

Judge	<u>A</u>
Mgst.	<u>TL</u>
Docketed	<u>MU</u>
Pro	
Region	
MS	<u>893</u>
Issued	

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

FILED
KENNETH J. MURPHY
CLERK

JUN 5 4 10 PM '89

U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST DIV. COLUMBUS

STATE OF OHIO ex rel. Anthony J.
Celebrezze, Jr.

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
AIR FORCE, et al.,

Defendants.

Civil No. C-2-86-0175
Judge Holschuh

CONSENT JUDGMENT

WHEREAS, on January 17, 1986, the State of Ohio filed, in the Court of Common Pleas, Franklin County, a Complaint in the above-captioned case against the United States Department of the Air Force and the Secretary of the Air Force (collectively, "the Air Force") as well as the Rockwell International Corporation ("Rockwell"), which Complaint was timely removed to this Court.

WHEREAS, Ohio's Complaint alleges that the Air Force and Rockwell (collectively, "the defendants") have violated various provisions of Ohio's air pollution laws and/or regulations appertaining to air quality and permits for air emissions, which violations, and any other violations, the Air Force and Rockwell deny.

WHEREAS, the Air Force has installed a baghouse and dry scrubbing system, known as the flue gas filtration system, to control the air emissions from the powerhouse at its facility

located at 4300 East Fifth Avenue in Columbus, Ohio ("Air Force Plant 85");

WHEREAS, repairs have been made on the air pollution control equipment controlling emissions from the central heating plant at the Rickenbacker Air National Guard Base located near Lockbourne, Ohio ("Rickenbacker");

WHEREAS, the emissions from the Air Force Plant 85 powerhouse and the Rickenbacker central heating plant currently comply with Ohio's opacity and particulate requirements;

WHEREAS, the Defendants deny any violation of and any liability under the Ohio air pollution laws and/or requirements;

WHEREAS, the parties wish to resolve this matter without further litigation (except to the extent set forth in this Consent Judgment), and have, therefore, agreed to the entry of this Consent Judgment 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 determined that it has the jurisdiction to assess civil penalties against the federal defendants, who have contested this Court's jurisdiction. That decision will be appealed by the federal defendants. Upon the determination of the Court's jurisdiction to assess civil penalties (and

resolution of the other issues reserved herein), after the exhaustion of all appellate rights by the parties, this Consent Judgment resolves the disputes among the parties to this Judgment in accordance with the ultimate decision upon appeal.

The Air Force further denies that the Court has jurisdiction over the Rickenbacker Air National Guard facility. This issue is specifically left unresolved by this Consent Judgment. Venue is proper in this Court.

II

RICKENBACKER AIR NATIONAL GUARD FACILITY

With regard to any and all allegations of the Complaint addressing the Rickenbacker Air National Guard facility, the Complaint is dismissed without prejudice.

The parties expect that the central heating plant at the Rickenbacker Air National Guard Base will no longer be in use after May, 1989. Based on this expectation, no injunctive relief is sought by Ohio in this Consent Judgment with respect to Rickenbacker's central heating plant. However, should the central heating plant be used after May, 1989, Ohio shall be allowed to refile this action to request injunctive relief against the central heating plant at Rickenbacker. Each party reserves its rights to assert and defend its respective legal position should the action be refiled for this purpose.

III

PRIOR DECISIONS OF THIS COURT

With regard to the State of Ohio's claims against the Air Force and Rockwell for civil penalties, the defendants deny that the United States has waived sovereign immunity under the Clean Air Act for the imposition of state law based civil penalties. The defendants also deny that Ohio's rules concerning air emissions, or concerning permits for air emissions, apply to federal facilities such as Air Force Plant 85. The defendants further assert that Ohio is bound by a one year period of limitations for seeking civil penalties (ORC §§ 2305.03, 2305.11). The Court has ruled against each of these contentions in orders filed on March 31, 1987, November 4, 1988 and October 27, 1988, respectively. However, through this Consent Judgment, the defendants reserve and preserve their right to appeal those issues and this Court's rulings on those issues.

IV

CIVIL PENALTIES

The parties hereby stipulate to the amount of civil penalties to be assessed against the Air Force if such penalties are ultimately held to be within this Court's jurisdiction and otherwise allowed by law and regulation.

If, after exhaustion of all appellate rights by the Air Force, the ultimate decision in this case is that a waiver of federal sovereign immunity has been made by the Clean Air Act,

authorizing state law penalties for violation of state regulations, and if the ultimate decision is also that the State of Ohio's regulations here at issue (OAC §§ 3745-35-02, 3745-17-10, 3745-17-07)¹ properly apply to federal facilities, then judgment will be entered for a civil penalty against the Air Force in the amount of \$25,000.00. Excepting, that if the ultimate result is also that the State of Ohio is bound by Ohio's one year period of limitations for bringing an action for a penalty, then judgment will be entered for a civil penalty against the Air Force in the amount of \$5,000.00. In the event that, after exhaustion of all appellate rights by the Air Force, the ultimate decision in this case is that no waiver of federal sovereign immunity has been made by the Clean Air Act, authorizing state law penalties for violation of state regulations, or if the ultimate decision is that the State of Ohio's regulations here at issue do not apply to federal facilities, then judgment will be entered against the State of Ohio, and in favor of the Air Force.

For purposes of this Consent Judgment, "exhaustion of all appellate rights" shall mean the exhaustion of all appeals of the Court's decisions on the issues reserved for appeal, including any remands and appeals of such remands, and shall occur on the later of (a) the last date on which a petition for a writ of certiorari can be filed in the United States Supreme

¹ The Air Force may argue that the definitional section, OAC § 3745-15-1(U), is relevant on this point.

Court with regard to a decision in this case by the United States Court of Appeals for the Sixth Circuit, if such a petition is not filed; (b) if a petition for a writ of certiorari is filed, the date on which the petition is denied by the Supreme Court, or if a petition for the rehearing of such a denial is filed, the date on which the petition for rehearing is denied; or (c) if a petition for writ of certiorari is granted, the date on which the opinion or order of the Supreme Court is issued, or if a petition for rehearing is filed, the date on which the petition for rehearing is denied or the final opinion or order on rehearing is issued.

V

ROCKWELL

Without the admission of any wrongdoing or of any liability at law, and in full satisfaction of any claims (including injunctive relief) against it by the other parties concerning the issues in this case, Rockwell will pay into the registry of the Court the sum of \$10,000.00, for the sole purpose of ending its participation in this case. This sum will be invested in certificates of deposit during the appeals process. If the State of Ohio ultimately receives a civil penalty in the sum of \$25,000.00 from the Air Force, Ohio shall be entitled to withdraw the \$10,000.00 dollars, and any interest which may accrue. In the event that Ohio ultimately recovers a penalty in the sum of \$5,000.00 from the Air Force, then the State of Ohio

and Rockwell shall divide the \$10,000.00 and interest equally. Or, if Rockwell has recovered such monies from the Air Force pursuant to its contract for Air Force Plant 85, then, from Rockwell's deposit into the registry of the Court, \$5,000.00 plus interest shall be paid into the Treasury of the United States. If the State recovers no penalty against the Air Force, then the \$10,000.00 plus interest shall be returned to Rockwell, or, if Rockwell has recovered such monies from the Air Force pursuant to its contract for Air Force Plant 85, then Rockwell's deposit of \$10,000.00, plus interest, shall be paid into the Treasury of the United States.

VI

INJUNCTIVE RELIEF

With regard to any and all allegations of the Complaint addressing injunctive relief at any facility or against any party, the Complaint is dismissed without prejudice.

VII

PARTICULATE EMISSIONS AND CREDIT PROJECTS

In the event that, after the exhaustion of all appeals, the imposition of a civil penalty is the ultimate result in this case, then it is further agreed as between Ohio and the Air Force that the design and construction of the flue gas filtration system at Air Force Plant 85, together with that system's ability to over-control particulate and sulfur emissions, shall be

regarded as a benefit to the State of Ohio and a credit project. Also in the event that a civil penalty is the ultimate result in this case, then it is further agreed between Ohio and the Air Force that particulate "emissions" (as defined by Ohio Administrative Code Section 3745-15-01(N)) from the powerhouse at Air Force Plant 85 shall not contain more than 0.110 pounds of particulate matter per million BTUs of heat input. The federal defendants shall give a copy of this Consent Judgment to any contractor operator for Air Force Plant 85. This limitation on emissions from the flue gas filtration system at Air Force Plant 85 shall be for fifteen (15) years, or for as long as Plant 85 is owned or leased by the Air Force, whichever term is shorter. In the event that the State of Ohio elects to reduce the level of particulates generally required by its statutes or regulations, such that Plant 85 would be called upon to meet emission levels lower than those required by this judgment, Plant 85 will not be prejudiced in meeting those new standards based on, or in any way, because it over controlled particulates before the change in standards. For example, if Ohio elects to order a reduction of particulates on a percentage of prior emissions basis, Plant 85 will be allowed to calculate its new emissions based upon the specific permissible limitations which would have been applicable to the facility in the absence of the agreed upon overcontrol, if Plant 85 so chooses.

VIII

RELEASES

Except as specifically provided in this Consent Judgment, the State hereby releases, covenants not to sue, and covenants not to bring any action whether civil, criminal or for administrative Findings and Orders, against Rockwell, the United States or any department or agency thereof, or any past or present official, employee, or contractor thereof (and any past or present official, officer, director, employee or sub-contractor of such contractor), with respect to the claims contained in the Complaint filed in this action.

Until such time as Ohio issues a lawful permit for the air emissions from the powerhouse at Air Force Plant 85 in response to the pending permit application, Ohio agrees not to litigate over the absence of permits to operate for the powerhouse. Ohio also agrees not to seek further fines, penalties, sanctions, or other relief against Plant 85 or its owners or operators for the absence of permits up until the time Ohio issues the pending lawful permit for those operations.

IX

THE RECORD

The parties may file with the Clerk of the Court all of the discovery documents in this case, including the Interrogatories, Requests for Admission, and transcripts of Depositions as part of the record in this case. However, this provision is not

to be construed as an admission by the State of Ohio that any of these discovery materials may be used or considered during the appeal of the final judgment in this case (including the Court's decisions of March 31, 1987, November 4, 1988, or October 27, 1988).

X

USE OF THIS JUDGMENT

This Consent Judgment was negotiated and executed by the parties in good faith to avoid further 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 Judgment is not an admission of liability with regard to any issue dealt with in this Consent Judgment. 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 this Consent Judgment), and any proceeding brought by the parties to enforce this Consent Judgment, and except as res judicata solely among the parties to this litigation on the issues ultimately decided, to the extent that the parties can bind themselves and others, this Consent Judgment 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, statute or regulation.

XI

MISCELLANEOUS

Without predetermining whether or not the President can exempt the facility from any provisions of this Consent Judgment, nothing in this Consent Judgment shall preclude, restrict or expand any right or authority of the President of the United States contained in 42 U.S.C. § 7418.

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.

XII

COSTS

Each party will bear its own costs and expenses, including attorney and expert witness fees. This provision shall not, however, be construed to preclude Rockwell from seeking to recover its costs and expenses from the Air Force pursuant to its contract for Air Force Plant 85. Court costs shall be paid by the Air Force if the imposition of a civil penalty is the ultimate result after exhaustion of all appeals. Court costs shall be paid by the State if no penalty is imposed as the ultimate result after exhaustion of all appeals.

- SO ORDERED this 5th day of June _____,

1989.

John D. Holschuh
JOHN D. HOLSCHUH, JUDGE
United States District Court

DATED: June 5, 1989

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- 13 -

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