

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

STATE OF OHIO, ex rel.	:	CASE NO. C-1-86-0217
NANCY HARDIN ROGERS	:	
ATTORNEY GENERAL OF OHIO,	:	JUDGE S. ARTHUR SPIEGEL
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES DEPARTMENT OF	:	
ENERGY, et al.	:	
	:	
Defendants.	:	

**JOINT MOTION OF STATE OF OHIO AND UNITED STATES DEPARTMENT OF ENERGY FOR ENTRY OF PROPOSED CONSENT DECREE**

Plaintiff, the State of Ohio (“Ohio”) and Defendant, the United States Department of Energy (“DOE”), by this motion ask the Court to execute and enter the proposed Consent Decree, attached to this Joint Motion as Attachment 1. This proposed Consent Decree is identical in substance to the proposed Partial Consent Decree lodged with the Court on July 7, 2008. The only change, from the proposed Partial Consent Decree, is the deletion of the word “Partial” from the title of the Consent Decree and throughout the Consent Decree. This change was made based upon comments received from the public. Ohio and DOE considered all comments submitted by the public on the proposed Consent Decree and have determined that the proposed Consent Decree is fair, reasonable, adequate, and consistent with the purposes of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* Therefore, the Court should enter the proposed Consent Decree. A summary of comments received and Ohio and DOE’s joint response to the comments (“Response to Comments”) is

attached hereto as Attachment 2.

In support of this Joint Motion, Ohio and DOE rely on the accompanying Memorandum in Support, the attached Response to Comments, other documents of record in this case, and the entire record of this litigation. Ohio and DOE respectfully submit that oral argument on this Joint Motion is not required.

Respectfully submitted,

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Attorney General of Ohio

GREGORY G. LOCKHART  
United States Attorney

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Counsel for Dept. of Energy

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Joint Motion of State of Ohio and United States Department of Energy for Entry of Proposed Consent Decree was filed electronically on October 27, 2008. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Timothy J. Kern  
Assistant Attorney General  
Timothy J. Kern

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SOUTHERN DISTRICT OF OHIO  
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ATTORNEY GENERAL OF OHIO,	:	JUDGE S. ARTHUR SPIEGEL
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
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 alleged that DOE, NLO, and NLI have violated various provisions of Federal and Ohio laws and regulations, which DOE, NLO, and NLI have denied;

WHEREAS, on December 2, 1988, the Court entered a Consent Decree (Doc. 95) (“1988 Consent Decree”) which resolved Count One and Counts Three through Twenty Seven of the Complaint;

WHEREAS, the 1988 Consent Decree was amended by the January 22, 1993 entry of the Stipulated Amendment to Consent Decree entered December 2, 1988, and Settlement of Charges in Contempt;

WHEREAS, paragraph 8.2 of the 1988 Consent Decree reserves Count Two of the Complaint, concerning Ohio's claim for natural resource damages pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9607(a) ("CERCLA");

WHEREAS, Ohio and DOE agree, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and is entered into without the admission or adjudication of any issues of fact or law, that settlement of this matter will avoid further litigation between the Parties, and that this Consent Decree is fair, reasonable, consistent with CERCLA and in the public interest; and

WHEREAS, Ohio and DOE agree, and the Court by entering this Consent Decree finds, that the restoration actions and other compensatory activities and damages payments set forth in this Consent Decree constitute appropriate actions to restore, replace, or acquire the equivalent of the natural resources allegedly injured by releases or threatened releases of hazardous substances at the Fernald Preserve.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED as follows:

#### I. DEFINITIONS

1.1 "DOE" means the United States Department of Energy and any predecessor or successor agency or department of DOE.

1.2 "DOI" means the United States Department of the Interior.

1.3 "Fernald Preserve" means the approximately 1050 acre tract of real property located at 7400 Willey Road, in Hamilton and Butler counties, Ohio, as shown

in Appendix A, and formerly known as the Fernald Closure Project, the Fernald Environmental Management Project, and the Feed Materials Production Center.

1.4 “Future Oversight Costs” means internal costs incurred by Ohio EPA after the Effective Date of this Consent Decree in implementing the Natural Resource Restoration Plan provided for in paragraph 3.1, below.

1.5 “Natural Resources” shall have the meaning provided in CERCLA section 101(16), 42 U.S.C. § 9601(16).

1.6 “Natural Resource Damages” means any damages recoverable by Ohio on behalf of the public, for injury to, destruction of, or loss or impairment of Natural Resources as set forth in CERCLA Section 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C), at and in the vicinity of the Fernald Preserve as a result of a release of hazardous substances, including but not limited to: (i) Natural Resource Damage Assessment Costs; (ii) the costs of restoration, rehabilitation, or replacement of injured or lost natural resources or of acquisition of equivalent resources; (iii) compensation for injury, destruction, loss, impairment, diminution in value, or loss of use of natural resources; and (iv) each of the categories of recoverable damages described in 43 C.F.R. § 11.15 and applicable state law.

1.7 “Natural Resource Damage Assessment Costs” means the costs Ohio has incurred prior to the Effective Date of this Consent Decree in connection with the assessment of the Natural Resource Damages at and in the vicinity of the Fernald Preserve, including but not limited to: (i) the costs of assessing injury, destruction, or loss or impairment arising from or relating to a release of hazardous substances; (ii) the costs of planning past restoration activities including, but not limited to, internal costs incurred

by Ohio EPA prior to the Effective Date of this Consent Decree and costs associated with the development of the Natural Resource Restoration Plan provided for in paragraph 3.1, below; and (iii) the costs of assessing the damages resulting from injury, destruction, or loss or impairment arising from or relating to a release of hazardous substances.

1.8 "Ohio" means the State of Ohio by and through its Attorney General, on behalf of the Ohio Environmental Protection Agency.

1.9 "Ohio EPA" means the Ohio Environmental Protection Agency.

1.10 "Parties" means DOE and Ohio.

1.11 "Trustees" means Ohio EPA, DOE, and DOI.

1.12 "United States" means the United States of America, including all of its departments, agencies, and instrumentalities.

## II. STATEMENT OF PURPOSE

2.1 By entering this Consent Decree, the mutual objectives of the Parties are: (a) to resolve DOE's alleged liability under Count Two of the Complaint by implementing the Natural Resource Restoration Plan, by making a one time cash payment to fund additional natural resource restoration projects and to provide for the reimbursement by DOE of Natural Resource Damage Assessment Costs incurred by Ohio, and by executing and recording Environmental Covenants which apply to the Fernald Preserve; and (b) to avoid further transaction costs and protracted litigation.

2.2 If for any reason the Court should decline to enter this Consent Decree in the form presented, or if entry of this Consent Decree is subsequently vacated, this Consent Decree and the Parties' agreement to it is voidable at the sole discretion of either

Party, and its terms may not be used as evidence in this or any other litigation between the Parties.

### III. NATURAL RESOURCE RESTORATION PLAN

3.1 The Natural Resource Restoration Plan ("Restoration Plan") for the Fernald Preserve is Appendix B, incorporated in and an enforceable part of this Consent Decree. The Restoration Plan outlines the approach for ecological restoration of the Fernald Preserve. Restoration of the Fernald Preserve will transition the majority of the site from post-remediation conditions to the selected final land use, an undeveloped park with an emphasis on wildlife habitat. As set forth in section 2.1 of the Restoration Plan, the ecological goals of the Restoration Plan are to: 1) enhance and restore, as feasible given post-excavation land forms and soils, vegetative communities similar to native communities present in pre-settlement southwestern Ohio; 2) enhance the natural dynamic stream characteristics and aquatic systems of Paddys Run; 3) enhance and restore ecological systems that promote the habitation of wildlife populations native to southwestern Ohio; and 4) integrate mitigation requirements into natural resource restoration planning.

3.2 DOE shall implement all requirements in the Restoration Plan, which includes the identified restoration projects and the monitoring and maintenance requirements of the restoration projects.

### IV. PAYMENTS BY THE UNITED STATES

4.1 As soon as reasonably practicable after the Effective Date of this Consent Decree, the United States on behalf of DOE shall pay Ohio Thirteen Million, Seven Hundred Fifty Thousand Dollars (\$13,750,000) to restore, replace, or acquire the

equivalent of injured Natural Resources at and in the vicinity of the Fernald Preserve, in a manner consistent with the Restoration Plan, and to reimburse Ohio's Natural Resource Damage Assessment Costs.

4.2 Ohio and the United States on behalf of DOE agree that in any judicial proceeding to enforce the terms of this Consent Decree and/or to find DOE in contempt for failure to comply or delay in compliance with such terms, the United States on behalf of DOE may raise as a defense that such 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 Ohio disagrees that such defenses exist, Ohio and the United States on behalf of DOE agree and stipulate that it is premature at this time to raise and adjudicate the existence of such defenses.

4.3 If payment pursuant to paragraph 4.1 is not made in full within 120 days after the Effective Date of this Consent Decree, then interest on the unpaid balance shall be paid, and shall begin to accrue commencing on the 121<sup>st</sup> day after the Effective Date and shall continue to accrue through the date of payment. Interest shall accrue at the same rate as is specified for interest on investments of the Hazardous Substances Superfund established under subchapter A of Chapter 98 of Title 26 of the U.S. Code.

4.4 Payment to Ohio pursuant to paragraph 4.1 and 4.3 shall be in the form of an Electronic Funds Transfer into an interest-bearing escrow account in the Registry of the United States District Court for the Southern District of Ohio ("Fernald Natural Resource Damages Court Registry Escrow Account," hereinafter "Escrow Account"). Pursuant to this Consent Decree, and in accordance with 28 U.S.C. § 2041, the Clerk of the Court for the United States District Court for the Southern District of Ohio will accept

payment from the United States on behalf of DOE and shall place said payment in the Registry of the Court in an interest-bearing account. The Clerk of the Court shall disburse money from the Escrow Account (less 10% of interest earned, which is the Registry fee) pursuant to orders of this Court in accordance with paragraphs 4.5 through 4.8 of this Consent Decree. The Parties may request waiver of the Registry fee from the Director of the Administrative Office of the United States Courts pursuant to Section 2.7.2 of the Guide to Judicial Policies and Procedures.

4.5 Applications for orders for disbursements from the Escrow Account to transfer funds or to use funds, as set forth in paragraphs 4.6 through 4.8 of this Consent Decree, shall be made by joint motion of counsel for Ohio and the United States.

4.6 The money in the Escrow Account, including interest earned, may be transferred to an account designated by Ohio and acceptable to the United States. Any transferred funds shall be applied toward the costs of restoration, replacement, or acquisition of the equivalent of injured Natural Resources at and in the vicinity of the Fernald Preserve, as set forth in the Restoration Plan, and to reimburse Ohio for its Natural Resource Damage Assessment Costs pursuant to paragraph 4.8 of this Consent Decree, and shall not be borrowed or used for any other purposes.

4.7 All decisions regarding expenditures from the Escrow Account, and all decisions regarding the implementation of and any amendment to the Restoration Plan, shall be made pursuant to and consistent with the terms of the Trustees' July 2001 Memorandum of Understanding, which is Appendix C to this Consent Decree, and which requires the unanimous agreement of the Trustees. The Trustees shall expend the funds

in the Escrow Account to implement the plan developed pursuant to Section 1.5 of the Restoration Plan.

4.8 A portion of the money in the Escrow Account shall be used to reimburse Ohio for its Natural Resource Damage Assessment Costs. Within 30 days after the Effective Date of this Consent Decree, Ohio shall submit an itemized statement of such costs to DOE and DOI. The Trustees shall jointly determine the amount of Ohio's Natural Resource Damage Assessment Costs and shall make their determination pursuant to and consistent with the terms of their July 2001 Memorandum of Understanding, Appendix C; provided however, that in no event shall the reimbursed amount of Ohio's Natural Resource Damage Assessment Costs be less than \$275,000 or more than \$500,000.

4.9 Future Oversight Costs shall continue to be paid by DOE pursuant to the federal facilities grant process created in order to implement Section 7 of the 1988 Consent Decree.

4.10 Future Oversight Costs for the development and implementation of the plan to be developed pursuant to section 1.5 of the Restoration Plan shall be capped at \$50,000 per year and shall be limited to the four years after the Effective Date of this Consent Decree, unless otherwise agreed by DOE and Ohio EPA.

## V. ENVIRONMENTAL COVENANTS

5.1 Within 60 days after the Effective Date of this Consent Decree, DOE shall submit to Ohio executed Environmental Covenants, in the form attached as Appendix D, to be recorded in the Hamilton and Butler County Recorders' Offices. Within 30 days of

receipt of the Environmental Covenants executed by Ohio EPA, DOE shall record in the Hamilton and Butler County Recorders' Offices the executed Environmental Covenants.

#### VI. COVENANTS BY OHIO

6.1 Except as provided in paragraphs 7.1, 7.2, and 7.3, Ohio releases, covenants not to sue and not to bring any civil action, or issue administrative findings and orders, against the United States or any department or agency thereof, or any past or present official, employee, agent, or contractor (and any past or present official, officer, director, employee, agent or sub-contractor of such contractor) of the United States, with respect to the claims for Natural Resource Damages contained in Count Two of the Complaint. These covenants shall take effect upon receipt of the payment pursuant to paragraph 4.1 or 4.3 of this Consent Decree, and are conditioned upon the satisfactory performance by DOE of its obligations under this Consent Decree.

6.2 The covenants in paragraph 6.1 extend only to the United States and any past or present official, employee, agent, or contractor (and any past or present official, officer, director, employee, agent or sub-contractor of such contractor) of the United States and do not extend to any other person.

#### VII. RESERVATIONS OF RIGHTS

7.1 General Reservation of Rights. This Consent Decree is without prejudice to any rights Ohio may have against the United States with respect to all other matters not expressly included within paragraph 6.1 of this Consent Decree or paragraph 8.1 of the 1988 Consent Decree.

7.2 Specific Reservations of Rights. Notwithstanding any other provision of this Consent Decree, Ohio reserves all rights against DOE with respect to:

- a) claims based upon a failure by DOE to meet a requirement of this Consent Decree;
- b) liability for any damages or any other costs incurred or to be incurred by Ohio that are not within the definition of Natural Resource Damages and have not been resolved by the 1988 Consent Decree;
- c) liability for failure to comply with any CERCLA Record of Decision pertaining to the Fernald Preserve as of the date of lodging this Consent Decree;
- d) liability arising from injury to Natural Resources after the date of lodging of this Consent Decree resulting from any disposal of hazardous substances at the Fernald Preserve; and
- (e) criminal liability, if any, including criminal liability for past actions by Defendants.

7.3 Notwithstanding any other provision of this Consent Decree, Ohio also reserves the right to institute proceedings against DOE in this action or in a new action seeking recovery of Natural Resource Damages, based on: (i) conditions with respect to the Fernald Preserve, unknown to Ohio as of the date of lodging of this Consent Decree, that result in releases of hazardous substances that cause or contribute to injury to, destruction of, or loss of Natural Resources (“Unknown Conditions”); or (ii) information received by Ohio after the date of lodging of this Consent Decree which indicates that there is injury to, destruction of, or loss of Natural Resources of a type that was unknown to Ohio as of the date of lodging of this Consent Decree (“New Information”). For the purpose of this paragraph, the information and conditions known to Ohio shall include any information or conditions listed or identified in records or documents relating to the

Fernald Preserve that were in the possession or under the control of Ohio as of the date of lodging this Consent Decree, or that are in the administrative records of the response actions taken pursuant to the 1988 Consent Decree.

7.4 DOE reserves any and all defenses it may have to the claims reserved in paragraphs 7.1, 7.2, and 7.3, except that in any subsequent administrative or judicial proceeding initiated by Ohio for injunctive relief, or Natural Resource Damages or other relief related to the Fernald Preserve, DOE shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by Ohio in the subsequent proceeding were or should have been brought in the instant case; provided however, that nothing in this paragraph affects the enforceability of the covenants by Ohio set forth in Section VI. Nothing in paragraphs 7.1, 7.2, or 7.3 shall limit or otherwise affect the provisions of paragraph 8.1 of the 1988 Consent Decree.

#### VIII. COVENANTS BY DOE

8.1 DOE hereby agrees not to assert against Ohio any direct or indirect claim for reimbursement of any payment for Natural Resource Damages based on Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, and covenants not to sue Ohio under Section 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, with respect to Natural Resource Damages, including payments made under Section IV of this Consent Decree. These covenants shall not apply in the event Ohio brings a claim and/or administrative action against DOE pursuant to the reservations set forth in paragraphs 7.1, 7.2, and 7.3,

above, but only to the same extent and for the same matters, transactions, or occurrences as are raised in the claims or actions brought by Ohio pursuant to such reservations.

#### IX. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

9.1 Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree, and each Party expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which that Party may have with respect to any matter, transaction, or occurrence relating in any way to the Fernald Preserve against any person not a Party to this Consent Decree.

9.2 The Parties agree, and by entering this Consent Decree this Court finds, that DOE is entitled, as of the Effective Date of this Consent Decree, to protection from actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), or other applicable law, for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are Natural Resource Damages.

9.3 The Parties agree, and by entering this Consent Decree this Court finds, that DOE resolves its liability for Natural Resource Damages at the Fernald Preserve within the meaning of CERCLA section 113(f)(3), 42 U.S.C. § 9613(f)(3).

#### X. NOTICES AND SUBMISSIONS

10.1 Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as

specified herein shall constitute complete satisfaction of any written notice requirement of this Consent Decree with respect to Ohio and DOE, respectively.

As to DOE:

- a. Chief, Environmental Defense Section  
Re: DJ # 90-7-5-13  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

Or, if sent by courier or overnight delivery service:

Chief, Environmental Defense Section  
Re: DJ # 90-7-5-13  
Environment and Natural Resources Division  
U.S. Department of Justice  
Suite 8000  
601 D Street, N.W.  
Washington, D.C. 20004

- b. Office of Legal Services  
Environmental Management Consolidated Business Center  
U. S. Department of Energy  
250 E. 5th Street, Suite 500  
Cincinnati, OH 45202
- c. Office of General Counsel  
U.S. Department of Energy  
Room 6A-245  
1000 Independence Avenue, SW  
Washington, D.C. 20585

As to Ohio:

- a. Chief, Environmental Enforcement Section  
Ohio Attorney General's Office  
30 E. Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215

- b. Thomas A. Schneider (or his successor)  
Federal Facilities Program  
Ohio EPA, Southwest District Office  
401 East Fifth Street  
Dayton, Ohio 54502-2911

As to DOI:

- a. Mary Knapp  
U.S. Fish and Wildlife Service  
Reynoldsburg Ecological Services Field Office  
690 Americana Parkway, Suite H  
Reynoldsburg, Ohio 43068

XI. EFFECTIVE DATE AND RETENTION OF JURISDICTION

11.1 This Consent Decree shall take effect upon entry by the Court (“Effective Date”). The Parties recognize that certain obligations under this Consent Decree may be performed before this Consent Decree is entered by the Court.

11.2 The Court shall retain jurisdiction to modify and enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

XII. MODIFICATIONS

12.1 Any material modification of this Consent Decree shall be made by agreement of the Parties and in writing, and shall not take effect unless approved by the Court. Any non-material modification of this Consent Decree shall be made by agreement of the Parties and in writing, and shall not take effect until filed with the Court. Any modification of the Restoration Plan (Appendix B to this Consent Decree), the July 2001 Memorandum of Understanding (Appendix C to this Consent Decree), or the Environmental Covenants (Appendix D to this Consent Decree) shall be made by agreement of the Parties and in writing, and shall not take effect until filed with the

Court. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise, or approve modifications of this Consent Decree or the 1988 Consent Decree, as previously amended.

12.2 The provisions of this Consent Decree are not severable. The Parties' consent hereto is conditioned upon the entry of this Consent Decree in its entirety without modification, addition, or deletion, except as agreed to by the Parties.

12.3 Unanticipated or increased costs or expenses associated with the implementation, oversight, or monitoring of actions called for by this Consent Decree shall not serve as a basis for modifications of this Consent Decree.

### XIII. SIGNATORIES

13.1 The undersigned representatives of Ohio and DOE each certify that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document. This Consent Decree may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument.

### XIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

14.1 This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The Parties reserve the right to withdraw or withhold their consent if comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate.

14.2 As soon as reasonably practicable after expiration of the public comment period in paragraph 14.1, the Parties shall jointly inform the Court of the substance of any

comments received regarding the Consent Decree, and of the Parties' responses to such comments, and shall move the Court to enter the Consent Decree if the Parties do not withdraw or withhold their consent pursuant to paragraph 14.1.

#### XV. FINAL JUDGMENT

15.1 This Consent Decree and its appendices constitute the final, complete, and exclusive understanding among the Parties with respect to the settlement embodied herein. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement of Count Two other than those expressly contained in this Consent Decree.

15.2 The terms of the 1988 Consent Decree, as previously amended, shall be unaltered and shall remain in full force and effect.

15.3 Upon approval and entry of this Consent Decree by the Court, this Consent Decree together with the 1988 Consent Decree, as previously amended, shall constitute a final judgment between and among Ohio and DOE in this case. The Court finds that there is no reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54(b) and 58.

15.4 Except as set forth in Section IV, each Party shall bear its own costs and attorneys' fees.

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Attorney General of Ohio

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Counsel for State of Ohio

October 27, 2008

Respectfully submitted,

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RONALD J. TENPAS  
Assistant Attorney General

By: [Signature]  
DANIEL R. DERTKE  
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Environment & Natural Resources Division  
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(202) 514-0994  
daniel.dertke@usdoj.gov

Counsel for Dept. of Energy

October 24, 2008

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2008

\_\_\_\_\_  
S. ARTHUR SPIEGEL  
United States District Judge

**OhioEPA**  
Office of Federal Facilities Oversight



**Response to Comments**

**Proposed Fernald Partial Consent Decree**

**Agency Contacts**

Ohio EPA:	Tom Schneider Office of Federal Facilities Oversight (937) 285-6466 tom.schneider@epa.state.oh.us
Public Involvement Coordinator:	Erika Wiggins (614) 644-2160 erika.wiggins@epa.state.oh.us
US Department of Energy:	Johnny Reising Fernald Preserve (513) 200-9676 johnny.reising@emcbc.doe.gov

Ohio EPA and U.S.DOE held a public hearing and associated comment period on July 31, 2008 regarding a proposed Partial Consent Decree to settle a natural resources damages claim at the Fernald site. This document summarizes the comments and questions received at the public hearing and/or during the associated comment period, which ended on August 22, 2008.

Ohio EPA and U.S.DOE reviewed and considered all comments received during the public comment period. In this case, Ohio EPA and U.S.DOE have authority to consider specific issues regarding whether the Partial Consent Decree should be entered into and comments on how to spend funds should the Partial Consent Decree be accepted.

In an effort to help you review this document, the questions are grouped by topic and organized in a consistent format.

**Partial Consent Decree**

**Comment 1:** **Several commenters expressed their support for entering into this settlement agreement.**

**Response 1:** Ohio and U.S.DOE appreciate the comments of support and believe that this settlement is in the best interests of all parties.

**Comment 2:** Several citizens suggested that the words “**Partial Consent Decree**” are confusing and should be combined with the prior 1988 consent decree to be one final consent decree.

**Response 2:** Ohio and U.S.DOE understand the citizens’ concerns with the naming convention of the agreement. The use of the term “Partial” was not intended to suggest that Ohio’s claims regarding Fernald are still unsettled. Rather the term “Partial” reflected the existence of another decree that resolved the majority of the counts asserted in Ohio’s complaint and that remains in operation. In 1986, Ohio initiated this proceeding by filing a multi-count complaint. In 1988, the parties settled all but one count of that complaint in a consent decree. That 1988 decree remains open and effective, still guiding and directing certain responsibilities and activities at the Fernald site. The only count not resolved by the 1988 decree is Ohio’s natural resource damage claim. This decree resolves this remaining claim, but does not modify, override, or subsume the 1988 decree in any way. To relieve any confusion, the parties will revise the name of this Consent Decree by eliminating the word “Partial”.

Staffing

**Comment 3:** Comments were made that due to their tenure and experience on the Fernald project Tom Schneider (Ohio EPA) and Johnny Reising (U.S.DOE) should continue as the Fernald natural resource trustees until the funds have been expended.

**Response 3:** Ohio and U.S.DOE appreciate the support expressed for these individual staff and agree that experience with the site issues is important to future success. Though both are expected to continue in their roles into the foreseeable future, should that change, both parties agree to provide other experienced and capable staff to ensure the project proceeds successfully.

**Comment 4:** A comment was made that Tom Schneider (Ohio EPA) and Johnny Reising (U.S.DOE) should have discretion to decide where the funds used will have the most value for the dollars spent.

**Response 4:** The funds are to be used by the trustee agencies to restore, replace or acquire the equivalent of the impacted natural resources. Both the Consent Decree and the Natural Resource Restoration Plan place restrictions on how the funds may be used. Within those restrictions, the trustees (U.S. DOE, Ohio and U.S. Department of the Interior) will determine how to utilize the funds. Specifics regarding fund utilization will be more fully described in the plan to be developed by the trustees within 120 days of U.S.DOE depositing the funds into the Court Registry account.

Restrictions on Use of Funds

**Comment 5:** Citizens requested that money from this fund be protected by an agreement and restricted for use in the Fernald NRD settlement only and never placed into the Ohio General Revenue fund.

**Response 5:** Ohio and U.S.DOE agree with the citizens' desire to ensure the money is only used for appropriate natural resource restoration activities consistent with the terms of the agreement. As required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and as set forth in the Consent Decree, the funds are to be used by the trustee agencies to restore, replace or acquire the equivalent of the impacted natural resources. Per the Consent Decree, the funds are to be deposited into an interest-bearing account in the Registry of the United States District Court for the Southern District of Ohio. The Natural Resource Restoration Plan also places restrictions on how the funds may be used and ensures that the funds are used only to restore, replace or acquire the equivalent of the impacted natural resources. The funds will be dispersed from the Court Registry account and will not be placed into the Ohio General Revenue fund.

**Comment 6:** Commenters requested funds from the settlement be placed into an interest bearing account and not be used for studies or research but should be used for tangible items.

**Response 6:** Per the Consent Decree, the funds are to be deposited into an interest-bearing account in the Registry of the United States District Court for the Southern District of Ohio. With regard to the desire for tangible items, the funds are to be used by the trustee agencies to restore, replace or acquire the equivalent of the impacted natural resources. Ohio and U.S.DOE agree that funds should be used for providing long-term benefits to these impacted natural resources. In this process it may be necessary to conduct limited studies, research or evaluations; however, Ohio and U.S.DOE agree that studies are not the intended primary utilization of the funds. Specifics regarding fund utilization will be more fully described in the plan to be developed by the trustee agencies within 120 days of U.S.DOE depositing the funds into the Court Registry account.

Suggested Uses of Funds

**Comment 7:** Commenters suggested that funds be used locally (e.g., within aquifer, a 5-mile radius, etc. ).

**Response 7:** Ohio and U.S.DOE agree that the funds should be used locally. As specified in the Natural Resource Restoration Plan, "The NRTs agree that funds from this restoration account may be used for habitat enhancements on site at the Preserve. The NRTs agree that funds from this restoration account may be used to acquire additional land or interests in land, to make ecological improvements to that land to enhance habitats and protect water quality in Paddys Run and the Great Miami Aquifer in the vicinity of the Preserve." Specifics regarding fund utilization will be more fully described in the plan to be developed by the trustees within 120 days of U.S.DOE depositing the funds into the Court Registry account.

**Comment 8:** Citizens request that property only be obtained from willing sellers.

**Response 8:** Ohio and U.S.DOE are committed to acquiring property or interests in property only from willing sellers. The parties

agree that eminent domain authority will not be invoked as part of utilization of these funds.

**Comment 9:** **Citizens request that, once easements are purchased, they should be in perpetuity and a mechanism should be in place for enforcement if land owners do not live up to the terms of the agreement.**

**Response 9:** Ohio and U.S.DOE would expect that easements would be perpetual and include a mechanism for enforcement. Mechanisms for the enforcement of environmental covenants or easements already exist in Ohio law. However, specifics regarding fund utilization will be more fully described in the plan to be developed by the trustees within 120 days of U.S.DOE depositing the funds into the Court Registry account.

**Comment 10:** **One commenter suggested creating a perpetual fund from which interest would be used in the future to fund land protection projects.**

**Response 10:** Both the Consent Decree and the Natural Resource Restoration Plan place restrictions on how the funds may be used by the trustee agencies. However, specifics regarding fund utilization will be more fully described in the plan to be developed by the trustees within 120 days of U.S.DOE depositing the funds into the Court Registry account. The parties will consider this suggestion when developing the plan.

**Comment 11:** **Many commenters had specific recommendations on how to spend the funds including:**

- **Development of cave salamander habitat**
- **Construction of vernal pool habitats**
- **Ambystomid habitat**
- **Amphibian reintroductions**
- **Protect and enhance riparian corridors in local streams.**

**Response 11:** Please see Response 10.

**Comment 12:** **Commenters requested projects be prioritized by proximity to the site and biological importance.**

**Response 12:** Please see Response 10.

- Comment 13:** **Citizens request that no money should be spent on projects that are covered under previous consent agreements.**
- Response 13:** Both the Consent Decree and the Natural Resource Restoration Plan place restrictions on how the funds may be used by the trustee agencies. These restrictions require that the funds are to be used to restore, replace or acquire the equivalent of the impacted natural resources.
- Comment 14:** **A commenter requested \$58,000 to purchase burial land in Adams County for Native American remains.**
- Response 14:** Purchasing property in Adams County would not be consistent with the terms of the settlement agreement nor the federal law governing natural resource damage claims. Federal law, the Consent Decree, and the Natural Resource Restoration Plan place restrictions on how the funds may be used by the trustee agencies. However, the trustees have always been supportive of the use of Fernald for re-interment of Native American remains. In fact, the Natural Resource Restoration plan addresses the issue, stating "Reburial of Native American remains can occur within the restored areas with no impact on the restoration plans outlined in this plan."

Project Timeline

- Comment 15:** **Citizens are concerned the project may go beyond the stated 4-year time frame.**
- Response 15:** Ohio and U.S.DOE hope to use the funds in a timely manner. However, the highest priority will be placed on proper and effective utilization of the funds, while attempting to maximize the benefits of the available dollars. The four-year time frame discussed at the public hearing is related to U.S.DOE funding Ohio's oversight costs and does not specifically restrict the timeframe for spending the restoration funds. However, both parties see it in their best interest to try to use the funds responsibly and as soon as practicable.

**Citizen Involvement**

**Comment 16:** Commenters requested regular updates on expenditures of the funds.

**Response 16:** Ohio and U.S.DOE are committed to maintaining the long history of successful stakeholder involvement in the Fernald cleanup and restoration. Both parties commit to providing regular updates through quarterly Legacy Management meetings, separate NRT meetings and regular dialogue with stakeholders. Any citizen wanting an update on activities is invited to contact Ohio EPA or U.S.DOE for an update on the current status of the project.

**Comment 17:** Citizens request the opportunity to comment on the draft fund utilization plan half way through the 120 days and to provide final comments at the end of the 120 days.

**Response 17:** Please see Response 16. In addition, with regard to a specific meeting halfway through the 120 day period, it is possible that a draft document would not be completed at that time, because the trustees (U.S.DOE, Ohio, and DOI) need to meet and conduct fact-gathering prior to drafting the document. Ohio and U.S.DOE commit to holding a public availability session, during which comments can be provided, prior to finalization of the document as well as having an on-going dialogue with interested stakeholders as the document is developed.

**End of Response to Comments**

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

STATE OF OHIO, ex rel.	:	CASE NO. C-1-86-0217
NANCY HARDIN ROGERS	:	
ATTORNEY GENERAL OF OHIO,	:	JUDGE S. ARTHUR SPIEGEL
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES DEPARTMENT OF	:	
ENERGY, et al.	:	
	:	
Defendants.	:	

**MEMORANDUM IN SUPPORT OF THE JOINT MOTION OF STATE OF OHIO AND  
UNITED STATES DEPARTMENT OF ENERGY FOR ENTRY OF PROPOSED  
CONSENT DECREE**

Plaintiff, the State of Ohio (“Ohio”) and Defendant, the United States Department of Energy (“DOE”), jointly move the Court to enter the proposed Consent Decree in this action, which was lodged with the Court on July 7, 2008. The proposed Consent Decree is “fair, reasonable and adequate – in other words, ‘consistent with the purposes that CERCLA is intended to serve.’” *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991). Therefore, the Court should grant the joint motion and enter the proposed Consent Decree.

## **BACKGROUND**

On March 11, 1986, Ohio filed a Complaint in the above-captioned case against DOE, NLO, Inc. ("NLO"), and NL Industries, Inc. ("NLI"). Ohio alleged that DOE, NLO, and NLI had violated various provisions of Federal and Ohio laws and regulations, which DOE, NLO, and NLI have denied. On December 2, 1988, the Court entered a Consent Decree (Doc. 95) ("1988 Consent Decree") which resolved Count One and Counts Three through Twenty Seven of the Complaint. The 1988 Consent Decree was amended by the January 22, 1993, entry of the Stipulated Amendment to Consent Decree entered December 2, 1988, and Settlement of Charges in Contempt (Doc. 124).

Paragraph 8.2 of the 1988 Consent Decree reserved Count Two of the Complaint concerning Ohio's claim for natural resource damages pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9607(a) ("CERCLA"). The proposed Consent Decree requires DOE to implement restoration actions, pursuant to a Natural Resource Restoration Plan, to compensate certain Ohio EPA costs, and to deposit \$13,750,000 into an interest-bearing account in the Registry of the United States District Court for the Southern District of Ohio for the restoration, replacement, or acquisition of the equivalent of the impacted natural resources at the Fernald Preserve. Entry of the proposed Consent Decree will resolve Ohio's claim for natural resource damages set forth in Count Two of the Complaint.

### **I. Site History and Nature of the Natural Resource Damages Claim**

After the 1988 Consent Decree was entered by this Court, the Natural Resource Trustees, Ohio EPA, DOE, and the United States Department of the Interior, directed their attention to resolving the issues regarding alleged injuries to natural resources at DOE's Feed Material

Production Center site, an approximately 1,050-acre tract of real property located at 7400 Willey Road, in Hamilton and Butler counties, now known as the Fernald Preserve. As part of this effort, DOE completed a Natural Resource Impact Assessment (“NRIA”) so that the Natural Resource Trustees could determine the impacts to natural resources caused by site operations. The NRIA was initially made public on September 21, 1998.

Despite several years of discussion, the Natural Resource Trustees did not reach agreement on Ohio’s natural resource damages claim. As a result, Ohio and DOE prepared to litigate the claim. At a final settlement conference held on June 18, 2008, Ohio and DOE reached agreement on a proposed Consent Decree.

**II. The Proposed Consent Decree and Comments on the Proposed Consent Decree**

The Consent Decree requires: (1) implementation by DOE of a Natural Resource Restoration Plan, which identifies restoration projects and the monitoring and maintenance requirements for those projects; (2) payment of \$13,750,000 to Ohio by the United States to restore, replace, or acquire the equivalent of injured natural resources at and in the vicinity of the Fernald Preserve, and to reimburse certain Ohio natural resource damages assessment costs; (3) recording of environmental covenants that restrict the use of the Fernald Preserve to the natural resource restoration purposes specified in the Natural Resource Restoration Plan; and (4) payment by DOE of certain Ohio EPA future oversight costs for the Natural Resource Restoration Plan.

Ohio published notice of the proposed Consent Decree in two newspapers of general circulation, and on July 31, 2008, Ohio and DOE held a public meeting to explain the proposed Consent Decree and to solicit additional public comments. Ohio and DOE received approximately thirty (30) comments on the proposed Consent Decree. A summary of comments

received and Ohio and DOE's joint response to the comments ("Response to Comments") is attached as Attachment 2 to the Joint Motion of Ohio and DOE for Entry of Proposed Consent Decree. Some of the more significant comments are highlighted below. Additional comments and responses are set forth in greater detail in the Response to Comments, in which the individual comments and responses were grouped by topic into seventeen comment categories. As explained below and in the Response to Comments, after reviewing the public comments, Ohio and DOE continue to believe that the entry of the proposed Consent Decree is fair reasonable, adequate, and consistent with the purposes of CERCLA, and that the Court should enter the proposed Consent Decree.

Several commenters expressed their support for entry of the proposed Consent Decree. Other commenters expressed concerns regarding how the funds would be used and maintained. Commenters suggested that the funds should be used for restoration projects at and near the Fernald Preserve, the funds should be used for tangible restoration projects rather than studies or research, the funds should be placed into an interest bearing account and not commingled with Ohio's General Revenue fund, and restoration projects should be completed in a timely manner. As set forth in the Response to Comments, Ohio and DOE believe that the proposed Consent Decree and accompanying Natural Resource Restoration Plan sufficiently address these concerns, and no changes to the content of the proposed Consent Decree were deemed necessary.

Some commenters suggested that the title "Partial Consent Decree" was confusing because this Consent Decree will be the final Consent Decree filed in this case. Thus, Ohio and DOE have agreed to delete the word "Partial" and identify this Decree as simply a "Consent Decree." The proposed Consent Decree, with the deletion of the word "Partial" from the title of

the proposed Consent Decree, and conforming changes throughout, is attached as Attachment 1 to the Joint Motion of Ohio and DOE for Entry of Proposed Consent Decree.

### ARGUMENT

#### THE PROPOSED CONSENT DECREE IS FAIR, REASONABLE, AND ADEQUATE.

In considering whether to enter the proposed Consent Decree, this Court must consider whether “the terms of the decree are fair, reasonable and adequate – in other words, consistent with the purposes that CERCLA is intended to serve.” *Akzo Coatings*, 949 F.2d at 1435 (internal quotation marks omitted). Although the Court is not a “rubber stamp,” it nevertheless “may not substitute [its] own judgment for that of the parties to the decree.” *Id.* This means that the Court need not “determine whether this is the best possible settlement that could have been obtained, but only whether it is fair, adequate, and reasonable.” *Id.* at 1436.

The Consent Decree proposed by Ohio and DOE meets all the criteria set forth above, and should be entered by this Court. The terms of the proposed Consent Decree are a fair compromise reached after extensive discovery and motion practice. Furthermore, Ohio and DOE negotiated the terms of the proposed Consent Decree in a fair, thorough and arms length manner with the oversight of the Court at the various status and settlement conferences. Finally, public comments regarding the terms of the proposed Consent Decree were received and considered. None of the public comments calls into question the basic conclusion that the parties’ proposed Consent Decree is fair, reasonable, and consistent with CERCLA, and is appropriate for the Court to enter as a final judgment which, together with the prior consent decree with respect to the other claims in the Complaint, fully concludes this case. Therefore, the Court should execute

the proposed Consent Decree and enter it as a final judgment in this action.

Respectfully submitted,

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United States Attorney

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Memorandum in Support of the Joint Motion of State of Ohio and United States Department of Energy for Entry of Proposed Consent Decree was filed electronically on October 27, 2008. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Timothy J. Kern  
Assistant Attorney General  
Timothy J. Kern

**Sumner, Wanda**

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**From:** Griffiths, Glenn  
**Sent:** Thursday, October 30, 2008 12:57 PM  
**To:** rc-fernald  
**Subject:** FW: Fernald motion to enter CD, as-filed----NRDA

**Attachments:** #390040-v1-FERNALD\_SETTLEMENT\_MOTION\_TO\_ENTER\_CD\_SIGNED\_CD.PDF; #390045-v1-FERNALD\_SETTLEMENT\_MOTION\_TO\_ENTER\_CD.PDF; #390039-v1-FERNALD\_SETTLEMENT\_MOTION\_TO\_ENTER\_CD\_RESPONSE\_TO\_COMMENTS.PDF; #390038-v1-FERNALD\_SETTLEMENT\_MOTION\_TO\_ENTER\_CD\_MEMO\_IN\_SUPPORT.PDF



#390040-v1-FERN #390045-v1-FERN #390039-v1-FERN #390038-v1-FERN  
LD\_SETTLEMENT\_..LD\_SETTLEMENT\_..LD\_SETTLEMENT\_..LD\_SETTLEMENT\_..

-----Original Message-----

**From:** Dertke, Daniel (ENRD) [mailto:Daniel.Dertke@usdoj.gov]  
**Sent:** Monday, October 27, 2008 5:33 PM  
**To:** Tormey, Randy; steven.miller@hq.doe.gov; Duchesne, Matthew (DOE); Reising, Johnny  
**Cc:** Lindsay, Jered (ENRD)  
**Subject:** Fernald motion to enter CD, as-filed

Attached is the motion asking the court to enter the CD, as filed today. Also attached is the memo in support, the response to comments, and <<#390045-v1-FERNALD\_SETTLEMENT\_MOTION\_TO\_ENTER\_CD.PDF>> t <<#390039-v1-FERNALD\_SETTLEMENT\_MOTION\_TO\_ENTER\_CD\_RESPONSE\_TO\_COMMENTS.PDF>> h <<#390038-v1-FERNALD\_SETTLEMENT\_MOTION\_TO\_ENTER\_CD\_MEMO\_IN\_SUPPORT.PDF>> e final version of the CD as signed by the parties. I have not attached the 4 appendices to the CD (site map, NRRP, MOU, and environmental covenant) because they are large files (about 7 MB total) and because they have not changed since the version we lodged in July 2008. But if anyone wants them (with today's file stamp), let me know and I will forward them to you.

We'll let you know when we hear something from the court.