

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

STATE OF OHIO, *ex rel.*
MICHAEL DEWINE
OHIO ATTORNEY GENERAL

Plaintiff.

v.

OTTERBEIN UNIVERSITY

Defendant,

and

UNITED STATES OF AMERICA
UNITED STATES DEPARTMENT OF
DEFENSE, and LEON PANETTA,¹
in his capacity as SECRETARY OF THE
DEPARTMENT OF DEFENSE

Defendant.

CASE NO.: 2:11-cv-508
(consolidated with 2:08-cv-709)

JUDGE: GEORGE C. SMITH

**CONSENT DECREE FOR IMPLEMENTATION OF REMEDIAL INVESTIGATION
AND FEASIBILITY STUDY**

WHEREAS, on June 10, 2011, State of Ohio, by and through Ohio Attorney General, Michael DeWine, at the written request of the Director of the Ohio Environmental Protection Agency, filed a complaint in this action against Defendants, Otterbein University and the United States, to seek reimbursement of certain Response Costs (as hereinafter defined) pursuant to CERCLA, 42 U.S.C. § 9601, *et seq.*, and to enforce Ohio's solid waste, hazardous waste and water pollution laws found in R.C. Chapters 3734 and 6111 and rules adopted thereunder.

WHEREAS, on July 22, 2008, Otterbein University, filed a complaint against the Defendant,

¹ Leon Panetta is now the Secretary of the Department of Defense and is substituted pursuant to Fed. R. Civ. P. 25(d), for the former Secretary Robert Gates.

United States Department of Defense and Robert M. Gates, in his official capacity as Secretary of the Department of Defense (collectively "United States"), alleging that the United States was liable to Otterbein University for response costs under CERCLA, Resource Conservation and Recovery Act ("RCRA"), and Declaratory Judgment Act ("DJA"), for environmental contamination at the former-Kilgore munitions manufacturing facility in Westerville, Ohio.

WHEREAS, the State's Complaint, Case No. 11 cv 508, and the Otterbein University Complaint, Case No. 08 cv 709, were consolidated on July 28, 2011.

WHEREAS, the Parties to this Consent Decree for Implementation of Remedial Investigation and Feasibility Study (hereinafter "Consent Decree") desire full and final resolution of disputed claims concerning past response costs incurred and future response costs to be incurred through the completion of the RI/FS (as hereinafter defined) and to avoid the complication and expense of litigation concerning such disputed claims. The Parties agree that nothing in this Consent Decree is an admission of any liability arising out of the transactions or occurrences alleged in the complaints. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and the implementation of this Consent Decree will expedite the cleanup of the Site and this Consent Decree is fair, reasonable, and in the public interest.

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

TABLE OF CONTENTS

	Page
I.	<u>STATEMENT OF PURPOSE AND GENERAL PROVISIONS.....</u> 4
II.	<u>DEFINITIONS.....</u> 5
III.	<u>JURISDICTION AND VENUE.....</u> 8
IV.	<u>PARTIES BOUND.....</u> 8
V.	<u>CALCULATION OF TIME.....</u> 9
VI.	<u>NO ADMISSION.....</u> 9
VII.	<u>RESPONSE ACTIONS.....</u> 10
VIII.	<u>REMEDIAL INVESTIGATION AND FEASIBILITY STUDY.....</u> 10
IX.	<u>ADDITIONAL WORK.....</u> 11
X.	<u>DEED NOTICE, LAND USE AND CONVEYANCE OF TITLE.....</u> 12
XI.	<u>DESIGNATION OF SITE COORDINATORS.....</u> 14
XII.	<u>SAMPLING AND DATA AVAILABILITY.....</u> 15
XIII.	<u>SITE ACCESS.....</u> 16
XIV.	<u>PROGRESS REPORTS AND NOTICE.....</u> 18
XV.	<u>REVIEW OF SUBMITTALS.....</u> 19
XVI.	<u>DISPUTE RESOLUTION.....</u> 20
XVII.	<u>ACCESS TO INFORMATION.....</u> 24
XXIII.	<u>INDEMNITY.....</u> 25
XIX.	<u>UNAVOIDABLE DELAYS.....</u> 26
XX.	<u>PAYMENTS AND REIMBURSEMENT OF COSTS BY OTTERBEIN UNIVERSITY.....</u> 27
XXI.	<u>PAYMENTS AND REIMBURSEMENT OF COSTS BY THE UNITED STATES.....</u> 28
XXII.	<u>COVENANTS NOT TO SUE AND RESERVATION OF RIGHTS.....</u> 30
XXIII.	<u>EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION.....</u> 33
XXIV.	<u>OTHER CLAIMS.....</u> 34
XXV.	<u>TERMINATION.....</u> 35
XXVI.	<u>MODIFICATION.....</u> 35
XXVII.	<u>MAILING AND DELIVERY OF DOCUMENTS.....</u> 35
XXIII.	<u>COMPLIANCE WITH APPLICABLE LAWS, PERMITS AND APPROVALS.....</u> 36
XXIX.	<u>APPENDICES AND DOCUMENTS APPROVED PURSUANT TO THIS CONSENT DECREE.....</u> 37
XXX.	<u>COURT COSTS.....</u> 37
XXXI.	<u>STIPULATED PENALTIES.....</u> 37
XXXII.	<u>SATISFACTION OF COUNTS ONE AND TWO IN THE STATE'S COMPLAINT AND STAY OF LITIGATION FOR COUNTS THREE THROUGH EIGHT.....</u> 38
XXXIII.	<u>DISMISSAL OF OTTERBEIN UNIVERSITY'S COMPLAINT.....</u> 39

XXXIV.	<u>NEGOTIATION OF FINAL CONSENT DECREE.....</u>	<u>39</u>
XXXV.	<u>AUTHORITY TO ENTER INTO THE CONSENT DECREE.....</u>	<u>40</u>

ATTACHMENTS

- A. RI/FS STATEMENT OF WORK
- B. GUIDANCE LIST
- C. SITE MAP
- D. DEED NOTICE TEMPLATE

I. STATEMENT OF PURPOSE AND GENERAL PROVISIONS

1. In entering into this Consent Decree, the mutual objectives of the State of Ohio and the Defendants include (1) completion of a Remedial Investigation and Feasibility Study ("RI/FS") to determine the nature and extent of contamination at and migrating from the approximate 40-acre portion of the former Kilgore Manufacturing Company property ("Site") now owned by Otterbein University; (2) the reimbursement of certain Response Costs incurred and to be incurred by the State of Ohio; and (3) the resolution of the claims asserted by Otterbein University against the United States concerning past response costs and future response costs to be incurred by Otterbein University through the completion of the RI/FS.

2. The Parties recognize and acknowledge that the settlement embodied in this Consent Decree is a partial resolution of issues related to response actions that may be necessary at the Site. The Parties agree that this Consent Decree: (1) requires Otterbein University to conduct and the United States to finance in part the RI/FS described in greater detail below; (2) resolves all claims for past response costs incurred by the Parties; and (3) resolves claims for future response costs incurred by the Parties in connection with the RI/FS required by this Consent Decree.

3. The Parties also agree that this Consent Decree does not resolve all claims for future response costs, and the scope of work in this Consent Decree does not include implementation of any final remedial actions resulting from the work performed pursuant to this Consent Decree. The Parties acknowledge that the State may seek to require implementation of the final remedial actions through additional agreements, decrees, or orders as appropriate.

II. DEFINITIONS

4. The following definitions shall apply in this Consent Decree:
- A. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended 42 U.S.C. § 9601, *et seq.*
 - B. "Consent Decree" or "Decree" means this Consent Decree and all attachments hereto.
 - C. "Day" means a calendar day, unless expressly stated to be a business day. "Business Day" means a day other than a Saturday, Sunday or state or federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday or state or federal holiday, the period shall run until the close of the next business day.
 - D. "Defendants" means Otterbein University and the United States of America.
 - E. "Director" means Ohio's Director of Environmental Protection.
 - F. "Effective Date" means the date the clerk of the U.S. District Court for the Southern District of Ohio, Eastern Division, enters this Consent Decree.
 - G. "Facility" means the former Kilgore Manufacturing Company facility, now owned by Otterbein University, comprising approximately 110 acres and located at 600 North Spring Street in Westerville, Ohio.
 - H. "Feasibility Study" means the study undertaken to develop and evaluate options for remedial action and is more fully described in the RI/FS Statement of Work. The term also refers to the report that describes the results of the study.

I. "Guidance Documents" mean those documents identified in Attachment B to this Consent Decree.

J. "National Contingency Plan" or "NCP" means the National Oil and Hazardous Substances Pollution Contingency Plan, promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 CFR Part 300, including, but not limited to, any amendments thereto.

K. "Ohio EPA" means the Ohio Environmental Protection Agency and its designated representatives.

L. "Ohio Response Costs" means the State of Ohio's costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), that are not inconsistent with the National Contingency Plan, and that have been incurred, or will be incurred, by the State related to the investigation and remediation of the Site including, but not limited to, payroll costs, contractor costs, travel costs, direct costs, overhead costs, administrative costs, legal and enforcement related costs, oversight costs, laboratory costs, the costs of reviewing and developing plans, reports, and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing or enforcing this Consent Decree. For purposes of this Consent Decree, "Past Ohio Response Costs" are those costs incurred on and before December 31, 2010. "Future Ohio Response Costs" are those costs incurred after December 31, 2010 in connection with the RI/FS required by this Consent Decree.

M. "Otterbein's Response Costs" means all costs related or pertaining to the Facility that are necessary, that are consistent with the NCP, and have been previously incurred at the Facility or will be incurred through the performance of the Work required by this Consent Decree. Otterbein's Response Costs to be incurred in the future, through the performance of Work required by this Consent Decree, do not include response costs incurred as a result of any necessary removal or remediation actions taken before the completion of the RI/FS.

N. "Paragraph" means a portion of this Consent Decree identified by an Arabic numeral or an uppercase or lowercase letter.

O. "Parties" means collectively the State of Ohio, Otterbein University and the United States.

P. "Performing Defendant" means Otterbein University.

Q. "Plaintiff" or "State" means the Ohio EPA by and through the Ohio Attorney

General.

R. "Pre-Investigation Evaluation Report" means the document prepared by the Performing Defendant to document the performance and results of the RI/FS scoping tasks to establish the framework for the subsequent development of the RI/FS Work Plan.

S. "RCRA" means the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

T. "Remedial Investigation" means a process undertaken to determine the nature and extent of contamination at the Site and is more fully described in the RI/FS Statement of Work. The term also refers to the report that describes the results of the investigation.

U. "RI/FS" means the Remedial Investigation and Feasibility Study.

V. "RI/FS Statement of Work" means the "Generic Statement of Work for Conducting Remedial Investigations and Feasibility Studies" for the implementation of the RI and FS at the Site, as set forth in Attachment A of this Consent Decree.

W. "RI/FS Work Plan" means the document submitted by Performing Defendant pursuant to this Consent Decree and approved by Ohio EPA.

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

Y. "Site" means the approximate 40-acre portion of the Facility, as depicted on Attachment C, where the treatment, storage, and/or disposal of hazardous waste and/or hazardous substances, and/or the discharge to waters of the state of industrial waste or other wastes have occurred, including any other area where such hazardous wastes, hazardous substances, industrial wastes, and/or other wastes have migrated or threaten to migrate.

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

AA. "Transferee" means any future owner of any interest in the Site, including but not limited to, owners of an interest in fee simple, mortgagors, easement holders, and lessees.

BB. "United States" means the United States of America and each of its departments, agencies, and instrumentalities, including but not limited to the United States Department of Defense.

CC. "Waste Material" means (1) any "hazardous waste" under R.C. 3734.01(J) or Ohio Adm. Code 3745-50-10(A) or 3745-51-03; (2) any "hazardous constituents" as that term is defined in Ohio Adm. Code 3745-50-10(A) and listed in the appendix to Ohio Adm. Code 3745-51-11; (3) any "industrial waste" under R.C. 6111.01(C); or (4) any "other wastes" under R.C. 6111.01(D).

DD. "Work" means all activities Performing Defendant is required to perform under this Consent Decree.

III. JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over claims in the Complaints, pursuant to 28 U.S.C. § 1331 (Federal Question), 42 U.S.C. §§ 9607 and 9613(b) (CERCLA), and 28 U.S.C. § 1367 (Supplemental Jurisdiction). This Court has personnel jurisdiction over the Parties. Venue is proper in this Court. For the purposes of this Consent Decree, the Defendants agree that the State Complaint, Case No. 11-cv-508, states one or more claims upon which relief can be granted.

IV. PARTIES BOUND

6. The provisions of this Consent Decree shall apply to and be binding upon Plaintiff, Defendants, and Defendants' agents, officers, employees, assigns, and successors in interest. Performing Defendant is ordered and enjoined to provide a copy of this Consent Decree to each contractor it employs to perform Work itemized herein. Performing Defendant shall ensure that its contractors perform the Work contemplated herein in accordance with this Consent Decree. No change in corporate ownership or status of Performing Defendant, including, without limitation, any transfer of assets or real or personal property, shall in any way alter Defendant's obligations under

this Consent Decree.

7. The obligations of Defendants to pay the amounts owed to the State under this Consent Decree are joint and several. In the event of the insolvency, bankruptcy, or other failure of any Defendant to pay the amounts owed to the State by this Consent Decree, the remaining Defendant shall complete all such payments.

V. CALCULATION OF TIME

8. Unless otherwise stated in this Consent Decree, where this Consent Decree requires actions to be taken within a specified period of time (*e.g.*, "within thirty (30) days"), this time period shall begin the day after the Effective Date of this Consent Decree unless the time is otherwise stated to start at another point in time.

VI. NO ADMISSION

9. With the exception of Paragraph 5, this Consent Decree is not to be interpreted as an admission on the part of any Party of any issue of fact or law, or liability or wrongdoing, and it is expressly understood that no Party, by agreeing to this Consent Decree, admits liability of any sort or any other issue of fact or law.

VII. RESPONSE ACTIONS

10. Performing Defendant is ordered and enjoined to comply with all applicable provisions of the Ohio hazardous waste laws and water pollution rules as set forth in R.C. Chapters 3734 and 6111 and Ohio Adm. Code Chapters 3745-50 through 3745-69 and 3745-270. Performing Defendant is ordered and enjoined to comply with and implement the Work requirements set forth in this Consent Decree.

11. Performing Defendant shall perform the Work in accordance with this Consent Decree including but not limited to the RI/FS SOW, all relevant Guidance Documents, and all standards, specifications, and schedules set forth in or developed and approved by Ohio EPA pursuant to Section XV, Review of Submittals of this Consent Decree. Defendants shall reimburse the State for all Ohio Response Costs and perform all other obligations of this Consent Decree. All Work to be performed by the Performing Defendant pursuant to this Consent Decree shall be under the direction and supervision of a qualified engineer, geologist or other person with expertise in hazardous waste site investigation and remediation.

VIII. REMEDIAL INVESTIGATION AND FEASIBILITY STUDY

12. Within sixty (60) days of the Effective Date of this Consent Decree, unless otherwise agreed to by the Parties, Performing Defendant shall submit, pursuant to Section XXVII, Mailing and Delivery of Documents, to Ohio EPA a RI/FS Work Plan for completion of the RI and FS. The RI/FS Work Plan shall be developed in conformance with this Consent Decree, the RI/FS SOW, applicable state and federal law, and the Guidance Documents listed in the attachments to this Consent Decree. The RI/FS Work Plan shall incorporate the Pre-Investigation Evaluation Report ("PER"), revised in accordance with Ohio EPA's comments. If during RI/FS Work Plan development Ohio EPA determines that any guidance documents in addition to those specified in the list of Guidance Documents attached to this Consent Decree affect the Work to be performed, Ohio EPA shall notify Performing Defendant and any affected work plan shall be modified accordingly. After Ohio EPA approves the RI/FS Work Plan, pursuant to Section XV, Review of Submittals of this Consent Order, Performing Defendant shall implement the RI/FS Work Plan in accordance with

the schedules contained therein.

IX. ADDITIONAL WORK

13. Should Ohio EPA determine that additional Work is necessary to achieve the purposes of this Consent Decree, as set forth in Section I, Ohio EPA may notify Performing Defendant in writing of the need for such additional Work. Within thirty (30) days of the receipt of such notification from Ohio EPA, Performing Defendant shall prepare and submit to Ohio EPA for review and approval a work plan for the performance of the additional Work ("Additional Work Work Plan"). Any required work plan that includes sampling as an element shall include a sampling plan together with a rationale for the sampling activities, locations, quantity and frequency of sampling, constituents for analysis, and quality control/quality assurance procedures.

14. Performing Defendant shall submit the Additional Work Work Plan for review and approval pursuant to Section XV, Review of Submittals, and Section XXVII, Mailing and Delivery of Documents. Upon approval of the Additional Work Work Plan by Ohio EPA, Performing Defendant shall implement the Additional Work Work Plan in accordance with the schedules contained therein.

15. In the event that Performing Defendant determines that additional Work is necessary to achieve the purposes of this Consent Decree as set forth in Section I., Performing Defendant shall submit a written request for approval to Ohio EPA explaining the need for and detailing the nature of the additional Work prior to performing the additional Work. Upon agreement by Ohio EPA with Performing Defendant's request, Performing Defendant shall develop and implement an Additional Work Work Plan as set forth in this Section of this Consent Decree.

16. In the event that additional Work is necessary for any task described in this Consent Decree, the deadline for completing such task(s) shall be extended by the amount of time required to perform the additional Work required, including the period of time required to plan and/or obtain approval from the Ohio EPA for the performance of such Work.

X. DEED NOTICE, LAND USE AND CONVEYANCE OF TITLE

17. Deed Notice. Within thirty (30) days of the Effective Date of this Consent Decree, or prior to conveying an interest in any property, which is part of the Site, Performing Defendant shall record a notice on the deed to all property owned by Performing Defendant, which is part of the Site, with the County Recorder's Office for Delaware County, Ohio. Performing Defendant shall use the Deed Notice Template, Attachment D, to complete the notice. The notice shall reference the existence of this Consent Decree as well as any monitoring, treatment, or containment devices present on Performing Defendant's property. A copy of the recorded notice shall be submitted to Ohio EPA within thirty (30) days after recording the notice. Thereafter, if Performing Defendant conveys any interest in the property included in the Site, each deed, title, or other instrument shall contain a notice stating that the property is subject to this Consent Decree and shall reference any monitoring, treatment, or containment devices present on the property as a result of this Consent Decree, and shall include a requirement that any subsequent owner shall not in any way compromise said monitoring, treatment, or containment devices. In addition, Performing Defendant shall review the deed notice on an annual basis and revise the deed notice if new monitoring, treatment, or containment devices have been added to the property as a result of this Consent Decree.

18. Land Use. Performing Defendant, its successors and assigns shall ensure that no portion of the Site shall be used in any manner that would adversely affect the integrity of any containment, treatment, or monitoring systems at the Site, or violate any use restrictions applicable to the Site under this Consent Decree.

19. Notice of Transfer of Property. Prior to Performing Defendant's executing an instrument conveying any interest in any portion of the Site, including but not limited to easements, deeds, leases and mortgages, Performing Defendant shall notify the Party purchasing the property of the existence of any containment, treatment, and monitoring systems on the Site, and shall provide a copy of this Consent Decree to the Party purchasing the property. Performing Defendant shall notify Ohio EPA at least sixty (60) days in advance of each conveyance of an interest in any portion of the property that is known to comprise the Site. The notice shall include a copy of the deed transfer document and the name and address of the Party purchasing the property and a description of the provisions made for the continued access to and maintenance of the containment, treatment, and monitoring systems. Within thirty (30) days after conveyance of any interest in any portion of the property, Performing Defendant shall submit to Ohio EPA, via certified mail, two copies of the following information:

- A. A copy of the deed or other documentation evidencing the conveyance.
- B. The name, address, and telephone number of the new property owner and the name, address, and telephone number of the contact person for the property.
- C. A legal description of the property, or the portion of the property, being transferred.
- D. A copy of the survey map, if any, of the property, or the portion of the property, being transferred.

- E. The closing date of the transfer of ownership of the property, or portion of the property.

XI. DESIGNATION OF SITE COORDINATORS

20. Within ten (10) days of the Effective Date of this Consent Decree, Performing Defendant shall designate, in writing or by electronic mail, a Site Coordinator to oversee and implement the Work required by this Consent Decree and to coordinate with the Ohio EPA Site Coordinator. Performing Defendant may also designate an alternate Site Coordinator. To the maximum extent practicable, communication between Performing Defendant and Ohio EPA concerning the activities performed under this Consent Decree shall be through the Site Coordinators. Each Party's Site Coordinator shall be responsible for ensuring that communications from the other Party are appropriately disseminated and processed. For the duration of this Consent Decree, Performing Defendant's designated Site Coordinator or alternate shall be on-site or on-call during all hours of Work to be performed pursuant to this Consent Decree. The absence of the Ohio EPA Site Coordinator from the Site shall not be cause for stoppage of Work unless otherwise provided.

21. Performing Defendant or Ohio EPA may change their Site Coordinator or alternate by notifying the other Party at least five (5) days prior to the change, unless impractical, but in no event later than the actual day the change is made.

22. Without limiting any authority conferred by law on Ohio EPA, the authority of the Ohio EPA Site Coordinator includes, but is not limited to:

- A. Taking samples and directing the type, quantity and location of samples to be

taken by Performing Defendant pursuant to an approved work plan.

- B. Observing, taking photographs, or otherwise recording information related to the implementation of this Consent Decree, including the use of any mechanical or photographic device.
- C. Directing that Work stop whenever the Ohio EPA Site Coordinator determines that the activities at the Site may create or exacerbate a threat to public health or safety, or threaten to cause or contribute to air or water pollution or soil contamination.
- D. Conducting investigations and tests related to the implementation of this Consent Decree. Inspecting and copying records, operating logs, contracts and/or other documents related to the implementation of this Consent Decree.
- E. Assessing compliance with this Consent Decree by Performing Defendant and their agents and/or contractors.

XII. SAMPLING AND DATA AVAILABILITY

23. Performing Defendant shall notify Ohio EPA not less than ten (10) days in advance of all sample collection activity. Upon request, Performing Defendant shall allow split and/or duplicate samples to be taken by Ohio EPA. Ohio EPA shall also have the right to take any additional samples it deems necessary.

24. As part of the monthly progress reports required in Section XIV, Progress Reports and Notice, Performing Defendant shall submit to Ohio EPA copies of the results of all sampling and/or tests or other data, including validated raw data and original laboratory reports, generated by or on behalf of Performing Defendant with respect to the Site and any Work related to this Consent Decree.

25. Performing Defendant shall submit to Ohio EPA two (2) copies of all interpretive reports and written explanations concerning the raw data and original laboratory reports. Such

interpretive reports and written explanations shall not be submitted in lieu of original laboratory reports and raw data. Should Performing Defendant subsequently discover an error in any report or raw data, Performing Defendant shall promptly notify Ohio EPA of such discovery and provide the correct information, in writing.

XIII. SITE ACCESS

26. As of the Effective Date of this Consent Decree, Plaintiff and its representatives and contractors shall have access at all times to the Site and any other property controlled by or available to Performing Defendant to which access is necessary to effectuate the actions required by this Consent Decree. Access shall be allowed for the purposes of conducting activities related to this Consent Decree including but not limited to:

- A. Monitoring the Work or any other activities taking place at the Site.
- B. Verifying any data or information submitted to Plaintiff.
- C. Conducting investigations relating to contamination at or near the Site
- D. Obtaining samples.
- E. Assessing the need for, planning, or implementing additional response actions at or near the Site.
- F. Inspecting and copying records, operating logs, contracts or other documents maintained or generated by Performing Defendant or its agents, consistent with this Consent Decree and applicable law.
- G. Using a camera, video recording, sound recording, or other documentary production equipment.
- F. Assessing compliance with this Consent Decree by Performing Defendant and their agents and/or contractors.

27. To the extent that any property of the Site, to which access is necessary to effectuate the actions required by this Consent Decree, is owned or controlled by persons other than Performing Defendant, Performing Defendant shall use its best efforts to secure access from such persons for Performing Defendant and Ohio EPA as necessary to effectuate this Consent Decree. Copies of all access agreements obtained by Performing Defendant shall be provided promptly to Ohio EPA. If any access required to effectuate this Consent Decree is not obtained within thirty (30) days of the Effective Date of this Consent Decree, or within thirty (30) days of the date Ohio EPA notifies Performing Defendant in writing that additional access beyond that previously secured is necessary, Performing Defendant shall promptly notify Ohio EPA in writing of the steps Performing Defendant have taken to attempt to obtain access. Ohio EPA may, as it deems appropriate, assist Performing Defendant in obtaining access.

28. Nothing in this Consent Decree shall be construed to limit the statutory authority of the Director or his authorized representatives to enter at reasonable times upon any private or public property, real or personal, to inspect or investigate, obtain samples and examine or copy any records to determine compliance with R.C. Chapters 3734 and/or 6111.

XIV. PROGRESS REPORTS AND NOTICE

29. Beginning with the first full month following the Effective Date of this Consent Decree and throughout the period that this Consent Decree is effective, unless otherwise directed by Ohio EPA, Performing Defendant shall submit, by mail or electronic mail, one (1) copy of written progress reports to Ohio EPA by the tenth day of every month. At a minimum, the progress reports shall:

- A. Describe the status of the Work and actions taken toward achieving compliance with the Consent Decree during the reporting period.
- B. Describe the difficulties encountered during the reporting period and actions taken to rectify any difficulties.
- C. Describe activities planned for the next month.
- D. Identify changes in key personnel.
- E. List targets and actual completion dates for each element of activity, including project completion.
- F. Provide an explanation for any deviation from any applicable schedule.
- G. Indicate what analytical data was received during the period and provide copies of all data required under Section XII, Sampling and Data Availability.
- H. Indicate the quantity of the contaminated soil and waste that was treated and/or removed and the contaminated ground water and surface water that was treated, and indicate where such contaminated media were disposed.

XV. REVIEW OF SUBMITTALS

30. This Section applies to all documents Performing Defendant is required to submit to Ohio EPA for review and approval in accordance with the requirements of this Consent Decree.

31. All RI/FS documents submitted to Ohio EPA shall be developed in accordance with the attached Guidance Documents and RI/FS SOW (Attachments A and B). Every document that Performing Defendant is required to submit to Ohio EPA under this Consent Decree is subject to the review and approval of Ohio EPA in accordance with this Consent Decree and applicable state and federal laws. Upon review, Ohio EPA may at its sole discretion (1) approve the submission in whole or in part; (2) approve the submission upon specified conditions or modifications; (3) modify the

submission; (4) disapprove the submission in whole or in part; (5) notify Performing Defendant of deficiencies; or (6) any combination of the above.

32. If Ohio EPA disapproves a submittal, in whole or in part, Ohio EPA will notify Performing Defendant of the deficiencies in writing. Performing Defendant shall, within forty-five (45) days of receipt of Ohio EPA's written notice, or if supplemental field, laboratory, or other investigatory work must be performed, within forty-five (45) days of completion of such work, or such longer period of time as specified in writing by Ohio EPA, correct the deficiencies and submit a revised submission to Ohio EPA for approval. Notwithstanding the notice of deficiency, Performing Defendant shall proceed to take any action(s) required by the approved portion(s) of the submission.

33. If Ohio EPA does not approve a revised submission, in whole or in part, Ohio EPA may again require Performing Defendant to correct the deficiencies and incorporate all changes, additions, and/or deletions within fourteen (14) days, or such time period as specified by Ohio EPA in writing. In the alternative, Ohio EPA may approve upon condition, modify or disapprove the revised submission.

34. In the event of approval or approval upon conditions or modifications, Performing Defendant shall proceed to take any action required by the submission as approved by Ohio EPA.

35. All work plans, reports, or other items required to be submitted to Ohio EPA under this Consent Decree shall, upon written approval by Ohio EPA, be deemed to be incorporated in and made an enforceable part of this Consent Decree. In the event that Ohio EPA approves a portion of a work plan, report, or other item, the approved portion, together with any modifications or conditions thereto, shall be deemed to be incorporated in and made an enforceable part of this Consent Decree.

36. If Ohio EPA determines that any additional or revised guidance documents affect the Work to be performed in implementing the RI/FS, Ohio EPA will notify Performing Defendant, and Performing Defendant shall modify the work plan(s) and/or other affected documents according to Ohio EPA's comments.

XVI. DISPUTE RESOLUTION

37. This Section shall only be applicable to the following portions of this Consent Decree: Section VIII, Remedial Investigation and Feasibility Study; Section IX, Additional Work; Section XV, Review of Submittals; and Section XX, Payments and Reimbursement of Costs, to the extent that the dispute concerns the accuracy of the State's request for reimbursement and/or whether the costs are related to Work beyond the objectives of this Consent Decree as set forth in Section I, Statement of Purpose. In the event of a dispute over Future Ohio Response Costs, Defendants shall not be required to pay the contested amount of the Future Ohio Response Costs until the dispute is resolved.

38. The Site Coordinators and/or the alternate Site Coordinators shall, whenever possible operate by consensus. In the event that a disagreement exists about either the adequacy or disapproval of any work plan, report, or other item required to be submitted by Performing Defendant pursuant to this Consent Decree; or the need for additional Work; then the Site Coordinators shall have fifteen (15) days from the date the dispute arises to negotiate in good faith in an attempt to resolve the differences. The dispute arises when either the Ohio EPA Site Coordinator provides a brief written notice of dispute to the Performing Defendant's Site Coordinator, or the Performing Defendant's Site Coordinator provides a brief written notice of dispute to the Ohio EPA

Site Coordinator. This fifteen (15) day period may be extended by mutual agreement of the Parties, up to an additional seven (7) days.

39. In the event that the Site Coordinators and/or the alternate Site Coordinators are unable to reach consensus on the dispute, then each Site Coordinator and/or the alternate Site Coordinator shall reduce his or her position to writing within thirty (30) days of the end of the good faith negotiations referenced in Paragraph 38. Those written positions shall be immediately exchanged by the Site Coordinators. Following the exchange of written positions, the Parties shall have an additional fourteen (14) days to resolve their dispute. If Ohio EPA concurs with the position of the Performing Defendant, then the work plan, report or other item required to be submitted pursuant to this Consent Decree shall be modified as provided for by Ohio EPA. If necessary, either Party may petition this Court for modification of the Consent Decree to include any required extensions of time or variances of required Work.

40. If Ohio EPA does not concur with the position of the Performing Defendant, the Ohio EPA Site Coordinator will notify the Performing Defendant in writing. Upon receipt of such written notice, the Parties shall have fourteen (14) days to forward a request for resolution of the dispute, along with a written statement of the dispute, to an Ohio EPA, Division of Environmental Response and Revitalization ("DERR") Manager. The statement of dispute shall be limited to a concise presentation of the Parties' position on the dispute. The DERR Manager, or his/her designee, will resolve the dispute based upon and consistent with this Consent Decree; state law, including R.C. Chapters 3734 and 6111, and the regulations promulgated there under; the NCP; and other appropriate state and federal laws.

41. If Performing Defendant and Ohio EPA do not agree on a resolution of the dispute within fourteen (14) days of the decision reached by the DERR Manager, either Party may petition this Court to resolve the dispute under this Consent Decree. In this Court proceeding, Performing Defendant shall have the burden of demonstrating by a preponderance of the evidence that the decision by Ohio EPA is unlawful and/or unreasonable.

42. The pendency of dispute resolution set forth in this Section shall not affect the time period for completion of the Work to be performed under this Consent Decree, except that upon written mutual agreement of the Parties, any time may be extended as appropriate under the circumstances. Elements of Work not affected by the dispute will be completed in accordance with the schedules contained in the RI/FS Work Plan and other deliverables.

43. Within thirty (30) days of resolution of a dispute regarding disapproval or inadequacy of a submittal or the need for additional Work, Performing Defendant shall incorporate the resolution and final determination into the work plan, report, or other item required to be submitted under this Consent Decree and proceed to implement this Consent Decree according to the amended work plan, report, or other item required to be submitted under this Consent Decree.

44. In the event that a disagreement exists about the accuracy of the State's request for reimbursement of Future Ohio Response Costs, then within sixty (60) days from receipt of the invoice for payment of Future Ohio Response Costs, a Defendant shall submit to an Ohio EPA, Division of Environmental Response and Revitalization ("DERR") Manager a concise written presentation of the Defendant's position on the dispute. The DERR Manager, or his/her designee, will resolve the dispute based upon and consistent with this Consent Decree; state law, including

R.C. Chapters 3734 and 6111, and the regulations promulgated thereunder; the NCP; and other appropriate state and federal laws.

45. If Defendants and Ohio EPA do not agree on a resolution of the Future Ohio Response Costs dispute within fourteen (14) days of the decision reached by the DERR Manager, any Party may file a motion in this Court to resolve the dispute under this Consent Decree. In this Court proceeding, Defendants shall have the burden of demonstrating by a preponderance of the evidence that the decision by Ohio EPA is unlawful and/or unreasonable.

46. Within sixty (60) days of resolution of a dispute regarding any inaccurate statement issued for reimbursement of Future Ohio Response Costs, Ohio EPA will make any necessary corrections to the statement and submit to Defendants a corrected statement. Performing Defendant shall pay its 50% share of the corrected amount within thirty (30) days of receipt of the corrected amount. The United States shall pay its 50% share of the corrected amount as soon as reasonably practicable after receipt of the corrected statement.

47. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to those matters set forth in Paragraph 37 of this Consent Decree.

XVII. ACCESS TO INFORMATION

48. Performing Defendant shall provide to Ohio EPA, upon request, copies of all non-privileged documents and information within its possession or control or within possession or control of its contractors or agents relating to events or conditions at the Site including, but not limited to manifests, reports, correspondence, or other documents or information related to the Work.

49. Performing Defendant may assert a claim that documents or other information submitted to Ohio EPA pursuant to this Consent Decree are confidential under the provisions of Ohio Adm. Code 3745-50-30(A) or R.C. 6111.05(A). If no such claim of confidentiality accompanies the documents or other information when it is submitted to Ohio EPA, it may be made available to the public without notice to Performing Defendant.

50. Performing Defendant may assert that certain documents or other information are privileged under the attorney-client or any other privilege recognized by applicable law. If Performing Defendant asserts that certain documents or information are privileged or confidential under applicable law it shall provide Ohio EPA with the confidentiality being asserted and the basis for the assertion.

51. No claim of confidentiality or privilege, including but not limited to, claims made pursuant to R.C. 3745.70 through 3745.73, shall be made with regard to any data gathered pursuant to this Consent Decree, including but not limited to, all sampling, analytical, monitoring, or laboratory reports.

52. Performing Defendant shall preserve for the duration of this Consent Decree and for a minimum of ten (10) years after its termination, all documents and other information within its possession or control, or within the possession or control of its contractors or agents, which in any way relate to the Work notwithstanding any document retention policy to the contrary. Performing Defendant may preserve such documents by microfiche, compact disc, or other electronic or photographic device. Performing Defendant shall notify Ohio EPA at least sixty (60) days prior to

the destruction of these documents or other information; and upon request, shall deliver such documents and other information to Ohio EPA.

XVIII. INDEMNITY

53. Performing Defendant agrees to indemnify, save, and hold harmless, but not defend, the State from any and all claims or causes of action arising from, or related to, events or conditions at the Site, except where the claims or causes of action result from negligent, reckless or intentionally tortious conduct by the State occurring outside of the State's exercise of its discretionary functions. Discretionary functions of the State include, but are not limited to, the State's review, approval, or disapproval of Work performed pursuant to the Consent Decree. The State agrees to provide notice to Defendants within thirty (30) days of receipt of any claim that may be the subject of indemnity as provided in this Section, and to cooperate with Performing Defendants in the defense of any such claim or action against the State. The State shall not be considered a Party to and shall not be held liable under any contract entered into by Performing Defendant in carrying out the activities pursuant to this Consent Decree.

XIX. UNAVOIDABLE DELAYS

54. If any event occurs that causes or may cause a delay of any Work requirements of this Consent Decree, Performing Defendant shall notify the Ohio EPA Site Coordinator in writing within ten (10) calendar days of the event, describing in detail the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken to prevent or minimize the delay and the timetable by which measures will be implemented. Performing Defendant will adopt all reasonable measures to avoid or minimize any such delay.

55. With the provision that the notification in Paragraph 54, above, does not necessarily terminate or delay any Work requirement in this Consent Decree, in any action by the State to enforce any of the provisions of this Consent Decree, Performing Defendant may raise that it is entitled to a defense and that its conduct was caused by reasons entirely beyond its control such as, by way of example and not limitation, acts of God, strikes, acts of war, civil disturbances, or vandalism. While the State does not agree that such a defense exists, it is, however, hereby agreed upon by Performing Defendant and the State that it is premature at this time to raise and adjudicate the existence of such a defense and that the appropriate point at which to adjudicate the existence of such a defense is at the time that a proceeding to enforce this Consent Decree, if any, is commenced by the State. At that time, Performing Defendant will bear the burden of proving that any delay was or will be caused by circumstances entirely beyond the control of the Performing Defendant. Unanticipated or increased costs associated with the implementation of any Work requirement required by this Consent Decree, shall not serve as a basis for an extension of time under this Consent Decree. Any extension of a date based on a particular incident does not mean that Performing Defendant shall receive an extension of a subsequent date or dates. Performing Defendant must make an individual showing of proof for each incremental step or other requirement for which an extension is sought.

XX. PAYMENTS AND REIMBURSEMENT OF COSTS BY OTTERBEIN UNIVERSITY

56. No later than one hundred twenty (120) days after the Effective Date of this Consent Decree, Performing Defendant shall pay to Ohio EPA \$36,459.03 in settlement of its share of all unpaid Past Ohio Response Costs incurred by Ohio EPA through December 31, 2010. Payment shall be paid in the form of a certified check made payable to "Treasurer, State of Ohio" and forwarded to Martha Sexton, or her successor, Environmental Enforcement Section, 30 East Broad St., 25th Floor, Columbus, OH 43215. Performing Defendant shall send a copy of the transmittal letter and a copy of the check to the Ohio EPA Kilgore Manufacturing Site Coordinator, and the Assistant Attorney General representing the State in this case.

57. Performing Defendant shall reimburse Ohio EPA for 50% of the Future Ohio Response Costs. Ohio EPA will submit an itemized statement of its Future Ohio Response Costs to Performing Defendant on an annual basis. Performing Defendant shall pay its 50% share of Future Ohio Response Costs for the previous year within one hundred and twenty (120) days of receipt of such itemized statement at the address set forth on the statement.

58. No later than one hundred twenty (120) days after the Effective Date of this Consent Decree, Performing Defendant shall pay to the Ohio Attorney General \$500.00 in settlement of its share of all unpaid Ohio Response Costs incurred by the Ohio Attorney General through the Effective Date of this Consent Decree. Payment shall be by electronic funds transfer according to the payment instructions provided by the Ohio Attorney General's Office. Performing Defendant

shall send a copy of the transmittal letter to the Assistant Attorney General representing the State in this case.

59. Pursuant to R.C. 131.02(D), interest shall accrue on all Ohio Response Costs from the date that they become past due, at the rate per annum required by R.C. 5703.47, until payment is remitted. Performing Defendant shall remit payment for any such interest due to Ohio EPA by a certified check made payable to "Treasurer, State of Ohio," at the address set forth in Paragraph 56 or on the itemized statement. Payment of interest on past due Ohio Attorney General's costs shall be by electronic funds transfer according to the payment instructions provided by the Ohio Attorney General's Office.

XXI. PAYMENTS AND REIMBURSEMENT OF COSTS BY THE UNITED STATES

60. As soon as reasonably practicable after the Effective Date of this Consent Decree, the United States, on behalf of the United States Department of Defense, shall pay Performing Defendant \$427,061.38 by electronic funds transfer pursuant to instructions to be provided by Performing Defendant. This payment shall be used to fund, in part, performance of the Work required by this Consent Decree, including but not limited to, the RI/FS. Additionally, this payment satisfies claims for recovery or reimbursement of, or contribution to, Otterbein Response Costs previously incurred at the Facility. In the event the payment required under this Paragraph is not made within 90 days of the Effective Date, interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), with the interest accrual commencing on the ninety-first day after the Effective Date.

61. As soon as reasonably practicable after the Effective Date of this Consent Decree, the United States shall pay \$36,459.03 in settlement of its share of all Past Ohio Response Costs incurred by Ohio EPA through December 31, 2010. Payment shall be paid by electronic funds transfer according to the payment instructions provided by Ohio EPA. The United States shall send a copy of the transmittal letter to the DERR Fiscal Officer, the Ohio EPA Kilgore Manufacturing Site Coordinator, and the Assistant Attorney General representing the State in this case.

62. The United States shall reimburse Ohio EPA for 50% of the Future Ohio Response Costs. Ohio EPA will submit an itemized statement of its Future Ohio Response Costs to Defendants on an annual basis. The United States shall pay its 50% share of Future Ohio Response Costs for the previous year as soon as reasonably practicable after the receipt of such itemized statement at the address set forth on the itemized statement.

63. As soon as reasonably practicable after the Effective Date of this Consent Decree, the United States shall pay to the Ohio Attorney General \$500.00 in settlement of its share of all Ohio Response Costs incurred by the Ohio Attorney General through the Effective Date of this Consent Decree. Payment shall be paid by electronic funds transfer according to the payment instructions provided by the Ohio Attorney General's Office. The United States shall send a copy of the transmittal letter to the Assistant Attorney General representing the State in this case.

64. In the event that any payment required to be made by United States under this Consent Decree is not made within 120 days of the Effective Date or after receipt of an itemized statement, interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), with interest accrual commencing on the ninety-first day

after the Effective Date or after the receipt date of the itemized statement. The United States shall remit payment for any such interest due to Ohio EPA/and or the Ohio Attorney General by electronic funds transfer according to the payment instructions provided by the State.

65. The State and the United States agree that in any judicial proceeding to enforce the terms of this Consent Decree and/or to find the United States in contempt for failure to comply or delay in compliance with such terms, the United States may raise as a defense that such failure or delay was caused by circumstances beyond its control or that such failure or delay was caused by the unavailability of appropriated funds. While the State disagrees that such defenses exist, the State and the United States agree and stipulate that it is premature at this time to raise and adjudicate the existence of such defenses.

XXII. COVENANTS NOT TO SUE AND RESERVATION OF RIGHTS

66. In consideration of the actions that will be performed by the Performing Defendant and the payments to be made by the United States under the terms of this Consent Decree, and except as otherwise specifically provided in this Consent Decree, the State covenants not to sue or to take administrative action against Otterbein University and the United States pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), R.C. Chapters 3734, 3745 and 6111 or other applicable State laws including common law, for the Work required by this Consent Decree and for Past Ohio Response Costs and Future Ohio Response Costs through the completion of the Work required by this Consent Decree. These covenants are conditioned upon the complete and satisfactory performance by the Defendants of their respective obligations under this Consent Decree, including, but not limited to, completion of the Work and payment of Ohio's Response Costs. These covenants extend only to the

Defendants and do not extend to any other person.

67. This Consent Decree shall not be construed to limit the authority of the State to seek relief for claims, conditions, or response actions not addressed by this Consent Decree, including without limitation injunctive relief, civil penalties, and cost recovery. Nothing in this Consent Decree is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the State may have against any person, firm corporation or other entity not a Party to this Consent Decree.

68. Nothing in this Consent Decree shall be construed to limit the authority of the State to undertake any action against any entity, including either or both Defendants, to eliminate or mitigate conditions that may present an imminent threat to the public health, welfare or environment and to seek cost reimbursement for any such action. Nothing in this Consent Decree shall be construed to limit the authority of the State to seek relief for claims for damage to natural resources.

69. Nothing in this Consent Decree shall relieve Defendants of any obligation to comply with R.C. 3734 and 6111 including, without limitation, any regulation, license or order issued under these Chapters, and any other applicable federal, state or local statutes, regulations, or ordinances, including but not limited to permit requirements.

70. The State reserves the right to seek legal and/or equitable relief to enforce the requirements of this Consent Decree, including penalties against Defendants for noncompliance with this Consent Decree.

71. The State reserves the right to perform all or any portion of the Work or take any other measures it deems necessary to protect public health and the environment, including recovery

of all Ohio Response Costs, in the event that the requirements of this Consent Decree are not wholly complied with within the time frames required by this Consent Decree.

72. Upon the payments of Response Costs by the United States as required by this Consent Decree, the Performing Defendant hereby forever releases, discharges, and covenants and agrees not assert (by way of the commencement of an action, the joinder of the United States 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 it may have had, or hereafter have, including, but not limited to, claims under CERCLA sections 107 and 113, against the United States for the (1) Work required under this Consent Decree; (2) Ohio's Response Costs; (3) any past response costs incurred by Otterbein as alleged in its Complaint; and (4) any response costs incurred by Otterbein through completion of the Work required under this Consent Decree. Notwithstanding the foregoing specific discharge and release, the Performing Defendant reserves the right to seek contribution from the United States for all response costs the Performing Defendant may incur as a result of any removal or remediation actions, other than the Work, that may subsequently be required by the State including any removal or remediation action response costs incurred by the Performing Defendant associated with unexploded ordnance at the Site.

73. By entering into this Consent Decree, Defendants do not waive any defenses that they may have in any future action identified in this Section, nor do Defendants waive any claim or defenses against any others not a Party to this action. However, in any subsequent administrative or judicial proceeding initiated by the State for injunctive relief, recovery of response costs, damages, or other relief relating to the Site, Defendants shall not assert, and may not maintain any defense or

claim based upon statute of limitations or the principles of waiver, laches, res judicata, collateral estoppel, issue preclusion, claim splitting or other defenses based upon the contention that the claims brought by the State in a subsequent action were or should have been brought in the instant action.

74. In any subsequent administrative or judicial proceeding initiated by the Performing Defendant for injunctive relief, recovery of response costs, damages, or other relief relating to the Facility, the United States shall not assert, and may not maintain any defense or claim based upon statute of limitations or the principles of waiver, laches, res judicata, collateral estoppel, issue preclusion, claim splitting or other defenses based upon the contention that the claims brought by the Performing Defendant in a subsequent action were or should have been brought in the instant action.

75. The United States specifically reserves its right to assert any claims or actions regarding the Site brought on behalf of the United States Environmental Protection Agency, any lead agency under the NCP, or a natural resource trustee.

XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

76. The Parties agree, and by entering this Consent Decree this Court finds, that this settlement constitutes a judicially approved settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that the Performing Defendant and the United States are entitled, as of the Effective Date, to protection from actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), or as may be otherwise provided by law, for matters addressed in this Consent Decree. Matters addressed means the Work, Ohio's Response Costs, and Otterbein's Response Costs.

77. Payments made and Work performed under this Consent Decree, are not intended to

establish a final allocation of responsibility for Ohio Response Costs or Otterbein's Response Costs between or among the Defendants.

XXIV. OTHER CLAIMS

78. Nothing in this Consent Decree shall constitute or be construed as a release from any claim, cause of action, or demand in law or equity against any person, firm, partnership, or corporation, not subject to this Consent Decree for any liability arising from, or related to, events or conditions at the Site, and Defendants have not purported to or held themselves out as representing another person, firm, partnership, or corporation. Defendants expressly deny that they are the agent for or those they represent or otherwise have the authority to represent or serve the interests of another person, firm, partnership, or corporation.

79. Performing Defendant certifies, based on knowledge and belief and subject to the penalties of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, and other applicable law, that as of the Effective Date, it has not been reimbursed by any entity or Party for the response costs for which it will receive reimbursement or payment under this Consent Decree. Performing Defendant shall not seek or accept any reimbursement or payment from any other entity or Party for the portions of Performing Defendant's response costs that the United States pays or reimburses to Performing Defendant pursuant to this Consent Decree.

XXV. TERMINATION

80. This Consent Decree shall terminate upon joint motion of the Parties, and approval of the Court, following completion of all activities required under this Consent Decree. This Section, and the Sections of this Consent Decree on Covenants not to Sue and Reservation of Rights. No

Admission, Deed Notice/Land Use and Conveyance of Title, and Access to Information, shall survive this Termination Provision.

XXVI. MODIFICATION

81. Except as otherwise allowed by law or otherwise specifically permitted by the Consent Decree, non-substantive modifications, for example address changes, of this Consent Decree shall be by written approval by the Parties and notice of such modification(s) to the Court. Substantive modifications to this Consent Decree shall be by written agreement of the Parties and shall not take effect unless approved by the Court.

XXVII. MAILING AND DELIVERY OF DOCUMENTS

82. Except as provided in Section XIV, Progress Reports and Notice, all documents requiring submittal pursuant to this Consent Decree or any plan developed in accordance with this Consent Decree shall be sent by certified mail return receipt requested, or equivalent, to:

Ohio EPA Central District Office
Division of Environmental Response and Revitalization
Attn. Kilgore Manufacturing Site Coordinator
P.O. Box 1049
50 West Town Street, Suite 700
Columbus, OH 43216-1049

All correspondence with the Defendants shall be sent to the following:

United States Department of Justice
Environmental & Natural Resources Division
Environmental Defense Section
United States Department of Justice
P.O. Box 7611
Washington, DC 20044
DJ#: 90-11-6-18349, 90-11-6-19174.

Rebecca Vazquez-Skillings
Vice President for Business Affairs
One Otterbein University
1 South Grove Street
Westerville, OH 43081-2006
Telephone: (614) 823-1354

XXVIII. COMPLIANCE WITH APPLICABLE LAWS, PERMITS AND APPROVALS

83. All activities undertaken by Performing Defendant pursuant to this Consent Decree shall be undertaken in accordance with the requirements of all applicable federal, state and local laws, rules, regulations and permits or other legal requirements, including the Consent Decree. Performing Defendant shall submit timely applications and requests for any such permits and approvals. Where such laws appear to conflict with the other requirements of this Consent Decree, Performing Defendant is ordered and enjoined to immediately notify Ohio EPA of the potential conflict. Performing Defendants is ordered and enjoined to include in all contracts or subcontracts entered into for Work required under this Consent Decree, provisions stating that such contractors or subcontractors, including their agents and employees, shall perform all activities required by such contracts or subcontracts in compliance with this Consent Decree and all applicable laws and rules. This Consent Decree is not a permit issued pursuant to any federal, state, or local law or rule.

84. Should Performing Defendant identify any inconsistency between or among this Consent Decree, any applicable federal, state or local laws, rules, regulations or permits or other legal requirements, or any of the guidance documents, work plans, reports, or other items required to be submitted to Ohio EPA under this Consent Decree, Performing Defendant shall promptly notify

Ohio EPA in writing of each inconsistency not later than thirty (30) days after identifying the inconsistency and the effect of the inconsistencies upon the Work to be performed. Performing Defendant shall also recommend, along with a supportable rationale justifying each recommendation, the requirement Performing Defendant believes should be followed. Performing Defendant shall implement the affected Work as directed by Ohio EPA.

**XXIX. APPENDICES AND DOCUMENTS APPROVED PURSUANT TO THIS
CONSENT DECREE**

85. The Parties agree that the appendices attached to this Consent Decree and all documents approved by Ohio EPA pursuant to the requirements of this Consent Decree are incorporated by reference into and are an enforceable part of this Consent Decree.

XXX. COURT COSTS

86. Performing Defendant shall pay any court costs in this case.

XXXI. STIPULATED PENALTIES

87. In the event that any Ohio EPA approved deadline contained in the schedule of any approved submittal is not met, Performing Defendant is ordered and enjoined to pay stipulated penalties that shall accrue in the amount of Fifty Dollars (\$50) per day for the first seven (7) days of non-compliance; One Hundred Twenty-Five Dollars (\$125) per day for the 8th day through the 14th day of non-compliance; Two Hundred Fifty Dollars (\$250) per day for the 15th day through the 30th day of non-compliance; and Five Hundred Dollars (\$500) per day, per violation for violations lasting beyond thirty (30) days and thereafter.

88. Any payment of stipulated penalties accrued under the provisions of Paragraph 86

shall be made by delivering to Martha Sexton, Paralegal, or her successor, at the Office of the Attorney General of Ohio, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215 a certified check(s) for the appropriate amount(s), within fourteen (14) days from the date the default is cured, made payable to "Treasurer, State of Ohio" to be deposited into the Hazardous Waste Clean-up Account, created pursuant to R.C. Section 3734.28.

**XXXII. SATISFACTION OF COUNTS ONE AND TWO IN THE STATE'S
COMPLAINT AND STAY OF LITIGATION FOR COUNTS THREE THROUGH
EIGHT**

89. Upon payment of the costs by the United States as required by this Consent Decree, Count One – Recovery of Past Response Costs under CERCLA and Count Two – Recovery of Future RI/FS Response Costs under CERCLA, as alleged in the State's Complaint, shall be satisfied and those Counts shall be dismissed with prejudice as to the United States. To the extent that portions of Counts Four through Eight seek relief for the investigation of soil, surface waters and groundwater contamination or the payment of the costs of the State overseeing such investigation at the Site ("investigation relief/costs"), those portions of Counts Four through Eight seeking investigation relief/costs shall be satisfied and dismissed with prejudice as to the United States upon payment of the costs by the United States. Upon completion of the Work and payment of the costs by Performing Defendant required by this Consent Decree, Count One – Recovery of Past Response Costs under CERCLA and Count Two – Recovery of Future RI/FS Response Costs under CERCLA, as alleged in the State's Complaint, shall be satisfied and those Counts shall be dismissed with prejudice as to the Performing Defendant. To the extent that portions of Counts Four through Eight seek relief for investigation relief/costs, those portions of Counts Four through Eight seeking

investigation relief/costs shall be satisfied and dismissed with prejudice as to Performing Defendant upon completion of the Work and payment of the costs by Performing Defendant.

90. The Parties agree that all further proceedings regarding the portions of Counts Four through Eight, not dismissed under paragraph 89 and Count Three, including but not limited to propounding discovery, shall be stayed pending further order of this Court. The Parties reserve the right to move the Court to lift such stay.

XXXIII. DISMISSAL OF OTTERBEIN UNIVERSITY'S COMPLAINT

91. Upon the payment of the costs required by paragraph 60 of this Consent Decree, all claims asserted by Otterbein University in its Complaint in Civil Action 08 cv 709 (S.D. Ohio) shall be dismissed. As provided in Paragraph 72, Otterbein University expressly reserves, and this Consent Decree is without prejudice to, any future claims and actions for contribution from the United States for response costs the Performing Defendant may incur as a result of any removal or remediation actions, other than the Work, that may subsequently be required by the State, and any response costs incurred by the Performing Defendant associated with unexploded ordnance at the Site.

XXXIV. NEGOTIATION OF FINAL CONSENT DECREE

92. Upon termination of this RI/FS Consent Decree, the Parties agree to meet and confer concerning the negotiation of a final consent decree that may include, but not necessarily be limited to, the resolution of the United States' liability to Performing Defendant, a permanent injunction implementing the Remedial Design and Remedial Action ("RD/RA") for the selected remedy, the payment of Ohio Response Costs not reimbursed as required by this Consent Decree, a covenant not

to sue for Defendants, a final resolution of Defendants' liability to the State of Ohio for the claims alleged in the Complaint, and a final reservation of rights for the State.

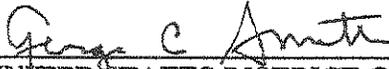
XXXV. AUTHORITY TO ENTER INTO THE CONSENT DECREE

93. Each signatory for a Party represents and warrants that he/she has been duly authorized to sign this document and so bind the Party to all terms and conditions thereof. This Consent Decree may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

Upon consideration of the foregoing, the Court finds that this Consent Decree is fair, reasonable, and consistent with applicable law.

IT IS SO ORDERED this 30th day of April, 2012.

JUDGE GEORGE C. SMITH



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

The undersigned Parties hereby consent to the foregoing Consent Decree in *State v. Otterbein University, et al.*

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

 Date April 4, 2012

TIMOTHY J. KERN (0034629)
Principal Assistant Attorney General
Environmental Enforcement Section
30 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 466-2766
Facsimile: (614) 644-1926
Timothy.Kern@OhioAttorneyGeneral.gov

Attorney for State of Ohio

 Date April 10, 2012

AMY J. DONA
United States Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Tel: (202) 514-0223
amy.dona@usdoj.gov

Attorney for the United States

The undersigned Parties hereby consent to the foregoing Consent Decree in *State v. Otterbein University, et al.*



Date April 4, 2012

BRIGID L. HEID, Esq.,
Trial Attorney
Carlile Patchen & Murphy LLP
366 East Broad Street
Columbus, Ohio 43215
Tel: (614) 228-6135
Facsimile: (614) 221-0216
beh@cpmlaw.com

Of Counsel:

RONALD L. KUIS, Esq.
12 Scenery Road
Pittsburgh, Pennsylvania 15221
Tel: (412) 731-7246
Facsimile: (412) 731-3970
rlkuis@aol.com

Attorneys for Otterbein University

ATTACHMENT C SITE MAP

