

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

**FILED**  
TIME: \_\_\_\_\_

AUG 19 2004

JAMES BONINI, Clerk  
COLUMBUS, OHIO

NATIONAL WILDLIFE FEDERATION,  
LEAGUE OF OHIO SPORTSMEN, and  
OHIO ENVIRONMENTAL COUNCIL,

Plaintiffs,

vs.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.,

Defendants.

No. C2-01-1052

Judge Frost  
Magistrate Judge Kemp

CONSENT DECREE

WHEREAS, this case involves claims by the National Wildlife Federation, League of Ohio Sportsmen, and the Ohio Environmental Council ("Plaintiffs") under the Clean Water Act, 33 U.S.C. § 1251, et seq. ("Act" or CWA"), and the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA"), to compel the United States Environmental Protection Agency, Michael O. Leavitt, Administrator, and the United States Environmental Protection Agency Region V, Bharat Mathur, Acting Regional Administrator (collectively "EPA") to establish the priority of restoring the waters of Lake Erie, the Ohio River and Maumee Bay pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), and to establish Total Maximum Daily Loads ("TMDLs") for each of the 881 waters included on Ohio's 1998 List of impaired waters, including Lake Erie, within an appropriate time frame. Plaintiffs also seek an order from the Court suspending the issuance of permits allowing new or expanded point source discharges that will cause or contribute to the violation of water quality standards in Ohio's impaired waters until EPA develops TMDLs for

those waters, and seek reasonable attorney and expert witness fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412;

WHEREAS, Section 303(d) of the CWA, 33 U.S.C. § 1313(d), and EPA's implementing regulations, 40 C.F.R. § 130.7 (b), (c), (d), and (e), provide for: (1) identification of waters for which applicable technology-based and other required controls are not stringent enough to implement water quality standards (the "Section 303(d) List"); (2) establishment of a priority ranking for such waters; and (3) establishment of TMDLs for pollutants for which those waters are not in attainment with water quality standards;

WHEREAS, in the complaint filed in this action, Plaintiffs allege *inter alia*, that:

- a. EPA failed to require Ohio to apply a priority ranking to Lake Erie, the Ohio River, and Maumee Bay in Ohio's 1998 Section 303(d) List;
- b. EPA failed to require Ohio to schedule the development of TMDLs for all water quality limited segments ("WQLS") on the 1998 Section 303(d) List, including Lake Erie and the Ohio River; and
- c. EPA failed to require Ohio to submit all 2,282 TMDLs which Ohio identified as necessary for the 881 impaired waters included on Ohio's 1998 Section 303(d) List;

WHEREAS, on July 17, 2003, EPA partially approved Ohio's 2002 Section 303(d) list, including the priority rank for Lake Erie, Maumee Bay, and the Ohio River, and on May 5, 2004, EPA fully approved both Ohio's 2002 and 2004 Section 303(d) lists;

WHEREAS, the APA provides for judicial review of agency action made reviewable by statute or final agency action for which there is no other adequate remedy at law to determine

whether such action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or unlawfully withheld or unreasonably delayed, 5 U.S.C. §§ 704, 706;

WHEREAS, the State of Ohio has lead responsibility for the identification and prioritization of waters still requiring TMDLs and for establishment of TMDLs pursuant to Section 303(d) of the CWA, 33 U.S.C. § 1313(d);

WHEREAS, the State of Ohio, the Association of Ohio Metropolitan Wastewater Agencies, the Northeast Ohio Regional Sewer District, Columbus Southern Power Company, Ohio Power Company, Buckeye Power, Inc., Cinergy Services, Inc. (on behalf of the Cincinnati Gas & Electric Company and Cinergy Power Investments, Inc.), The Dayton Power and Light Company, Ohio Valley Electric Corp., and the Ohio Chamber of Commerce have intervened as defendants in this case;

WHEREAS, Plaintiffs, EPA and the State of Ohio have agreed to a settlement of this action without any admission of fact or law, which they consider to be a just, fair, adequate and equitable resolution of the claims raised in this action;

WHEREAS, by entering into this Consent Decree, Plaintiffs, EPA and the State of Ohio do not waive or limit any claim or defense, on any grounds, related to any final agency action taken pursuant to this Consent Decree, including EPA's or Ohio's approval, disapproval and/or establishment of Section 303(d) Lists or TMDLs in Ohio, or to any agency inaction; and

WHEREAS, it is in the interest of the public, the parties and judicial economy to resolve the issues in this action without protracted litigation, including a trial.

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

1. **Parties.** The parties to this Consent Decree are Plaintiffs, EPA and the State of Ohio. The parties understand that (a) Michael O. Leavitt and Bharat Mathur were sued in their official capacities as Administrator of the United States Environmental Protection Agency and Acting Regional Administrator of United States EPA, Region V, respectively, and (b) the federal obligations arising under this Consent Decree are to be performed by EPA and not by Michael O. Leavitt or Bharat Mathur in their individual capacities.

2. **Parties Bound.** This Consent Decree applies to, is binding upon, and inures to the benefit of Plaintiffs (and their successors, assigns, and designees), EPA and the State of Ohio.

3. **Definitions.** Whenever terms listed below are used in this Consent Decree, the following terms have the meanings provided below. All references in this Consent Decree to sections of the United States Code ("U.S.C.") or the Code of Federal Regulations ("C.F.R.") are to those sections in effect as of the effective date of this Consent Decree or to any amendments to those sections when those amendments become effective.

A. "Aquatic Life Habitat Use" has the meaning provided at OAC 3745-1-07(A)(1)&(6) and (B).

B. "Assessment" means the monitoring, collection and analysis of water quality related data within an Assessment Unit in order to identify water quality-limited segments still requiring TMDLs.

C. "Assessment Unit" means a river unit draining an area larger than 500 square miles or a watershed identified by an 11-digit hydrologic unit code ("HUC") in the Ohio 2002 Integrated Water Quality Monitoring and Assessment Report.

D. "Day" means a calendar day unless expressly stated to be a working day.

In determining 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.

E. "EPA" means the United States Environmental Protection Agency, Michael O. Leavitt, Administrator, and the United States Environmental Protection Agency Region V, Bharat Mathur, Acting Regional Administrator.

F. "Establish" for purposes of this Consent Decree means (1) final agency action taken by EPA on a TMDL after proposal for public comment of that TMDL by EPA or (2) the State of Ohio's submission of a TMDL to EPA.

G. "Federal Fiscal Year" or "FFY" means the 12-month period beginning October 1st of a calendar year and ending September 30th of the following calendar year. FFY 2005 encompasses the period October 1, 2004 to September 30, 2005. FFY 2007 encompasses the period October 1, 2006 to September 30, 2007.

H. "Impairment" means the pollutant or cause identified on Ohio's then-current Section 303(d) List, or determined while assessing a waterbody, preventing attainment of any applicable water quality standard.

I. "Intervenors" mean the Association of Ohio Metropolitan Wastewater Agencies, the Northeast Ohio Regional Sewer District, Columbus Southern Power Company, Ohio Power Company, Buckeye Power, Inc., Cinergy Services, Inc. (on behalf of the Cincinnati Gas & Electric Company and Cinergy Power Investments, Inc.), The Dayton Power and Light Company, Ohio Valley Electric Corp., and the Ohio Chamber of Commerce.

J. "Ohio" means the State of Ohio, admitted as a sovereign State of the United States forming a Constitution and a state government, including its officers, agencies, departments and instrumentalities.

K. "ORSANCO" means the Ohio River Valley Water Sanitation Commission, an interstate commission established to control and abate pollution in the Ohio River Basin.

L. "Plaintiffs" means the National Wildlife Federation, League of Ohio Sportsmen, and the Ohio Environmental Council.

M. "Section 303(d) List" means the list required to be submitted by Section 303(d) (2) of the CWA, 33 U.S.C. § 1313(d)(2), and 40 C.F.R. § 130.7(b).

N. "Total Maximum Daily Load" or "TMDL" has the meaning provided at CWA Section 303(d)(1)(C), 42 U.S.C. § 1313(d)(1)(C), and EPA's implementing regulations at 40 C.F.R. § 130.2(i).

O. The "United States" means the United States of America including its officers, agencies, departments and instrumentalities.

P. "Water quality-limited segments" or "WQLS" has the meaning provided at 40 C.F.R. § 130.2(j).

4. Terms of Agreement.

A. OHIO'S ESTABLISHMENT OF TMDLS

By the end of Federal Fiscal Year ("FFY") 2007, Ohio will conduct assessments in 50 Assessment Units ("AUs") and establish the TMDLs necessary for all of the waters in 50 AUs to achieve Ohio's Aquatic Life Habitat Use water quality standards. These

TMDLs will identify the pollutants of concern and quantify the reductions necessary for the waters to achieve their Aquatic Life Habitat Use designation with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Nothing in this Consent Decree prohibits ORSANCO or any of Ohio's political subdivisions from helping Ohio carry out its responsibilities under this Consent Decree, including conducting assessments or developing TMDLs.

**B. EPA'S ESTABLISHMENT OF TMDLs**

(1) If, by the end of each FFY identified in the Table 1, Ohio has not established TMDLs to address the cumulative number of impairments corresponding to that FFY, then EPA will establish TMDLs to address that cumulative number of impairments by the end of the following FFY.

**TABLE 1**

<b>FFY</b>	<b>CUMULATIVE NUMBER OF IMPAIRMENTS ADDRESSED BY TMDLs</b>
2005	500
2007	600

(2) For purposes of measuring compliance with the milestones identified in Table 1, and EPA's commitment to establish TMDLs in paragraph 4(B)(1), EPA may count:

(a) Impairments for which EPA has approved a TMDL submitted by Ohio, including any TMDLs developed by ORSANCO or any

other entity,

(b) Impairments for which EPA has established a TMDL, including any TMDLs developed by ORSANCO or any other entity, and

(c) Impairments for which a TMDL(s) is not needed pursuant to paragraph 4(B)(3)(a) or (b) below.

(3) In fulfilling its obligations under this Consent Decree, EPA is under no obligation to establish TMDLs for any impairments/waterbodies that

(a) EPA determines do not need TMDLs consistent with Section 303(d) of the CWA, 33 U.S.C. § 1313(d), and its implementing regulations, including 40 C.F.R. § 130.7(b), because, for example, the waterbody's impairment is not caused by a pollutant, or

(b) are removed from Ohio's 1998 Section 303(d) List or a future list consistent with the provisions of the Clean Water Act and EPA's implementing regulations.

(4) If EPA establishes a TMDL pursuant to this Consent Decree, in selecting impairments or waterbodies for which to establish the TMDL, EPA shall consider, among other factors, whether the water has a "high" priority on Ohio's then-current Section 303(d) List and any priorities previously established by Ohio. However, in selecting impairments or waterbodies for which to establish a TMDL, EPA is not bound by any prior Ohio TMDL selection decision, an assessment within an AU, or by TMDL work started but not completed by Ohio.

C. ANNUAL REPORTS

Both EPA and Ohio agree to submit to Plaintiffs and Intervenors annual reports, on or before March 1st of each year, beginning in 2005, informing Plaintiffs of their respective progress in meeting their commitments under this Consent Decree.

5. Effective Date. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the District Court does not enter this Consent Decree, the obligations set forth in this Decree are null and void.

6. Remedy and Scope of Judicial Review. The parties agree that if Ohio fails to perform its obligations under Paragraph 4.A, Plaintiffs' sole remedy is to seek to enforce the requirements of paragraph 4.B against EPA. Nothing in the terms of this Consent Decree shall be construed to confer upon this Court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Decree, except for the purpose of determining EPA's compliance with this Decree, and nothing in this Consent Decree alters or affects the standards for judicial review of final EPA action.

7. Release. Upon approval and entry of this Consent Decree by the Court, this Decree shall constitute a complete and final settlement of all claims which were asserted, or could have been asserted, by Plaintiffs against the United States or Ohio in their Complaint, No. C2-01-1052. Plaintiffs hereby release, discharge, and covenant not to assert (by way of the commencement of an action, the joinder of EPA or Ohio in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which they may have had, or may now or hereafter have, against EPA and Ohio based

upon matters which were asserted, or could have been asserted by Plaintiffs in the complaint filed in this case.

8. Reservation of Rights. Plaintiffs reserve their rights to challenge in a separate lawsuit or administrative action the merits of any final action taken by EPA or Ohio pursuant to this Consent Decree including, but not limited to, the merits of EPA's final action in approving or disapproving TMDLs submitted by Ohio or establishing TMDLs, and the merits of Ohio's final agency action on a TMDL after proposal for public comment on that TMDL. EPA and Ohio reserve all their defenses to such suits. Nothing in this Consent Decree shall be construed to expand whatever rights Plaintiffs may otherwise have under state and federal law.

9. Termination. This Consent Decree shall terminate after fulfillment of all the obligations of Ohio and EPA under paragraph 4 of this Decree. Upon termination of this Consent Decree, this case shall be dismissed with prejudice. The parties shall file the appropriate notice with the Court so that the Clerk of the Court may close the file.

10. Force Majeure. The parties recognize that the performance of this Consent Decree is subject to fiscal and procurement laws and regulations of the United States, which include but are not limited to the Anti-Deficiency Act, 31 U.S.C. §§ 1341, et. seq. The possibility exists that circumstances outside the reasonable control of EPA or Ohio could delay compliance with the timetables contained in this Consent Decree. For Ohio, such situations include, but are not limited to, state budgetary cuts that would prevent Ohio EPA's Division of Surface Water from assessing AUs and establishing TMDLs; such state budgetary cuts shall not, however, relieve EPA from fulfilling its obligations under this Consent Decree. Should a delay occur due to circumstances outside the reasonable control of EPA or Ohio, any resulting failure

to meet the timetables set forth herein shall not constitute a failure to comply with the terms of this Consent Decree, and any deadlines occurring within one hundred twenty (120) days of the termination of the delay shall be extended one day for each day of the delay. EPA and Ohio will provide Plaintiffs and Intervenors with notice as soon as is reasonably possible in the event that EPA or Ohio invoke this term of the Consent Decree and will provide Plaintiffs and Intervenors with an explanation of EPA's and Ohio's basis for invoking this paragraph. Plaintiffs may challenge the invocation of this term of the Consent Decree under the dispute resolution terms of paragraph 11 of this Consent Decree, and EPA and Ohio shall bear the burden of justifying the invocation of this term.

11. Dispute Resolution. In the event of a disagreement between the parties concerning any aspect of this Consent Decree, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties agree to attempt to reach an agreed resolution for at least thirty (30) days after receipt of the notice by the other party.

12. Extensions and Modifications. Any dates set forth in this Consent Decree may be extended by written agreement of the parties and notice to the Intervenors and the Court. To the extent the parties are not able to agree to an extension, EPA or Ohio may seek a modification of this Consent Decree in accordance with the procedures specified below. Except for extensions of dates, this Consent Decree may be modified only by written agreement of Plaintiffs, EPA, and Ohio, and approval by the Court, after notice to Intervenors and an opportunity for Intervenors to respond to the proposed modification. Nothing in this Consent Decree, or in the parties' agreement to its terms, shall be construed to limit the equitable powers of the Court to modify

those terms upon a showing of good cause by any party. Good cause includes, but is not limited to, changes in the law affecting EPA's commitments under this Decree.

A. If EPA or Ohio files a motion requesting modification of a date or dates established by this Consent Decree totaling more than thirty (30) days and provides notice to the Plaintiffs of the requested modification and the reasons then known for the modification at least thirty (30) days prior to filing such motion, and files the motion at least sixty (60) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, automatically stay the date for which modification is sought. Such automatic stay shall remain in effect until the earlier to occur of (i) a dispositive ruling by this Court on such motion, or (ii) the date sought in such motion.

B. If EPA or Ohio files a motion requesting modification of a date or dates established by this Consent Decree totaling thirty (30) days or less, provides notice to the Plaintiffs of the requested modification and the reasons then known for the modification at least fifteen (15) days prior to the filing of such motion, and files the motion at least seven (7) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, automatically stay the date for which modification is sought. Such stay shall remain in effect until the earlier to occur of (i) a dispositive ruling by this Court on such motion, or (ii) the date sought in the modification.

C. If neither EPA nor Ohio provides notice pursuant to Subparagraphs 12.A or 12.B above, EPA or Ohio may move the Court for a stay of the date for which modification is sought. In any such motion, the moving party shall state why it did not use the modification procedures set forth in subparagraphs A or B, above. The moving party shall also give notice to

the Plaintiffs and the Intervenor as soon as reasonably possible of its intent to seek a modification and/or stay of the date sought to be modified, and of the reasons then known for the modification.

D. If the Court denies a motion to modify a date established by this Consent Decree, then the date for performance for which modification had been requested shall be such date as the Court may specify.

E. Any motion to modify a date established in this Consent Decree shall be served upon Plaintiffs and Intervenor, and Plaintiffs and Intervenor shall be given a reasonable opportunity to respond. Any motion to modify a date established by this Consent Decree shall be accompanied by a motion for expedited consideration. The parties to this Decree shall join in any such motion for expedited consideration.

13. Continuing Jurisdiction. The Court retains jurisdiction for the purposes of resolving any disputes arising under this Consent Decree, and issuing such further orders or directions as may be necessary or appropriate to construe, implement, modify, or enforce the terms of this Consent Decree, and for granting any further relief as the interests of justice may require.

14. Notice. Any notice required or made with respect to this Consent Decree shall be in writing and shall be effective upon receipt. For any matter relating to this Consent Decree, the contact persons are:

For Plaintiffs:

Neil S. Kagan, Senior Counsel  
National Wildlife Federation  
Great Lakes Nat. Res. Center  
213 West Liberty Street, Suite 200

Ann Arbor, MI 48104

For EPA:

Associate General Counsel, Water Law Office  
Office of General Counsel, 2355 A  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave. N.W.  
Washington, D.C. 20460

and

Craig Melodia  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
77 W. Jackson  
Chicago, IL 60604

and

Chief, Environmental Defense Section  
Environment & Natural Resources Division  
United States Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

For Ohio:

Margaret A. Malone  
Assistant Attorney General  
Environmental Enforcement Section  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, OH 43215-3428

For Intervenors Association of Ohio Metropolitan Wastewater Agencies, and the  
Northeast Ohio Regional Sewer District:

David W. Burchmore  
Squire, Sanders & Dempsey L.L.P.  
4900 Key Tower  
127 Public Square  
Cleveland, OH 44114

For Intervenors Columbus Southern Power Company, Ohio Power Company, Buckeye  
Power, Inc., Cinergy Services, Inc. (on behalf of the Cincinnati Gas & Electric Company and

**Cinergy Power Investments, Inc.), The Dayton Power and Light Company, and Ohio Valley Electric Corp.:**

William L. Patberg  
Michael A. Snyder  
Shumaker, Loop & Kendrick, LLP  
41 S. High Street  
Suite 2210  
Columbus, OH 43215

**For Intervenor Ohio Chamber of Commerce:**

Karen A. Winters  
Kendra S. Sherman  
Squire, Sanders & Dempsey L.L.P.  
41 South High Street  
Suite 1300  
Columbus, OH 43215

Upon written notice to the other parties, any party may designate a successor contact person for any matter relating to this Consent Decree.

15. **Mutual Drafting and Construction.** It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiffs, EPA, and Ohio. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Decree. This Decree shall be governed and construed under the laws of the United States.

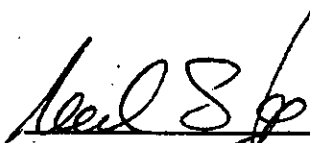
16. **Effect of Decree.** This Consent Decree shall not constitute an admission or evidence of any issue of fact or law, wrongdoing, misconduct, or liability on the part of any party.

17. Scope of Decree. Except as expressly provided in this Consent Decree, none of the parties waives or relinquishes any legal rights, claims, or defenses it may have. Nothing in the terms of this Consent Decree shall be construed to limit or modify the discretion accorded EPA or Ohio under the Clean Water Act or by general principles of administrative law. Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Consent Decree.

18. Costs. EPA agrees to settle Plaintiffs' claim for costs and attorneys' fees by paying \$15,000.00 within sixty (60) days of receipt of the signed court order approving this Consent Decree. This amount shall be paid by Fed Wire Electronic Funds Transfer to the National Wildlife Federation. Plaintiffs agree to accept payment of \$15,000.00 in full satisfaction of any and all claims for attorneys' fees with respect to this case, except that Plaintiffs reserve the right to seek fees for enforcement of the Consent Decree. EPA does not concede that plaintiffs have the right to seek fees for enforcement of the Consent Decree and reserves all defenses to a such a motion.

19. Representative Authority. Each undersigned representative of the parties to this Consent Decree certifies that he or she is fully authorized by the party to enter into and execute the terms and conditions of this Consent Decree and to legally bind such party to this Consent Decree. By signature below, all of the parties consent to entry of this Consent Decree.


For Plaintiffs:

  
Neil S. Kagan, Senior Counsel  
National Wildlife Federation  
Great Lakes Nat. Res. Center

7/28/2004  
Date

213 West Liberty Street  
Suite 200  
Ann Arbor, MI 48104

For Ohio:

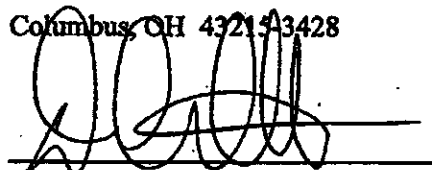


Margaret A. Malone  
Assistant Attorney General  
Environmental Enforcement Section  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, OH 43215-3428

8/6/04

Date

For EPA:



Daniel R. Dertke  
Environmental Defense Section  
Environment & Natural Resources Division  
United States Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

8-4-04

Date

ORDER

UPON CONSIDERATION OF THE FOREGOING, the Court hereby finds that this Consent Decree is fair and reasonable, both procedurally and substantively, consistent with applicable law, in good faith, and in the public interest. THE FOREGOING Consent Decree is hereby APPROVED.

SIGNED and ENTERED this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

  
United States District Court Judge