UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF
SRF-5J

Ray Miskelley
Office of the Chief Counsel
U. S. Department of Energy
200 Administration Road
Oak Ridge, TN 37831

Frances Kovak
Legal Section
Ohio EPA
1800 Watermark Drive
Columbus, Ohio 43216

Subject: Administrative Consent Order, In the Matter of United States Department of Energy: Portsmouth Gaseous Diffusion Plant, OH7 890 008 983

Dear Ms. Kovak and Mr. Miskelley:

Enclosed please find your originals of the Administrative Consent Order signed by all parties. Please do not hesitate to contact me at (312) 886-4591 if there are any questions.

Sincerely,

Gene Jablonowski
Remedial Project Manager
Federal Facilities Section
SFD Remedial Response Branch #2

cc: Gene Gillespie, U.S. DOE (3 copies)
Bob Sleeman, U.S. DOE (2 copies)
John Sheppard, U.S. DOE (2 copies)
Maria Galanti, Ohio EPA (2 copies)

Attorney General
Betty D. Montgomery

June 2, 1997

Brian Barwick
Office of Regional Counsel
U.S. Environmental Protection Agency
77 W. Jackson Blvd.
C-29A
Chicago, IL 60604

C. Ray Miskelley
Office of Chief Counsel
U.S. Department of Energy
P.O. Box 2001
Oak Ridge, TN 37831

Re: Administrative Consent Order, In the Matter of United States Department of Energy: Portsmouth Gaseous Diffusion Plant, US EPA Administrative Docket No. OH7 890 008 983

Dear Mr. Barwick and Mr. Miskelley:

As you know, during the past two years, representatives of the Ohio Environmental Protection Agency (Ohio EPA), the U.S. Environmental Protection Agency (US EPA) and the U.S. Department of Energy (US DOE) have completed negotiations of an amendment to the above-referenced Administrative Consent Order. The negotiated amended Order (Order) is intended to streamline remediation of US DOE's Portsmouth Gaseous Diffusion Plant (PORTS). The Ohio Attorney General's Office fully supports streamlining remediation at PORTS by establishing Ohio EPA as the regulator overseeing day-to-day remediation activities as provided in the Order. The Ohio Attorney General's Office intends to sign the Order, but first seeks agreement from US EPA and US DOE to confirm the parties' understandings and agreements as to three matters in the Order. This letter serves to confirm those understandings and agreements.

The first understanding and agreement is that the Order is not an order against Ohio EPA. The order provides that "OEPA shall be responsible for day-to-day oversight of response action activities at PORTS under this Order." Paragraph 39; see, also, paragraphs 42, 46 and 52. Notwithstanding the occasional use of the term "shall" when referring to Ohio EPA, it is understood and agreed that the Order is not enforceable against Ohio EPA.

The second understanding and agreement is that the Order does not supersede the Consent Decree issued on September 1, 1989, in State of Ohio v. U.S. Department of Energy, U.S. Southern District of Ohio, Case No. C2 89 732. According to the Order, "[i]f any term of this Order conflicts with any term of the Ohio Decree, any other administrative order, permit, license or approved plan, the latter shall control for the purposes of any OEPA enforcement action." Paragraph 64.e. This understanding and agreement applies, for example, to Paragraph 60 and Section XI of the Order, which have provisions that address the federal Anti-Deficiency Act and force majeure, respectively, in a manner different from Paragraph 19.1 of the Consent Decree. It is understood and agreed that provisions in the Consent Decree concerning the federal Anti-Deficiency Act and force majeure control over Paragraph 60 and Section XI of the Order for purposes of any enforcement action by Ohio EPA under the Consent Decree.

Mr. Barwick has asked the parties to confirm that the authorization that US EPA issued for Ohio to implement corrective action requirements under the federal Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 6901, et seq (RCRA), does not prevent issuance of the Order. See 61 Fed. Reg. 54950 (October 23, 1996). Paragraph 4 of the Order refers to various authorizations that US EPA has issued to Ohio under RCRA, and indicates that the authorization of June 7 and August 19, 1991 "did not include RCRA corrective action." The corrective action authorization occurred while the Order was in the process of being signed by the parties. It is understood and agreed that the authorization for Ohio to implement corrective action under RCRA does not prevent issuance of the Order.

If US EPA and US DOE concur with the understandings and agreements in this letter, I ask that you sign this letter in the space provided below and return it to me. I have included three originals of this letter so that I can return to each agency an original for its records. When I receive back this letter with your signatures, I will sign the Order and transmit it to US EPA for its signature.

Please do not hesitate to contact us if there are any questions.

Very truly yours,

BETTY D. MONTGOMERY
ATTORNEY GENERAL OF OHIO

Christopher Jones, Chief
Environmental Enforcement Section
(614) 466-2766

cc: Fran Kovac, Ohio EPA/Legal
Brian Blair, Ohio EPA/SEDO

Date

Title - Director, Superfund Division
U.S. Environmental Protection Agency

June 12, 1997
Date

Title - Attorney
U.S. Department of Energy

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
AND THE STATE OF OHIO

IN THE MATTER OF:	)
	)
UNITED STATES DEPARTMENT OF ENERGY: PORTSMOUTH GASEOUS DIFFUSION PLANT	) Administrative) Docket Number:
	)
OH7 890 008 983	) Proceeding under 3008(h) of) the Resource Conservation and) Recovery Act, as amended,) 42 U.S.C. Section 6928(h) and) 106(a) of the Environmental) Response, Compensation, and) Liability Act, as amended,) 42 U.S.C. Section 9606(a).

CONTENTS

ADMINISTRATIVE CONSENT ORDER

The United States Environmental Protection Agency (U.S. EPA), the Ohio Environmental Protection Agency (OEPA), and the United States Department of Energy (U.S. DOE) (referred to collectively herein as the "Parties"), based on the information available to them on the effective date of this Administrative Consent Order ("ACO" or "Order"), and without trial or adjudication of any issues of law or fact, agree as follows:

The purpose of this Order is to: (1) ensure compliance by U.S. DOE at the Portsmouth Gaseous Diffusion Plant (PORTS) with the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. Section 6901 et seq., and implementing regulations, (2) ensure compliance by U.S. DOE at PORTS with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. Section 9601 et seq., and implementing regulations, and (3) establish a structure for oversight of U.S. DOE activities which encourages expeditious and efficient clean-up of Hazardous Waste, Hazardous Constituents, and/or Hazardous Substances present at PORTS.

I. JURISDICTION

1. U.S. EPA enters into this Order pursuant to Sections 2002(a)(1) and 3008(h) of RCRA, 42 U.S.C. Sections 6912(a)(1) and 6928(h), respectively. The authority vested in the Administrator has been delegated to the Regional Administrators by U.S. EPA Delegation Nos. 8-31 and 8-32 dated April 16, 1985, and further delegated to the Director, Waste Management Division, by U.S. EPA Delegation No. 8-32 dated August 1987.

2. With respect to any Hazardous Substance which is not a Hazardous Waste, U.S. EPA enters into this Consent Order pursuant to the authority vested in the President of the United States by Sections 104 and 106(a) of CERCLA 42 U.S.C. Sections 9604 and 9606(a). The authority of the President to issue this Order has been delegated under Sections 104 and 106(a) of CERCLA, 42 U.S.C. Section 9604 and 9606(a), to the Administrator of U.S. EPA, with the concurrence of the Attorney General, by Executive Order 12580 dated January 23, 1987, 52 Federal Register 2923 (January 29, 1987), and further delegated to the Assistant Administrator for Solid Waste and Emergency Response and the Regional Administrator by U.S. EPA Delegation No. 14-14-C and further delegated to the Associate Division Director of Superfund.

3. With respect to any Hazardous Substance which is not a Hazardous Waste, U.S. DOE enters into this Order pursuant to Sections 104 and 106(a) of CERCLA, 42 U.S.C. Sections 9604 and 9606(a), Executive Order 12580, and the Atomic Energy Act of 1954, as amended, 42 U.S.C. Sections 2011 et seq. U.S. DOE waives any claims or demands for compensation or payment under

section 106(b), 111, and 112 of CERCLA against the Hazardous Substance Response Trust Fund established by Section 221 of CERCLA for, or arising out of, any activity performed or expenses incurred pursuant to this Order. This Order does not constitute any decision or preauthorization of funds under Section 111(a)(2) of CERCLA.

4. On June 30, 1989, pursuant to Section 3006 of RCRA, 42 U.S.C. §6926, U.S. EPA authorized the State of Ohio to administer and enforce the Ohio hazardous waste management program in lieu of the Federal base RCRA program, including regulation of mixed waste. On June 7 and August 19, 1991, Ohio received authorization from U.S. EPA for additional RCRA program elements which did not include RCRA corrective action. For the purposes of 40 CFR §271.6(b), the State of Ohio has designated OEPA as the State agency responsible for administration of the authorized State hazardous waste management program.

5. The State of Ohio, OEPA, enters into this Order pursuant to Sections 120(a)(4), 120(f), and 121(f) of CERCLA, 42 U.S.C. §§ 9620(a)(4), 9620(f), and 9621(f), RCRA, and Ohio Revised Code Sections 3734.13, 3734.20, 3745.01, and 6111.03.

6. Should PORTS be listed on the NPL, Section 120(e) of CERCLA will require that U.S. EPA and DOE enter into an Interagency Agreement to which Ohio may be Party. The Parties agree that it is now premature to negotiate an Interagency Agreement but expect, based on the current legal framework and information known to the parties as of the effective date of this Order, that any such agreement will, to the extent allowed by law, maintain the structure for oversight of U.S. DOE activities established in this Order.

II. DEFINITIONS

Any term not herein defined shall have the ~~same~~ meaning as used in RCRA, CERCLA, and any implementing regulations.

"CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499.

"CMI" shall mean Corrective Measures Implementation which requires U.S. DOE to design and construct the response action selected by U.S. EPA and to operate, monitor, and maintain the remedy after construction. The CMI plan includes general plans, and a schedule for preparation of design criteria and detailed engineering plans, specifications and construction drawings as necessary to implement the approved cleanup actions, and schedules for selection of contractors, commencement of work, and completion of work. CMI under this Order shall be deemed to be

those documents referenced in Paragraph 7.6 of the Ohio Decree as workplans for cleanup provided such documents collectively contain all of the information specified in Attachment III to this Order (Information does not include requirements relating to schedules for submitting documents, progress reports, the submittal of draft documents, or other procedural/non-substantive provisions of the attachment).

"CMS" shall mean Corrective Measures Study which will develop and evaluate the response action alternative(s) to be undertaken at the Facility. CMS under this Order shall be deemed to be the documents referenced in Paragraph 7.5 of the Ohio Decree as the "cleanup alternatives study (CAS)" provided such documents collectively contain all of the information specified in Attachment II to this Order for remediation of hazardous wastes, and hazardous constituents, pursuant to Section 3008(h) of RCRA (42 U.S.C. § 6928(h)), and hazardous substances which are not hazardous wastes pursuant to Sections 104 and 106(a) of CERCLA (42 U.S.C. §§ 9604 and 9606(a)) (Information does not include requirements relating to schedules for submitting documents, progress reports, the submittal of draft documents, or other procedural/non-substantive provisions of the attachment).

"Day" shall, for the purposes of computing any period of time prescribed or allowed under this Order, not include the day of the event from which the designated period begins to run but all calendar days thereafter unless otherwise specified elsewhere in this Order. If a due date should fall on a Federal or State holiday or a Saturday or Sunday, such due date shall be deemed to fall on the next business day.

"Effective Date" shall mean seven days after the date on which this Order is signed by U.S. EPA.

"Facility" shall have the meaning provided in 40 CFR Section 260.10 and Section 101(9) of CERCLA, as amended, ~~42~~ U.S.C. Section 9601(9).

"Hazardous Constituents" are the substances listed in Appendix VIII to 40 CFR Part 261 and Appendix IX to 40 CFR Part 264.

"Hazardous Substance" shall have the meaning provided in Section 101(14) of CERCLA, 42 U.S.C. Section 9601(14).

"Hazardous Waste" shall have the meaning provided in Section 1004(5) of RCRA, 42 U.S.C. Section 6903(5).

"RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq., as amended.

"Response action activities" shall mean those U.S. DOE activities, more fully described in Section VI of this Order, related to investigation and cleanup of releases of hazardous wastes, and hazardous constituents, pursuant to Section 3008(h) of RCRA (42 U.S.C. § 6928(h)), and hazardous substances which are not hazardous wastes pursuant to Section 104 and 106(a) of CERCLA (42 U.S.C. §§ 9604 and 9606(a)), at the PORTS Facility.

"RFI" shall mean RCRA Facility Investigation which gathers sufficient data to fully characterize the nature, extent, and rate of migration of hazardous substances, within and beyond the Facility boundary. RFI under this Order shall be deemed to be the documents referenced in Paragraph 7.4 of the Ohio Decree as facility investigation workplans provided such documents collectively contain all of the information specified in Attachment I to this Order (Information does not include requirements relating to schedules for submitting documents, progress reports, the submittal of draft documents, or other procedural/non-substantive provisions of the attachment).

"Work" shall mean any activity directly related to completing all required or necessary action to achieve the purposes of this Order.

III. FINDINGS OF FACT

7. PORTS commenced operations in 1954 and is located approximately twenty miles north of downtown Portsmouth, Ohio. PORTS operations are located on a 15.4 square kilometer (3700 acres) federally owned site. Several rural communities lie within a few kilometers of the site.

8. PORTS is an industrial Facility owned by the U.S. DOE and, since July 1, 1993, operated by the United States Enrichment Corporation (USEC). Pursuant to Section 1403(a) of the Energy Policy Act of 1992 (Public Law 102-486), U.S. DOE leases uranium enrichment facilities at PORTS to USEC. Pursuant to Section 1403(d) of the Energy Policy Act, U.S. DOE is responsible for any costs of decontamination and decommissioning, response action activities, or corrective actions with respect to conditions existing before the July 1, 1993, date that PORTS operations were assumed by USEC.

9. The primary function of PORTS is the enrichment of uranium for use in fueling power plants and U.S. Navy vessels. The principal radioactive elements present in waste materials handled at the Facility are uranium and technetium. The principal non-radioactive Hazardous Wastes known to be generated at PORTS are those exhibiting characteristics of ignitability (Hazardous Waste Number D001); TCLP for chromium, lead, and cadmium (Hazardous Wastes Number D007, D008, and D006); and various listed wastes including: spent halogenated solvents such

as TCE; spent non-halogenated solvents; as well as small quantities of laboratory chemicals such as vanadium pentoxide, aniline, formaldehyde, formic acid, lead acetate, and thioacetamide (Hazardous Waste Numbers F001, F002, F003, F004, P120, U012, U122, U123, U144, and U218).

10. On August 18, 1980, the U.S. DOE submitted a notification of hazardous waste activity at the Facility as required by Section 3010(a) of RCRA, 42 U.S.C. Section 6930(a), on July 12, 1984, the U.S. DOE filed a RCRA Part A permit application as required by Section 3005(a) of RCRA, 42 U.S.C. Section 6925(a), to treat, store, and dispose of Hazardous Waste at the Facility. Subsequently U.S. DOE filed a RCRA Part A permit application revision on September 9, 1988. OEPA transmitted PORT's RCRA Part B Permit Application to the Ohio Hazardous Waste Facility Board on March 18, 1993.

11. On July 8, 1985, and November 12, 1985, U.S. EPA issued Findings of Non-Compliance to U.S. DOE identifying RCRA violations and U.S. EPA's major concerns over the environmental impacts associated with PORTS past and present operations.

12. On September 30, 1986, U.S. EPA and U.S. DOE entered into a Federal Facility Compliance Agreement (FFCA) addressing RCRA violations cited in the July 8, 1985, and November 12, 1985, U.S. EPA Findings of Non-compliance.

13. On September 1, 1989, U.S. DOE and Ohio filed a Consent Decree, Civil Action Number C2-89-732, in the United States District Court for the Southern District of Ohio, Eastern Division (Ohio Decree).

14. On September 27, 1989, U.S. EPA and U.S. DOE entered into an Administrative Order by Consent, U.S. EPA Docket Number V-W-90R-03, for the performance of response action activities at PORTS.

15. In August 1994, the September 27, 1989, Administrative Order by Consent was amended to, among other things, include Ohio as a party for the purpose of recovering its oversight costs from U.S. DOE.

IV. DETERMINATIONS BY EPA AND OHIO

Based on the Findings of Fact set forth above, and the administrative record, the Regional Administrator of the U.S. EPA and the Director of the OEPA make the following conclusions of law and determinations:

16. U.S. DOE is subject to all Federal, State, interstate, and local requirements, both substantive and procedural, respecting control and abatement of solid waste or hazardous

waste disposal as set forth in Section 6001 of RCRA, 42 U.S.C. Section 6961.

17. U.S. DOE is subject to the same requirements as a "person" within the meaning of Section 1004(15) of RCRA, 42 U.S.C. Section 6903(15), and Section 101(21) of CERCLA, as amended 42 U.S.C. Section 9601(21).

18. U.S. DOE is the owner of a Facility that has operated or is operating subject to Section 3005(e) of RCRA, 42 U.S.C. Section 6925(e).

19. Certain wastes and constituents thereof found at the Facility are Hazardous Wastes or Hazardous Constituents as defined by Section 1004(5) of RCRA, 42 U.S.C. Section 6903(5). These are also Hazardous Wastes or Hazardous Constituents within the meaning of Section 3001 of RCRA, 42 U.S.C. Section 6921, and 40 CFR Part 261.

20. There are or have been releases of Hazardous Wastes and Hazardous Constituents from the Facility into the environment within the meaning of Section 3008(h) of RCRA, 42 U.S.C. Section 6928(h), and the issuance of a Corrective Action Order is authorized pursuant to this Section.

21. The PORTS is a facility within the meaning of Section 101(9) of CERCLA, as amended, 42 U.S.C. Section 9601(9).

22. Certain wastes found at the Facility are Hazardous Substances as defined by Sections 101(14) and 101(33) of CERCLA, 42 U.S.C. §§ 9601(14) and 9601(33).

23. There are or have been releases of Hazardous Substances from the Facility into the environment within the meaning of Section 101(22) of CERCLA.

24. All determinations necessary for the issuance of an Order under Section 106(a) of CERCLA, 42 U.S.C. Section 9606(a), have been made at the Facility.

25. The actions and response measures required by this Order are consistent with RCRA and CERCLA and are necessary to ascertain the nature and extent of the releases from the Facility and to protect human health and the environment.

26. U.S. DOE and U.S. EPA entered into the Uranium Enrichment Toxic Substances Control Act Federal Facilities Compliance Agreement (UE TSCA FFCA) on February 20, 1992. Any polychlorinated biphenyl (PCB) contamination at the PORTS facility that is not specifically addressed by the UE TSCA FFCA shall be responded to by U.S. DOE in accordance with CERCLA, the National Contingency Plan, and applicable U.S. EPA policy. This

Paragraph 26 shall not affect any application of the Ohio Decree to PCBs at PORTS.

V. STIPULATIONS

27. The Ohio Decree and the August 1994, U.S. EPA, OEPA, and U.S. DOE Administrative Order by Consent, U.S. EPA Docket Number V-W-90-03 contain the same substantive requirements for RCRA corrective actions. However, procedural differences, as well as other factors, have caused delays in the implementation of response action activities.

28. OEPA has the necessary expertise and resources to oversee the day-to-day conduct of response action activities at PORTS.

29. For the purposes of this Order only, OEPA will be deemed to have authority to direct response action activities at PORTS. OEPA shall exercise such authority in accordance with RCRA and its implementing regulations, CERCLA, the National Contingency Plan, and applicable U.S. EPA policy.

30. Paragraph 29 will not be construed as:

A. a DOE recognition that OEPA has legal authority under CERCLA or other law to require response action activities at PORTS with respect to CERCLA hazardous substances;

B. a DOE recognition that OEPA has legal authority to regulate radioactive wastes or the radioactive component of mixed waste at PORTS; or

C. U.S. EPA or U.S. DOE delegation of CERCLA authority to OEPA.

31. Paragraphs 28 and 29 will not be used by any of the parties to support the position that OEPA has legal authority under CERCLA or other law to require response action activities at PORTS with respect to CERCLA hazardous substances and pollutants or contaminants or that OEPA has legal authority to regulate radioactive wastes or the radioactive component of mixed waste at PORTS.

32. Designating OEPA as the regulator responsible for day-to-day oversight at the PORTS shall not be construed as U.S. EPA authorization of Ohio under Section 3006 of RCRA nor delegation of any U.S. EPA CERCLA authority.

33. Concurrent with the time this Order is effective, the August 1994, U.S. EPA, OEPA, and U.S. DOE Administrative Order by Consent, U.S. EPA Docket Number V-W-90R-03, shall be terminated. U.S. EPA approvals which were granted under the terminated Order

shall remain in effect and are in no way diminished or rescinded by this Order. U.S. DOE agrees that it will, within the timeframes specified by the terminated order, address any U.S. EPA comments on U.S. DOE documents submitted under the terminated Order which have not, at the time this Order is effective, been addressed by U.S. DOE. Notwithstanding the forgoing, the Quadrant I-IV RFI Reports and the Quadrant I-IV CMS Reports, as well as all future document submittals shall, subject to Paragraph 41 of this Order, require only OEPA approval.

34. In the event that the Ohio Decree is amended, modified, or otherwise revised, any reference to the Ohio Decree in this Order shall mean the Ohio Decree as amended, modified, or otherwise revised. Each Party shall have thirty (30) days from the date it receives notice of any such change in which to raise to the other Parties any concerns about the amended, modified, or otherwise revised Ohio Decree's incorporation in this Order. In the event a Party raises any concerns, all the Parties agree to enter into good faith negotiations as expeditiously as possible concerning any necessary revisions to this Order and to conclude such negotiations within ninety (90) days. These negotiations shall be limited to the purpose of making this Order consistent, if possible, with the Ohio Decree. If concerns are timely raised, requirements of this Order that are alleged to be inconsistent with the Ohio Decree shall be tolled during the period of good faith negotiations, which may be extended by consent of all of the Parties. At the end of the good faith negotiation period, any Party may refer the matter for resolution under the dispute resolution provisions of this Order.

35. It is the expectation of the Parties that the structure of oversight established in this Order will result in diminished U.S. EPA participation in the day-to-day oversight of response action activities at PORTS, including reviewing and commenting on documents required by this Order.

36. This Order does not address the treatment of RCRA waste generated by response action activities conducted under this Order. The Parties acknowledge that treatment of these wastes will be governed by an order to be issued by the State of Ohio under authority of the Federal Facility Compliance Act, 42 USC Section 3021(b) or other appropriate state authority.

37. This Order shall apply to U.S. DOE, its officers, successors in office, directors, agents, employees, contractors, and subsequent owners and all operators of PORTS in Piketon, Ohio.

VI. OVERSIGHT

38. U.S. DOE agrees to conduct the following response action activities at PORTS in accordance with the procedural and

schedule requirements of Paragraphs 7.3 through 7.8 and Section XI of the Ohio Decree (except as provided in this Order): interim remedial measures (IRM), RCRA facility investigation (RFI), corrective measures study (CMS), and corrective measures implementation (CMI). U.S. DOE agrees to perform, and OEPA agrees to oversee, the Supplemental Environmental Project approved pursuant to the May 10, 1993, Agreement Resolving Dispute Concerning Revised Quadrant III RCRA Facility Investigation Workplan.

39. OEPA shall be responsible for day-to-day oversight of response action activities at PORTS under this Order. OEPA's oversight authority under this Order includes, but is not limited to, providing direction and advice, review and comment on, and approval of, U.S. DOE documents, granting of time extensions, and recommendation of final remedies to U.S. EPA. Oversight does not include exclusive right to select final remedies under this Order, although OEPA reserves its right to select final remedies pursuant to the Ohio Decree. As part of its oversight responsibilities, OEPA agrees to ensure that the documents referenced in Paragraphs 7.4, 7.5, and 7.6 of the Ohio Decree contain all of the information required for an RFI, CMS, and CMI, respectively, as defined in Section II of this Order. OEPA's authority under this Order does not include the right to enforce the requirements of this Order under Ohio law, and nothing in this Order shall be construed as an order under Ohio law requiring compliance with the requirements of this Order.

40. By the fifteenth day of January, April, July, and October, U.S. DOE shall submit a report to U.S. EPA describing response action activities during the preceding three months with a schedule of projected activities for the next three months.

41. U.S. DOE shall, within five (5) days of receiving a U.S. EPA request for any document provided to OEPA pursuant to this Order, provide such document to U.S. EPA. Within the timeframes established by the Ohio Decree, U.S. EPA may review and comment on any document and any such comments must be taken into account and addressed by U.S. DOE or OEPA. U.S. EPA comments shall be substantial and material with respect to the technical content of such documents. U.S. EPA will, to the extent practicable, present its comments to U.S. DOE in coordination with OEPA comments.

42. Following completion and approval of each RFI Report and CMS Report and in accordance with the requirements and schedules set forth in the Ohio Decree, OEPA shall select a proposed remedy(ies) and request U.S. EPA concurrence with that selection. With its request for U.S. EPA concurrence, OEPA shall

send a copy of the approved RFI Report and CMS Report, OEPA's draft Statement of Basis for its proposed remedy, and a list of all other relevant documents in the administrative record file. U.S. DOE agrees to provide to U.S. EPA any other documents requested by U.S. EPA from the administrative record file. Any such documents shall be provided within ten days or as agreed by U.S. DOE and U.S. EPA Project Coordinators.

43. Within 60 days of receiving OEPA's request for concurrence and any additional documents requested by U.S. EPA from U.S. DOE under Paragraph 42, U.S. EPA shall issue a written concurrence with the proposed remedy or send a written notice of non-concurrence to U.S. DOE and OEPA. U.S. EPA shall have sixty (60) days after the date of any written notice of non-concurrence, or after the conclusion of any dispute resolution procedures under this Order, to formally concur with the OEPA draft Statement of Basis or issue a separate Statement of Basis. A written notice of non-concurrence shall describe in detail the deficiencies of the proposed remedy, the reasons therefore, and delineate the changes to the proposed remedy(ies). A concurrence notice means U.S. EPA agrees with OEPA's proposed remedy(ies) as proposed.

44. U.S. DOE must prepare a complete Administrative Record supporting the selection of the corrective measure and make the Administrative Record available for public review at the DOE Environmental Information Center in Pike County when the OEPA and U.S. EPA Statements of Basis for each Quadrant are released for public comment.

45. The Administrative Record and OEPA's and U.S. EPA's Statement(s) of Basis for selecting a proposed remedy(ies) shall be available for public review and comment for at least thirty (30) days.

46. After completion of the public review and comment period for OEPA's and U.S. EPA's Statement(s) of Basis for selecting a proposed remedy(ies), the U.S. EPA in consultation with OEPA shall select the final remedy(ies) to be implemented at the Facility. If U.S. EPA and OEPA select the same remedy(ies), OEPA shall prepare, in consultation with U.S. EPA, a Record of Decision (ROD) and Response to Comments. If U.S. EPA and OEPA select different remedies, U.S. EPA shall have one-hundred twenty (120) days from the close of the public review and comment period to issue a ROD and Response to Comments and notify OEPA and U.S. DOE, in writing, of the selected final remedy. Except as specified in Section IX herein, U.S. EPA's selection of a final remedy shall be final and not subject to dispute in any forum.

47. Following final remedy selection, U.S. DOE shall submit to OEPA the CMI for implementation of the remedy. Following

review and approval by OEPA, U.S. DOE shall implement the final remedy in accordance with the CMI.

48. The provisions of this Order do not eliminate U.S. EPA's responsibility for oversight of Ohio's exercise of its authorized RCRA authorities. In carrying out such oversight, U.S. EPA shall follow the statutory and regulatory procedures for such oversight.

VII. DOE REIMBURSEMENT OF OHIO COSTS

49. U.S. DOE shall request funding and reimburse OEPA for the costs of monitoring work ("Work") directly related to the implementation of this Order, including but not limited to the costs of payroll, fringe, indirect, review of activity data sheets, travel, sampling, laboratory analysis, data management, safety and general equipment, supplies and general maintenance. This reimbursement shall be subject to the conditions and limitations set forth in this Section and Section VIII below (Funding). OEPA costs related to State activities conducted pursuant to the Consent Decree in State of Ohio v. U.S. Department of Energy, et al., Case No. C2 89 732 (S.D. Ohio 1989) shall not be excluded from reimbursement pursuant to this Section if these activities are also directly related to Work under this Order.

50. Reimbursable costs shall consist only of expenditures actually made by OEPA in providing assistance to PORTS:

A. Technical review and substantive comment on reports or studies which U.S. DOE prepares in support of its site cleanup actions and submits to OEPA or any other technical review in support of this Order.

B. Identification and explanation of State requirements applicable to Federal facilities in performing Work, especially State applicable or relevant and appropriate requirements (ARARS).

C. Field visits to ensure investigations and cleanup activities are implemented in accordance with appropriate OEPA requirements, or in accordance with agreed upon conditions between OEPA and U.S. DOE that are established in the framework of this Order. This shall include review of draft data in order to analyze and guide fieldwork.

D. Support and assistance to U.S. DOE in the conduct of public participation activities in accordance with Federal and State requirements for public involvement.

E. Preparation for and participation in technical meetings.

F. Laboratory costs incurred as a result of split sampling performed in order to validate U.S. DOE's investigations under this Order.

G. Review of U.S. DOE's cost estimates and scheduling documents associated with the cleanup program, including site specific Activity Data Sheets and Five Year Plans.

H. Other activities specified in this Order.

51. A separate grant shall be the specific mechanism for transfer of funds between U.S, DOE and OEPA for payment of the costs referred to herein.

52. On an annual basis, (1) OEPA shall submit, in a timely fashion and in writing, to U.S. DOE a grant application including a proposed Scope of Work and estimates of costs to be incurred relating to the Work, as defined herein, to be performed under this Order by OEPA for the upcoming year, and (2) subsequent to negotiation between U.S. DOE and OEPA, U.S. DOE shall make a grant award. These actions shall be performed utilizing the procedures of 10 C.F.R. Part 600 Subparts A, D, and E with the following exceptions:

A. Notwithstanding 10 CFR Section 600.405, U.S. DOE shall not impose any additional requirements on this cost reimbursement except with the written consent of OEPA.

B. OEPA shall remit to U.S. DOE interest earned on advances as necessary and where required by the Cash Management Improvement Act and its implementing regulations, 31 CFR Part 205, which shall apply in lieu of 10 CFR Section 600.421(i).

C. U.S. DOE payments shall be made in advance in accordance with 10 CFR Section 421(c).

D. Pursuant to 10 CFR Section 600.443(a)(i), U.S. DOE may temporarily withhold a cash payment pending correction of any material noncompliance related to that cash payment. U.S. DOE may use the noncompliance and enforcement remedies of 10 CFR Part 600 Subparts A, D, and E including but not limited to those in Sections 600.29 and 600.43, to prevent the expenditure by OEPA of money on expenses not authorized by Paragraphs 49 and 50 of this Section or to recover money spent by OEPA on such unauthorized expenses. U.S. DOE shall not suspend or terminate grant payments for expenses authorized by Paragraphs 49 and 50 of this Section. U.S. DOE shall not use its noncompliance and enforcement remedies against OEPA for any punitive purposes unless necessary to address fraud. Any withholding, suspension, or termination of payment of costs pursuant to 10 CFR Part 600 Subparts A, D, or E shall be subject to the informal dispute resolution and appeals procedures as described in Paragraphs 53 and 54 of this Section.

53. In the event that U.S. DOE contends that any costs incurred were not directly related to the implementation of this Order, or were incurred in a manner inconsistent with Federal law or the grant award, U.S. DOE may challenge the costs allowable under the grant to OEPA. Whenever practicable, U.S. DOE and OEPA shall attempt to resolve informally any dispute over the award or administration of financial assistance including any matter controlled by this Section. U.S. DOE and OEPA representatives may initiate the informal process by requesting that the involved parties attempt to resolve any issue covered by this Section. Such informal resolution shall begin with the representative of the U.S. DOE contracting officer who signed the grant to the State agency implementing the cost recovery provisions of this Order and the contract representative of OEPA attempting to resolve the issue. If they are not successful, they may elevate the issue to the cognizant Contracting Officer for purposes of dispute resolution pursuant to 10 CFR 600.26(a), and the Fiscal Officer for the Division of Emergency and Remedial Response of OEPA for resolution. If these parties are unable to agree on resolution, each of the involved parties will issue a written decision setting forth their position on the issue. The written position of U.S. DOE shall be deemed to be the Contracting Officer's determination from which a formal appeal may be taken. This written position will be issued within 21 days after the parties agree that they are unable to informally resolve the issue.

54. If unresolved after conclusion of informal dispute resolution under Paragraph 53 of this Section, OEPA's demand and U.S. DOE's challenge may be resolved through the appeals procedures set forth in 10 CFR Section 600.443(b) and 10 CFR Part 1024 as modified below:

A. The procedure of appeal shall be the method specified in 10 CFR Section 1024.3(d)(1), regardless of the amount in dispute.

B. Unless OEPA requests a hearing, OEPA shall not be required to make any appearances outside of Dayton, or Columbus, Ohio in exercising appeal procedures under 10 CFR Part 1024.

C. Notwithstanding Rule 5(a)(4) of the Rules of Procedure of the U.S. DOE Financial Assistance Appeal Board, OEPA may seek to recover the contested costs through any other mechanism available to the State if the Board's decision has not been issued within ninety (90) days after all submissions are filed or after the time for filing has expired, whichever occurs earlier.

55. Subject to Paragraphs 56 and 57 of this Section, U.S. DOE shall not be responsible under the terms of this Order for reimbursing OEPA for any costs actually incurred in excess of the maximum U.S. DOE obligation as defined in the grant award. Any

invoiced amounts exceeding the maximum U.S. DOE obligation shall roll over into the next grant period.

56. OEPA's performance of its obligations under this Order shall be excused if its response costs as defined herein are not paid as required by this Section VII.

57. OEPA reserves any right it may have to recover costs for matters not reimbursable pursuant to this Order and the grant award, costs not reimbursed by U.S. DOE pursuant to Section VII after exhaustion of the appeals procedures described in Paragraphs 53 and 54 of this Section, costs in excess of the maximum U.S. DOE obligation in the grant award, or costs not being paid because U.S. DOE and OEPA have been unable to successfully conclude negotiations on the terms or language of the grant award.

58. Within sixty (60) days of the effective date of this Order, U.S. DOE shall reimburse the State for preaward costs of its activities at PORTS, which are consistent with the activities required by this Order, incurred between October 15, 1994 and June 30, 1995, in the amount of $189,499.75. State costs incurred after June 30, 1995 shall be reimbursed pursuant to paragraphs 49 through 57, above.

VIII. FUNDING

59. It is the expectation of the Parties to this Order that all obligations of the U.S. DOE arising under this Order will be fully funded. The U.S. DOE shall take all necessary steps and use its best efforts to obtain timely funding to meet its obligations under this Order. U.S. DOE shall advise U.S. EPA and OEPA of its efforts to obtain the funding necessary to implement this Order. This requirement shall include, but not be limited to, U.S. DOE providing U.S. EPA and OEPA a copy of its annual report to Congress which includes the specific cost estimates and budgetary proposals associated with the implementation of this Order.

60. U.S. DOE's performance of the commitments under this Order is subject to the availability of appropriated funds for such purposes. Failure to obtain adequate funds or appropriations from Congress does not, in any way, release U.S. DOE from its obligations to comply with RCRA and CERCLA. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, 31 U.S.C. Section 1341, the schedule established under this Order requiring the payment or obligation of such funds shall be appropriately adjusted. If appropriated funds are not available to fulfill requirements of the Order, U.S. EPA and OEPA reserve the right to initiate such action each deems appropriate to the extent permitted by law.

IX. RESERVATION OF RIGHTS

61. Nothing herein shall be construed as a waiver, delegation, or compromise of any U.S. EPA authority under RCRA, CERCLA, or any other statute.

62. Based upon the information known to the Parties on the effective date of this Order, U.S. EPA agrees that compliance with this Order shall stand in lieu of any civil remedies, including administrative, legal and equitable, against U.S. DOE, its employees, its contractors or their employees, available under current law to U.S. EPA. The scope of this covenant is strictly limited to currently known releases or threatened releases of hazardous substances, hazardous constituents, and hazardous wastes at PORTS which are the subject of activities performed by U.S. DOE, its employees, its contractors or their employees under this Order.

63. Under any of the following circumstances, U.S. EPA may, subject to exhausting dispute resolution, unilaterally withdraw from this Agreement and/or employ any legal means available, including the issuance of administrative orders and the filing of enforcement actions, to address the situation:

A. The requirements of this Order are no longer protective of human health or the environment;

B. Significant and/or continual non-compliance by U.S. DOE with the requirements of this Administrative Order by Consent;

In the absence of either of these two circumstances, U.S. EPA agrees it will not withdraw from this Agreement or bring any administrative, legal, or equitable action against U.S. DOE, its employees, its contractors, or their employees. In the event U.S. EPA determines to exercise rights in accordance with this Paragraph 63, it shall provide written notice to the Parties.

64. OEPA may, subject to exhausting dispute resolution, unilaterally withdraw from this Agreement in any of the following situations:

A. Any of the conditions described in Subsections A and B of Paragraph 63;

B. Disagreement between U.S. EPA and OEPA over any of the response action activities or the final remedy;

C. U.S. EPA failure to timely perform its obligations under this Order;

D. A conflict between the requirements of this Order and the requirements of the Ohio Decree or of State law; and/or

E. Significant and/or continual non-compliance with the Ohio Decree.

Ohio agrees that it will not issue notices of violations of this Order or bring any administrative, legal, or equitable action against U.S. DOE, its employees, its contractors, or their employees, under this Order. Nothing in this Order limits OEPA in its enforcement of the terms of the Ohio Decree, or any other administrative order, permit, license or approved plan, or any State statute or rule. If any term of this Order conflicts with any term of the Ohio Decree, any other administrative order, permit, license or approved plan, the latter shall control for the purposes of any OEPA enforcement action. In the event OEPA determines to exercise rights in accordance with this Paragraph 64, OEPA agrees to provide written notice to the Parties.

65. If U.S. EPA and OEPA are unable to agree on a final remedy, then each reserves its rights to impose its requirements directly on U.S. DOE, to defend the basis for those requirements, and to challenge the other's conflicting requirements. In such event, U.S. DOE reserves all rights and defenses.

66. U.S. EPA and OEPA each reserves its right to seek judicial review of a proposed decision or action taken with respect to response action activities that either U.S. EPA or OEPA claims conflicts with its respective laws. It is the understanding of the Parties that this reservation is intended to provide for challenges where the adequacy of protection of human health and the environment or the means of achieving such protection are at issue.

67. OEPA expressly reserves all rights and defenses it may have under Federal, State, or local law and including the Consent Decree between the State of Ohio and U.S. DOE in State of Ohio v. U.S. Department of Energy, et al., Case No. C2 89 732.

68. Compliance by U.S. DOE with the terms of this Order shall not relieve U.S. DOE of any other obligations to comply with RCRA or any other applicable State or Federal law. Except as expressly provided elsewhere in this Order, U.S. EPA and OEPA reserve the right to take an enforcement action pursuant to RCRA, CERCLA and/or any available legal authority against U.S. DOE or its contractors/operators of PORTS for violations of applicable laws or regulations. Nothing in this Order shall preclude U.S. EPA or OEPA from exercising any administrative, legal and equitable remedies available to them to require additional response action activities by U.S. DOE in the event that: (1) conditions previously unknown or undetected by U.S. EPA and OEPA arise or are discovered at the Facility; or (2) U.S. EPA or OEPA receives additional information not previously available concerning the premises which it employed in reaching the terms of this Order, and the implementation of the requirements of this

Order are no longer protective of human health and the environment.

69. U.S. EPA and OEPA reserve the right to perform any portion of the work agreed to herein or any additional site characterization, feasibility study, and response/corrective action activities as it deems necessary to protect public health or welfare or the environment to the extent authorized by law. Absent an immediate hazard, U.S. EPA and OEPA will not perform work agreed to herein if U.S. DOE is performing said work in a timely and satisfactory manner. However, this Paragraph does not preclude OEPA from performing any of the activities described in this Paragraph or other activities under authority other than this Order, as more fully described in Paragraph 70 of this Section. Notwithstanding compliance with the terms of this Order, U.S. DOE is not released from liability, if any, for the costs of any response action activities taken by U.S. EPA.

70. It is the position of OEPA that the Ohio Decree and the application of State law to PORTS are in no way preempted or otherwise impaired or affected by Federal law or this Order. By signing and participating in this Order, OEPA reserves and does not waive any rights it may have to enforce any provisions of the Consent Decree or State Law at PORTS. OEPA's signing and participation in this Order shall be without prejudice to the position of any party on this issue and OEPA's signing and participation shall not be used by any of the parties as support for its position on this issue. Nothing in this Order, including but not limited to its Funding (Section VIII), Dispute Resolution (Sections X and XI), or Force Majeure (Section XII) provisions, shall constitute a modification of or affect any schedules, dispute resolution procedures, or any other provisions of the Ohio Decree.

71. U.S. EPA expressly reserves its right to require, in the event it is necessary to assure protection of human health and the environment, the development of additional information prior to selecting any tentative, proposed, or final remedy. In any dispute concerning the development of additional information, U.S. EPA shall bear the burden of demonstrating such information is necessary to assure protection of human health and the environment.

72. Nothing in this Order shall be construed as a waiver or compromise of U.S. DOE's jurisdiction over source, special nuclear, and byproduct material under the Atomic Energy Act, 42 U.S.C. Sections 2011 et seq.

73. Ohio hereby releases, covenants not to sue, and not bring any action, including administrative, legal, or equitable remedies against U.S. DOE, its employees, its contractors, or

their employees, to recover costs which have been reimbursed pursuant to this Order.

X. DISPUTE RESOLUTION

74. Should Ohio EPA, U.S. DOE, or U.S. EPA have a good faith dispute under this Order, the procedures of this section shall apply.

75. Disputes concerning any document required under this Order to be submitted to Ohio EPA or U.S. EPA for review and approval shall be resolved pursuant to this Paragraph 75 in lieu of Paragraph 76.

a. U.S. DOE may request a meeting with Ohio EPA and U.S. EPA within five (5) working days of its receipt of the written notice of disapproval or a requirement to modify the document to discuss or dispute any deficiencies specified in the notice. Such meeting shall be held within five (5) working days, if possible, of such request, and may be conducted by telephone unless one of the parties requests a face-to-face meeting. To facilitate such meetings, U.S. DOE, Ohio EPA, and U.S. EPA each shall appoint a project coordinator, who shall make reasonable efforts to resolve all disputes or disagreements informally.

b. Disputes not resolved by the project coordinator shall be referred to the Submittals Dispute Resolution Committee within five (5) working days, if possible. The Submittals Dispute Resolution committee shall have three members consisting of one individual designated by Ohio EPA, one designated by U.S. DOE, and one designated by U.S. EPA. The Ohio EPA representative will be the Chief, Division of Solid and Hazardous Waste Management, or the Chief, Division of Emergency and Remedial Response. The U.S. DOE representative will be the Portsmouth Site Manager. The U.S. EPA representative will be the Chief, Remedial Response Branch.

c. Within three (3) working days of receipt of a disputed matter, the Submittals Dispute Resolution Committee shall meet and attempt resolution. Disputed matters not resolved by the Committee within five (5) working days of receipt of a disputed matter shall be referred to the Executive Committee (EC) for resolution. The EC shall have three members consisting of one individual designated by Ohio EPA, one designated by U.S. DOE, and one designated by U.S. EPA. The Ohio EPA representative will be the Deputy Director of Waste Programs or her designee. The U.S. DOE representative will be the Assistant Manager for Enrichment Facilities. The U.S. EPA representative will be the Director, Superfund Division. The EC shall meet and attempt resolution of the disputed matter.

d. Disputes not resolved by the EC within ten (10) working days of receipt of a disputed matter, shall be referred to the Senior Executive Committee (SEC). Ohio EPA's participation in the SEC is at Ohio EPA's option, and Ohio EPA may choose to invoke or enforce the dispute resolution provisions of the Ohio Decree at any stage of this process. The U.S. EPA representative on the SEC will be the Regional Administrator, Region V or his designee. The U.S. DOE representative on the SEC will be the manager of the DOE Oak Ridge Operations Office or his designee. If Ohio EPA chooses to participate on the SEC, the Ohio EPA representative on the SEC shall be the Director of the Ohio EPA or his designee. If the members to the SEC cannot reach agreement on a disputed matter, all Parties may exercise their respective authorities and rights and U.S. DOE may raise the issue dispute to the Administrator of U.S. EPA.

e. U.S. EPA may elect not to participate in the dispute resolution provisions of Paragraph 75, except that U.S. EPA shall participate in such dispute resolution for any dispute regarding requirements of the Order that are alleged to be inconsistent with requirements of this Ohio Decree and for any dispute regarding U.S. EPA's exercise of authorities reserved under this Order, including determinations made pursuant to Paragraph 41. OEPA may elect not to participate in resolution of disputes at the SEC level.

76. Any good faith dispute over the interpretation of this Order or over whether a term of this Order has been violated, shall be resolved pursuant to this Paragraph 76 in lieu of Paragraph 75.

a. U.S. DOE shall, within fifteen (15) days of any action which it is disputing, provide Ohio EPA and U.S. EPA with a written notice of dispute. U.S. DOE shall, within thirty (30) days of any such action which it is disputing, provide Ohio EPA and U.S. EPA with a written statement of dispute setting forth the nature of the dispute, U.S. DOE's position with respect to the dispute and the information U.S. DOE is relying upon to support its position.

b. Upon receipt of the written statement of dispute, Ohio EPA, U.S. DOE, and U.S. EPA shall engage in dispute resolution among the project coordinators. The project coordinators shall have fourteen (14) days from the receipt by Ohio EPA and U.S. EPA of the written statement of dispute to resolve the dispute. During this period the project coordinators shall meet or confer by telephone as many times as necessary to discuss and attempt resolution of the dispute. If a resolution cannot be reached on any issue within this fourteen (14) day period, Ohio EPA, U.S. DOE, or U.S. EPA may, by written notice, elevate the dispute to the Dispute Resolution Committee (DRC) for resolution.

c. U.S. DOE, Ohio EPA, and U.S. EPA shall each designate one individual to serve on the DRC. The individuals designated to serve or the DRC shall be those designated in subparagraph [D], or their delegate authorized to serve on the DRC on behalf of such designated individual, for the purposes of dispute resolution under this Order. The DRC will serve as a forum for resolution of disputes for which agreement has not been reached pursuant to subparagraph [B].

d. The Ohio EPA designated member of the DRC is the Chief, Division of Emergency and Remedial Response, Ohio EPA. The U.S. DOE designated member is the Assistant Manager for Enrichment Facilities. The U.S. EPA designated member is the Director, Superfund Division. Notice of any delegation of authority from a Party's designated member on the DRC shall be provided to all other Parties.

e. If the designated members of the DRC do not agree on a resolution of the dispute within thirty (30) days, any Party may elevate the dispute to the Senior Executive Committee (SEC). The U.S. EPA representative on the SEC will be the Regional Administrator of U.S. EPA, Region V or his designee. The U.S. DOE representative will be the Manager of the DOE Oak Ridge Operations Office or his designee. The Ohio EPA representative will be the Director of Ohio EPA, or his designee. The SEC members, shall, as appropriate, confer, meet and exert their best efforts to resolve the dispute and issue a written decision signed by all Parties. If the members are unable to reach resolution of the issue in dispute, the Parties may exercise their respective authorities and rights and U.S. DOE may raise the issue in dispute to the Administrator of U.S. EPA.

f. U.S. EPA may elect not to participate in the dispute resolution provisions of Paragraph 76, except that U.S. EPA shall participate in such dispute resolution for any dispute regarding requirements of this Order that are alleged to be inconsistent with requirements of the Ohio Decree and for any dispute regarding U.S. EPA's exercise of authorities reserved under this Order, including determinations made pursuant to Paragraphs 63 and 71. OEPA may elect not to participate in resolution of disputes at the SEC level.

77. In any dispute subject to dispute resolution, the Parties may by written agreement modify the procedures of Paragraphs 74 through 76 above, including but not limited to an extensions or shortening of the times therein or the waiver of any provision set forth herein.

78. It is the intent of the Parties that any dispute arising from this Order will be resolved in accordance with either Paragraphs 75 or 76 and that no Party will exercise other rights and authorities with respect to an issue in dispute until

all dispute resolution provisions of Paragraphs 75 or 76 have been exhausted, irrespective of whether a Party has elected not to participate in the resolution of a dispute under such provision, except that Ohio EPA may choose at any stage of the dispute resolution procedures of Paragraphs 75 or 76 to invoke the dispute resolution provisions of the Ohio Decree.

XI. FORCE MAJEURE

79. U.S. DOE shall perform the requirements of this Order within the time limits set forth herein, unless the performance is prevented or delayed by events which constitute a force majeure. U.S. DOE shall have the burden of proving such a force majeure. A force majeure is defined as any event arising from causes not foreseeable and beyond the control of U.S. DOE which could not be overcome by due diligence and which delays or prevents performance by the date required by this Consent Order. A force majeure event includes delay or inability to perform which results from unresolved inconsistencies between this Order and the Ohio Decree. Determinations regarding whether such an inconsistency constitutes a force majeure event in a specific instance are fact sensitive and will be made on a case by case basis. Force majeure events do not include increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain Federal, State or Local permits. It shall be presumed, for purposes of this Order, that delays due to compliance with applicable statutes and regulations governing procurement, despite the exercise of reasonable diligence are unforeseeable and beyond the control of U.S. DOE.

80. U.S. DOE shall notify U.S. EPA in writing seven (7) days after it becomes aware of events which U.S. DOE knows or should know constitute a force majeure. Such notice shall estimate the anticipated length of delay, including necessary demobilization and remobilization, its cause, measures taken or to be taken to minimize the delay, and an estimated time table for implementation of these measures. Failure to comply with the notice provisions of this section shall constitute a waiver of U.S. DOE right to assert a force majeure.

81. If U.S. EPA determines that the delay has been or will be caused by circumstances not foreseeable and beyond U.S. DOE's control, which could not have been overcome by due diligence, the time for performance for that element of the relevant scope of Work shall be extended, upon U.S. EPA approval, for a period equal to the delay resulting from such circumstances. This shall be accomplished through an amendment to the appropriate schedule of this Consent Order. Such an extension does not alter the schedule for performance or completion of other tasks required by any work plan unless these are also specifically altered by amendment of the schedule. In the event that U.S. EPA and U.S. DOE cannot agree that any delay or failure has been or will be

caused by circumstances not reasonably foreseeable and beyond the control of U.S. DOE, which could not have been overcome by due diligence, or if there is no agreement on the length of the extension, the dispute shall be resolved in accordance with the Dispute Resolution provisions of this Order.

XII. MODIFICATIONS AND TERMINATION

82. U.S. DOE and OEPA project coordinators, by mutual agreement, may make modifications to schedules contained in or required by this Order. Prior to granting any schedule extensions of greater than 120 days, for whatever reason, OEPA must consult with U.S. EPA. For the purpose of determining whether an extension of time is for greater than 120 days, the Parties shall count the cumulative length of any previous extensions granted for the scheduled due date.

83. At U.S. DOE's request, the parties will in good faith enter into negotiations to modify this Order in order to:

a. incorporate as a Party(ies) to this Order U.S. DOE contractor(s) conducting response action activities directed by this Order at PORTS; and

b. address the DOE-wide strategy for revising clean-up agreements to reflect the liklihood of reduced appropriations.

84. If any party withdraws from this Order for any of the reasons specified in Paragraphs 63 and 64, and U.S. DOE is without fault with regard to such withdrawal, U.S. EPA and U.S. DOE agree, in good faith, to negotiate the termination of this Order and the requirements of a new Order, prior to U.S. EPA initiating any action, including administrative, legal, or equitable remedies, with respect to activities required by law and covered by this Order.

85. The provisions of this Consent Order shall be deemed satisfied upon U.S. DOE's receipt of written notice from U.S. EPA that U.S. DOE has demonstrated, to the satisfaction of U.S. EPA, that the terms of this Consent Order, including any additional tasks which, subject to the limitations set forth herein, U.S. DOE has agreed to undertake, have been satisfactorily completed. U.S. EPA shall issue such notice after it has been determined that all requirements of this Consent Order have been satisfactorily completed. The Parties intend that any response action selected, implemented and completed to remediate Hazardous Waste, Hazardous Constituents, and hazardous substances contamination identified under this Order shall be protective of human health and the environment such that the response action activities covered by this Order shall obviate the need for further remediation of that contamination.

IT IS SO AGREED:

By: _____
U.S. Department of Energy — Date: 6/14/96

By: _____
U.S. Environmental Protection Agency — Date: 8/11/97

By: _____
Ohio Attorney General — Date: 7/2/97

By: _____
Ohio Environmental Protection Agency — Date: _____