

**ORIGINAL**

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**FILED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

SEP 29 PM 3: 56  
NORTHERN DISTRICT OF OHIO  
TOLEDO

UNITED STATES OF AMERICA

and the

STATE of OHIO,

Plaintiffs,

v.

CITY OF CLYDE, OHIO,

Defendant.

**3:04CV7587**

(consol with 3:04cv7588)

CIVIL ACTION NO.:

JUDGE DAVID A. KATZ

**CONSENT DECREE**

**BACKGROUND**

The United States, on behalf of the Administrator of the Environmental Protection Agency ("EPA"), has filed a complaint alleging that the City of Clyde, Ohio ("Clyde" or "the City") has repeatedly violated the Clean Water Act (the "Act"), 33 U.S.C. § 1251 et seq., the regulations implementing the Act, and the terms and conditions of Clyde's 1994, 1997, and 2002 National Pollutant Discharge Elimination System ("NPDES") Permits.

The United States named the State of Ohio ("Ohio") as a defendant pursuant to Section 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e) and Ohio moved to realign as a plaintiff in this action, and filed a Complaint against Clyde. The State's action was consolidated with the United States' action.

The City owns, operates and maintains the City of Clyde Wastewater Treatment Plant ("WWTP"), a Publicly Owned Treatment Works ("POTW"), as defined in 40 C.F.R. § 122.2, and 403.3(o), located at 749 West McPherson Highway, Clyde, Sandusky County, Ohio, which treats sanitary wastewater produced in and around the City of Clyde.

Clyde owns, operates and maintains the City of Clyde's collection system which transports storm water and sanitary wastewater produced in and around Clyde to the WWTP.

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treatment.

Clyde's POTW was subject to the terms and conditions of Ohio EPA Permit No. 2PD00004\*JD, an NPDES Permit issued in 1994 and modified and renumbered to 2PD00004\*KD, and is subject to the terms and conditions of Ohio EPA Permit No. 2PD00004\*LD, an NPDES Permit issued in 1997, and the currently effective NPDES Permit 2PD00004\*MD.

Since the United States notified the City of its claims in this case, the City has taken significant actions to remedy the alleged violations. As a result, the City has, prior to the lodging of this Consent Decree, eliminated all but one of the combined sewer overflows that are the subject of the United States' Complaint and has otherwise made substantial improvements in the operation and maintenance of its sewage collection and treatment system. The United States and the State of Ohio have taken those actions by the City into account in entering into this Decree.

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 will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I, below, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

#### **I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of this action, and over the parties hereto, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355 and Section 309(b) of the Act, 33 U.S.C. § 1319(b). Venue is proper in the Northern District of Ohio, Western Division, pursuant to 28 U.S.C. §§ 1391(b) and (c), 1395(a), and Section 309(b) of the Act, 33 U.S.C. § 1319(b).

For purposes of this Decree, Defendant does not contest the Court's jurisdiction over this action or over Defendant and does not contest venue in this judicial district.

2. For purposes of this Consent Decree, Defendant agrees that the Complaints state claims upon which relief may be granted pursuant to Section(s) 301(a), 309(b) and (d), 405(d) and (e) of the Clean Water Act ("Act"), 33 U.S.C. §§ 1311(a), 1319(b) and (d), and 1345(d) and (e).

3. Notice of the commencement of this action has been given to the State of Ohio, as required by Section 309(b) of the Act, 33 U.S.C. § 1319(b).

## **II. PARTIES BOUND AND SCOPE OF CONSENT DECREE**

4. The provisions of this Consent Decree shall apply to and be binding upon the United States, the State of Ohio, and Clyde, and upon Clyde's elected officials, officers, agents, employees, trustees, successors, assigns, and all persons, firms, contractors and corporations acting through, for or under the control or direction of the City of Clyde to the extent they perform, or have responsibility to perform, any responsibilities of the City under this Consent Decree.

5. Clyde shall promptly provide a copy of this Consent Decree to each consultant and contractor selected or retained to perform any activity required by this Consent Decree.

6. No later than forty-five (45) days prior to transfer of any ownership interest, operation management, or other control of the POTW, Clyde shall give written notice of any such planned transfer to EPA Region 5, the United States Attorney for the Northern District of Ohio, Western Division, the United States Department of Justice, the State of Ohio and Ohio EPA. Clyde shall provide a copy of this Consent Decree to any such transferee or successor in interest. Clyde shall also require, as a condition of any such sale or transfer, that the purchaser or transferee agrees in

writing to be bound by this Consent Decree and submit to the jurisdiction of this Court for its enforcement.

7. In any action to enforce this Consent Decree, Clyde shall not raise as a defense the lack of notice to any of its elected officials, officers, agents, employees, trustees, successors, assigns, and all persons, firms, contractors and corporations acting through, for or under the control or direction of Clyde to take any actions necessary to comply with the provisions of the Consent Decree.

### **III. OBJECTIVES**

8. It is the express purpose of the parties entering into this Consent Decree to further the goals of the Clean Water Act, 33 U.S.C. §§ 1251-1387 and Ohio Revised Code Chapter 6111 ("R. C. Chapter 6111"), and to enable Clyde to come into compliance with the Act and the Ohio Revised Code. All obligations in this Consent Decree shall be interpreted in a manner consistent with requiring Clyde to expeditiously achieve, and at all times maintain, full compliance with its NPDES Permit and all applicable federal, state, and local laws and regulations.

### **IV. DEFINITIONS**

9. Unless otherwise defined herein, terms used in this Consent Decree shall have the meaning given to those terms in Clyde's NPDES Permit, the Clean Water Act, and the regulations promulgated thereunder.

10. The following terms used in this Consent Decree shall be defined as follows:

- (a) "Calendar Quarter" shall mean the three-month periods ending on March 31st, June 30th, September 30th, and December 31<sup>st</sup>.
- (b) "City" shall mean the City of Clyde, Ohio.

- (c) **“Collection System” or “Sewer System” means the wastewater collection and transmission system owned or operated by Clyde, designed to collect and convey municipal sewage (domestic, commercial and industrial) and/or storm water to the WWTP.**
- (d) **“Combined Sewer Overflow” or “CSO” shall mean the discharge from the collection system at a point prior to the WWTP.**
- (e) **“Complaint” shall mean the civil complaint filed by the United States and the State in this action;**
- (f) **“Consent Decree” shall mean this Consent Decree.**
- (g) **"Date of Entry" shall mean the date the Consent Decree is approved and signed by a United States District Court Judge.**
- (h) **"Date of Lodging" shall mean the date the Consent Decree is filed for lodging with the Clerk of the Court for the United States District Court for the Northern District of Ohio, Western Division.**
- (i) **"Day" or "Days" as used herein shall mean a calendar day or calendar days, unless otherwise indicated. When the day a report or other deliverable is due under this Consent Decree falls on a Saturday, Sunday, federal holiday or legal holiday for the City, the City shall have until the next business day for submission of such report or other deliverable.**
- (j) **“Defendant” shall mean the City of Clyde, Ohio;**

- (k) "Effective Date" shall mean the date of entry of this Consent Decree by the Court (after satisfaction of the public notice and comment procedures set forth in Section XX of this Consent Decree);
- (l) "U. S. EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;
- (m) "Facility" shall mean Defendant's Wastewater Treatment Plant which is a Publicly Owned Treatment Works located in Clyde, Ohio.
- (n) "Paragraph" shall mean a portion of this Decree identified by an arabic numeral;
- (o) "Parties" shall mean the United States, the State of Ohio, and Defendant;
- (p) "Permit" means Clyde's National Pollutant Discharge Elimination System Permit, #2PD0004\*MD which became effective on July 1, 2002, and any effective Permit that succeeds it including any renewals, modifications, or changes thereof issued to Clyde.
- (q) "Wastewater Treatment Plant" ("WWTP") shall refer to the City of Clyde's Wastewater Treatment Plant, which is a Publicly Owned Treatment Works ("POTW") as that term is defined in 40 C.F.R §§ 122.2 and 403.3.

## **V. PERMANENT INJUNCTION & COMPLIANCE REQUIREMENTS**

11. Clyde shall achieve and maintain compliance with Clyde's Permit and the provisions of the Act, 33 U.S.C. §1281 et seq., and Ohio Revised Code Chapter 6111, and the rules promulgated thereunder, and with the compliance program and schedules set forth below.

12. Clyde agrees that it will not authorize or allow any connection of flow or extensions to its sewer system except in accordance with the following terms and conditions. Clyde shall

not connect any additional sources of wastewater (new tap/hook-up, connection or extension) to its sewer system without first documenting clean water removal adequate to offset the volume of flow and the quantity of the pollutants that Clyde proposes be added to the system above any CSO in the sewer system. For each downstream CSO there shall be neither an increase in the duration or frequency of the discharges, nor a decrease in the water quality of the discharge. At a minimum for the addition of any sources of wastewater, Clyde must demonstrate through the annual reporting provisions of paragraph 15, below, that at least five gallons of clean water (inflow and infiltration or storm water) has been removed from the area above the CSO for every gallon of wastewater proposed to be added through a tap in connection or extension or other flow increase upstream of the CSO. Consistent with its Permit, Clyde must also demonstrate compliance with this paragraph when applying for a Permit to Install or when conducting a full anti degradation review.

13. Clyde may connect additional wastewater flows contingent upon both the issuance of a Permit to Install ("PTI") from Ohio EPA and the completion by Clyde of sufficient inflow and infiltration or storm water removal reduction projects prior to the connection of such flow to meet the requirements outlined in paragraph (12) above. Even when a PTI is not required prior to connection, such as for an individual residential "tap" to an existing sewer, removal credits or offset consistent with paragraph (12) above will be needed prior to connection of the new business, home or any other source of wastewater.

14. Clyde's clean water removal credit/offset will require at least a 5 to 1 flow offset ratio, and is to be evaluated upon "peak flow" conditions. The conditions to be utilized are the peak hourly flow ("peak GPD") for the additional flow or sewer line extension project and the 10 - year 1- hour storm event (calculated gallons removed during a one hour storm event) to characterize the flow reduction portion of the project.

15. Clyde shall develop a tracking system and shall document the amount of Inflow and

Infiltration ("I/I") or other clean water removal, along with the allocation of credits. A narrative report and map which identifies and defines the specific areas of the City where I/I removal has been completed or where sewers have been separated and used for flow credits shall be submitted to Ohio EPA annually no later than the 30<sup>th</sup> day of January of each year, with a copy to U.S. EPA. This narrative and map should be updated annually or sooner if necessary with additional removal credit submittals.

16. Clyde's prohibition on addition of any flows without off set/removal credits under the clean water removal credit program described above shall continue in any sections of the sewer system where all downstream CSOs have not yet been removed from the system.

17. All sewer taps, connections and extensions will require removal credits, regardless of the location of the proposed flow increase, as the treatment plant and collection system may be impacted. As more flow is directed through separate sewer lines to the WWTP, the increased flows from the separate sewers may displace combined sewage flows that the WWTP had previously been capable of treating. For all sewer connections other than those upstream of a CSO (as addressed above), a 1:1 removal ratio (peak flow to 10 year-1 hour storm event) will be required for any sewer connection or extension tributary to any other portion of the sewer system.

18. In accordance with its Permit, Clyde shall monitor outfall # 2PD00004010 (1A and 1B combined) for floatable solids within 24 hours of a rain event. This outfall shall be sampled in accordance with Clyde's Permit.

19. Clyde shall install a Combined Sewer Screening Facility at outfall # 2PD00004010 (1A and 1B combined). Clyde shall complete this work under the following schedule:

- a. No later than May 1, 2003, Clyde shall complete all necessary flow monitoring in order to prepare the engineering design and submit the Permit to Install and detail drawing to Ohio EPA. (PTI application was received and pending prior to date of lodging of the Consent Decree).

- b. No later than August 1, 2003, Clyde shall complete and submit to Ohio EPA an approvable Permit to Install and detailed plan of the Combined Sewer Screening Facility for outfall # 2PD00004010 (1A and 1B combined). (PTI application was received and pending prior to date of lodging of the Consent Decree).
- c. No later than September 1, 2004, Clyde shall start construction on the Combined Sewer Screening Facility for outfall # 2PD00004010 (1A and 1B combined). This work shall be done in accordance with the approved Permit to Install as referenced in paragraph (b).
- d. No later than September 1, 2005, Clyde shall complete the post construction monitoring of outfall # 2PD00004010 (1A and 1B combined) to determine if the Combined Sewer Overflow Screening Facility has eliminated floatable solids from being discharged from the outfall during a rain event.
- e. No later than December 1, 2005, Clyde shall submit to Ohio EPA a report detailing the results of the post construction monitoring of outfall # 2PD00004010 (1A and 1B combined).

20. No later than January 1, 2004, Clyde shall complete wet weather stress testing of its wastewater treatment plant. This testing shall be done in accordance with the Permit and the Wet Weather Stress Testing Plan of Study that was previously submitted and approved by Ohio EPA.

21. No later than July 1, 2004, Clyde shall submit to Ohio EPA and U.S. EPA a report of the results of the wet weather stress testing. This report shall include the raw data and analysis of the plant's capabilities.

22. Clyde shall develop a Long-term Control Plan ("LTCP") in accordance with U.S. EPA's 1994 Combined Sewer Overflow Policy, 59 Fed. Reg. 18688 (April 19, 1994). This plan

shall be submitted to Ohio EPA for approval on or before January 1, 2006, and to U.S. EPA for review. This plan shall include but not be limited to a characterization, monitoring and modeling of the combined sewer system, CSO control evaluation and cost performance curves. This analysis should include but not be limited to an analysis of sewer separation and /or express sewers as potential control, an implementation schedule, operation plan, and a post construction compliance monitoring plan.

23. As part of the proposed implementation schedule submitted pursuant to paragraph 22, above, Clyde shall provide a construction schedule to Ohio EPA and U.S. EPA. As part of this construction schedule Clyde shall propose at least 3 milestones for which stipulated penalties shall apply pursuant to Section IX, if the milestones are not achieved in accordance with the approved implementation schedule for the LTCP. The milestones proposed by Clyde shall relate to and be consistent with the proposed implementation schedule and shall be based upon objective criteria such that Clyde, Ohio EPA, and U.S. EPA, shall each be capable of, on the associated milestone date, determining with certainty whether Clyde has completed that milestone. The final milestone shall be the submission of the post construction monitoring program report.

24. Upon approval by Ohio EPA and U.S. EPA of the LTCP, the approved LTCP shall be incorporated into and made an enforceable part of this Consent Decree, and Clyde shall implement the approved LTCP in accordance with the schedule included in the approved LTCP.

25. Implementation of its approved LTCP shall not relieve Clyde of its obligation to comply with the requirements of its Permit, including, but not limited to, general water quality and technology-based effluent limitations.

## **VI. FUNDING**

26. Compliance with the terms of this Consent Decree by Clyde is not conditioned on the

receipt of federal or state grant funding. In addition, failure to comply is not excused by the lack of federal or state grant funds, or by the processing of any applications for the same.

## **VII. REPORTING**

27. Beginning forty-five (45) days after the end of the next calendar quarter after entry this Consent Decree and forty-five (45) days after the end of every calendar quarter thereafter until this Consent Decree terminates in accordance with Section XXII, below, Clyde shall submit a written Status Report to U.S. EPA and Ohio EPA in conjunction with its Monthly Operating Report for the month following the end of the calendar quarter. In each Status Report, Clyde shall provide the following:

(a) a statement setting forth the deadlines and other terms that Clyde is required by this Consent Decree to meet since the date of the last quarterly statement, whether and to what extent Clyde has met these requirements, and the reasons for any noncompliance; and

(b) a general description of the work completed within the three-month period, and a projection of work to be performed pursuant to this Consent Decree during the three-month period. Clyde shall notify U.S. EPA and Ohio EPA of any anticipated delay, but such notice shall not, by itself, excuse the delay.

28. Until the termination of this Consent Decree pursuant to Section XXII below, Clyde shall submit to U.S. EPA a copy of each report which it is required by Clyde's Permit to submit to Ohio EPA at the time such reports are due to Ohio EPA, including Monthly Operating Reports and Unauthorized Discharge Reports.

29. Defendant shall submit any plan, report, or other item that is required to be submitted for approval pursuant to this Consent Decree to both U.S. EPA and Ohio EPA. The Plaintiffs may approve the submittal or decline to approve it and provide written comments through Ohio EPA. Within 45 days of receiving Ohio EPA's written comments, unless otherwise specified in the

comment letter, Defendant shall either: (i) modify the submittal consistent with Ohio EPA's written comments and provide the submittal to U.S. EPA, and to Ohio EPA for final approval; or (ii) if, in the event that U.S. EPA exercises its statutory authority to withhold final approval, submit the matter for dispute resolution under Section X of this Decree. Upon receipt of final approval of the submittal, or upon completion of the submittal pursuant to dispute resolution, Defendant shall implement the submittal in accordance with the approved schedule.

30. Clyde shall retain all underlying documents from which it has compiled any report or other submission required by this Consent Decree until four years after termination, pursuant to Section XXII, of that part of the Consent Decree to which those documents relate. Clyde will be permitted to dispose of the records after it has provided Ohio EPA and U.S. EPA with written notification that the documents will be destroyed in 30 days unless Clyde receives written objection from either of the Plaintiffs.

#### **VIII. CIVIL PENALTY**

31. Clyde shall pay, as provided for in Paragraph 32 and 33 below, a civil penalty in the amount of \$35,000 for past violations as alleged by the United States and the State in the complaint through the date of lodging of this Consent Decree.

32. Within 30 days of the date of entry of this Consent Decree, Clyde shall pay \$17,500 to the United States. Clyde shall make payment of this amount to the United States by tendering a check payable to the "Treasurer, United States of America," and sending it to the United States Attorney for the Northern District of Ohio, Western Division, Four Seagate, Suite 308, Toledo, Ohio 43604. At the time of payment, Clyde shall simultaneously send written notice of payment and a copy of any transmittal documentation (referencing the above-captioned case name and civil action number, and DJ# 90-5-1-1-06524) to the Plaintiffs in accordance with Section XI, (Notices and Submissions) of this Decree.

33. Within 60 days of the date of entry of this Consent Decree, Clyde shall pay \$17,500 to the "State of Ohio" sending it to Jena Suhadolnik, Administrative Assistant (or her successor) Environmental Enforcement Section, 30 East Broad Street, 25<sup>th</sup> Floor, Columbus, Ohio 43215.

34. The United States and the State of Ohio shall be deemed judgment creditors for purposes of collection of this penalty.

35. If Clyde fails to tender all or any portion of the civil penalty payment within sixty days (60) of the date of entry of this Consent Decree, interest on the unpaid amount shall accrue and be paid from the date said payment was due, in accordance with the provisions of 28 U.S.C. § 1961.

#### **IX. STIPULATED PENALTIES**

36. If Clyde fails to comply with any daily maximum effluent limitations, any 7-day average (weekly average) limitations, or 30-day average (monthly average) limitations contained in its Permit or any monitoring requirements of its Permit, Clyde shall pay the following stipulated penalties, as applicable:

Any daily maximum effluent limitation	
violated or monitoring violation	\$250 per day per violation
Any weekly average violation	\$450 per day per violation
Any monthly average violation	\$650 per day per violation

37. Clyde shall pay a stipulated penalty for any unauthorized or unpermitted discharge from Clyde's wastewater treatment plant or from Clyde's collection system of \$1,500.00 per day.

38. If Clyde fails to comply with any deadline or requirement set forth in Section V, Permanent Injunction, Clyde shall pay the following stipulated penalties:

<u>Period of Failure to Comply</u>	<u>Stipulated Penalty</u>
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1 <sup>st</sup> to 30 <sup>th</sup> day	\$500 per day
31 <sup>st</sup> to 60 <sup>th</sup> day	\$750 per day
after 60th day	\$1,000 per day

39. If Clyde fails to comply with any of the approved LTCP milestone dates proposed in accordance with Paragraph 23, Clyde shall pay the following stipulated penalties with respect to each of the approved milestones:

<u>Period of Failure</u>	<u>Stipulated Penalty</u>
1 <sup>st</sup> to 30 <sup>th</sup> day	\$500 per day
31 <sup>st</sup> to 60 <sup>th</sup> day	\$750 per day
After 60th day	\$1,000.00 per day

40. All stipulated penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of completion of the activity or correction of the noncompliance. Any payment required to be made under the provisions of Section IX of this Decree shall be paid, as in Section VIII, within 30 days to both the State of Ohio and U.S. EPA. Fifty percent (50%) of the penalty shall be paid to the United States by certified or cashiers check payable to the "Treasurer, United States of America" and shall be tendered to the United States Attorney for the Northern District of Ohio, Western Division, Four Seagate, Suite 308, Toledo, Ohio 43604. Fifty percent (50%) of the penalty shall be paid to the State of Ohio by cashier's check or certified funds payable to "Treasurer, State of Ohio" and sent to : Jena Suhadolnik, Administrative Assistant (or her successor), Environmental Enforcement Section, 30 East Broad Street, 25th Floor Columbus, Ohio 43215-3428.

41. Accompanying both the letter to the United States and the State of Ohio shall be a description of the specific failure of the Consent Decree and/or NPDES Permit term and/or condition which was not complied with, and the date(s) of non-compliance. The payment of

stipulated penalties by Defendant and the acceptance of such stipulated penalties by Plaintiffs for specific violations pursuant to Section V shall not be construed to limit Plaintiffs' authority to seek additional relief or to otherwise seek judicial enforcement of this Consent Decree.

42. Notwithstanding any provisions of this Section, the United States and the State of Ohio may, in their unreviewable discretion, waive any portion of the stipulated penalties that accrue pursuant to this Consent Decree.

#### **X. CERTIFICATION OF SUBMISSIONS**

43. Any report, plan, proposal, or other submission which is required of Clyde by this consent decree, including reports, plans, proposals, or other submissions which are required of Clyde by its NPDES Permit, shall be signed by an official or authorized agent of Clyde and shall include the following certification:

I certify, under penalty of law, that this document and all attachments were prepared under my direction or supervision. Based on my inquiry of the person or persons who gathered the information, or their supervisors, the information submitted herewith is, to the best of my knowledge and belief, true, accurate, complete, and not misleading. I am aware that there are significant penalties for submitting false information, including possible fines or imprisonment for intentionally submitting false information or other knowing violations.

#### **XI. NOTICES & SUBMISSIONS**

44. Except as otherwise specified, when written notification to or communication with the United States, U.S. EPA Region 5, the State of Ohio, Ohio EPA or Clyde is required or necessary by the terms of this Consent Decree, it shall be addressed as set forth below.

As to the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
Post Office Box 7611  
Ben Franklin Station  
Washington, D.C. 20044-7611

As to U.S. EPA, Region 5:  
U.S. EPA Region 5 - Water Division  
Water Enforcement and Compliance Assurance Branch  
77 West Jackson Boulevard (WC-15J)  
Chicago, Illinois 60604-3590

As to the United States Attorney for the Northern District of Ohio,  
Western Division:

Office of the United States Attorney  
Northern District of Ohio, Western Division  
Four Seagate, Suite 308  
Toledo, Ohio 43604

As to the City of Clyde:

City Manager's Office  
222 N. Main St.  
Clyde, Ohio 43410

As to the State of Ohio:

Attorney General's Office  
Environmental Enforcement Section  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215-3428

As to Ohio EPA:

c/o Bill Landshof  
Lazarus Government Center  
122 S. Front St.  
Columbus, OH 43215

OHIO EPA  
Northwest Dist. Office  
347 N. Dunbridge Rd.  
Bowling Green, OH 43402

45. Notifications to or communications with U.S. EPA, the United States, the State of Ohio, Ohio EPA or the City of Clyde shall be deemed submitted on the date they are postmarked and/or sent by first class or overnight mail, or by facsimile.

## **XII. RIGHT OF ENTRY**

46. Until termination of this Consent Decree, U.S. EPA or its representatives, contractors, and consultants, shall have the authority to enter Clyde's POTW, at reasonable times

and upon presentation of credentials, for the purpose of:

1. monitoring the progress of activities required by this Consent Decree,
2. verifying any data or other information submitted to EPA or by Clyde pursuant to this Consent Decree,
3. obtaining samples and, upon request, splits of any samples taken by Clyde, and
4. assessing Clyde's compliance with this Consent Decree.

47. Notwithstanding the above paragraph, U.S. EPA's right to inspect, enter, examine, copy records, take samples, and otherwise monitor Clyde's POTW, as provided by any statute, regulation, or permit, shall not be abridged by this Consent Decree.

48. No Section of this Consent Decree in any way limits or affects any right of entry and inspection, or any other statutory rights and authorities, held by the United States and U.S. EPA, and the State of Ohio and Ohio EPA, pursuant to applicable federal or state laws, regulations or permits

### **XIII. FORCE MAJEURE BETWEEN THE UNITED STATES AND CLYDE**

49. For purposes of this Consent Decree, a force majeure event is an event that is caused by unforeseen circumstances beyond the control of Clyde, its contractors, or its consultants. Unanticipated or increased costs or expenses associated with the implementation of this Consent Decree, changed financial circumstances, or technical infeasibility shall not, in any event, be deemed force majeure events. This section shall not apply to, and force majeure shall not excuse, violations of discharge or effluent limitations.

50. If any event occurs that causes or is likely to cause Clyde to violate any provision of this Consent Decree, Clyde shall notify EPA Region 5, orally and in writing by fax, within ten

(10) business days of the event. In addition, Clyde shall separately notify the United States Department of Justice, in writing, within ten (10) business days of the event. Notices to EPA and the United States Department of Justice shall reference this Section of the Consent Decree, and shall describe the actual and/or anticipated duration of the violation or delay, the nature and causes of the violation or delay, and all measures taken or to be taken by Clyde to prevent or minimize the violation or delay.

51. Any failure to provide the notice required by this Section of the Consent Decree shall render inapplicable any claim that the event giving rise to Clyde's obligation to provide such notice is a force majeure event, and shall constitute a waiver of Clyde's rights under this Section.

52. If, after being notified of an event causing or likely to cause a violation or delay in the fulfillment of Clyde's obligations under this Consent Decree, U.S. EPA agrees that the event in question has been or will be caused by unforeseen circumstances that are beyond the control of Clyde, its contractors, or its consultants, the time for performance of such obligations may be extended for a period not to exceed the delay resulting from such circumstances, and Clyde shall not be liable for Stipulated Penalties for the period or violations resulting from those unforeseen circumstances.

53. U.S. EPA shall send a written notification to Clyde of U.S. EPA's agreement or disagreement with Clyde's force majeure claim within thirty (30) days of receipt of Clyde's written notification of violation or delay. If U.S. EPA does not agree with Clyde's force majeure claim, Clyde may submit the issue to the Court for resolution pursuant to the "Dispute Resolution" provisions of Section XXI of this Consent Decree within thirty (30) days of receipt of U.S. EPA's written notification that U.S. EPA does not agree with Clyde's force majeure claim. Clyde shall bear the burden of demonstrating that its noncompliance should be excused pursuant to the force majeure provision of this Consent Decree.

54. Unless otherwise agreed to in writing by the parties, Stipulated Penalties, plus

interest, shall accrue during the process described by this Section of the Consent Decree. Stipulated Penalties for specific violations shall not be due from Clyde where the City prevails on the issue of such violations in Court, or if U.S. EPA agrees that the violation may be excused on the basis of the force majeure provisions of the decree. In all other circumstances, Stipulated Penalties shall be due and payable within thirty (30) days of Clyde's receipt of notice from U.S. EPA that U.S. EPA does not believe that a force majeure event has occurred, or within thirty (30) days after the matter has been decided by the District Court.

#### **XIV. POTENTIAL FORCE MAJEURE BETWEEN OHIO AND CLYDE**

55. If any event occurs that causes or may delay the completion of any requirement of this Consent Decree or causes or is likely to cause Clyde to violate any provision of this Consent Decree, whether or not due to a Potential Force Majeure event, Clyde shall so notify Ohio EPA and the Ohio Attorney General's office, in writing, within ten (10) business days of the event. The notice shall reference this Section of the Consent Decree and shall describe in detail the bases for Ohio's contention that it experienced a Potential Force Majeure event, the nature and causes of the violation or delay, all measures taken or to be taken by Clyde to prevent or minimize the noncompliance, delay or event, and the timetable by which those measures will be implemented. Failure to so notify Ohio EPA and the Ohio Attorney General's Office shall constitute a waiver of any claim of Force Majeure as to the event in question.

56. In any action by the State of Ohio to enforce any of the provisions of this Consent Decree, Clyde may raise at that time that it is entitled to a defense that its conduct was caused by reasons entirely beyond its control or the control of any entity controlled by Clyde, including its consultants and contractors. While the State of Ohio does not agree that such a defense exists, it is, however, hereby agreed upon by the Defendant and the Plaintiff that it is premature at this time to raise and adjudicate the existence of such a defense and that the appropriate time at which

to adjudicate the existence of such a defense is at the time that an enforcement action is commenced by the State of Ohio. At that time the burden of proving that any potential force majeure event was or will be caused by circumstances entirely beyond Clyde's control or the control of any entity controlled by Clyde, including its consultants and contractors shall rest with the Defendant. Nothing in this Section is intended to relieve Clyde of its duty to use all due diligence to complete the requirements of this Consent Decree in a timely manner or of Clyde's obligation to meet all discharge limitations and other obligations contained in Clyde's current Permit. Unanticipated or increased costs or changed financial circumstances are not Force Majeure events. Failure to apply for a required Permit or approval, or to provide in a timely manner all information required to obtain a Permit or approval necessary to meet the requirements of this Decree, are not Force Majeure events. Violations of discharge or effluent limitations are not Force Majeure events. An extension of one compliance date based on a particular event does not mean that Defendant qualifies for an extension of a subsequent compliance date. Defendant must make an individual showing of proof regarding each incremental step or other requirement for which an extension is sought.

#### **XV. EFFECT OF SETTLEMENT**

57. This Consent Decree fully resolves all civil claims against Clyde for violations of the Clean Water Act, 33 U.S.C. §§ 1251-1387, and regulations promulgated thereunder alleged in the Complaint filed by the United States. The alleged violations resolved by this Consent Decree include those occurring prior to and through the date of the lodging of this Consent Decree with the Court.

58. This Consent Decree fully resolves all civil claims against Clyde for violations of the Clean Water Act, 33 U.S.C. §§ 1251-1387, regulations promulgated thereunder, and R.C. Ch.

6111, alleged in the Complaint filed by the State of Ohio. The alleged violations resolved by this Consent Decree include those occurring prior to and through the date of the lodging of this Consent Decree with the Court.

**XVI. NON-WAIVER PROVISIONS & RESERVATION OF RIGHTS**

59. This Decree is not and shall not be construed as either an NPDES Permit or a modification of any existing NPDES Permit.

60. By entering into this Consent Decree, the United States and the State of Ohio do not warrant in any manner that Clyde's complete compliance with the terms of this Consent Decree will result in compliance with the provisions of the Clean Water Act, 33 U.S.C. §§ 1251-1387, regulations promulgated thereunder, or with Ohio R.C. Ch. 6111, and other State or local laws.

61. This Consent Decree shall not affect Clyde's obligation to comply with its NPDES Permit and with all applicable federal, state and local laws, regulations and permits. Notwithstanding any U.S. EPA or Ohio EPA review that may occur, Clyde shall remain solely responsible for its compliance with the terms of the Consent Decree and with all applicable laws, regulations and permits. The Consent Decree does not relieve Clyde of its obligation to obtain all required Permits and approvals under state, federal and local law, including obtaining Permits to Install and/or planned approvals from Ohio EPA.

62. Nothing in this Consent Decree shall be construed as authorizing the occurrence of unpermitted or dry weather CSOs from the Clyde collection system or WWTP.

63. Nothing in this Consent Decree shall be construed as authorizing the occurrence of an unauthorized discharge from the Clyde collection system or WWTP.

64. The United States and the State of Ohio expressly reserve, and nothing herein shall be construed to limit, its right to pursue all remedies available for violations of any federal or state laws or regulations not specifically pleaded in the civil Complaints filed in this matter.

65. This Consent Decree shall not be construed to limit the rights of the United States and the State of Ohio to undertake any criminal enforcement activity against any person or entity.

66. This Consent Decree shall not be construed to limit the authority of the United States or the State of Ohio to undertake any actions in response to conditions that may present an imminent and substantial endangerment to the public health, welfare or the environment, or waters or natural resources of the State.

67. Clyde's execution of this Consent Decree shall not be construed as an admission by Clyde of any facts that would limit or affect any right Clyde may have to seek or receive State or Federal loan or grant funds.

#### **XVII. COSTS OF SUIT**

68. The United States, the State of Ohio and the City of Clyde shall bear their own costs and attorney's fees in this action.

#### **XVIII. CONSENT DECREE MODIFICATIONS**

69. This Consent Decree represents the entire agreement between the Parties and cannot be modified by any prior oral or written agreement, representation or understanding.

70. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to any term of this Decree, it shall be effective only upon approval by the Court. The terms and schedules contained in this Decree, if any, may be modified upon written agreement of the Parties without Court approval, unless any such modification effects a material change to the terms of this Consent Decree or materially affects the Defendant's ability to meet the objectives of this Decree.

### **XIX. PUBLIC NOTICE & COMMENT**

71. This Consent Decree shall be lodged with the Court for a period of not less than thirty days for public notice and comment in accordance with the requirements of 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent to this Decree on the basis of such comments if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper or inadequate. Clyde consents to entry of this Consent Decree without further notice.

### **XX. CONTINUING JURISDICTION OF THE COURT**

72. The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree, to interpret the rights and obligations of the Parties to the Consent Decree, to resolve any disputes arising hereunder, and for such purposes as may be necessary or appropriate for the construction or execution of this Consent Decree. Such jurisdiction shall not terminate until all requirements of this Consent Decree have been completed and all disputes arising under this Consent Decree have been resolved.

### **XXI. DISPUTE RESOLUTION**

73. A. This Court shall retain jurisdiction of this matter for the purposes of implementing and enforcing the terms and conditions of this Consent Decree and for the purpose of adjudicating all disputes among the United States and Clyde that may arise under the provisions of this Consent Decree, to the extent that Paragraph C, below, provides for resolution of disputes by the Court.

B. The issuance, renewal, modification, denial or revocation of a Permit and the issuance of orders or other actions of the Director of Environmental Protection, are not subject to

dispute resolution under this Decree but, rather shall be subject to challenge under Chapter 3745, Ohio Revised Code. The term "actions of the Director of Environmental Protection" shall be consistent with the definitions set forth in Chapter 3745, Ohio Revised Code.

C. Except as provided in Paragraph B, above, if any dispute between the United States and Clyde arises with respect to the meaning, application, implementation, interpretation, amendment or modification of this Consent Decree, or with respect to Defendant's compliance with this Decree, the United States and Clyde agree to follow the following procedures:

1). If any Party believes it has a dispute with any other Party, it shall notify all the other Parties in writing, including notice to the U.S. Department of Justice, and setting forth the matter(s) in dispute, and the Parties will proceed initially to resolve the matter in dispute by informal means. Such period of informal negotiations shall not exceed thirty (30) days from the date the notice was sent, unless the Parties, by written agreement, extend the thirty (30) day period.

2). If the parties have not resolved a dispute by informal negotiations, then the position advanced by U.S. EPA shall be considered binding, unless the dispute is submitted to the Court within the time period and in accordance with the other requirements prescribed by this Section.

3). If an agreement is not reached during the informal negotiations period, Clyde may, within thirty (30) days thereafter, serve on the United States and file with the Court, a motion and memorandum setting forth the nature of the dispute and a proposal for resolution. The United States shall have thirty (30) days to file its response, and may advocate one or more alternative proposals for resolution. In any dispute between Clyde and the United States, Clyde shall have the burden of proving that its position is in accordance with all terms and conditions of the Consent Decree by a preponderance of the evidence, and the standard of review shall be that provided by applicable law.

74. The dispute resolution procedure in this Section shall be the exclusive mechanism for resolving disputes arising between the United States and Clyde under or with respect to implementation of this Consent Decree except as provided in Paragraph B, above. Any order or directive issued to Clyde which asserts facts or conclusions pertaining to Clyde's compliance with the Decree, purports to define Clyde's obligations under this Decree, or orders or requires Clyde to perform tasks in order to attain compliance with this Decree, are subject to dispute resolution under this Decree.

75. The invocation of dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Clyde under this Consent Decree not directly in dispute. For ongoing violations, stipulated penalties with respect to the disputed matter shall continue to accrue but payment to the United States shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree until such noncompliance ceases, unless the Court rules otherwise. In the event that Clyde does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in the "Stipulated Penalties" Section of this Consent Decree.

## **XXII. TERMINATION**

76. This Decree shall terminate by the Court's Order granting a motion of any party to the Court after all of the following have occurred:

A. Clyde has achieved full compliance with all provisions contained in this Consent Decree and with all provisions of its NPDES Permit and has maintained such compliance for 24 consecutive months;

B. Clyde has paid all stipulated penalties due under this Consent Decree and there

are no outstanding disputes between the parties or pending before the Court pursuant to the dispute resolution provisions of this Consent Decree;

C. Clyde has certified, pursuant to Section X, above, compliance with the above requirements to the Court and to U.S. EPA and Ohio EPA;

#### **XXIII. EFFECTIVE DATE**

77. This Consent Decree is effective upon the date of its entry by the Court.

#### **XXIV. AUTHORITY TO SIGN**

78. Each undersigned representative of Clyde, the State, and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document. The individuals executing this Consent Decree on behalf of the Defendant represent that they are duly authorized to execute this Consent Decree on its behalf.

#### **XXV. APPROVAL AND ENTRY OF CONSENT DECREE**


79. The Parties hereby consent to the entry of this Consent Decree and submit it to the Court so that it may be approved and entered. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States, the State, and Clyde. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS 1st DAY OF December, 2004.

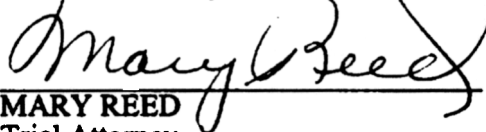
s/ DAVID A. KATZ  
\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in this action captioned  
United States and the State of Ohio v. City of Clyde, Ohio (N.D. Ohio):

FOR THE UNITED STATES OF AMERICA



THOMAS L. SANSONETTI  
Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice



MARY REED  
Trial Attorney  
Environmental Enforcement Section  
United States Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044  
(202) 514-2580

GREG WHITE  
United States Attorney



HOLLY SYDZOW  
Assistant United States Attorney  
Four Seagate, Suite 308  
Toledo, Ohio 43604  
(419) 259-6376

THE UNDERSIGNED PARTY enters into this Consent Decree in this action captioned  
United States and the State of Ohio v. City of Clyde, Ohio (N.D. Ohio):

FOR THE UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY:

*Mark P. Sullivan*

  
\_\_\_\_\_  
THOMAS V. SKINNER  
Acting Assistant Administrator for  
Enforcement & Compliance Assurance

\_\_\_\_\_  
BHARAT MATHUR  
Acting Regional Administrator  
United States Environmental Protection  
Agency, Region 5

\_\_\_\_\_  
JOSE C. de LEON  
Associate Regional Counsel  
United States Environmental Protection  
Agency, Region 5  
77 W. Jackson Blvd. (C-14J)  
Chicago, IL 60604

THE UNDERSIGNED PARTY enters into this Consent Decree in this action captioned  
United States and the State of Ohio v. City of Clyde, Ohio (N.D. Ohio):

FOR THE UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY:



**BHARAT MATHUR**  
Acting Regional Administrator  
United States Environmental Protection  
Agency, Region 5




**JOSE C. de LEON**  
Associate Regional Counsel  
United States Environmental Protection  
Agency, Region 5  
77 W. Jackson Blvd. (C-14J)  
Chicago, IL 60604

**THE UNDERSIGNED PARTY enters into this Consent Decree in this action captioned  
United States and the State of Ohio v. City of Clyde, Ohio (N.D. Ohio):**

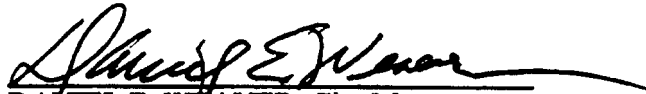
**FOR PLAINTIFF, STATE OF OHIO:**

**JIM PETRO  
ATTORNEY GENERAL OF OHIO**

  
**MARGARET A. MALONE (0021770)  
TERI JO FINFROCK (0037903)**  
Assistant Attorneys General  
Environmental Enforcement Section  
30 East Broad Street, 25th Floor  
Columbus, Ohio 43215-3428  
Telephone: (614) 466-2766  
Facsimile: (614) 644-1926  
[mmalone@ag.state.oh.us](mailto:mmalone@ag.state.oh.us)  
[tfinfrock@ag.state.oh.us](mailto:tfinfrock@ag.state.oh.us)

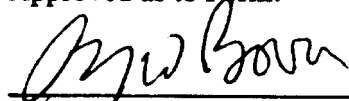
THE UNDERSIGNED PARTY enters into this Consent Decree in this action captioned United States and the State of Ohio v. City of Clyde, Ohio (N.D. Ohio):

FOR DEFENDANT CITY OF CLYDE:



DANIEL E. WEAVER, City Manager  
City of Clyde, Ohio

Approved as to Form:



BARRY W. BOVA, City Solicitor  
City of Clyde, Ohio