

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
 v.) Case No. C2-96-0097
)
) Judge, Honorable George C. Smith
 SOUTHERN OHIO COAL COMPANY,)
)
) Magistrate Judge, Mark Abel
 Defendant.)
)

WHEREAS, on March 22, 1996, this Court entered a Consent Decree and Settlement Agreement in this matter that set forth, among other things, actions to be taken by Southern Ohio Coal Company ("SOCCO") to address the effects on two streams of a release in the Summer of 1993 of mine water from SOCCO's "Meigs Mine No. 31" located in Meigs County, Ohio (the 1996 Consent Decree");

WHEREAS, despite SOCCO's good faith efforts under the 1996 Consent Decree, not all of the biological criteria established for demonstration of full recovery of two segments of one of the affected streams have been met;

WHEREAS, in Paragraph 106 of the 1996 Consent Decree, Ohio Power Company guaranteed the full performance of all payment and work obligations of its then subsidiary, SOCCO. In 2001, Ohio Power Company sold SOCCO, but retained certain obligations relating to the 1996 Consent Decree. Ohio Power Company now undertakes through this Amended Consent Decree to satisfy all remaining obligations of SOCCO and Ohio Power Company pursuant to the 1996 Consent Decree.

WHEREAS, Ohio Power Company asserts, with substantial evidentiary basis, that the failure of the two segments of one of the affected streams to meet the selected biological criteria is due to factors beyond its, or SOCCO's, control and is unrelated to the 1993 discharge of water from Meigs Mine No. 31;

WHEREAS, Ohio Power Company has agreed to pay to OEPA \$10,000 for funding of certain activities in connection with the monitoring of unionid mussel communities in Leading Creek and to pay \$100,000 to fund an environmental study of relating to watershed management issues..

WHEREAS, Ohio Power Company has agreed, upon entry of this Amended Consent Decree, to convey to the Meigs Soil and Water Conservation District, certain conservation easements on land owned by Ohio Power Company along Parker Run and Leading Creek, in Meigs County, Ohio; and

WHEREAS, upon review of the performance of SOCCO and/or Ohio Power Company under the 1996 Consent Decree and the data collected by both companies and governmental agencies, the United States Environmental Protection Agency ("U.S. EPA") and OEPA have determined that the interests of the public will best be served by terminating the prior Consent

Decree and substituting this Decree in its place.

BACKGROUND

1. SOCCO owned and operated an underground coal mine complex in Southeastern Ohio, which includes Meigs Mine No. 31.
2. On or about July 11, 1993, as much as one billion gallons of water inundated the active workings of Meigs Mine No. 31, halting all mining operations. Soon thereafter, SOCCO requested emergency authorization from OEPA to dewater the Mine by pumping the water from the mine and discharging it without meeting the effluent limits of its NPDES Permits. U.S. EPA raised objections to the discharge. On July 26, 1993, OEPA issued a Director's Final Findings and Order ("DFFO"). The DFFO provided that SOCCO could discharge untreated or partially treated water from Meigs Mine No. 31.
3. On or about July 30, 1993, SOCCO began to discharge into adjacent streams untreated and/or partially treated water from Meigs Mine No. 31. This discharge associated with the dewatering of the mine ceased on or about September 23, 1993.
4. The untreated or partially treated water discharged prior to September 23, 1993, entered Raccoon Creek, Leading Creek, and tributaries thereto (the "Affected Streams"), all waters of the United States. These discharges resulted in, among other things, extensive mortality to aquatic life in Parker Run, Leading Creek, and Strong's Run.
5. 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.

6. On March 22, 1996, this Court entered a consent decree between U.S. EPA and SOCCO resolving claims asserted by U.S. EPA relating to the dewatering of Meigs Mine No. 1. The United States' claims were asserted under the Clean Water Act, 33 U.S.C. §§ 1251 et seq., the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq., and the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 et seq.

7. In accordance with Section VI of the 1996 Consent Decree, among other things, SOCCO conducted an ecological assessment of conditions in the entire Leading Creek watershed and developed recommendations for enhancing the aquatic life uses of the entire Leading Creek stream system. The assessment was memorialized in a report that was accepted as complete by the United States Fish and Wildlife Service (FWS). Also in accordance with Section VI of the 1996 Consent Decree, SOCCO paid \$1,900,000 into the Department of the Interior's Natural Resource Damage Assessment and Restoration Fund to be used for the implementation of actions to improve the aquatic life uses of Leading Creek and its tributaries. FWS has begun implementation of watershed enhancement actions with the monies deposited by SOCCO for this purpose.

8. OEPA, the agency that took the lead in monitoring the recovery of the Affected Streams, has determined that one Affected Stream, the Raccoon Creek stream system, has fully recovered from the effects of the 1993 discharges of mine water from Meigs Mine No. 31. After review of the data for the other Affected Stream, Leading Creek, OEPA determined that some of the original biological endpoints were inappropriate for certain segments of Leading Creek. SOCCO maintains, with considerable evidence to support the

contention, that factors beyond the Company's control altered the characteristics of the habitat in certain portions of Leading Creek to such an extent that some of the original biological criteria for recovery could not be met. Both OEPA and U.S. EPA have reviewed the data from the Leading Creek stream system and have concluded that actions in parts of the affected watersheds, most or all of which would address problems unconnected with the 1993 discharges, are more likely to result in significant resource restoration, and sooner, than continued operation under the 1996 Consent Decree.

9. This Decree is a settlement of a contested matter. 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

10. This Court has jurisdiction over the subject matter and over the Parties to this action pursuant to 28 U.S.C. §§ 1331, 1333, 1345, and 1355, and 33 U.S.C. § 1319. 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

11. This Decree shall apply to and be binding upon and inure to the benefit of the

United States, and Ohio Power Company, their officers, directors, successors, and assigns.

III. DEFINITIONS

12. 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.

"Amended 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.

"U.S. 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 and any successor departments or agencies of the United States.

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

"Parties" means the United States and Southern Ohio Coal Company, and where applicable, Ohio Power Company.

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

"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.

"United States" means the United States of America.

IV. ADDITIONAL REIMBURSEMENT FOR NATURAL RESOURCE DAMAGES

13. Pursuant to the 1996 Consent Decree, SOCCO paid 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. In light of the fact that certain portions of the Leading Creek Stream System did not meet the biological endpoints selected under the 1996 Consent Decree as indicia of recovery, Ohio Power Company, as guarantor for SOCCO, shall pay to the United States an additional \$1,400,000 as further compensation for natural resources alleged to have been affected by the 1993 dewatering of Meigs Mine No. 31.

14. Payment pursuant to Paragraph 13 shall be made by Electronic Funds Transfer in accordance with instructions provided by the United States prior to entry of this Consent Decree, or by tender of certified check made payable to the Secretary of the Interior and

delivered to Department of the Interior, NBC - Division of Financial Management Services, Branch of Accounting Operations, Mail Stop 1313, 1849 C St., N.W., Washington, D.C. 20240 Attn: Kim Viel [phone (202) 219-0875]. Promptly after lodging, Ohio Power shall notify counsel for the United States of the method by which payment will be made and counsel will provide the necessary instructions. The Department of the Interior will assign these funds a special project number previously established for funds received under the 1996 Consent Decree to allow these 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 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.

15. All funds in the Leading Creek Improvement Account shall be used by FWS to implement (directly or indirectly) and monitor projects intended to improve the aquatic life uses of the Leading Creek Stream System and/or to acquire resources equivalent to those affected by the 1993 dewatering of Meigs Mine No. 31. 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 Amended

Consent Decree, provided, however, that any reimbursement to FWS for costs shall not exceed \$60,000 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.

16. 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.

17. 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 for the Leading Creek Steam System would best be accomplished through a continued state/federal cooperative effort. Pursuant to the 1996 Consent Decree, FWS has developed a working relationship with several federal and state agencies for the purpose of selecting and/or implementing enhancement projects for the Leading Creek Watershed. These cooperative relationships are expected to be continued under this Amended Consent Decree.

18. Even with the addition of the funds provided by Paragraph 13 above, 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 as beneficial to the biological conditions in the Leading Creek Stream System. Therefore, it shall remain the responsibility of FWS to determine the most effective way to use the funds in the Leading Creek

Improvement Account to implement enhancement projects for the Leading Creek Stream System. FWS will 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. Funds in the Leading Creek Improvement Fund, at FWS's sole discretion, may be used to pay for work that will enable any federal, state, or local agency to obtain matching or additional funds for work that will contribute to improvement in the biological quality of the Leading Creek Stream System.

V. ACCESS TO INFORMATION AND PROPERTY

19. Ohio Power Company shall provide to U.S. 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 Ohio Power Company 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.

20. Commencing on the date of lodging of this Consent Decree, Ohio Power Company agrees to provide access to U.S. EPA, FWS, and their contractors at all reasonable times to any property in or adjacent to the Stream Systems that is owned or controlled by Ohio Power Company for the purpose of:

- a. Conducting investigations relating to the Stream Systems;
- b. Obtaining samples; and
- c. Assessing the need for, or planning the implementation of, projects related to

the Affected Streams.

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

VI. STIPULATED PENALTIES

22. Ohio Power Company shall be liable to the United States for stipulated penalties in the amounts set forth in subparagraph a of this Paragraph for failure to comply with the requirements of this Amended Consent Decree specified below.

a. The following stipulated penalties shall be payable per violation per day to the United States for any failure to pay the amount specified in Paragraph 13, to provide documents requested pursuant to Paragraph 19, or to allow access as provided in Paragraph 20 above.

<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

23. 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.

24. 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. All payments under this Section shall be made in the same manner specified in the Demand for Payment.

25. If Ohio Power Company fails to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties.

26. Nothing in this Amended 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 Ohio Power Company's violation of this Decree.

VII. COVENANTS NOT TO SUE

27. Except as specifically provided in Paragraphs 29-31, effective upon entry of the Decree, the receipt of Ohio Power Company's first payment into the Leading Creek Improvement Account pursuant to Paragraph 13, the United States covenants not to sue or to take administrative action against SOCCO or Ohio Power Company for (a) 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 or (b) claims arising out of the 1996 Consent Decree. This covenant not to sue extends to American Electric Power Company, Inc., American Electric Power Service Corporation, Ohio Power Company, SOCCO 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 1993 dewatering of Meigs Mine No. 31 or in connection with compliance activities under the 1996 Consent Decree. This covenant not to sue does not extend to any other person.

28. Effective upon the entry of this Decree, Ohio Power Company 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, neither SOCCO nor Ohio Power Company waive any defense they may have to any future action reserved to the United States under this Amended Consent Decree.

VIII. RESERVATIONS OF RIGHTS

29. The covenants not to sue in Paragraph 27 shall apply only to civil claims arising out of the discharge of untreated or partially treated AMD during the approximately July 1993 through September 1993 dewatering of the Meigs Mine No. 31, and any claim arising out of the 1996 Consent Decree, and shall not apply to claims based on a failure of Ohio Power Company to satisfy the requirements of this Amended Consent Decree or any violation of law not expressly covered by this Amended Consent Decree.

30. The United States reserves, and this Amended Consent Decree is without prejudice to, any civil cause of action or claim for relief not arising directly out of the dewatering of the Meigs Mine No. 31 during the period from approximately July 1993 through September 1993. In addition, notwithstanding the covenant not to sue in Paragraph 27, the United States reserves all rights to take any action, including administrative or judicial actions against SOCCO or any other person or entity, to address any imminent and substantial endangerment to human health or the environment.

31. Except as expressly stated in this Amended Consent 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 from July 30, 1993, through

September 23, 1993.

32. Nothing in this Amended Consent 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 or Ohio Power may have for contribution and indemnification arising from this settlement against any person not a Party to this Decree.

IX. FORCE MAJEURE AND DISPUTE RESOLUTION

33. If any event occurs which causes or may cause a delay or impediment to performance in complying with any provision of this Amended Consent Decree, Ohio Power Company shall notify the United States in writing as soon as practicable, but in any event within ten (10) business days of when the Ohio Power Company first knew of the event or should have known of the event by the exercise of due diligence. In this notice, the Ohio Power Company shall specifically reference this Paragraph of this Amended Consent Decree and describe the anticipated length of time the delay may persist, the cause or causes of the delay, and the measures taken or to be taken by Ohio Power Company to prevent or minimize the delay. The Ohio Power Company shall adopt all necessary measures to avoid or minimize such delays. The notice required by this section shall be effective upon the mailing of the same by certified mail, return receipt requested, to Robert H. Smith, U.S. EPA, and Phillip A. Brooks, U.S. DOJ, at the addresses provided on the signature pages of this Amended Consent Decree.

34. Failure by Ohio Power Company to substantially comply with the notice requirements of Paragraph 33 as specified above shall render this Section IX ("Force Majeure") voidable by the United States as to the specific event for which Ohio Power Company has failed

to comply with such notice requirement, and, if voided, is of no effect as to the particular event involved.

35. The United States shall notify Ohio Power Company in writing regarding their claim of a delay or impediment to performance within thirty (30) days of receipt of the force majeure notice provided under Paragraph 33. If the United States agrees that the delay or impediment to performance has been or will be caused by circumstances beyond the control of Ohio Power Company including any entity controlled by Ohio Power Company and that Ohio Power Company could not have prevented the delay by the exercise of due diligence, the parties shall stipulate to an extension of the required deadline by a period equivalent to the delay actually caused by such circumstances. Ohio Power Company shall not be liable for stipulated penalties for the period of any such delay.

36. If the United States does not accept Ohio Power Company's claim of a delay or impediment to performance, Ohio Power Company must submit the matter to the Court for resolution to avoid payment of stipulated penalties, by filing a petition for determination with the Court. Once Ohio Power Company has submitted this matter to the Court, the United States shall have forty-five (45) days to file its response to the petition. If the Court determines that the delay or impediment to performance has been or will be caused by circumstances beyond the control of Ohio Power Company including any entity controlled by Ohio Power Company and that the delay could not have been prevented by Ohio Power Company by the exercise of due diligence, Ohio Power Company shall be excused as to that delay (including stipulated penalties), for a period of time equivalent to the delay caused by such circumstances.

37. Ohio Power Company shall bear the burden of proving that any delay of any

requirement(s) of this Amended Consent Decree was caused by or will be caused by circumstances beyond its control, including any entity controlled by it, and that it could not have prevented the delay by the exercise of due diligence. Ohio Power Company shall also bear the burden of proving the duration and extent of any delay(s) attributable to such circumstances.

38. Insufficient funds shall not constitute circumstances beyond its control, or serve as a basis for an extension of time under this Section.

X. REPRESENTATIVES

39. Each undersigned representative of Ohio Power Company certifies that he or she is fully authorized to enter into the terms and conditions of this Amended Consent Decree and to execute and legally bind Ohio Power Company to this Decree.

XI. MISCELLANEOUS

40. The Parties agree that this Amended Consent Decree may be executed in counterpart.

41. For purposes of the enforcement of this Consent Decree only, Ohio Power consents to the jurisdiction of this Court and waives any defense based upon service of process in this case.

XII. MODIFICATION

42. Minor modifications not materially altering this Amended Consent Decree may be effected by the written agreement of the Parties. 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.

XIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

43. This Amended 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 Amended Consent Decree disclose facts or considerations which indicate that the Amended Consent Decree is inappropriate, improper, or inadequate. Ohio Power Company consents to the entry of this Amended Consent Decree without further notice.

44. If for any reason the Court should decline to approve this Amended 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.

XIV. TERMINATION

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

XV. CONTINUING JURISDICTION

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

Dated and entered this _____ day of _____, 2003.

GEORGE C. SMITH
UNITED STATES DISTRICT JUDGE

XV. CONTINUING JURISDICTION

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


Dated and entered this 21 day of November, 2003.


GEORGE C. SMITH
UNITED STATES DISTRICT JUDGE

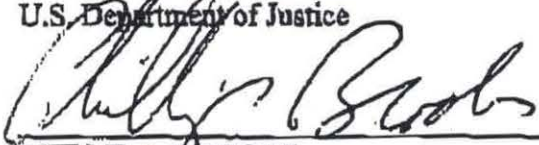
WE HEREBY CONSENT to the entry of this Decree:

FOR THE UNITED STATES OF AMERICA:

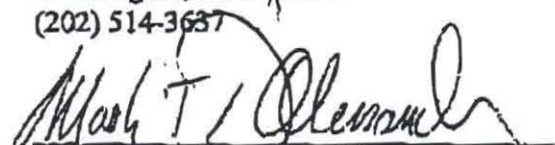
7.12.03
Date


THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

7/8/03
Date


PHILLIP A. BROOKS
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7/25/03
Date


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U.S. V. SOUTHERN OHIO COAL COMPANY, NO. C2-96-0097(S.D. OHIO)**FOR THE UNITED STATES, CONTINUED**

April 29, 2003
Date

David A. Allert
for THOMAS V. SKINNER
Regional Administrator
Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard (R-19J)
Chicago, IL 60604-3590

4/22/03
Date

Robert H. Smith
ROBERT H. SMITH
Associate Regional Counsel
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U.S. V. SOUTHERN OHIO COAL COMPANY, NO. C2-96-0097(S.D. OHIO)


FOR THE UNITED STATES, CONTINUED

June 5, 2007
Date

John Peter Suarez
JOHN PETER SUAREZ
Assistant Administrator for
Enforcement & Compliance Assurance
U.S. Environmental Protection Agency
Washington, DC 20460

FOR OHIO POWER COMPANY:

March 25, 2003
Date



D. MICHAEL MILLER
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