties may by written agreement modify the procedures of

subparagraphs 12.1 through 12.11 above, including but not limited to an extension or shortening of the times therein or the waiver of any provision set forth therein.

XIII. EFFECTIVE AND TERMINATION DATES

13.1 This Consent Decree shall be effective upon the date of its entry by the Court.

13.2 This Consent Decree shall terminate as to DOE upon completion of the mandatory relief ordered herein, or upon the passage of five (5) years from its effective date, whichever is later.

13.3 This Consent Decree shall terminate as to NLO upon the payment in full of the amounts required in Paragraph 7.7.

XIV. MISCELLANEOUS

14.1 DOE shall require that all of its contractors operating the FMPC comply with all applicable hazardous waste and water pollution laws and the provisions of this Consent Decree.

14.2 Without predetermining whether or not the President can exempt the facility from any provisions of this Consent Decree, nothing in this Consent Decree shall preclude, restrict or expand any right or authority of the President of the United States contained in 33 U.S.C. § 1323, 42 U.S.C. § 6961, or 42 U.S.C. § 9620(j).

14.3 The Court shall maintain jurisdiction of the claims of the State for the purpose of enabling the parties to apply to the Court for any further orders that may be necessary to construe,

carry out, or enforce compliance with the terms and conditions set forth in this Consent Decree.

SO ORDERED this 2nd day of December, 1988.



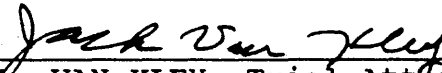
S. ARTHUR SPIEGEL
United States District Judge

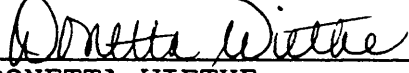
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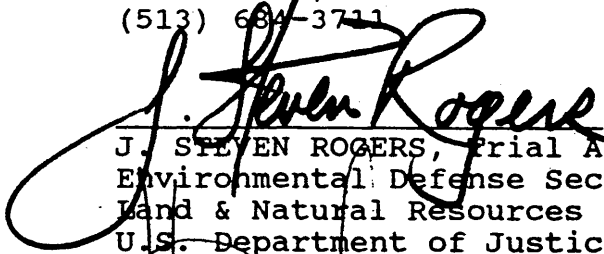
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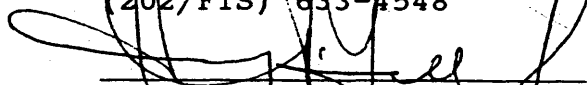
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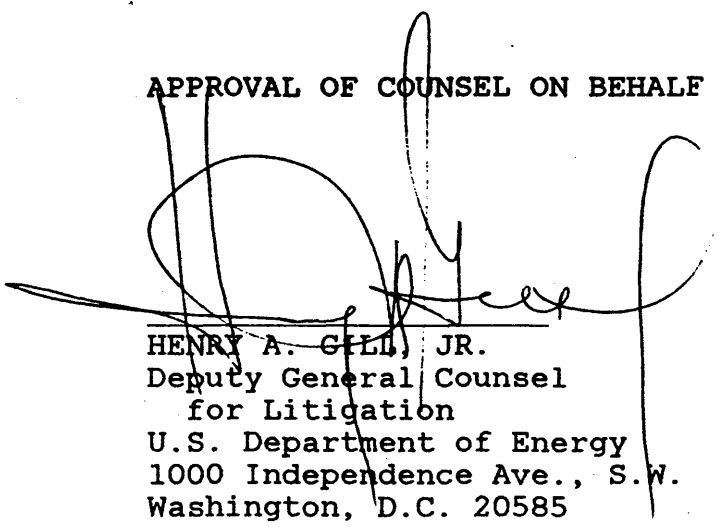
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