

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

8/03/95 markup

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Case No.
v.)	
)	Hon. Judge
SOUTHERN OHIO COAL COMPANY,)	
)	
Defendant.)	
_____)	

CONSENT DECREE AND SETTLEMENT AGREEMENT

TABLE OF CONTENTS

	<u>Page</u>
BACKGROUND	1
I. JURISDICTION	7
II. PARTIES BOUND	7
III. DEFINITIONS	8
IV. CIVIL PENALTY AND COST REIMBURSEMENT	12
V. RESTORATION MEASURES FOR THE AFFECTED STREAMS	14
A. General Provisions	14
B. Determination of Recovery	16
C. Selection of Restoration Measures	23
VI. LEADING CREEK WATERSHED IMPROVEMENT PROJECT	27
A. Development of the Leading Creek Improvement Plan	27
B. Funding for Projects to Enhance the Leading Creek Watershed	30
C. Selection and Implementation of Enhancement Projects for the Leading Creek Watershed	32
VII. SUBMISSIONS REQUIRING AGENCY APPROVAL	34
VIII. DISPUTE RESOLUTION	36
IX. ACCESS TO INFORMATION AND PROPERTY	41
X. BIOLOGICAL AND CHEMICAL MONITORING AND REPORTING .	42
XI. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS ...	49
XII. REPORTING REQUIREMENTS	50
XIII. STIPULATED PENALTIES	52
XIV. CERTIFICATION OF RECOVERY	55
XV. FORCE MAJEURE	57
XVI. COVENANTS NOT TO SUE	60

XVII.	RESERVATIONS OF RIGHTS	61
XVIII.	NOTICES AND SUBMISSIONS.....	62
XIX.	REPRESENTATIVES	63
XX.	ASSURANCE OF ABILITY TO PERFORM	64
XXI.	MISCELLANEOUS	64
XXII.	MODIFICATION	65
XXIII.	LODGING AND OPPORTUNITY FOR PUBLIC COMMENT	65
XXIV.	TERMINATION	66
XXV.	CONTINUING JURISDICTION	66

TABLE OF APPENDICES

- APPENDIX 1 -- Ecological Recovery Endpoints of Streams Affected by the Meigs # 31 Mine Discharges during July - September 1993, March 2, 1994.
- APPENDIX 1A -- Errata Sheet to "Ecological Recovery Endpoints of Streams Affected by the Meigs # 31 Mine Discharges during July - September 1993" July 10, 1995
- APPENDIX 2 -- Unionid Mussel Recovery Endpoints
- APPENDIX 3 -- Leading Creek Improvement Plan Statement of Work
- APPENDIX 4 -- Periphyton Sampling
- APPENDIX 5 -- Supplemental Macroinvertebrate Sampling
- APPENDIX 6 -- Sediment Sampling Plan
- APPENDIX 7 -- Sampling Station Locations

CONSENT DECREE AND SETTLEMENT AGREEMENT

Concurrently with the filing of this Consent Decree and Settlement Agreement ("Decree") the United States of America, on behalf of the Environmental Protection Agency ("EPA") and the Department of the Interior, Office of Surface Mining Reclamation and Enforcement ("OSMRE") and the United States Fish and Wildlife Service ("FWS"), filed an action against Southern Ohio Coal Company ("SOCCO") pursuant to the Clean Water Act 33 U.S.C. §§ 1251 et. seq., and the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 et seq. This Decree resolves the claims raised in the United States' complaint filed simultaneously with this Decree (the "Complaint").

BACKGROUND

1. SOCCO owns and operates an underground coal mine complex in Southeastern Ohio, which includes Meigs Mine No. 31 ("Meigs No. 31"). Meigs No. 31 is the name given to the combined underground workings of what once were two separate mines, Meigs Mine No. 1 and Raccoon Mine No. 3. Meigs No. 31 naturally accumulates acidic water that contains in solution a number of metals and other chemicals. Such water is commonly referred to as "acid mine drainage" or "AMD."

2. A portion of the former Raccoon Mine No. 3 workings was abandoned in 1989 and in accordance with a plan submitted to the United States Mine Safety and Health Administration, a bulkhead was installed between the abandoned works and the active mine areas to store the naturally accumulated AMD from the

combined workings for eventual treatment and to assure proper ventilation in the active workings.

3. SOCCO holds two National Pollutant Discharge Elimination System ("NPDES") permits issued by the State of Ohio which, among other things, authorize SOCCO to discharge AMD and/or process wastewaters through designated outfalls into tributaries of Leading and Raccoon Creeks, both of which are tributaries of the Ohio River. SOCCO's NPDES Permits contain, among other things, limits on the concentration of a number of pollutants or contaminants allowed in any effluent discharged.

4. On or about July 11, 1993, as much as one billion gallons of AMD from the inactive portion of Meigs No. 31 inundated the active workings of the mine, halting all mining operations. Soon thereafter, SOCCO requested emergency authorization from the Ohio Environmental Protection Agency ("OEPA") to dewater Meigs No. 31 by pumping AMD from the mine and discharging it without meeting the effluent limits of its NPDES Permits.

5. On July 26, 1993, OEPA issued a "Director's Final Findings and Orders" ("DFFO"), which sets forth the terms and conditions under which OEPA would allow SOCCO to discharge untreated and/or partially treated AMD from Meigs Mine No. 31. The DFFO provided that SOCCO could discharge the effluent into Leading Creek, Raccoon Creek, and certain specified tributaries thereof.

6. On July 28, 1993, the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement ("OSMRE") issued an administrative order directing SOCCO to cease its discharges of untreated or partially treated AMD (the "Cessation Order").

7. On July 29, 1993, SOCCO initiated an action styled Southern Ohio Coal Company v. Office of Surface Mining, Reclamation and Enforcement, et al., United States District Court for the Southern District of Ohio, Eastern Division, Civil Action No. C2-93-751. In its complaint SOCCO sought, among other things, to enjoin OSMRE's enforcement of the Cessation Order. On July 30, 1993, the United States District Court for the Southern District of Ohio, Eastern Division, issued a temporary restraining order prohibiting OSMRE from taking any action, including enforcement of the Cessation Order, that would interfere with SOCCO's dewatering of Meigs No. 31.

8. On or about August 3, 1993, the United States Environmental Protection Agency ("EPA") advised SOCCO that unless it immediately ceased discharging effluent that did not meet its NPDES Permit discharge limits, EPA would take administrative and/or judicial action to stop the discharges.

9. On August 4, 1993, SOCCO amended its complaint to include, among other things, claims to enjoin EPA from taking any action to interfere with SOCCO's dewatering of Meigs No. 31 pursuant to the DFFO.

10. On August 19, 1993, following a hearing, the court for the Southern District of Ohio, Eastern Division granted SOCCO preliminary injunctive relief by ordering that EPA and OSMRE not take any action to interfere with the dewatering of Meigs No. 31. The same day, EPA and OSMRE appealed the order to the Sixth Circuit Court of Appeals, and moved that Court for a stay of the preliminary injunction pending appeal.

11. On August 30, 1993, the Sixth Circuit granted in part EPA's motion for a stay of the District Court's injunction and denied OSMRE's stay request.

12. On September 3, 1993, EPA issued an administrative order essentially requiring SOCCO to cease discharges of untreated or partially treated effluent.

13. In response to a motion by SOCCO, on September 8, 1993, the District Court issued an order staying EPA's administrative order.

14. The District Court's stay order was vacated by the Sixth Circuit Court of Appeals on September 23, 1993.

15. Following the Court of Appeals' ruling, SOCCO timely complied with EPA's administrative order, treating all discharges to its NPDES Permit limits.

16. The untreated or partially treated AMD discharged prior to September 23, 1993, entered Raccoon Creek, Leading Creek, and tributaries thereto (the "Affected Streams"). These discharges resulted in, among other things, extensive mortality to aquatic life in Parker Run, Leading Creek, and Strong's Run.

This Decree addresses the environmental impacts of the discharges in three separate Sections, as briefly summarized in the following Paragraphs.

17. In accordance with the terms of the State of Ohio's DFFO, OEPA and SOCCO jointly developed a plan for: (a) monitoring the biological, physical and chemical conditions in the Affected Streams; and, (b) implementing corrective measures deemed necessary by OEPA to hasten or facilitate recovery of the Affected Streams. The OEPA/SOCCO plan is set forth in two related documents. Biological criteria for determining when the Affected Streams have returned to their pre-discharge condition were established and described in a document entitled "Ecological Recovery Endpoints of Streams Affected by the Meigs # 31 Mine Discharges during July - September 1993," March 2, 1994 and the Errata Sheet thereto dated July 10, 1995. ("Ecological Endpoints Document"), attached hereto as Appendices 1 and 1A respectively. The framework for certain sampling and monitoring activities, active restoration work, and other related matters is described in a document entitled "Southern Ohio Coal Company, Meigs Mine No. 31, Stream Restoration Plan" (the "SOCCO/OEPA Restoration Plan").

18. EPA provided comments to OEPA during the development of the Ecological Endpoints Document and the SOCCO/OEPA Restoration Plan. Although EPA did not concur on all aspects of the final versions of either of these documents as approved by OEPA, the Parties believe that the public's interest

is best served by cooperation of the regulatory agencies in pursuing restoration of the Affected Streams. To this end, as detailed below, actions to hasten or facilitate recovery of the Affected Streams will in the first instance be carried out under the direction of OEPA pursuant to the SOCCO/OEPA Restoration Plan and the Ecological Endpoints Document. In accordance with Section V of this Decree, if the Ecological Endpoints have not been met in any portion of the Affected Streams by certain specified times, EPA may direct SOCCO to take active measures to hasten or facilitate recovery. EPA and OEPA will coordinate their actions in accordance with a Memorandum of Understanding between the two agencies.

19. In accordance with Section VI, upon entry of this Decree SOCCO will commence an ecological assessment of conditions in the entire Leading Creek watershed and develop recommendations for enhancing the aquatic life uses of the entire Leading Creek Stream System. Also, in accordance with Section VI, SOCCO will deposit funds into the Department of the Interior's Natural Resource Damage Assessment and Restoration Fund to be used for the implementation of some or all of the recommendations made in the watershed assessment.

20. In accordance with Section VI, Paragraph 49, SOCCO will provide funds to be used for actions that will benefit aquatic fauna in the Ohio River that may use, be affected by, or affect the Leading Creek Stream System. This payment is the final element of a settlement of claims asserted in a related

action styled Southern Ohio Coal Co. v. Division of Environmental Protection, West Virginia Department of Commerce, Labor and Environmental Resources et al. Case No. 2:94-0432, United States District Court for the Southern District of West Virginia.

21. This Decree is a settlement of a contested matter. The Parties hereto dispute many factual and legal issues, including but not limited to the authority of OEPA to issue the DFFO. Participation in this settlement does not constitute or represent any admission of law or fact by any Party. In addition, there are no findings of fact or conclusions of law express or implied in this Decree and nothing in this Decree shall be construed to be, or to represent, an adjudication of any claim or an admission of liability.

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

I. JURISDICTION

22. This Court has jurisdiction over the subject matter and over the Parties to this action pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 33 U.S.C. §§ 1319(b) and 1321(e) and (n). Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b). The Complaint in this action states claims upon which relief may be granted.

II. PARTIES BOUND

23. This Decree shall apply to and be binding upon and inure to the benefit of the United States and SOCCO, its officers, directors, successors and assigns. By signing this

Decree, the State of West Virginia does not obtain any rights, duties or obligations other than those specifically provided for in Paragraph 49.

III. DEFINITIONS

24. Unless otherwise provided herein, whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"Affected Streams" means those portions of the Leading Creek and Raccoon Creek Stream Systems into which untreated or partially treated water was discharged or otherwise introduced during the process of the dewatering of SOCCO's Meigs Mine No. 31 during some or all of the period from July 30, 1993, through September 23, 1993.

"Appendix" means one of the seven numbered attachments to this Decree labeled as an appendix.

"Consent Decree" means this Decree and all appendices attached hereto. In the event of a conflict between this Decree and any appendix, this Decree shall control.

"Day" means a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

"DFFO" means the Director's Final Findings and Orders issued by OEPA to SOCCO on July 26, 1993, and the amendments thereto dated September 22, 1993 and January 27, 1994.

"Ecological Endpoints" means the biological criteria consisting of specific index scores and certain species/taxa, that have been selected as measures of Recovery for each Segment of the Affected Streams. As used in this Decree, Ecological Endpoints refers only to the "final endpoints" (as opposed to the "interim endpoints") identified in the Ecological Endpoints Document and its Errata Sheet.

"The Ecological Endpoints Document" or "Endpoints Document" means the report prepared by the OEPA, Division of Surface Water Ecological Assessment Section, entitled "Ecological Recovery Endpoints for Streams Affected by the Meigs Mine Discharges during July - September 1993," OEPA Report No. EAS/1994-1-1, March 2, 1994, and the Errata Sheet thereto dated July 10, 1995. The Ecological Endpoints Document and the Errata Sheet are attached to this Decree as Appendix 1 and Appendix 1A respectively. Any changes to the Endpoints Document by OEPA subsequent to the entry of this Decree shall not be incorporated into the requirements of this Decree unless such changes are mutually adopted by SOCCO and EPA in accordance with Section XXII (Modification).

"EPA" means the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"FWS" means the United States Fish and Wildlife Service, an agency of the United States Department of the Interior, and any successor departments or agencies of the United States.

"OEPA" means the Ohio Environmental Protection Agency.

"OSMRE" means the Office of Surface Mining Reclamation and Enforcement, an agency of the United States Department of the Interior, and any successor departments or agencies of the United States.

"Paragraph" means a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

"Parties" means the United States and Southern Ohio Coal Company. Although the State of West Virginia, through the Division of Environmental Protection, West Virginia Department of Commerce, Labor and Environmental Resources, is a signatory to this Decree, its participation hereunder is limited to acceptance of the terms of Paragraph 49 as satisfaction of a requirement of a settlement agreement by and between SOCCO and the State of West Virginia that concluded the related action styled Southern Ohio Coal Co. v. Division of Environmental Protection, West Virginia Department of Commerce, Labor and Environmental Resources et al. Case No. 2:94-0432, United States District Court for the Southern District of West Virginia. That settlement agreement was accepted by the West Virginia District Court by an order dated May 8, 1995. The State of West Virginia is not a party to the underlying complaint in this action and is not included within the definition of Parties in this Decree.

"Responsible Agency" means the federal agency designated in this Decree as having the authority to approve, accept, or direct actions by SOCCO pursuant to any provision of this Decree. The United States Department of the Interior, Fish and Wildlife Service is the Responsible Agency for Section VI (Leading Creek Watershed Improvement Project). EPA is the Responsible Agency for all other requirements of the Decree.

"Restoration" and "Recovery" means the reestablishment of the pre-discharge aquatic functions and related physical and chemical characteristics. In this Decree, the pre-discharge aquatic functions and related physical and chemical characteristics are those which existed in the Affected Streams prior to the discharge of untreated or partially treated AMD pursuant to the DFFO. Restoration (Recovery) will be determined in accordance with Section V of this Decree.

"Restoration Measures" means activities taken pursuant to Section V of this Decree to facilitate and/or hasten Recovery of the Affected Streams.

The "SOCCO/OEPA Restoration Plan" means the document jointly developed by SOCCO and OEPA in accordance with the DFFO setting forth the actions to be taken by SOCCO to satisfy requirements of the DFFO regarding restoration in certain portions of Leading Creek, Raccoon Creek, and certain identified tributaries thereof. The document is entitled "Southern Ohio Coal Company, Meigs Mine No. 31, Stream Restoration Plan."

"Section" means a portion of this Consent Decree identified by a roman numeral.

"Stream Segment" or "Segment" means the named tributaries to, and designated stretches of, either Leading Creek or Raccoon Creek that are identified as distinct geographic zones for which specific Ecological Endpoints have been established in the Ecological Endpoints Document. The Stream Segments are identified below in Paragraph 30(b).

"Stream System" means the named and unnamed streams in the Raccoon Creek or the Leading Creek watersheds which flow into either Raccoon Creek or Leading Creek. Leading Creek is located in Athens County, Gallia County, and Meigs County, Ohio, and Raccoon Creek is located in Vinton County, and Gallia County, Ohio. For purposes of this Decree, Raccoon Creek and Leading Creek and their respective tributaries constitute two separate and distinct Stream Systems.

"Summer/Fall Index Period" means June 15 through October 15 of each year.

"United States" means the United States of America.

IV. CIVIL PENALTY AND COST REIMBURSEMENT

25. Within 15 days of the entry of this Decree, SOCCO shall pay to the United States \$300,000 as a civil penalty. Payment of this amount shall be made through two separate disbursements, as follows: (a) \$200,000 shall be paid by Fedwire Electronic Funds Transfer ("EFT") to the United States Department of Justice, referencing this action and the DOJ number

90-5-1-1-5033. Payment by EFT shall be made in accordance with instructions to be provided to SOCCO by the Financial Litigation Unit at the United States Attorney's Office for the Southern District of Ohio, Eastern Division. Any EFT received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited to the next business day. Notice of payment pursuant to this subparagraph shall be sent to the United States as provided in Section XVIII (Notices and Submissions); (b) \$100,000 shall be paid by certified check made payable to "Office of Surface Mining Reclamation and Enforcement" and delivered to Department of the Interior, Office of the Field Solicitor, Ten Parkway Center, Room 385, Pittsburgh, PA, 15220. The check shall be accompanied by a letter referencing this action and indicating that the check is in payment of a civil penalty pursuant to this Decree. SOCCO shall send copies of the check and transmittal letter identified in this subparagraph to the United States as specified in Section XVIII (Notices and Submissions).

26. Within 15 days of the entry of this Decree, SOCCO shall pay to the United States \$240,200 as reimbursement for costs incurred in monitoring and assessing the effects of the discharges addressed in the Complaint. This payment shall be made through two separate disbursements as follows: (a) \$230,000 shall be paid by Fedwire Electronic Funds Transfer ("EFT") to the United States Department of Justice, referencing this action and the DOJ number 90-5-1-1-5033. Payment by EFT shall be made in accordance with instructions to be provided to SOCCO by the

Financial Litigation Unit at the United States Attorney's Office for the Southern District of Ohio, Eastern Division. Any EFT received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited to the next business day. (b) \$10,200 shall be paid by certified check made payable to the Secretary of the Interior and shall be delivered to and shall be delivered to Chief, Division of Finance Division, United States Fish and Wildlife Service, 4401 North Fairfax Drive, Room 380, Arlington, VA 22203 [phone (703) 358-1742]. The check shall reflect that it is to be deposited in the "Natural Resource Damage Assessment and Restoration Fund, Account No. 14X5198 and reference the "SOCCO Mine Discharge." A transmittal letter shall accompany the check and indicate that it is reimbursement for natural resource damage assessment costs. SOCCO shall send copies of the check and transmittal letter to the United States as specified in Section XVIII (Notices and Submissions).

V. RESTORATION MEASURES FOR THE AFFECTED STREAMS

A. General Provisions

27. One of the primary objectives of this Decree is the Restoration (Recovery) of the Affected Streams, i.e. the reestablishment of the aquatic functions and related physical and chemical characteristics that existed prior to the dewatering of Meigs No. 31 in July through September of 1993. Due to the dynamic nature of stream systems, the Parties recognize that Restoration (Recovery) will be an approximation of pre-discharge conditions rather than an exact reproduction. As more

particularly described below, for the purposes of this Decree, Restoration (Recovery) shall be evaluated by reference to the specific biological criteria determined to be representative or descriptive of the pre-July 30, 1993 conditions in the Affected Streams. These biological criteria are the Ecological Endpoints that are set out in the Ecological Endpoints Document and its Errata Sheet attached hereto as Appendices 1 and 1A respectively. Specific Ecological Endpoints have been established for specified Stream Segments of each Affected Stream.

28. The Ecological Endpoints consist of: (1) the minimum mean score for the Index of Biotic Integrity ("IBI"), the minimum score(s) for the Invertebrate Community Index ("ICI"), and, for certain Stream Segments, the minimum mean score for the Modified Index of Well-being ("MIwb"); and, (2) a list of certain "Key" fish, macroinvertebrate, amphibian, and/or mussel species/taxa that must be demonstrated to have returned to a particular Stream Segment as set forth below. IBI, ICI, and MIwb scores shall be calculated in accordance with the provisions of the Endpoints Document and the OEPA protocols referenced therein.

29. EPA shall be the Responsible Agency for the oversight of actions required of SOCCO under this Decree relating to the Restoration of the Affected Streams. EPA shall notify SOCCO in writing of the name and address of the person who will act as the Responsible Agency Contact Person for purposes of submissions relating to Restoration Measures and notification pursuant to Section XV (Force Majeure). The Agency Contact

Person may be changed at any time upon written notification to SOCCO.

B. Determination of Recovery

30. Notwithstanding anything to the contrary in the Endpoints Document, the SOCCO/OEPA Restoration Plan, or any other document; for the purposes of this Decree, Restoration (Recovery) of the Affected Streams shall be demonstrated through attainment and maintenance of the Ecological Endpoints in accordance with the criteria set forth in subparagraphs (a) through (j) below.

a. The Leading Creek and Raccoon Creek Stream Systems comprise separate and distinct Stream Systems. Recovery of the Affected Streams in each Stream System will be evaluated independently.

b. Distinct Ecological Endpoints have been established for each Stream Segment and are specified in the Endpoints Document and its Errata Sheet. The Stream Segments for which distinct Ecological Endpoints have been established are:

- i. Leading Creek Segment 1 - Ohio River Backwater. This Segment runs from River Mile ("RM") 0.0 to approximately RM 1.0 of Leading Creek. Endpoints Document at p. 15.
- ii. Leading Creek Segment 2 - Low Gradient Lower Leading Creek. This Segment runs from approximately RM 1.1 through approximately RM 9.0. Endpoints Document at

p. 15-16.

- iii. Leading Creek Segment 3 - Middle Leading Creek. This Segment runs from approximately RM 9.1 through approximately RM 15.6.

Endpoints Document at

p. 16-17.

- iv. Parker Run Segment ("Parker Run"). This Segment includes all of Parker Run covering approximately from river mile 2.97 of Parker Run to the confluence with Leading Creek.

Endpoints Document at p. 17.

- v. Raccoon Creek Segment ("Raccoon Creek"). This Segment includes the portion of Raccoon Creek from the confluence of Strongs Run at approximately RM 43.3 to the Ohio River.

Endpoints Document pp. 18.

- vi. Strongs Run Segment ("Strongs Run"). This Segment includes all of Strongs Run from approximately RM 4.73 to the confluence with Raccoon Creek. Endpoints Document at pp. 18

- 19.

- vii. Sugar Run Segment ("Sugar Run"). This Segment includes all of Sugar Run from approximately RM 2.40 to the confluence with Robinson Run. Endpoints Document at pp. 18 -

20.

viii. Robinson Run Segment ("Robinson Run"). This Segment includes all of Robinson Run from the confluence of Sugar Run at approximately RM 1.31 to the confluence with Raccoon Creek at approximately RM 41.67. Endpoints Document at pp. 18 - 20.

c. Specific zones ("Sampling Stations") have been established in each Stream Segment for the collection of biological and other sampling/monitoring data necessary to demonstrate attainment or maintenance of the Ecological Endpoints. These Sampling Stations are identified and described in Appendix 7. For each Sampling Station, the Ecological Endpoints will be deemed to have been attained or maintained for a particular year if the biological sampling/monitoring data collected at that Sampling Station demonstrate attainment of the minimum mean IBI, the minimum ICI, and the minimum mean MIwb scores established in the Endpoints Document for the Segment in which the Sampling Station is located. In Segments for which the Endpoints Document does not specify a minimum MIwb score, attainment of Endpoints at a Sampling Station shall be demonstrated through IBI and ICI scores only.

d. A Stream Segment will be deemed to have Recovered or to have been Restored when the biological sampling/monitoring data demonstrate that: (1) for three consecutive years, (a) the minimum prescribed IBI, ICI, and MIwb scores have been attained (or maintained) at each Sampling Station in the Segment, and (b)

each of the Key Species/Taxa of macroinvertebrates and fish required for that Segment, other than the River Redhorse, have been found at one or more Sampling Stations in that Segment in the abundance, and with the collection of recruits and sexually mature individuals, as required by the Endpoints Document and the Errata Sheet; (2) for Segments for which the River Redhorse is designated a Key Species, the requirements of Item 7, pp 4-5, of the Endpoints Document Errata Sheet have been met; and, (3) for Segments for which Mudpuppies are designated a Key Species, the requirements of Item 6, pp 3-4, of the Endpoints Document Errata Sheet have been met.

e. A Stream System will be deemed to have Recovered or to have been Restored, when the biological sampling/monitoring data demonstrate that: (1) all Stream Segments within the Stream System have recovered as provided in Paragraph 30(d) and, (2) all Ecological Endpoints for unionid mussels have been attained in the Stream System in accordance with the requirements of Appendix 2 (Unionid Mussel Recovery Endpoints).

f. In the event that one or more Endpoints are not attained or maintained in a particular Segment in a particular year solely as a result of an Exotic Event, such year shall be excluded from the determination of, and not be deemed to interrupt, the number of consecutive years of attainment of Endpoints in that Segment pursuant to Paragraphs 30(d) and 74. As used in this Decree, an Exotic Event is either: (1) an extraordinary introduction into the Stream System of a toxic

quantity of pollutants or contaminants from an identified source that is not located on property owned or controlled by SOCCO, or its parent or affiliate companies, and is otherwise beyond SOCCO's control; or (2) a severe drought. An extraordinary introduction of pollutants or contaminants could include such events as chemical or oil spills or sudden substantially increased flows of acid mine drainage from abandoned mine areas, but would not include typical agricultural and storm water runoff, discharges from SOCCO's mining and coal preparation operations, or acid mine drainage in volumes and/or concentrations seasonally typical in the watershed of the Affected Stream alleged to have experienced an Exotic Event. A severe drought, for purposes of this Decree, occurs when any Segment both ceases to flow and there are insufficient pools capable of sustaining the biological community required to meet an applicable Ecological Endpoint at one or more Sampling Stations in the Segment. Within two working days of the discovery of any extraordinary introduction of pollutants or contaminants into a Stream System that SOCCO believes may have an impact on attainment of any Endpoint(s), SOCCO shall provide telephonic and telefax notice to the United States of the nature and location of the event at the addresses listed in Section XVIII (Notices and Submissions).

g. If SOCCO chooses to assert the Exotic Event exception in Paragraph 30(f) for any Segment for any year, SOCCO shall so notify EPA in writing and shall request a determination from EPA

as to the applicability of the Exotic Event exception for specific Endpoints. Any request for a determination of the applicability of the Exotic Event exception must be submitted to EPA no later than 30 days after the submission of the biological sampling results that SOCCO contends were affected by the Exotic Event. Along with such notice and request, SOCCO shall provide the following information:

1. For a demonstration of an extraordinary introduction of pollutants or contaminants into the Stream System.

(i) identification of the source of the pollutants or contaminants preventing attainment of an Endpoint, to the extent that the source can be determined; (ii) photographs documenting any visible evidence of the Exotic Event; (iii) to the extent possible using best efforts, chemical data that fully characterize any such pollutants or contaminants; (iv) to the extent possible using best efforts, documentation of the in-stream conditions that existed during the Exotic Event, including pH, dissolved oxygen, conductivity, and sediment chemistry; (v) an evaluation of the habitat in the area believed to be affected by the Exotic Event using OEPA QHEI protocols, as appropriate; (vi) an explanation of the precise toxicologic or other adverse effect any contaminants or pollutants are believed to have, or have had, on organisms in the Segment; (vii) an explanation of the basis of the contention that the failure to attain Endpoints was caused by the Exotic Event (including citations to supporting scientific literature);

(viii) all toxicity data relied upon by SOCCO; and, (ix) any other information SOCCO believes supports its position.

For a demonstration that an Exotic Event
2. involving a severe drought has occurred.

(i) meteorological data supporting the claim of drought;
(ii) photographic documentation of the conditions throughout the Segment claimed to be affected by the drought; (iii) documentation of in-stream conditions during the drought, including number and physical dimensions of all pools in the Sampling Station(s) in the affected Segment(s), pH, dissolved oxygen, conductivity, temperature and, as appropriate, sediment chemistry; and (iv) an explanation of the basis for the contention that the drought is the cause of non-attainment of Endpoints.

h. EPA shall respond to SOCCO's request pursuant to Paragraph 30(h) within 180 days of receipt. Failure to meet the requirements of Paragraph 30(h) or to satisfy the notice requirement of Paragraph 30(f) shall preclude SOCCO from asserting the Exotic Event exception in any Request for Certification of Achievement of Endpoints pursuant to Section XIV (Certification of Recovery), or in any Dispute Resolution procedure under this Decree.

i. If an Exotic Event ~~is~~ occurs after SOCCO has completed two valid sampling passes for fish and one valid collection of macroinvertebrates at a Sampling Station, and if the data collected demonstrate that for such Sampling Station the Ecological Endpoints have been attained or maintained as provided

in Paragraph 30(c), then that year may be considered an attaining year with respect to such Sampling Station. In addition, notwithstanding the requirements of Paragraph 71, if despite the exercise of best efforts, SOCCO is not able to conduct three valid fish collecting passes or two valid macroinvertebrate collections at a Sampling Station due to lack of appropriate flow conditions for such collections, then upon the written concurrence of EPA under Section XV (Force Majeure), SOCCO may demonstrate attainment of a required IBI or MIwb score using the data from only two valid sampling passes and demonstrate attainment of a required ICI through the use of only one valid macroinvertebrate collection.

C. Selection of Restoration Measures

31. Commencing the earlier of either, (a) a formal written determination by OEPA that SOCCO has satisfied its obligations under the OEPA/SOCCO Restoration Plan with respect to one or both Stream Systems, or (b) January 30, 1998 (the submission date for data collected during the 1997 Summer/Fall Index Period) if, after evaluating any biological data, EPA determines that any Ecological Endpoints have not been attained or are not currently being maintained in an Affected Stream or any Segment thereof, then EPA may so notify SOCCO in writing, specifying the Endpoints that have not been met .

32. Within 75 days of receipt of notice to SOCCO from EPA that an Endpoint has not been met, or such longer time as agreed to in writing by EPA, SOCCO shall submit to EPA for

approval a report identifying the factor(s) impeding Recovery and evaluating measures that could be taken to facilitate or hasten the achievement of the Endpoint(s) in the Stream Segment(s) ("Restoration Measures"). Restoration Measures may include active measures to address specific problems as well as special additional sampling or monitoring efforts to further characterize a problem or support the selection of an active measure. The report assessing Restoration Measures (the "Restoration Measures Report") shall evaluate any Restoration Measure timely suggested by EPA to SOCCO and shall also evaluate a "no action" alternative. Timely identification of a potential Restoration Measure includes, but is not limited to, identification contemporaneous with the issuance of the notice from EPA to SOCCO pursuant to Paragraph 31 or in EPA's comments disapproving a Restoration Measures Report pursuant to Section VII (Submissions Requiring Agency Approval).

33. EPA will review the Restoration Measures Report and may select one or more Restoration Measures for implementation by SOCCO. Within 60 days of notification by EPA that an active Restoration Measure(s) has been selected, or such longer time as approved in writing by EPA, SOCCO shall submit to EPA for approval a work plan for the implementation of the selected Restoration Measure(s) ("Restoration Measure Work Plan" or "R.M. Work Plan").

34. The R.M. Work Plan shall include the following:
(a) the schedule for implementation of the Restoration

Measure(s); (b) the schedule and strategy for satisfying any applicable permitting requirements; (c) a construction quality control plan, if the Restoration Measure involves actual construction; and, if applicable, (d) performance standards for the Restoration Measure. The content and level of detail required in the R.M. Work Plan shall be commensurate with the complexity of the Restoration Measure selected by EPA.

35. If any selected Restoration Measure requires engineering or design work, then SOCCO shall include in the R.M. Work Plan the schedules for implementation of all design and pre-design tasks identified in the R.M. Work Plan which shall include, but not be limited to, plans and schedules for the completion of a preliminary design submittal and a pre-final/final design submittal, which shall include a Construction Quality Control/Quality Assurance Plan.

a. The preliminary design submittal shall include, at a minimum, the following: (1) design criteria; (2) results of any additional field sampling and pre-design work; (3) preliminary plans, drawings and sketches; (4) required specifications in outline form; and (5) a preliminary construction schedule.

b. The pre-final/final Restoration Measure design submittal shall include, at a minimum, the following: (1) final plans and specifications; and (2) a Construction Quality Control/Quality Assurance Plan. The Construction Quality Control/Quality Assurance Plan must detail the approach to

quality control and assurance during any construction activities, and specify a quality assurance official to conduct a quality assurance program during the construction phase of the project(s).

36. Upon its approval by EPA, the R.M. Work Plan(s) shall be incorporated into and become enforceable under this Decree.

37. Within 30 days of the approval of a R.M. Work Plan by EPA, or such longer time as agreed to in writing by EPA, SOCCO shall commence the activities required under the R.M. Work Plan. SOCCO shall submit to EPA and OEPA all documents required under an approved Work Plan. Unless otherwise directed by EPA, SOCCO shall not commence physical on-site Restoration Measure activities selected by EPA pursuant to this Decree prior to approval of the Restoration Measure Work Plan.

38. In implementing a Restoration Measure pursuant to this Section, SOCCO shall be obligated to achieve any performance standards identified in the approved Restoration Measure design or R.M. Work Plan.

39. Without waiving any rights under this Section, EPA may in its sole discretion, allow SOCCO to continue to take actions necessary for the Recovery of the Affected Streams under the direct oversight of OEPA even after the January 30, 1998, milestone established by Paragraph 31. Neither EPA's decision to forebear exercising its rights under this Section for any period of time, nor its selection of a "no action" alternative, shall

affect its right to subsequently require SOCCO to develop and implement a Restoration Measure in accordance with this Section. SOCCO acknowledges and agrees that nothing in this Decree or in the approval of any R.M. Work Plan or Restoration Measure design, constitutes a warranty or representation of any kind by EPA that compliance with the requirements of those documents will result in the achievement of the Ecological Endpoints. SOCCO's compliance with the requirements of this Decree or R.M. Work Plan approved hereunder shall not foreclose EPA from requiring additional Restoration Measures in accordance with this Section if Recovery has not been achieved.

VI. LEADING CREEK WATERSHED IMPROVEMENT PROJECT

A. Development of the Leading Creek Improvement Plan

40. In accordance with the Statement of Work for the Development of the Leading Creek Improvement Plan, attached hereto as Appendix 3, SOCCO shall prepare and submit for approval a plan that will describe actions that could be taken in the Leading Creek watershed to enhance the physical, chemical, and biological characteristics throughout the Leading Creek Stream System.

41. The United States Fish and Wildlife Service ("FWS") shall be the Responsible Agency for the approval of the Leading Creek Improvement Plan and shall have the exclusive authority pursuant to Section VII (Submissions Requiring Agency Approval) to approve, disapprove or amend any plan, report or schedule submitted by SOCCO in connection with the development of

the Leading Creek Improvement Plan. FWS will consider all timely submitted comments from other federal and/or state agencies prior to approving any submission from SOCCO pursuant to this Section. FWS shall notify SOCCO in writing of the name and address of the person who will act as the Responsible Agency Contact Person for purposes of submissions pursuant to this Section and for notification pursuant to Section XV (Force Majeure). The Responsible Agency Contact Person may be changed at any time upon written notification to SOCCO.

42. Within 60 days of the entry of this Decree, SOCCO shall submit to FWS for approval, a draft work plan for the development of the Leading Creek Improvement Plan described in the preceding Paragraph ("LCIP Work Plan"). The LCIP Work Plan shall include a master schedule for preparation and submission of deliverables required by the Statement of Work for the LCI Plan (Appendix 3) or any plan or schedule developed thereunder, including but not limited to (a) drafts of the Leading Creek Improvement Plan or portions thereof, (b) drafts of any analytical plans or protocols, (c) revisions of draft plans and reports in accordance with comments from FWS, and (e) final plans and reports, including the final Leading Creek Improvement Plan. FWS will approve or disapprove the LCIP Work Plan in accordance with the Statement of Work for the Leading Creek Improvement Plan (Appendix 3) and Section VII (Submissions Requiring Agency Approval).

43. Upon approval by FWS, the LCIP Work Plan and any other plan, report, protocol, or schedule approved by FWS under this Decree shall be incorporated into and become enforceable under this Consent Decree.

44. SOCCO shall submit to FWS, 3 copies of all deliverables, including drafts, required under the approved L.C.I.P. Work Plan in accordance with the schedule for submissions contained in this Decree, the Statement of Work, the LCIP Work Plan, or any other schedule approved pursuant to this Section. Simultaneously with the submission to FWS, SOCCO shall submit a copy of all such documents to EPA and OEPA as provided in Section XVIII (Notices and Submissions).

45. The Parties encourage input into the project from local citizens and private groups. To foster community input, SOCCO shall deposit copies of the draft Leading Creek Improvement Plan with local public libraries in Athens, Meigs and Gallia Counties and the Ohio University library at Athens. Copies of the draft Leading Creek Improvement Plan shall be provided to the designated libraries by SOCCO within 10 days of their submission to FWS. In addition, within 5 days of providing the draft Improvement Plan to a library, SOCCO shall publish in at least one newspaper of general circulation in that County, a notice to the public where the draft is available for review. The notice regarding the draft shall indicate that written comments may be directed to FWS within 45 days of the date of the notice at the address provided under Section XVIII (Notices and Submissions).

Copies of the approved Leading Creek Improvement Plan shall also be deposited at each of the local libraries identified above.

B. Funding for Projects to Enhance the Leading Creek Watershed

46. SOCCO shall pay to the United States the sum of \$1,900,000 as compensation for natural resources alleged to have been affected by the 1993 dewatering of Meigs Mine No. 31. Payment of the \$1,900,000 shall be made in three separate installments. The first installment in the amount of \$750,000 shall be made within 15 days of the entry of this Decree by the Court. The second installment of \$750,000 shall be made within 180 days from the date of entry of this Decree. The third and final installment of \$400,000 shall be made within one year of the entry of this Decree.

47. Payments pursuant to Paragraph 46 shall be made by tender of certified checks to the Department of the Interior, Fish and Wildlife Service. Checks shall be made payable to the Secretary of the Interior and shall be delivered to Chief, Division of Finance Division, United States Fish and Wildlife Service, 4401 North Fairfax Drive, Room 380, Arlington, VA 22203 [phone (703) 358-1742]. The check shall reflect that it is a payment to the "Natural Resource Damage Assessment and Restoration Fund, Account No. 14X5198 -- Leading Creek Improvement Project" and reference the "SOCCO Mine Discharge." The Department of the Interior will assign these funds a special project number to allow the funds to be maintained as a segregated account within the Department of the Interior Natural

Resource Damage Assessment and Restoration Fund, Account No. 14X5198 (the "Leading Creek Improvement Account"). The Department of the Interior shall, in accordance with law, manage and invest funds in the Leading Creek Improvement Account, and shall hold all funds in the Leading Creek Improvement Account subject to the provisions of this Decree.

48. All funds in the Leading Creek Improvement Account shall be used to: (a) support FWS activity in connection with the development of the LCI Plan; (b) implement or support the implementation of enhancement projects identified in the approved Leading Creek Improvement Plan; and (c) monitor the progress and effect of such projects. FWS may, to the extent otherwise allowed by law, obtain reimbursement from the Leading Creek Improvement Account for its direct and indirect costs incurred in connection with the performance of its obligations under this Decree, provided, however, that any reimbursement to FWS for such costs shall not exceed \$30,000 in any calendar year. The foregoing shall not be construed as a limitation on the ability of FWS to charge a reasonable amount of overhead for actual costs incurred in connection with procurement of, or contracting for, goods or services required to implement this Decree.

49. In accordance with the terms and conditions below, SOCCO shall pay the sum of \$100,000 to the State of West Virginia Division of Environmental Protection ("West Virginia DEP") to be used exclusively for projects in, or relating to, the

Ohio River intended to benefit the aquatic fauna in the Ohio River that may use, be affected by, or affect the Leading Creek Stream System. Such projects shall be selected by the West Virginia DEP and shall be subject to approval by the FWS, Reynoldsburg, Ohio Field Office. Within 15 days of the receipt of (a) a written demand for funds from West Virginia DEP for a sum certain and (b) a written approval from FWS for a proposed use of such funds, SOCCO shall transfer the requested funds to West Virginia DEP. The Parties and West Virginia agree that West Virginia DEP may make multiple requests for funds pursuant to this Paragraph, but that SOCCO's total payments to West Virginia DEP hereunder shall in no event exceed \$100,000. West Virginia agrees to use all funds received pursuant to this paragraph for the project(s) approved by FWS. By signing this Decree, the State of West Virginia does not obtain any rights, duties or obligations other than those specifically provided for in this Paragraph. And the entry or non-entry of this Decree shall have no effect on the finality of the termination of the West Virginia Action pursuant to the Settlement Agreement therein.

C. Selection and Implementation of Enhancement Projects for the Leading Creek Watershed

50. FWS shall be the Responsible Agency for the selection, implementation, and oversight of enhancement projects to be funded in whole or in part with funds from the Leading Creek Improvement Account. Nothing in this Decree shall be deemed to limit any authority FWS may otherwise have under applicable law to use monies from the Leading Creek Improvement

Account to fund grants, cooperative agreements, and/or inter-agency agreements necessary to allow other federal or state agencies to implement or support enhancement projects selected or approved by FWS pursuant to this Decree.

51. Because certain state agencies have technical expertise with respect to the matters covered by this Decree, and because along with the United States the State of Ohio is a trustee for some or all of the natural resources to be addressed by the Leading Creek Improvement Plan, the United States has determined that implementation of any enhancement projects identified in the Leading Creek Improvement Plan would best be accomplished through a continued state/federal cooperative effort. FWS will endeavor to develop with the appropriate federal and state agencies a memorandum of understanding that will guide the decision-making process for selection and implementation of enhancement projects pursuant to this Section. Development of a formal memorandum of understanding is not, however, a prerequisite to either approval of the Leading Creek Improvement Plan pursuant to Section VII (Submissions Requiring Agency Approval) or to selection and implementation by FWS of projects pursuant to Paragraph 50.

52. The Parties acknowledge that the funds in the Leading Creek Improvement Account will likely not be sufficient to fully implement every potential enhancement project identified in the Leading Creek Improvement Plan. Therefore, it shall be the responsibility of FWS to determine the most effective way to

use the funds in the Leading Creek Improvement Account to implement enhancement projects identified in the Leading Creek Improvement Plan. FWS shall, to the extent practicable, seek to maximize the value of such funds by encouraging other state and/or federal agencies to provide matching funds or to provide services in connection with the implementation of selected projects. In selecting or approving projects, FWS will place a premium on the maximization of ecological benefits to be derived from the Leading Creek Improvement Account by taking into consideration SOCCO's obligations regarding Restoration of the Affected Streams set forth in Section V of this Decree and SOCCO's obligations under the SOCCO/OEPA Restoration Plan. Thus, as a general principle, FWS will not expend funds from the Leading Creek Improvement Account for enhancement projects that would primarily benefit SOCCO in the satisfaction of such other obligations. In addition, except as may be appropriate for determining the effectiveness of any implemented enhancement project, unless EPA agrees with FWS in writing, no funds in the Leading Creek Improvement Account shall be used to conduct further studies unless directly connected with some aspect of the implementation of an enhancement project identified in the LCI Plan (e.g., design related studies).

VII. SUBMISSIONS REQUIRING AGENCY APPROVAL

53. After review of any plan, report or other item which is required to be submitted by SOCCO for approval pursuant to this Decree, the Responsible Agency shall: (a) approve the

submission; (b) disapprove the submission, directing that SOCCO modify the submission in accordance with the Responsible Agency's comments or directions; or (c) if the Parties agree, approve a portion of the submittal and disapprove the remainder.

54. In the event of approval by the Responsible Agency pursuant to Paragraph 53(a) or (c), SOCCO shall proceed to take any action required by the plan, report, or other item, as approved by the Responsible Agency, subject only to its right to invoke the Dispute Resolution procedures set forth in Section VIII (Dispute Resolution).

55. Upon receipt of a notice of disapproval pursuant to Paragraph 53(b), SOCCO shall, within 30 days or such other time as specified by the Responsible Agency in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Unless otherwise agreed to by SOCCO, except for minor modifications, FWS shall not provide less than 30 days for the revision of the LCIP Work Plan, the Quality Assurance Project Plan, or the LCI Plan.

56. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by the Responsible Agency, the Responsible Agency may again require SOCCO to correct the deficiencies, in accordance with the preceding Paragraphs. The Responsible Agency also retains the right to amend the plan, report or other item. SOCCO shall implement any such plan, report, or item as amended by the Responsible Agency, subject

only to its right to invoke the procedures set forth in Section VIII (Dispute Resolution).

57. If upon the second resubmission, a plan, report, or item is disapproved or modified by the Responsible Agency due to a material defect, SOCCO shall be deemed to have failed to submit such plan, report, or item timely and adequately unless SOCCO invokes the dispute resolution procedures set forth in Section VIII (Dispute Resolution) and the Responsible Agency's action is overturned pursuant to that Section.

58. All plans, reports, and other items required to be submitted to the Responsible Agency under this Decree shall be, upon approval or amendment by the Responsible Agency, enforceable obligations under this Decree. In the event that the Responsible Agency approves or amends a portion of a plan, report, or other item required to be submitted to the Responsible Agency under this Decree, the approved or amended portion shall be enforceable under this Decree.

VIII. DISPUTE RESOLUTION

59. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce SOCCO's obligations that have not been disputed in accordance with this Section.

60. Any dispute which arises under or with respect to this Decree shall in the first instance be the subject of

informal negotiations between the Parties. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is extended by written agreement of the Parties. The dispute shall be considered to have arisen when one Party sends the other Party a written Notice of Dispute.

61. a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Responsible Agency shall be considered binding unless, within 20 days after the conclusion of the informal negotiation period, SOCCO invokes the formal dispute resolution procedures of this Section by serving on the Responsible Agency a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by SOCCO. SOCCO shall simultaneously serve a copy of its Statement of Position on the Chief, Environmental Enforcement Section, United States Department of Justice at the address indicated in Section XVIII (Notices and Submissions).

b. After receipt of SOCCO's Statement of Position, the Responsible Agency will serve on SOCCO its Statement of Position, including but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the Responsible Agency. Within 21 days of service of the Responsible Agency's Statement of Position, SOCCO may

serve on the Responsible Agency a response to the Responsible Agency's Statement of Position.

c. If there is disagreement between the Responsible Agency and SOCCO as to whether dispute resolution should proceed under Paragraph 62 or Paragraph 64, the Parties shall follow the procedures set forth in the paragraph determined by the Responsible Agency to be applicable. However, if SOCCO ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards identified in Paragraphs 62 and 64.

62. Formal dispute resolution for disputes pertaining to any aspect of the selection by EPA of a Response Measure pursuant to Section V (Restoration Measures for Affected Streams), determinations regarding the occurrence of an Exotic Event pursuant to Paragraph 30(f), attainment of any Ecological Endpoint, the adequacy of any submittal requiring agency approval under Section VII, disposition of a request for certification of Recovery pursuant to Section XIV (Certification of Recovery), approval by FWS of the LCIP Work Plan or Plans and reports submitted pursuant thereto, approval by FWS of the final Leading Creek Improvement Plan, and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph.

a. An administrative record of the dispute shall be maintained by the Responsible Agency and shall contain all

Statements of Position and responses thereto, including supporting documentation, submitted pursuant to Paragraph 61. Where appropriate, the Responsible Agency may allow submission of supplemental Statements of Position by the Parties.

b. When EPA is the Responsible Agency, the Director of the Water Division, EPA Region V, or such other person as may be designated by the Regional Administrator, EPA Region V, will issue a final administrative decision resolving the dispute based on the administrative record described in Subparagraph a above. When FWS is the Responsible Agency the Regional Director, Region III of the United States Fish and Wildlife Service, or such other person as he or she may designate will issue the final administrative decision resolving the dispute based on the administrative record described in Subparagraph a above. These decision(s) shall be binding upon SOCCO and shall not be subject to judicial review, unless, within 20 days of the service upon SOCCO of the decision, SOCCO serves upon the United States and files with this Court a motion challenging the decision. Such motion shall be served upon the United States as provided in Section XVIII (Notices and Submissions). The United States shall have 60 days from the date of service to serve and file a response to SOCCO's motion. SOCCO's motion shall inform the Court of this provision regarding the length of time allowed to the United States for a response.

63. In any proceeding to review a determination made pursuant to Paragraph 62(b), SOCCO shall have the burden of

demonstrating that the decision of the designated decision-maker of the Responsible Agency is arbitrary and capricious or otherwise not in accordance with law. Judicial review of the Responsible Agency's decision shall be on the administrative record compiled pursuant to Paragraph 62(a) with either Party having the right to request oral argument.

64. Formal dispute resolution for disputes that are neither explicitly identified in Paragraph 62 nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of SOCCO's Statement of Position submitted pursuant to Paragraph 61, the designated decision-maker of the Responsible Agency, will issue a final decision resolving the dispute. This decision shall be binding upon SOCCO and shall not be subject to judicial review unless, within 20 days of the service upon SOCCO of the decision, SOCCO serves upon the United States and files with this Court a motion challenging the decision. Such motion shall be served upon the United States as provided in Section XVIII (Notices and Submissions). The United States shall have 60 days from the date of service to serve and file a response to SOCCO's motion, and SOCCO's motion shall inform the Court of this provision regarding the length of time allowed for a response.

b. Judicial review of any dispute governed by this Paragraph shall be governed by applicable provisions of law.

65. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of SOCCO's under this Consent Decree not directly in dispute, unless the Responsible Agency or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraphs 87 and 88.

66. For the purposes of this Section, Service is complete when the documents are deposited for delivery with an overnight delivery service or with the United States Postal Service if sent certified mail, return receipt requested, or, if any other method is used, service is complete upon actual receipt.

IX. ACCESS TO INFORMATION AND PROPERTY

67. SOCCO shall provide to EPA, FWS and OEPA, upon request, copies of all non-privileged documents and information within its possession or control or that of its contractors or agents (to the extent that SOCCO has the authority to require its contractor or agent to produce such documents or information) relating to activities taken pursuant to the SOCCO/OEPA Stream Restoration Plan and this Decree including, but not limited to, sampling, analysis, chain of custody records, manifests, receipts, reports, correspondence, or other documents.

68. Commencing on the date of lodging of this Consent Decree, SOCCO agrees to provide EPA, FWS, and their

representatives, including its contractors, access at all reasonable times to any property in or adjacent to the Stream Systems that is owned or controlled by SOCCO for the purposes of:

- a. Monitoring the implementation of any Restoration Measure;
- b. Verifying any data or information submitted to the United States or OEPA, including any data collected pursuant to the LCIP Work Plan;
- c. Conducting investigations relating to the Stream Systems;
- d. Obtaining samples; and
- e. Assessing the need for, or planning the implementation of, Restoration Measures.

69. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, including enforcement authorities related thereto, under any applicable statute or regulations.

X. BIOLOGICAL AND CHEMICAL MONITORING AND REPORTING

70. This Section describes the chemical and biological sampling/monitoring to be performed by SOCCO pursuant to Section V (Restoration Measures). Although SOCCO may be obligated to perform some or all of these sampling/monitoring activities to satisfy its obligations to OEPA, the requirements of this Section are separate and independent obligations of SOCCO to the United States. In the event of a discrepancy between this Decree and the Endpoints Document, the terms of the Decree shall

control. Chemical and biological sampling/monitoring to be performed by SOCCO to satisfy the requirements of Section VI (Leading Creek Watershed Improvement Project) shall be performed in accordance with the procedures approved by FWS pursuant to that Section.

71. This Paragraph applies to all biological sampling/monitoring data submitted by SOCCO to EPA for the purposes of demonstrating attainment of Ecological Endpoints under this Decree.

a. SOCCO shall conduct biological sampling and monitoring in the Affected Streams, and shall analyze and report all data collected therefrom, in accordance with the Endpoints Document and all OEPA Protocols identified therein.

b. All biological sampling/monitoring shall be conducted at the Sampling Stations identified in Appendix 7 (Sampling Stations).

c. Except as otherwise provided in the Endpoints Document Errata Sheet with respect to the Silver Lamprey, the Least Brook Lamprey, and the River Redhorse, all fish and macroinvertebrate sampling/monitoring shall be conducted during the Summer/Fall Index Period, unless otherwise agreed to by EPA in writing.

d. Except as provided in Paragraphs 30(i) and 74, each year during the Summer/Fall Index Period SOCCO shall conduct at least two valid collections of macroinvertebrates and three valid fish sampling passes at each Sampling Station. The minimum number of sample collections or sampling passes required by this Paragraph

(as may be modified by Paragraph 30(i) or Paragraph 74)
establishes the minimum number of valid samples necessary to demonstrate attainment or maintenance of a required IBI, ICI, and MIwb score at any Sampling Station. To be considered valid, each collection must follow the procedures described in, and occur under in-stream conditions contemplated by, the relevant OEPA protocol.

e. Mussel and amphibian sampling/monitoring will be conducted as appropriate to demonstrate attainment of mussel and amphibian Ecological Endpoints. .

f. Sampling Stations for demonstrating attainment of the Ecological Endpoints for amphibians (Muddpuppies) in Segment 3 of Leading Creek had not been finally identified at the time this Decree was drafted. As provided in item 6 of the Errata Sheet to the Endpoints Document SOCCO has proposed seven (7) locations that appear to have suitable muddpuppy habitat. These Sampling Stations are identified in Appendix 7 to this Decree as the Leading Creek Sampling Stations at RM (river mile) 15.6, 15.5, 14.8, 13.8, 12.9, 12.3 and, 10.3. Based upon sampling data to be obtained subsequent to the signing of this Decree, OEPA will select four of these Sampling Stations for the demonstration of the attainment and maintenance of the Ecological Endpoints for amphibians in Segment 3 of Leading Creek. OEPA will notify both SOCCO and EPA of the Sampling Stations selected. Upon their selection by OEPA, these four Sampling Stations shall be the Sampling Stations at which SOCCO must demonstrate satisfaction of

the Ecological Endpoint for amphibians (collection of adult and juvenile mudduppies for three consecutive years at each Sampling Station).

g. Biological sampling and/or monitoring conducted by SOCCO for the purpose of submission to OEPA pursuant to the SOCCO/OEPA Restoration Plan and/or Endpoints Document may be submitted by SOCCO to EPA to satisfy requirements of this Decree so long as such data also meets the requirements of this Decree and provided that any deviation from the terms of the Endpoints Document, as attached to this Decree, or the sampling protocols identified therein, has been agreed to in writing by EPA.

72. Unless otherwise agreed to in writing by EPA, all biological data collected during the Summer/Fall Index Period (June 15 through October 15) and all analysis of that data shall be submitted to EPA no later than the earlier of either the date it is submitted to OEPA, or January 30th of the year immediately following the collection of the data. In reporting biological data to EPA, SOCCO shall provide copies of all forms required to be completed pursuant to the Endpoints Document or OEPA protocols identified therein, including but not limited to, the qualitative habitat evaluation forms, all field notes of samplers, and all worksheets and final reports addressing calculation of IBI, ICI, and MIwo scores. Until such time as OEPA directs otherwise, all voucher specimens required by the Endpoints Document are to be provided only to OEPA in accordance with the Endpoints Document. If for any reason OEPA informs SOCCO that it is no longer willing

to receive or provide for the retention of voucher specimens, then SOCCO shall continue to collect and preserve voucher specimens in the manner prescribed by the Endpoints Document and shall submit such specimens directly to EPA.

73. In addition to the biological monitoring conducted pursuant to Paragraph 72, SOCCO shall:

(a) Sample periphyton growth in the Affected Streams in accordance with Appendix 4. The periphyton monitoring shall be conducted between April 1 and May 31 and between July 1 and August 31 of 1995. Additional periphyton monitoring, if any, will be required under this Decree only in connection with specific Restoration Measures or Restoration Measures Reports under Section V (Restoration Measures for the Affected Streams); and,

(b) Collect and report qualitative data regarding macroinvertebrate communities in the Affected Streams in accordance with Appendix 5. These data shall be collected in conjunction with each macroinvertebrate collection required pursuant to Paragraph 71.

74. Notwithstanding anything to the contrary in the Endpoints Document, SOCCO may reduce the level of effort for biological sampling/monitoring in any Stream Segment, upon the written concurrence of EPA, only as follows:

(a) In the year following two consecutive years of demonstrated attainment of all Ecological Endpoints for fish in a particular Stream Segment, SOCCO may reduce the fish collections

at each Station in that Segment to two valid sampling passes for fish. In the year following two consecutive years of demonstrated attainment of all Ecological Endpoints for macroinvertebrates in a particular Stream Segment, SOCCO may reduce the macroinvertebrate collections at each Station in that Segment to one valid macroinvertebrate collection. Notwithstanding any reduced sampling for fish and/or macroinvertebrates, SOCCO shall, unless otherwise directed by EPA, continue to collect and report the additional qualitative macroinvertebrate data required by Paragraph 73(b) unless EPA agrees, in writing, that such sampling may be further reduced or eliminated.

(b) Upon the Certification of Recovery for a particular Segment, SOCCO may further reduce biological sampling/monitoring in such Segment by sampling only at designated "Key Station(s)" and "Control Stations" in that Segment. Key Stations shall be established by: (1) OEPA designation of Key Stations and written confirmation by OEPA to EPA of such designation, or (2) if OEPA has not designated Key Stations by the time SOCCO is entitled, pursuant to this Paragraph, to reduce sampling to Key Stations, SOCCO shall propose and obtain written concurrence from EPA that one or more Sampling Stations in a Stream Segment is (are) the representative Station(s) for that Segment. Control Stations are identified in Appendix 7 (Sampling Stations). Sampling/monitoring of Key Stations and Control Stations will continue until the Stream

System has Recovered in accordance with Paragraph 30(e). SOCCO may, upon the concurrence of EPA pursuant to Section XIV (Certification of Recovery), discontinue biological sampling/monitoring in a Stream System when that System has Recovered.

(c) To obtain EPA concurrence for the reduction of sampling, SOCCO must submit to EPA a written request identifying precisely what sampling SOCCO wishes to reduce and the basis for such request. EPA shall respond to SOCCO's request within 120 days. Failure of EPA to deny SOCCO's request for a reduction of sampling within the designated time period shall be deemed an approval of such request for the next following Summer/Fall Index Period and for any subsequent sampling period unless EPA, in writing, objects to the reduction and requires resumption of the more frequent sampling during the next following Summer/Fall Index Period.

75. SOCCO shall conduct periodic sampling of sediments in the Affected Streams in accordance with the provisions of Appendix 6. Sediment sampling will continue in each Stream System until such time as EPA certifies Recovery of such Stream System pursuant to Section XIV (Certification of Recovery). Any additional sampling of sediments or of water quality shall be undertaken in accordance with a Restoration Measures Plan approved pursuant to Section V (Restoration Measures for Affected Streams). Unless otherwise agreed to in writing by EPA, all water and sediment samples must be analyzed, subjected to QA/QC

procedures in accordance with Section XI, and the results reported to EPA within 90 days of each sampling event.

76. Not less often than quarterly (January 15, April 15, July 15, and October 15), SOCCO shall submit to EPA copies of all discharge monitoring reports required to be submitted to OEPA pursuant to any NPDES Permit held by SOCCO for discharge into the Leading Creek or Raccoon Creek Stream Systems.

XI. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

77. For any work performed pursuant to this Decree, SOCCO shall use quality assurance, quality control, and chain of custody procedures for all samples which shall substantially meet the quality assurance requirements established in the following guidance: "EPA Requirements for Quality Assurance Project Plans for Environmental Data Operations" (EPA QA/R-5), Draft Final July 1993; "Guidance for the Data Quality Objectives Process" (EPA QA/G-4) Final September 1994; and, "Data Quality Objectives Decision Error Feasibility Trails" (EPA QA/G-4D) Final September 1994. SOCCO shall ensure that EPA personnel and their authorized representatives are allowed access at reasonable times to all laboratories owned and utilized by SOCCO in implementing this Decree. SOCCO shall ensure that the laboratories it utilizes for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. SOCCO shall ensure that all laboratories it uses for analysis of samples taken pursuant to this Decree use an EPA or equivalent QA/QC program.

78. Upon request, SOCCO shall allow split or duplicate samples to be taken by EPA and/or OEPA or their authorized representatives. SOCCO shall notify EPA and OEPA not less than 14 days in advance of any sample collection activity required by this Decree, including, but not limited to, water, sediment and biological sampling, unless shorter notice is agreed to by EPA. The results of any unscheduled sampling or supplemental sampling conducted by SOCCO but not explicitly required by this Decree shall be provided to EPA along with the bi-annual progress reports required in Section XII. Upon request, EPA shall allow SOCCO to take split or duplicates of any samples it takes as part of its implementation of this Decree.

79. Except as otherwise provided in this Decree or in the Statement of Work for the Leading Creek Improvement Plan, SOCCO shall submit to EPA results of all sampling and/or tests or other data obtained or generated by or on behalf of SOCCO with respect to the implementation of this Decree within 14 days of SOCCO's receipt or preparation of data sheets or other compilation of test results, unless EPA agrees otherwise. SOCCO shall send courtesy copies of all such data to OEPA.

XII. REPORTING REQUIREMENTS

80. In addition to any other requirement of this Decree, SOCCO shall submit to EPA written progress reports every 6 months that: (a) describe the actions which have been taken toward achieving Restoration of the Affected Streams during the previous 6 months, including an identification of all sampling

collection activities as referenced in Paragraph 79; (b) identify all work plans, plans and other deliverables required by the OEPA/SOCCO Restoration Plan completed and submitted during the previous six months; (c) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next 6 months; and (d) include any modifications to the work plans or other schedules that SOCCO has proposed to OEPA under the SOCCO/OEPA Restoration Plan or this Decree. SOCCO shall submit these progress reports to OEPA and EPA by the tenth day of April and October of each year following the entry of this Decree until EPA has issued a Certification of Recovery for both Stream Systems pursuant to Section XIV (Certification of Recovery).

81. All reports and other documents submitted by SOCCO to FWS and EPA that purport to document SOCCO's compliance with the terms of this Decree shall be signed by an authorized representative of SOCCO. The person signing such report or document shall make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

XIII. STIPULATED PENALTIES

82. SOCCO shall be liable to the United States for stipulated penalties in the amounts set forth in subparagraphs (a) and (b) of this Paragraph for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XV (Force Majeure). "Compliance" shall include completion of the activities required under this Consent Decree or any work plan approved under this Consent Decree in accordance with the terms of this Decree or the approved plan.

a. The following stipulated penalties shall be payable per violation per day to the United States for any: (i) failure to commence or complete any Restoration Measure in accordance with any schedule in any EPA approved or amended work plan; (ii) failure to timely make any payment required under Paragraphs 26, 27, 46 or 49; or (iii) failure to conduct sampling/monitoring as required by this Decree.

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
a. \$500	a. Day 1 through 10
b. \$1,000	b. Day 11 through 20
c. \$5,000	c. Day 21 and each day thereafter

b. The following stipulated penalties shall be payable per violation per day to the United States for: (i) failure to submit timely or adequate reports or plans pursuant to Paragraphs 32-35, 40-42, and 80, and pursuant to the schedule(s) adopted or approved pursuant to the LCIP Work Plan and/or the provisions of Section VI (Leading Creek Watershed Improvement Plan); and (ii)

failure to timely submit data and analyses pursuant to Paragraphs 72, 73, 75, 76, and 79:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
a. \$250	a. Day 1 through 10
b. \$500	b. Day 11 through 20
c. \$2,000	c. Day 21 and each day thereafter

83. All stipulated penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

84. Following the Responsible Agency's determination that SOCCO has failed to comply with a requirement of this Consent Decree, the Responsible Agency may give SOCCO written notification of the same and describe the noncompliance. The Responsible Agency may send SOCCO a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether the Responsible Agency has notified SOCCO of a violation.

85. All penalties owed to the United States under this Section shall be due and payable within 30 days of receipt from the Responsible Agency of a demand for payment of the penalties, unless SOCCO invokes the Dispute Resolution procedures under Section VIII (Dispute Resolution). All payments under this

Section shall be made in the same manner as the payment required by Paragraph 25(a).

86. The payment of penalties shall not alter in any way SOCCO's obligation to complete the performance required under this Consent Decree.

87. Penalties shall continue to accrue as provided in Paragraphs 82 and 83 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of the Responsible Agency that is not appealed to this Court, accrued penalties determined to be owing shall be paid within 30 days of the agreement or the receipt of the Responsible Agency decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, SOCCO shall pay all accrued penalties determined by the Court to be owed to the United States.

88. Notwithstanding the forgoing, if stipulated penalties accrue relating to SOCCO's failure to (a) timely or adequately submit a Restoration Measure Work Plan pursuant to Paragraphs 33-35 or, (b) timely commence implementation of a Restoration Measure pursuant to a Restoration Measure Work Plan amended by EPA pursuant to Paragraph 56 then, for such penalties that accrue between the time that SOCCO invokes formal Dispute Resolution and 10 days after the dispute resolution procedure has concluded by agreement, failure to challenge the decision of the

Water Division Director, or by entry of a final non-appealable order by the Court, any assessment of stipulated penalties shall be made by order of the Court based upon the Court's assessments of the reasonableness of SOCCO's challenge to EPA's decision, and such other equitable factors as the Court deems appropriate.

89. If SOCCO fails to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties.

90. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of SOCCO's violation of this Decree or of the statutes and regulations upon which it is based.

XIV. CERTIFICATION OF RECOVERY

91. If at any time after submittal to EPA of all of the sampling data required under this Decree for any particular Summer/Fall Index Period, SOCCO concludes that either the Leading Creek or Raccoon Creek Stream System or any Segment thereof has Recovered, SOCCO may submit to EPA a written request for certification by EPA that such Stream System(s) or Segment(s) has Recovered. A copy of the request shall be contemporaneously sent to the Chief, Environmental Enforcement Section, at the address provided in Section XVIII (Notices). In the request, a corporate representative of SOCCO shall (a) state that all Restoration Measures as implemented in the relevant Stream System pursuant to this Decree have been completed in full satisfaction

of the requirements of this Decree and any work plan approved hereunder, (b) state that Recovery has occurred, and (c) provide a summary and explanation of the data and documentation that SOCCO believes demonstrate that Recovery has occurred in the Stream System or Segment. The request shall contain the following statement, signed by a responsible corporate official of SOCCO:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the request for certification EPA determines, based upon any available data, that (a) a Restoration Measure or any portion thereof has not been completed in accordance with this Decree or approved work plan, or (b) Recovery of the Stream System or Segment has not been achieved, EPA will so notify SOCCO in writing and EPA may, in accordance with the procedures provided under Paragraphs 31 through 39, require SOCCO to take further actions. Failure of EPA to approve or deny within 180 days a properly submitted request for certification of Recovery shall be deemed a denial of the request and subject to Section VIII (Dispute Resolution).

92. If EPA agrees that Recovery has occurred in a Stream System or Segment, EPA will so certify in writing to

SOCCO. At SOCCO's request EPA may certify that a Segment has Recovered except for the Key Species/Taxa of unionid mussels specified as Ecological Endpoints. Certification of Recovery of a Stream Segment with a reservation regarding mussels shall not affect EPA's authority to require additional actions by SOCCO related to recovery of Key Species/Taxa of mussels in such Segment pursuant to Section V (Restoration Measures for Affected Streams). Certification of Recovery of a Stream Segment without a reservation for Key Species/Taxa of mussels shall terminate SOCCO's obligations under Sections V of this Decree as to actions related to Ecological Endpoints for that Stream Segment. Certification of Recovery of a Stream System shall terminate SOCCO's obligations under Sections V and X of this Decree as to that Stream System.

93. EPA shall not be bound by any determinations regarding Recovery made by OEPA. Any such determinations may, however, be included in the administrative record for purposes of Dispute Resolution under Section VIII if documentation of OEPA's decision is timely added to the administrative record compiled pursuant to Paragraph 62(a).

XV. FORCE MAJEURE

94. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of SOCCO or of any entity controlled by SOCCO, including, but not limited to, their contractors and subcontractors, that delays or prevents the performance of any obligation under this

Consent Decree despite SOCCO's best efforts to fulfill the obligation. The requirement that SOCCO exercise "best efforts to fulfill the obligation" includes best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the extent possible. "Force Majeure" does not include financial inability to complete required work or a failure to attain the Ecological Endpoints.

95. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, SOCCO shall notify orally the Contact Person for the Responsible Agency or, in the event that person is unavailable, the Contact Person's supervisor, within 5 days of when SOCCO first knew or should have known that the event would cause a delay. The Contact Person for a Responsible Agency shall be the person to whom SOCCO has been directed in writing to submit deliverables, data or other submissions under this Decree. Within 10 days thereafter, SOCCO shall provide in writing to the Responsible Agency an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; and, SOCCO's rationale for attributing such delay to a force majeure event if it intends to assert such a claim. SOCCO shall include with any notice all

available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude SOCCO from asserting any claim of force majeure for that event. SOCCO shall be deemed to have notice of any circumstance of which its contractors or subcontractors had actual notice.

96. If the Responsible Agency agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by the Responsible Agency, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If the Responsible Agency does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, the Responsible Agency will, within 60 days, notify SOCCO in writing of its decision. If the Responsible Agency agrees that the delay is attributable to a force majeure event, the Responsible Agency will notify SOCCO in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

97. If SOCCO elects to invoke the dispute resolution procedures set forth in Section VIII (Dispute Resolution), it shall do so no later than 20 days after receipt of the Responsible Agency's notice pursuant to Paragraph 96. In any

such proceeding, SOCCO shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that SOCCO complied with the requirements of Paragraphs 94 and 95. If SOCCO carries this burden, the delay at issue shall be deemed not to be a violation by SOCCO of the affected obligation of this Consent Decree identified to the Responsible Agency and the Court.

XVI. COVENANTS NOT TO SUE

98. Except as specifically provided in Paragraphs 100 and 101, effective upon entry of the Decree, the receipt of SOCCO's first payment into the Leading Creek Improvement Account pursuant to Paragraph 46, the receipt of the reimbursement payments pursuant to Paragraph 26, and the payment in full of the civil penalty pursuant to Paragraph 25, the United States covenants not to sue or to take administrative action against SOCCO for claims and allegations asserted in the Complaint in this action, including but not limited to claims for natural resource damages and the costs of assessing any damage to natural resources arising out of the discharge of untreated or partially treated effluent during the dewatering of Meigs Mine No. 31 during July 30, 1993 through September 23, 1993. This covenant not to sue extends to SOCCO, American Electric Power Company,

Inc., American Electric Power Service Corporation, Ohio Power Company, and the officers, directors and employees of each of those companies to the extent such person was acting in such capacity in connection with the dewatering of Meigs Mine No. 31 during July 30, 1993 through September 23, 1993. This covenant not to sue does not extend to any other person.

99. Effective upon the entry of this Decree, SOCCO covenants not to sue the United States on any claim arising out of the operative facts underlying the action filed in the United States District Court for the Southern District of Ohio, Eastern Division, styled Southern Ohio Coal Company v. Office of Surface Mining, Reclamation, and Enforcement, et al., Civil Action No. C2-93-751. Notwithstanding the foregoing, SOCCO does not waive any defense it may have to any future action reserved to the United States under Paragraphs 100 and 101.

XVII. RESERVATIONS OF RIGHTS

100. The covenants not to sue in Paragraph 98 shall apply only to civil claims arising out of the discharge of untreated or partially treated AMD during the July 30, 1993 through September 23, 1993 dewatering of the Meigs No. 31, and shall not apply to claims based on a failure of SOCCO to satisfy the requirements of this Decree or any violation of law occurring prior to July 30, 1993 or subsequent to September 23, 1993.

101. The United States reserves, and this Decree is without prejudice to, any civil cause of action or claim for relief not arising directly out of the July 30, 1993 through

September 23, 1993 dewatering of the Meigs Mine. In addition, notwithstanding the covenant not to sue in Paragraph 98, the United States reserves all rights to take any action, including administrative or judicial actions against SOCCO, to address any imminent and substantial endangerment to human health or the environment.

102. Except as expressly stated in this Decree, each Party reserves against any person not a Party to this Decree all rights, claims, or defenses available to it arising out of or relating to the Meigs Mine No. 31 dewatering in July 30, 1993 through September 23, 1993.

103. Nothing in this Decree creates, nor shall it be construed as creating, any claim in favor of any person not a Party to this Decree. Nothing in this Decree shall be construed as limiting, barring, or otherwise prejudicing claims SOCCO may have for insurance, contribution, and/or indemnification arising from this settlement against any person not a Party to this Decree.

XVIII. NOTICES AND SUBMISSIONS

104. Except as otherwise provided herein, if written notice or submission is required to be given by one Party to another Party or entity for any reason, it shall be directed to the individuals and addresses specified below, unless the individuals specified or their successors give notice, in writing, to the other Parties that notice or submission should be directed to a different individual or address. All notices shall

reference the action United States v. Southern Ohio Coal Company, its action number and the United States Department of Justice file number, 90-5-1-1-5033.

Notice and submissions to the United States:

(Notices and submissions to the United States shall be sent to all persons listed under this subheading. Notices and submissions to EPA shall be sent to the person denoted with an *. Notices and submissions to FWS shall be sent to the person denoted with a **.)

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

* Director, Division of Water
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3507

** Field Office Supervisor
U.S. Fish and Wildlife Service
6950 Americana Pkwy
Suite H
Reynoldsburg, OH 43068-4132

Notice to SOCCO

William C. Bosworth
Manager Environmental Engineering
American Electric Power Service Corporation
1 Memorial Drive
Lancaster, Ohio 43130

Copies to OEPA

Edward Rankin
Ohio Environmental Protection Agency
Division of Surface Water
1685 Westbelt Drive
Columbus, OH 43228-3809

XIX. REPRESENTATIVES

105. Each undersigned representative of SOCCO certifies that he or she is fully authorized to enter into the

terms and conditions of this Decree and to execute and legally bind SOCCO to this Decree.

XX. ASSURANCE OF ABILITY TO PERFORM

106. Within 15 days of the entry of this Decree, SOCCO shall provide assurance of ability to complete the requirements of this Decree by providing to EPA a letter of guarantee from Ohio Power Company guaranteeing to the United States full performance of all payment and work obligations of SOCCO under this Decree.

XXI. MISCELLANEOUS

107. The Parties agree that this Decree may be executed in counterpart.

108. All activities undertaken by SOCCO pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations.

109. Where any activity required by this Decree requires a federal or state permit or approval, SOCCO shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. SOCCO may seek relief under the provisions of Section XV (Force Majeure) of this Consent Decree for any delay resulting from a failure to obtain, or a delay in obtaining, any required permit. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

110. Except with the prior written consent of EPA, SOCCO agrees that, consistent with safe mining practices, it will maintain the currently-existing drainage at the bulkhead area from the inactive portion of Meigs No. 31 (formerly Raccoon No. 3) and will not reseal the opening between this inactive area and Meigs No. 31 for the purpose of storing any water. The presently existing passageway for ventilation and/or access control shall not be deemed a violation of this provision.

XXII. MODIFICATION

111. Minor modifications not materially altering this Decree may be effected by the written agreement of the Parties. Modifications to the Endpoints Document and changes to any R.M. Work Plan schedules which are agreed to in writing by SOCCO and EPA shall be considered minor modifications to this Decree and shall not require the Court's approval. No other modifications of this Decree may be made unless the Parties agree in writing to the modification and the Court approves of the requested modification.

XXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

112. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw consent to this Decree if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is

inappropriate, improper, or inadequate. SOCCO consents to the entry of this Consent Decree without further notice.

113. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the discretion of either Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXIV. TERMINATION

114. Upon the complete satisfaction of all of the requirements of this Decree, and after at least 60 days written notice to the United States, SOCCO may move this Court for a termination of this Decree. If the Court determines that SOCCO has satisfied all of its obligations hereunder, the Court may terminate this Decree.

XXV. CONTINUING JURISDICTION

115. The Court retains jurisdiction to enforce the terms of this Decree.

Dated and entered this _____ day of _____, 1995.

UNITED STATES DISTRICT JUDGE

WE HEREBY CONSENT to the entry of this Decree:
FOR THE UNITED STATES OF AMERICA:

Date

LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

Date

PHILLIP A. BROOKS
ANITA J. CICERO
Attorneys
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7611 Ben Franklin Station
Washington, D.C. 20044
(202) 514-3637

EDMUND A. SARGUS, JR.
United States Attorney
Southern District of Ohio

Date

JAMES E. RATTAN (Bar # 0018632)
Assistant United States Attorney
Southern District of Ohio
2 Nationwide Plaza
280 N. High Street, 4th Floor
Columbus, OH 43215

Date

VALDAS V. ADAMKUS
Regional Administrator
Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard (R-19J)
Chicago, IL 60604-3590

FOR THE UNITED STATES, CONTINUED

Date

STEVEN A. HERMAN
Assistant Administrator for
Enforcement & Compliance Assurance
U.S. Environmental Protection Agency
Washington, DC 20460

Date

DAVID MUCHA
U.S. Environmental Protection Agency
Office of Regional Counsel
Region 5
77 West Jackson Boulevard (C-30A)
Chicago, IL 60604-3590

Date

ROBERT URAM
Director
Office of Surface Mining
Reclamation and Enforcement

????????????????????

FOR SOUTHERN OHIO COAL COMPANY:

Date

CHARLES A. EBETINO, JR.
President and
Chief Operating Officer
Southern Ohio Coal Company
1 Memorial Drive
Lancaster, Ohio 43130

Date

LANCE G. SOGAN
Vice President
Administration and Human Resources
American Electric Power Service
Corporation-Fuel Supply Department
1 Memorial Drive
Lancaster, Ohio 43130
AS AGENT FOR SOUTHERN OHIO COAL CO.

Date

D. MICHAEL MILLER
American Electric Power Service
Corporation-Fuel Supply Department
1 Memorial Drive
Lancaster, Ohio 43130
AS COUNSEL FOR SOUTHERN OHIO COAL CO.

