



Response to Comments

Proposed Fernald Partial Consent Decree

Agency Contacts

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

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

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

Partial Consent Decree

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

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

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

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

Staffing

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

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

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

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

Restrictions on Use of Funds

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

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

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

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

Suggested Uses of Funds

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

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

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

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

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

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

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

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

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

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

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

Response 11: Please see Response 10.

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

Response 12: Please see Response 10.

Comment 13: **Citizens request that no money should be spent on projects that are covered under previous consent agreements.**

Response 13: Both the Consent Decree and the Natural Resource Restoration Plan place restrictions on how the funds may be used by the trustee agencies. These restrictions require that the funds are to be used to restore, replace or acquire the equivalent of the impacted natural resources.

Comment 14: **A commenter requested \$58,000 to purchase burial land in Adams County for Native American remains.**

Response 14: Purchasing property in Adams County would not be consistent with the terms of the settlement agreement nor the federal law governing natural resource damage claims. Federal law, the Consent Decree, and the Natural Resource Restoration Plan place restrictions on how the funds may be used by the trustee agencies. However, the trustees have always been supportive of the use of Fernald for re-interment of Native American remains. In fact, the Natural Resource Restoration plan addresses the issue, stating “Reburial of Native American remains can occur within the restored areas with no impact on the restoration plans outlined in this plan.”

Project Timeline

Comment 15: **Citizens are concerned the project may go beyond the stated 4-year time frame.**

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

Citizen Involvement

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

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

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

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

End of Response to Comments