

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
CABOT CORPORATION; DETREX)
CORPORATION; ELKEM METALS COMPANY)
L.P.; THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY; GENCORP INC.;)
MALLINCKRODT.'NNE; MILLENNIUM "*****"+)
INORGANIC CHEMICALS INC.; OCCIDENTAL)
CHEMICAL CORPORATION; OHIO POWER)
COMPANY; OLIN CORPORATION; RMI)
TITANIUM COMPANY, INC.; THE)
SHERWIN-WILLIAMS COMPANY; UNION)
CARBIDE CORPORATION; CBS OPERATIONS)
INC.; NORFOLK SOUTHERN RAILWAY)
COMPANY; NORFOLK SOUTHERN)
CORPORATION; CONRAIL INC.;)
and CONSOLIDATED RAIL CORPORATION,)
)
Defendants.)

CIVIL ACTION NO.

STATE OF OHIO, ex rel. Michael DeWine,)
Ohio Attorney General,)
)
Plaintiff,)
)
v.)
)
CABOT CORPORATION; DETREX)
CORPORATION; ELKEM METALS COMPANY)
L.P.; THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY; GENCORP INC.;)
MALLINCKRODT.'NNE; MILLENNIUM "*****"+)
INORGANIC CHEMICALS INC.; OCCIDENTAL)
CHEMICAL CORPORATION; OHIO POWER)
COMPANY; OLIN CORPORATION; RMI)
TITANIUM COMPANY, INC.; THE)
SHERWIN-WILLIAMS COMPANY;)

CIVIL ACTION NO.

UNION CARBIDE CORPORATION; CBS)
OPERATIONS INC.; NORFOLK SOUTHERN)
RAILWAY COMPANY; NORFOLK)
SOUTHERN CORPORATION; CONRAIL INC.;)
CONSOLIDATED RAIL CORPORATION;)
UNITED STATES GENERAL SERVICES)
ADMINISTRATION; UNITED STATES)
DEPARTMENT OF ENERGY; UNITED)
STATES DEPARTMENT OF THE NAVY; and)
UNITED STATES MARITIME)
ADMINISTRATION,)
)
)
Defendants.)
_____)

**CONSENT DECREE
REGARDING ASHTABULA RIVER AREA NATURAL RESOURCE DAMAGES**

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	JURISDICTION	5
III.	PARTIES BOUND	6
IV.	DEFINITIONS	7
V.	STATEMENT OF PURPOSE	14
VI.	ARCG II RESTORATION PROJECTS	14
VII.	RAILROADS RESTORATION PROJECT	21
VIII.	REVIEW AND APPROVAL OF WORKPLANS AND OTHER SUBMISSIONS	23
IX.	PAYMENTS FOR ASSESSMENT COSTS AND TRUSTEE-SPONSORED NATURAL RESOURCE RESTORATION ACTIVITIES	25
X.	TRUSTEE-SPONSORED NATURAL RESOURCE RESTORATION ACTIVITIES	32
XI.	ACCESS TO RESTORATION PROPERTIES; INFORMATION AND DOCUMENT RETENTION	33
XII.	FORCE MAJEURE	35
XIII.	DISPUTE RESOLUTION	38
XIV.	STIPULATED PENALTIES	41
XV.	COVENANTS BY PLAINTIFFS	46
XVI.	RESERVATION OF RIGHTS BY PLAINTIFFS	47
XVII.	COVENANTS BY SETTLING DEFENDANTS AND SETTLING FEDERAL AGENCIES	51

TABLE OF CONTENTS cont.

XVIII.	EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION	54
XIX.	NOTICES AND SUBMISSIONS	55
XX.	TERMINATION	58
XXI.	PUBLIC COMMENT	60
XXII.	EFFECTIVE DATE AND RETENTION OF JURISDICTION	60
XXIII.	APPENDICES	61
XXIV.	CONSENT DECREE MODIFICATIONS	61
XXV.	SIGNATORIES/SERVICE	62
XXVI.	FINAL JUDGMENT	63
Appendix A	Map of the Ashtabula River Area	
Appendix B	List of Restoration Properties	
Appendix C	Natural Resource Restoration Plan and Environmental Assessment for the Ashtabula River and Harbor Site	
Appendix D	Scope of Work for ARCG II Restoration Workplan	
Appendix E	Environmental Covenant Template	
Appendix F	Trustee Memorandum of Understanding (MOU)	
Appendix G	Railroads Restoration Project Workplan	

I. BACKGROUND

A. The United States of America (the “United States”) on behalf of the Secretary of the United States Department of the Interior (“DOI”) and the Secretary of the United States Department of Commerce (“Commerce”) (acting through the National Oceanic and Atmospheric Administration (“NOAA”)), and the State of Ohio (the “State”), by and through the Attorney General of Ohio, on behalf of the people of Ohio, and at the request of the Ohio Environmental Protection Agency (“Ohio EPA”) (collectively the “Plaintiffs”), filed Complaints asserting claims under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9607, and Section 311 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1321, commonly known as the Clean Water Act (“CWA”), seeking damages for injury to, destruction of, or loss of natural resources belonging to, managed by, held in trust by, controlled by, or appertaining to the United States or the State, resulting from releases of hazardous substances into or which have migrated into the Ashtabula River Area, including the costs of assessing such injury, destruction, or loss.

B. The Complaints filed by Plaintiffs herein allege that natural resources, including but not limited to, fish, invertebrates, birds, water and sediments, have been injured and that the public has suffered the loss of natural resource services, including lost recreational fishing, reduced opportunities for navigation, and passive human use losses, as a result of releases of hazardous substances to the Ashtabula River Area from various facilities in Ashtabula, Ohio. The Complaints also allege that Plaintiffs have incurred costs in connection with the assessment of such injuries, destruction or losses. The Complaints allege that hazardous substances, including, but not limited to, polychlorinated biphenyls (“PCBs”), polynuclear aromatic

hydrocarbons (“PAHs”), chlorinated benzenes, chlorinated ethenes, hexachlorobutadiene and heavy metals, have been detected in the sediments, water and fish of the Ashtabula River Area.

C. The Complaints further allege that Settling Defendants are liable for damages for injury to, destruction of, or loss of natural resources within the Ashtabula River Area because Settling Defendants (or their predecessors) are owners or operators of one or more facilities from which such releases occurred or were owners or operators of one or more such facilities at a time hazardous substances were disposed at such facilities. In addition, the Complaint filed by the State alleges that Settling Federal Agencies are liable for damages for injury to, destruction of, or loss of natural resources within the Ashtabula River Area because Settling Federal Agencies (or their predecessors) are owners or operators of one or more facilities from which such releases occurred or were owners or operators of one or more such facilities at a time hazardous substances were disposed at such facilities.

D. The defendants that have entered into this Consent Decree (“Settling Defendants”) do not admit any liability to the Plaintiffs arising out of the transactions or occurrences alleged in the Complaints. The Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences alleged in any claim asserted by the State. By entering into this Consent Decree, undertaking the obligations imposed under its terms, and making the payments required by its terms, Settling Defendants and Settling Federal Agencies do not expressly, or by implication, admit liability for damages for injury to, destruction of, or loss of natural resources in the Ashtabula River Area as alleged in the Complaints or otherwise.

E. Pursuant to Executive Order 12580 and the National Contingency Plan, 40 C.F.R. Part 300 (the “NCP”), DOI through the United States Fish and Wildlife Service (“FWS”) and the

United States Department of Commerce, acting through NOAA, have been delegated authority to act as Federal Trustees for natural resources impacted by the releases of hazardous substances into or within the Ashtabula River Area. Ohio EPA has been delegated authority to act as the State Trustee for natural resources impacted by such releases of hazardous substances.

F. Pursuant to 43 C.F.R. Part 11, the FWS, NOAA, and Ohio EPA (collectively the “Trustees”) initiated an assessment of injuries to natural resources resulting from the releases of hazardous substances into or within the Ashtabula River Area.

G. Pursuant to the Great Lakes Legacy Act of 2002, as amended, 33 U.S.C. § 1268, the United States Environmental Protection Agency entered into a Project Agreement with the Ashtabula City Port Authority to provide for, among other things, removal of approximately 497,000 cubic yards of contaminated sediments from a segment of the Ashtabula River between the Upper Turning Basin and the Fifth Street Bridge, proper disposal of such sediments, and implementation of certain habitat restoration activities. Funding for the Ashtabula River Great Lakes Legacy Act Project (“GLLA Project”) was provided by the United States, the Ashtabula City Port Authority, in cooperation with ARCG II, and the State of Ohio. Sediment removal activities under the Project Agreement were completed during 2007, but habitat mitigation activities under the GLLA Project have not yet been completed.

H. Pursuant to the Rivers and Harbors Act of 1937 and the Water Resources Development Act of 1986, as amended, 33 U.S.C. § 2211, and pursuant to Sections 312 (a) and (f) (3) of the Water Resources Development Act of 1990, as amended, 33 U.S.C. § 1272(a) and (f)(3), the Department of the Army and the Ashtabula City Port Authority have entered into a Project Cooperation Agreement (W912P4-07-D-0003) for the removal of approximately 135,000

cubic yards of contaminated sediments found outside the boundaries and adjacent to the Federal navigation channel between the Fifth Street Bridge and the mouth of the Ashtabula River, and for the disposal of such contaminated sediment in a privately owned disposal facility, as described in the Final Comprehensive Management Plan (feasibility report) and Environmental Impact Statement dated August, 2004 and approved by the Assistant Secretary of the Army on March 3, 2006. The dredging, removal and disposal of contaminated sediments pursuant to Project Cooperation Agreement W912P4-07-D-0003 commenced by April 1, 2008 and was completed in July, 2008. The Project is defined at Section I.A. of the “Project Cooperation Agreement between the Department of the Army and Ashtabula City Port Authority for Removal and Disposal of Contaminated Sediments from Outside the Boundaries and Adjacent to the Federal Navigation Channel Between the Fifth Street Bridge and the Mouth of the Ashtabula River” entered into on August 22, 2007.

I. In March, 2008, the Trustees published their Draft Natural Resource Restoration Plan and Environmental Assessment for the Ashtabula River and Harbor Site, dated February 22, 2008 (“Draft Restoration Plan”). The Trustees held a public meeting on April 22, 2008 in Ashtabula, Ohio regarding the Draft Restoration Plan and provided an opportunity for submission of public comments on the Draft Restoration Plan until April 30, 2008. After considering and responding to the comments submitted during the public comment period on the Draft Restoration Plan, the Trustees published notice of adoption of a final Natural Resource Restoration Plan and Environmental Assessment for the Ashtabula River and Harbor Site on November 10, 2009. A transcript of the public meeting, copies of the public comments on the Draft Restoration Plan, and the Trustees’ response to such comments are all available to the

public as part of the administrative record maintained by the Trustees for the Ashtabula River Area.

J. In order to facilitate more expeditious restoration of natural resources, ARCG II has previously incurred \$695,289 in connection with acquisition of five of the Restoration Properties identified in Appendix B and various preliminary restoration planning activities.

K. The United States, the State of Ohio and the Settling Defendants (collectively, the “Parties” to this Consent Decree) recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that implementation of this Consent Decree will avoid prolonged and complicated litigation among the Parties, and that this Consent Decree is fair, reasonable, consistent with applicable law, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, without adjudication of any issue of fact or law, except as provided in Section II (Jurisdiction), and with the consent of the Parties, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and Sections 107 and 113(b) of CERCLA, 42 U.S.C. §§ 9607 and 9613(b). The Court also has personal jurisdiction over the Parties. Venue lies in this district pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b) and (e), because the releases and injuries alleged in the Complaints occurred within this district, and a substantial part of the events giving rise to Plaintiffs’ claims occurred in this district. For the purposes of this Consent Decree, or any action to enforce this Decree, Settling Defendants

consent to this Court's jurisdiction over this Decree and any such action and over Settling Defendants as well as to venue in this district.

III. PARTIES BOUND

2. The obligations of this Consent Decree apply to and are binding upon the United States and the State, and upon the Settling Defendants and any successors, assigns or other persons otherwise bound by law. No change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall relieve such Settling Defendant of its obligation to ensure that the terms of the Decree are implemented.

3. ARCG II and the Railroads may each retain contractors to perform obligations under this Consent Decree, including, without limitation, acquiring and holding title to Restoration Properties and Additional Restoration Properties, establishing and recording Environmental Covenants, negotiating subordination agreements, conveying Restoration Properties and Additional Restoration Properties to Acceptable Entities, and performing work required under Restoration Workplans or SOWs. ARCG II and the Railroads shall require contractors to perform all work in conformity with all requirements of this Consent Decree. ARCG II and the Railroads shall nonetheless be responsible for ensuring that their contractors and subcontractors perform all work contemplated herein in accordance with this Consent Decree. ARCG II shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work on behalf of ARCG II under this Consent Decree. The Railroads shall provide a copy of this Consent Decree to all officers, employees,

and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work on behalf of the Railroads under this Consent Decree. In any action to enforce this Consent Decree, no Settling Defendant shall raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

IV. DEFINITIONS

4. Unless otherwise expressly provided herein, the terms used in this Consent Decree that are defined in the CWA, CERCLA, the NCP, or the DOI Natural Resource Damage Assessment and Restoration Regulations, 43 C.F.R. Part 11, shall have the meaning assigned to them in such statutes or regulations. Whenever terms listed below are used in this Consent Decree or in the Appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. “Acceptable Entity” means a nonprofit corporation, governmental authority, including a local park district or department, or other organization or entity, approved in writing by the Trustees to be a grantee of a property interest in any Restoration Property or Additional Restoration Property.

b. “Additional Restoration Property” or “Additional Restoration Properties” means any real property or properties, other than those listed in Appendix B, approved by the Trustees as suitable for implementation of ARCG II Restoration Projects pursuant to the provisions of Paragraph 7, below.

c. “ARCG II” means each of the following companies, which are members of an unincorporated association known as the “Ashtabula River Cooperating Group II”: Cabot

Corporation; Detrex Corporation; Elkem Metals Company L.P.; The Cleveland Electric Illuminating Company; GenCorp Inc.; Mallinckrodt. 'NNE; Millennium Inorganic Chemicals Inc.; Occidental Chemical Corporation; Ohio Power Company; Olin Corporation; RMI Titanium Company, Inc.; The Sherwin-Williams Company; Union Carbide Corporation; and CBS Operations Inc. All obligations of ARCG II under this Consent Decree shall be joint and several obligations of each ARCG II member.

d. “ARCG II Restoration Projects” means natural resource restoration projects that are implemented by ARCG II in accordance with the requirements of Section VI, below. The term “ARCG II Restoration Projects” includes: 1) the acquisition of property interests acceptable to the Trustees in Restoration Properties identified in Appendix B and any Additional Restoration Properties identified by the Trustees pursuant to Paragraph 7, below; 2) the development and implementation of Restoration Workplans for Restoration Properties and Additional Restoration Properties, in accordance with the requirements of Paragraphs 8 - 10, below; and 3) the conveyance to an Acceptable Entity of title to, or other property interest held by ARCG II in, such Restoration Properties and Additional Restoration Properties in accordance with Paragraph 15, below.

e. “Ashtabula River Area” means all areas below the ordinary high water mark within a segment of the Ashtabula River located in Ashtabula County, Ohio between United States Army Corps of Engineers Station 195 and the mouth of the Ashtabula River (where it meets the Ashtabula Harbor) and within the Ashtabula Harbor, as specifically depicted on the Map attached as Appendix A.

- f. “Assessment Costs” means the costs that the Trustees have paid in connection with the assessment of the Natural Resource Damages in the Ashtabula River Area.
- g. “CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9601 *et seq.*
- h. “Consent Decree” or “Decree” means this Consent Decree and all Appendices attached hereto, as well as all plans, reports or other items or deliverables approved by the Trustees pursuant to this Consent Decree. In the event of a conflict between this Consent Decree and any Appendix hereto, or any plan, report or other item or deliverable approved by the Trustees pursuant to this Consent Decree, this Consent Decree shall govern.
- i. “CWA” means the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.*, also known as the Clean Water Act.
- j. “Day” means a calendar day unless expressly stated to be a Working Day. “Working Day” means a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next Working Day.
- k. “DOI” means the United States Department of the Interior and any successor departments or agencies of the United States.
- l. “Effective Date” means the effective date of this Consent Decree as provided by Section XXII (Effective Date and Retention of Jurisdiction) of this Consent Decree.

m. “Environmental Covenant” means an “Environmental covenant” as defined in Ohio Revised Code § 5301.80(D) that complies with Ohio Revised Code §§ 5301.80 - 5301.92.

n. “FWS” means the Fish and Wildlife Service of the United States Department of the Interior.

o. “Interest” means interest accruing at the rate established pursuant to 28 U.S.C. § 1961.

p. “Lodging Date” means the date on which this Consent Decree is lodged with the Court.

q. “Natural Resources” means land, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources, belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States or the State.

r. “Natural Resource Damages” means compensation for injury to, destruction of, or loss of, Natural Resources in the Ashtabula River Area arising from or relating to releases of hazardous substances into, or which have migrated into, the Ashtabula River Area, as set forth in Section 107(a)(4)(C) of CERCLA. Natural Resource Damages includes reimbursement of Assessment Costs incurred by the Trustees in assessing such injury, destruction, or loss arising from or relating to such a release, and each of the categories of damages described in 43 C.F.R. §11.15.

s. “NOAA” means the National Oceanic and Atmospheric Administration of the United States Department of Commerce and any successor departments or agencies of the United States.

t. “NRDAR Fund” means DOI’s Natural Resource Damage Assessment and Restoration Fund.

u. “Ohio EPA” means the Ohio Environmental Protection Agency and any successor departments or agencies of the State of Ohio.

v. “Paragraph” means a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

w. “Parties” means the United States, the State, and the Settling Defendants.

x. “Plaintiffs” means the United States and the State.

y. “Qualified Costs” means reasonable costs incurred by ARCG II after the date of lodging of this Consent Decree in connection with implementation of ARCG II Restoration Projects in accordance with the requirements of this Consent Decree, including reasonable costs of:

1) acquiring property interests acceptable to the Trustees in Additional Restoration Properties, including but not limited to, the title report, the title insurance, as built drawings, filing fees, and any such costs approved by the Trustees in writing prior to ARCG II’s acquisition of such properties, provided that ARCG II establishes Environmental Covenants on such properties in accordance with Paragraphs 11 - 14, below;

2) establishing Environmental Covenants in accordance with Paragraphs 11 - 14, below;

3) developing Restoration Workplans in accordance with Paragraphs 8 and 9, below;

4) performing work in accordance with the requirements of approved Restoration Workplans pursuant to Paragraph 10, below; and

5) conveying Restoration Properties and Additional Restoration Properties to an Acceptable Entity in accordance with Paragraph 15, below;

provided, however, that the term “Qualified Costs” does not include: a) any costs of acquisition of Restoration Properties, including but not limited to, the title report, the title insurance, as built drawings, and filing fees; b) any costs incurred by the ARCG II, its contractors or representatives, in negotiating the acquisition of property interests or Environmental Covenants in, or in negotiating the conveyance to an Acceptable Entity of property interests acceptable to the Trustees in, the Restoration Properties or Additional Restoration Properties; c) any closing costs not listed on standard closing documents; or d) any costs incurred in connection with any dispute resolution proceeding pursuant to Section XIII, below, or in connection with litigation or other efforts by ARCG II to enforce any terms of Environmental Covenants or any agreements between ARCG II and any person not a party to this Consent Decree.

z. “Railroads” means Norfolk Southern Railway Company, Norfolk Southern Corporation, Conrail Inc., and the Consolidated Rail Corporation. All obligations of the Railroads under this Consent Decree shall be joint and several obligations of Norfolk Southern Railway Company, Norfolk Southern Corporation, Conrail Inc., and the Consolidated Rail Corporation.

aa. “Railroads Restoration Project” means the natural resource restoration project described in the Railroad Restoration Workplan attached hereto as Appendix G.

- bb. “Railroads Restoration Property” refers to the real property described in the Railroads Restoration Project Workplan attached hereto as Appendix G.
- cc. “Restoration Property” or “Restoration Properties” means one or more of the real properties identified in Appendix B.
- dd. “Section” means a portion of this Consent Decree identified by a roman numeral.
- ee. “Settling Defendants” means the ARCG II and the Railroads.
- ff. “Settling Federal Agencies” means the United States General Services Administration, the United States Department of Energy, the United States Department of the Navy, the United States Maritime Administration, and any predecessor or successor agencies or departments of the United States.
- gg. “State” means the State of Ohio.
- hh. “Trustees” means DOI, NOAA and Ohio EPA.
- ii. “United States” means the United States of America, including all of its departments, agencies and instrumentalities, including, without limitation, DOI, FWS, NOAA and the Settling Federal Agencies.
- jj. “WRDA” means the Water Resources Development Act of 1990, as amended, 33 U.S.C. § 2316 *et seq.*
- kk. “WRDA Project” means the Water Resources Development Act project to dredge and dispose of the contaminated sediment of the Ashtabula River downstream of the Fifth Street Bridge, United States Army Corps of Engineers Station 139, as described more particularly in the “Project Cooperation Agreement between the Department of the Army and

Ashtabula City Port Authority for Removal and Disposal of Contaminated Sediments from Outside the Boundaries and Adjacent to the Federal Navigation Channel Between the Fifth Street Bridge and the Mouth of the Ashtabula River” entered into on August 22, 2007.

V. STATEMENT OF PURPOSE

5. The mutual objectives of the Parties in entering into this Consent Decree are: (i) to provide for the restoration, replacement, or acquisition of the equivalent of the natural resources allegedly injured, destroyed, or lost as a result of releases of hazardous substances into or within the Ashtabula River Area through implementation of ARCG II Restoration Projects and the Railroads Restoration Project consistent with the restoration plans approved by the Trustees; (ii) to reimburse natural resource damage assessment costs and certain other costs incurred by the Trustees, as provided herein; (iii) to resolve potential liability among the Parties with respect to Natural Resource Damages as provided herein, without determining any other rights, claims or obligations of any parties, including any such rights, claims or obligations at issue in *ARCG II v. Norfolk Southern, et al.*, United States District Court, Northern District of Ohio, Case No. 1:07CV3311; and, (iv) to avoid costly and time-consuming litigation.

VI. ARCG II RESTORATION PROJECTS

6. Subject to the provisions of Paragraph 19, below, ARCG II shall implement ARCG II Restoration Projects on each of the Restoration Properties identified in Appendix B, in accordance with the provisions set forth below in this Section VI.

7. The Trustees may identify Additional Restoration Properties that they determine are suitable for implementation of ARCG II Restoration Projects consistent with the approved Restoration Plan. For a period of one year after the Effective Date of this Consent Decree,

ARCG II shall use best efforts, subject to the provisions of Paragraph 19, below, to acquire such Additional Restoration Properties, including the payment of reasonable sums which shall be subject to approval by the Trustees. Subject to the provisions of Paragraph 19, below, ARCG II shall implement ARCG II Restoration Projects in accordance with the provisions set forth below in this Section VI on any Additional Restoration Properties acquired by ARCG II.

8. For each Restoration Property and for each Additional Restoration Property acquired prior to the Effective Date of this Consent Decree, ARCG II shall, within 90 days after the Effective Date of this Consent Decree, develop and submit to the Trustees for approval in accordance with the provisions of Section VIII (Review and Approval of Workplans and Other Submissions), Restoration Workplans providing detailed descriptions of activities proposed to be undertaken on each such Restoration Property and Additional Restoration Property to restore, replace or acquire the equivalent of natural resources that the Trustees allege were injured as a result of releases of hazardous substances into or within the Ashtabula River Area, together with proposed schedules for implementation of such activities, estimated costs of such activities, and the basis for such cost estimates. Each such Restoration Workplan shall be consistent with the Natural Resource Restoration Plan & Environmental Assessment for the Ashtabula River and Harbor Site attached hereto as Appendix C (hereinafter "Restoration Plan") and with the Scope of Work attached as Appendix D to this Consent Decree.

9. For each Additional Restoration Property acquired after the Effective Date of this Consent Decree, ARCG II shall, within 60 days after acquisition of such Additional Restoration Property, develop and submit to the Trustees for approval in accordance with the provisions of Section VIII (Approval of Workplans and Other Submissions), a Restoration Workplan

providing a detailed description of activities proposed to be undertaken on such Additional Restoration Property to restore, replace or acquire the equivalent of natural resources that the Trustees allege were injured as a result of releases of hazardous substances into or within the Ashtabula River Area, together with a proposed schedule for implementation of such activities, an estimate of the costs of such activities, and the basis for such cost estimates. Each such Restoration Workplan shall be consistent with the Restoration Plan and with the Scope of Work attached as Appendix D to this Consent Decree.

10. Upon approval of each Restoration Workplan submitted pursuant to Paragraph 8 or 9, above, ARCG II shall implement the ARCG II Restoration Project described in such approved Restoration Workplan, in accordance with the terms and schedules therein, subject to ARCG II's right to contest Trustees' determination with respect to any schedule in such Workplan in accordance with Section XIII (Dispute Resolution). All such work shall be performed consistent with the Restoration Plan, the Scope of Work, and the provisions of Paragraph 21, below.

11. Within 30 days following approval of the Restoration Workplan for any Restoration Property or any Additional Restoration Property acquired by ARCG II or its contractors pursuant to this Consent Decree, ARCG II shall submit to the Trustees:

a. for approval in accordance with Section VIII (Review and Approval of Workplans and Other Submissions), a draft Environmental Covenant relating to the Restoration Property or Additional Restoration Property that is the subject of such approved Restoration Workplan; and

b. a description of all interests in such Restoration Property or Additional Restoration Property that would not be subject to the Environmental Covenant under Ohio Revised Code § 5301.86(A), absent a subordination agreement.

Each such draft Environmental Covenant shall be consistent with and in substantially the same form as the Environmental Covenant Template set forth in Appendix E.

12. If requested by the Trustees, ARCG II shall seek to negotiate subordination agreements with persons holding any interest identified pursuant to Paragraph 11.b, above, and shall incorporate any such subordination agreements in a revised draft Environmental Covenant submitted to the Trustees for approval.

13. Subject to the right of ARCG II to contest, in accordance with Section XIII (Dispute Resolution), any disapproval or modification of the draft Environmental Covenant by the Trustees, ARCG II shall, within 30 days after approval of any draft Environmental Covenant by the Trustees, execute such Environmental Covenant as approved by the Trustees and present the executed Environmental Covenant to the Trustees for signature.

14. Within 30 days after receipt of all Trustee signatures on any Environmental Covenant, ARCG II shall cause the fully executed Environmental Covenant to be recorded in the office of the Ashtabula County Recorder, as provided in Ohio Revised Code § 5301.88.

15. For each Restoration Property and Additional Restoration Property acquired by ARCG II or its contractors, ARCG II shall cause any property interest held by ARCG II or its contractors in such Restoration Property or Additional Restoration Property (including title) to be conveyed to an Acceptable Entity, free and clear of liens and other encumbrances (except for

encumbrances acceptable to the Trustees), in accordance with the requirements set forth in Paragraphs 16 - 18, below.

16. At the time ARCG II submits each draft Environmental Covenant pursuant to Paragraph 11.a., above, ARCG II shall also submit to the Trustees for approval in accordance with Section VIII (Review and Approval of Workplans and Other Submissions):

a. a draft deed or other instrument providing for conveyance of any interest of ARCG II in the Restoration Property or Additional Restoration Property that is the subject of the Environmental Covenant (other than ARCG II's interest as a holder of the Environmental Covenant) to an Acceptable Entity; and

b. a current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (2001) (the "Standards"), or otherwise acceptable to the Trustees.

17. Concurrently with the submission of each draft deed or other instrument to the Trustees, ARCG II shall provide a copy of such draft deed or other instrument to the Acceptable Entity named as grantee in the deed, and a copy of the Environmental Covenant relating to such property. All such draft deeds or other instruments shall be enforceable under the laws of the State of Ohio, free and clear of liens and other encumbrances (except for encumbrances acceptable to the Trustees) , and otherwise acceptable under the United States Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255.

18. Subject to the right of ARCG II to contest, in accordance with Section XIII (Dispute Resolution) any disapproval or modification by the Trustees of any draft deed, for each draft deed submitted pursuant to Paragraph 16.a., above, ARCG II shall, within 30 days

following approval of such draft deed by the Trustees, cause the title searches of the Restoration Property or Additional Restoration Property that is the subject of the deed to be updated if requested by the Trustees, and execute and deliver to the Acceptable Entity, the approved deed along with final title evidence acceptable under the Standards for each such Restoration Property or Additional Restoration Property. ARCG II shall ensure that each such deed is properly recorded.

19. Nothing in this Consent Decree shall be construed to require ARCG II to expend more than \$1,454,711.00 in Qualified Costs for ARCG II Restoration Projects. If ARCG II is unable to acquire one or more of the Additional Restoration Properties identified by the Trustees pursuant to Paragraph 7, above, within one year after the Effective Date of this Consent Decree and ARCG II has expended less than \$1,454,711.00 in Qualified Costs upon completion of ARCG II Restoration Projects on the Restoration Properties and all of the Additional Restoration Properties acquired by ARCG II, then ARCG II shall pay to the NRDAR Fund, Ashtabula River Account within thirty (30) days of completion of all ARCG II Restoration Projects, the difference between \$1,454,711.00 and the amount of the Qualified Costs expended by ARCG II.

20. Accounting to the Trustees. ARCG II shall submit to the Trustees on a monthly basis (a) an accounting of costs incurred by ARCG II in connection with ARCG II Restoration Projects, to the extent that ARCG II believes such costs are Qualified Costs, and (b) a statement of ARCG's projected costs of completing remaining activities under all Restoration Workplans approved under this Section VI.

21. ARCG II shall notify the Trustees in writing whenever it appears that the costs identified in Paragraph 20(a) and (b), above, would exceed the limitation on Qualified Costs in

Paragraph 19, above. After receiving any such notification, the Trustees may provide ARCG II with a written Statement of Priorities for proceeding with remaining work on the ARCG II Restoration Projects. Following receipt of any such statement, ARCG II shall implement all remaining work consistent with the Statement of Priorities.

22. Completion of Required Restoration Activities. When ARCG II has satisfied all requirements under this Section VI, ARCG II shall submit to the Trustees for approval a Restoration Completion Report. The Restoration Completion Report shall include a detailed description of all activities performed by ARCG II on each Restoration Property and Additional Restoration Property acquired pursuant to this Consent Decree and shall include as-built drawings, signed and stamped by a professional engineer, for any construction undertaken pursuant to an approved Restoration Workplan. In addition, the Restoration Completion Report shall include a final statement of the total Qualified Costs incurred by ARCG II.

a. The Restoration Completion Report shall state whether ARCG II fully implemented all provisions of each approved Restoration Workplan and provide a description of any Restoration Workplan provisions not completed by ARCG II. The Restoration Completion Report shall include a statement, signed by a registered professional engineer and the ARCG II's Project Coordinator, affirming that all restoration activities undertaken by ARCG II pursuant to this Section were performed in accordance with approved Restoration Workplans and all other requirements of this Consent Decree.

b. If the Restoration Completion Report indicates that ARCG II did not fully implement all provisions of approved Restoration Workplans, the Restoration Completion Report shall include a final accounting of the Qualified Costs incurred by ARCG II, signed by

ARCG II's Project Coordinator, together with supporting documentation demonstrating that all such costs claimed by ARCG II satisfy the requirements of Paragraph 4.y, above.

c. The Restoration Completion Report shall contain the following statement, signed by ARCG II's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VII. RAILROADS RESTORATION PROJECT

23. Railroads shall implement the Railroads Restoration Project described in the approved Railroads Restoration Workplan attached hereto as Appendix G, in accordance with the terms and schedules of such Workplan. All such work shall be consistent with the Restoration Plan attached as Appendix C to this Consent Decree.

24. Within 30 days after the Effective Date of this Consent Decree, Railroads shall submit to the Trustees:

a. for approval in accordance with Section VIII (Review and Approval of Workplans and Other Submissions) a draft Environmental Covenant relating to Railroads Restoration Property; and

b. a description of all interests in such Railroads Restoration Property that would not be subject to the Environmental Covenant under Ohio Revised Code § 5301.86(A), absent a subordination agreement.

Such draft Environmental Covenant shall be consistent with and in substantially the same form as the Environmental Covenant Template set forth in Appendix E.

25. If requested by the Trustees, Railroads shall seek to negotiate subordination agreements with persons holding any interest identified pursuant to Paragraph 24.b, above, and shall incorporate any such subordination agreements in a revised draft Environmental Covenant submitted to the Trustees for approval.

26. Within 30 days after approval of such draft Environmental Covenant by the Trustees, Railroads shall execute such Environmental Covenant as approved by the Trustees and present the executed Environmental Covenant to the Trustees for signature.

27. Within 30 days after receipt of all Trustee signatures on the Environmental Covenant, Railroads shall cause the fully executed Environmental Covenant to be recorded in the office of the Ashtabula County Recorder, as provided in Ohio Revised Code § 5301.88.

28. Completion of Required Restoration Activities. When Railroads have satisfied all requirements under this Section VII, Railroads shall submit to the Trustees for approval a Restoration Completion Report. The Restoration Completion Report shall include a detailed description of all activities performed by Railroads on the Railroads Restoration Property and shall include as-built drawings, signed and stamped by a professional engineer, for all construction undertaken pursuant to the approved Railroads Restoration Project Workplan.

a. The Restoration Completion Report shall include a statement, signed by a registered professional engineer and Railroads' Project Coordinator, affirming that all restoration activities undertaken by Railroads pursuant to this Section were performed in accordance with the approved Railroads Restoration Workplan and all other requirements of this Consent Decree.

b. The Restoration Completion Report shall contain the following statement, signed by Railroads' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VIII. REVIEW AND APPROVAL OF WORKPLANS AND OTHER SUBMISSIONS

29. After review of any Workplan, draft deed or Environmental Covenant, report or other item submitted for approval pursuant to this Consent Decree, the Trustees shall: (a) approve the submission in whole or in part; (b) approve the submission upon specified conditions; (c) modify the submission to cure any deficiencies; (d) disapprove, in whole or in part, the submission, directing the submitting Party or Parties to modify the submission; or (e) any combination of the above.

30. Following approval, approval upon conditions, or modification by the Trustees of any Workplan or other submittal pursuant to the preceding Paragraph, the submitting Party or Parties shall proceed to take any action required by the Workplan, or other submittal, as approved or modified by the Trustees, subject only to any right of such Party or Parties to contest such disapproval or modification under Section XIII (Dispute Resolution).

31. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 29(d), the Party or Parties submitting the Workplan or other submission shall, within 30 days or such longer time as specified by the Trustees in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XIV, shall accrue during the 30-day period or otherwise specified period but

shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraph 33.

b. Notwithstanding the receipt of a notice of disapproval of any Workplan or other submission pursuant to Paragraph 29(d), the Party or Parties submitting such Workplan or other submission shall proceed, at the direction of the Trustees, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve the submitting Party or Parties of any liability for stipulated penalties under Section XIV (Stipulated Penalties).

32. In the event that a resubmitted Workplan or other submission, or portion thereof, is disapproved by the Trustees, the Trustees may again require the submitting Party or Parties to correct the deficiencies, in accordance with the preceding Paragraphs. Trustees also retain the right to modify or develop the resubmitted Workplan or other submission. The submitting Party or Parties shall implement any Workplan or other submission as modified or developed by the Trustees, subject only to the right of such Party or Parties to invoke the procedures set forth in Section XIII (Dispute Resolution).

33. If upon resubmission, a plan, report, or item is disapproved or modified by the Trustees due to a material defect, the submitting Party or Parties shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the submitting Party or Parties invokes the dispute resolution procedures set forth in Section XIII (Dispute Resolution) and the Trustees' action is overturned pursuant to that Section. The provisions of Section XIII (Dispute Resolution) and Section XIV (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If the Trustees'

disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XIV.

34. All Workplans and other items required to be submitted to Trustees for approval under this Consent Decree shall, upon approval or modification by the Trustees, be enforceable under this Consent Decree. In the event the Trustees approve or modify a portion of a plan, report, or other item required to be submitted to the Trustees under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

IX. PAYMENTS FOR ASSESSMENT COSTS AND TRUSTEE-SPONSORED NATURAL RESOURCE RESTORATION ACTIVITIES

35. Payments by ARCG II. Within 30 days after the Effective Date of this Consent Decree, ARCG II shall pay to the Trustees a total of \$1,027,445.70, for Assessment Costs, plus Interest on such amount accruing from June 1, 2010, and an additional \$415,000.00 for Trustee-sponsored natural resource restoration activities, including oversight and operation and maintenance of ARCG II Restoration Projects, as specified below in this Paragraph.

a. Payment to the United States. ARCG II shall pay \$1,234,285.20, plus Interest accruing from June 1, 2010 through the date of payment on the sum of the principal amounts set forth in Paragraph 35.a.(2) and (3), to the United States by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account in accordance with current EFT procedures, referencing DOJ Case Number 90-11-2-210/1. Payment shall be made in accordance with instructions provided to the ARCG II by the Financial Litigation Unit of the United States Attorney’s Office for the Northern District of Ohio following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern

Time) will be credited on the next business day. Of the total amount paid by ARCG II pursuant to this Paragraph 35.a.:

(1) \$415,000.00 shall be deposited in a segregated sub-account within the NRDAR Fund, to be managed by DOI for the joint benefit and use of the federal and state Trustees to pay for Trustee-sponsored natural resource restoration activities, including oversight and operation and maintenance of ARCG II Restoration Projects, in accordance with Section X, below.

(2) \$763,494.90, plus Interest on that amount accruing from June 1, 2010 through the date of payment, shall be deposited in the DOI NRDAR Fund, in reimbursement of DOI's Assessment Costs.

(3) \$55,790.30, plus Interest on that amount accruing from June 1, 2010 through the date of payment, shall be deposited in the NOAA Damage Assessment Restoration and Revolving Fund ("DARRF"), in reimbursement of NOAA's Assessment Costs.

b. Payment to State of Ohio. ARCG II shall pay \$208,160.50, plus Interest on that amount accruing from June 1, 2010 through the date of payment, to the State of Ohio in reimbursement of the State of Ohio's Assessment Costs. The payment shall be made in the form of an Electronic Funds Transfer to the Treasurer, State of Ohio, to be deposited into the Natural Resource Damages Fund, referencing the Ashtabula River NRD claim. A copy of the Electronic Funds Transfer transmittal shall be sent to: Steven Snyder or his successor, DERR Fiscal Officer, Ohio EPA, P.O. Box 1049, Columbus, Ohio 43216-1049; and to Assistant Attorney General

Timothy J. Kern, Environmental Enforcement Section, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215.

36. Payments by Railroads. Within 30 days after the Effective Date of this Consent Decree, Railroads shall pay to the Trustees a total of \$306,791.25 for Assessment Costs plus Interest on that amount accruing from June 1, 2010 through the date of payment, and an additional \$25,000.00 for Trustee-sponsored natural resource restoration activities, as specified below in this Paragraph.

a. Payment to the United States. Railroads shall pay \$269,635.34, plus Interest accruing from June 1, 2010 through the date of payment on the sum of the principal amounts set forth in Paragraph 36.a.(2) and (3), to the United States by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing DOJ Case Number 90-11-2-210/1. Payment shall be made in accordance with instructions provided to Railroads by the Financial Litigation Unit of the United States Attorney's Office for the Northern District of Ohio following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. Of the total amount paid by Railroads pursuant to this Paragraph 36.a.:

(1) \$25,000.00 shall be deposited in a segregated sub-account within the NRDAR Fund, to be managed by DOI for the joint benefit and use of the federal and state Trustees to pay for Trustee-sponsored natural resource restoration activities in accordance with Section X, below.

(2) \$227,976.58, plus Interest on that amount accruing from June 1, 2010 through the date of payment, shall be deposited in the DOI NRDAR Fund, in reimbursement of DOI's Assessment Costs.

(3) \$16,658.76, plus Interest on that amount accruing from June 1, 2010 through the date of payment, shall be deposited in the NOAA DARRF, in reimbursement of NOAA's Assessment Costs.

b. Payment to State of Ohio. Railroads shall pay \$62,155.91, plus Interest on that amount accruing from June 1, 2010 through the date of payment, to the State of Ohio in reimbursement of the State of Ohio's Assessment Costs. The payment shall be made in the form of an Electronic Funds Transfer to the Treasurer, State of Ohio, to be deposited into the Natural Resource Damages Fund, referencing the Ashtabula River NRD claim. A copy of the Electronic Funds Transfer transmittal shall be sent to: Steven Snyder or his successor, DERR Fiscal Officer, Ohio EPA, P.O. Box 1049, Columbus., Ohio 43216-1049; and to Assistant Attorney General Timothy J. Kern, Environmental Enforcement Section, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215.

37. Payments on behalf of Settling Federal Agencies. As soon as reasonably practicable after the Effective Date of this Consent Decree, and consistent with Paragraph 37.a and 37.b, the United States, on behalf of Settling Federal Agencies, shall pay to the Trustees a total of \$768,799.69, which payment includes Interest accruing from July 1, 2008.

a. Payment For Assessment Costs of DOI and NOAA. The United States, on behalf of Settling Federal Agencies, shall pay \$613,040.87 to the U.S. Department of Justice,

referencing DOJ Case Number 90-11-2-210/1, and in accordance with Interagency Payment System information furnished by the U.S. Department of Justice. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

Of the total amount paid on behalf of Settling Federal Agencies pursuant to this Paragraph 37a.:

(1) \$571,295.05 shall be deposited in the DOI NRDAR Fund, in reimbursement of DOI's Assessment Costs.

(2) \$41,745.82 shall be deposited in the NOAA DARRF, in reimbursement of NOAA's Assessment Costs.

The United States, including the Settling Federal Agencies, and the Settling Defendants recognize and acknowledge that the payment obligations of the Settling Federal Agencies under this Paragraph 37.a can only be paid from appropriated funds legally available for such purpose.

Nothing in this Consent Decree shall be interpreted as or constitute a commitment or requirement that any Settling Federal Agency obligate or pay funds pursuant to this Paragraph 37.a in contravention of the Anti-Deficiency Act, 31 U.S.C. §§ 1341-42 and §§ 1511-19, or any other applicable law.

b. Payment to State of Ohio. The United States, on behalf of Settling Federal Agencies, shall pay \$155,758.82 to the State of Ohio. The payment shall be made in the form of an Electronic Funds Transfer to the Treasurer, State of Ohio, to be deposited into the Natural Resource Damages Fund, referencing the Ashtabula River NRD claim. A copy of the Electronic Funds Transfer transmittal shall be sent to: Steven Snyder or his successor, DERR Fiscal Officer, Ohio EPA, P.O. Box 1049, Columbus., Ohio 43216-1049; and to Assistant Attorney General Timothy J. Kern, Environmental Enforcement Section, Ohio Attorney General's

Office, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215. The State and the Settling Federal Agencies agree that in any judicial proceeding to enforce payment of the amounts owed to the State under this Consent Decree, Settling Federal Agencies may raise as a defense their obligation to comply with the Anti-Deficiency Act, 31 U.S.C. §§ 1341-42 and §§ 1511-19, or any other applicable law. While the State disagrees that such defenses exist, the State and Settling Federal Agencies agree that it is premature at this time to raise and adjudicate the existence of such defenses.

38. Notice of Payment. Upon making payments required under this Section, the Party or Parties making the payment shall send to the following addresses written notice that payment has been made:

For notice to the United States:

Chief, Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Ref. DJ # 90-11-2-210/1

Department of the Interior
Natural Resource Damage Assessment and Restoration Program
Attn: Restoration Fund Manager
1849 C Street, NW
Mailstop 4449
Washington, DC 20240

Department of the Interior
Office of the Solicitor
Three Parkway Center, Suite 385
Pittsburgh, PA 15220

NOAA/U.S. Department of Commerce
General Counsel's Office for Natural Resources/NE
NOAA Office of General Counsel
55 Great Republic Drive
Gloucester, MA 01930

For notice to the State of Ohio:

Fiscal Officer
DERR
Ohio EPA
P.O. Box 1049
Columbus, Ohio 43216-1049
ATTN: Steven Snyder or his successor

Timothy J. Kern
Assistant Attorney General
Environmental Enforcement Section
Ohio Attorney General's Office
30 East Broad Street - 25th Floor
Columbus, Ohio 43215

39. In the event that Settling Defendants do not make any payment required by this Section IX when due, the Party or Parties responsible for such payment shall pay Interest on the unpaid balance commencing on the payment due date and accruing through the date of full payment. In the event that Settling Federal Agencies do not make any payment required under Paragraph 37 within 120 days after entry of this Consent Decree, Settling Federal Agencies shall pay Interest on the unpaid balance commencing on the 121st day after entry through the date of full payment. All payments required pursuant to this Paragraph shall be made in the same manner and directed to the same funds or accounts as specified in Paragraph 35.a and b (for payments by ARCG II), Paragraph 36.a and b (for payments by Railroads), and Paragraph 37.a and b (for payments by Settling Federal Agencies). Any payments pursuant to this Paragraph shall be in

addition to any other remedies provided by this Consent Decree for failure to make timely payments required under this Section.

X. TRUSTEE-SPONSORED NATURAL RESOURCE RESTORATION ACTIVITIES

40. All funds deposited in a segregated sub-account within the NRDAR Fund pursuant to Paragraphs 19, 35.a.(1) or 36.a.(1) shall be managed by DOI for the joint benefit and use of the Trustees to pay for natural resource restoration efforts in accordance with this Consent Decree, including but not limited to, planning, selection and implementation of any natural resource restoration activities, as well as any administrative, legal, oversight and maintenance activities undertaken by the Trustees in connection with ARCG II Restoration Projects or the Railroad Restoration Project. All such funds shall be applied toward the costs of restoration, rehabilitation, or replacement of injured natural resources, and/or acquisition of equivalent resources.

41. Restoration Planning. The Trustees have prepared a Restoration Plan describing how the funds will be used for restoration, rehabilitation, replacement or acquisition of equivalent resources. The Restoration Plan is attached hereto as Appendix C.

42. Use and Expenditure of Funds. Decisions regarding any use or expenditure of funds under this Section shall be made by the Trustees, acting through a Trustee Council. Settling Defendants and Settling Federal Agencies shall not be entitled to dispute, in this or any other forum or proceeding, any decision of the Trustees relating to use of funds or restoration efforts under this Section.

**XI. ACCESS TO RESTORATION PROPERTIES; INFORMATION
AND DOCUMENT RETENTION**

43. a. Commencing on the date of lodging of this Consent Decree, ARCG II shall provide the Plaintiffs and their representatives access at all reasonable times to the Restoration Properties upon presentation of credentials, and allow Plaintiffs and their representatives to move about, without restriction, for the purposes of conducting any activity related to this Consent Decree, including but not limited to monitoring implementation of ARCG II Restoration Projects, verifying any data or information submitted to the Plaintiffs under this Consent Decree, and assessing ARCG II's compliance with this Consent Decree.

b. Upon acquisition of any Additional Restoration Property, ARCG II shall provide the Plaintiffs and their representatives access at all reasonable times to such Additional Restoration Property, and to allow Plaintiffs and their representatives to move about such Additional Restoration Property, without restriction, for the purposes of conducting any activity related to this Consent Decree, including but not limited to monitoring implementation of ARCG II Restoration Projects, verifying any data or information submitted to the Plaintiffs under this Consent Decree, and assessing ARCG II's compliance with this Consent Decree.

44. Commencing on the date of lodging of this Consent Decree, Railroads shall provide the Plaintiffs and their representatives access at all reasonable times to the Railroads Restoration Property upon presentation of credentials, and allow Plaintiffs and their representatives to move about, without restriction, for the purposes of conducting any activity related to this Consent Decree, including but not limited to monitoring implementation of the Railroads Restoration Project, verifying any data or information submitted to the Plaintiffs under this Consent Decree, and assessing Railroads' compliance with this Consent Decree.

45. All rights of access pursuant to this Section XI shall be in addition to, and shall not limit, any access rights afforded by any law or regulation.

46. Settling Defendants shall provide to Plaintiffs, upon request, copies of all documents and information within their possession or control (or that of their contractors or agents) relating to compliance with this Consent Decree. Settling Defendants shall also make available to Plaintiffs their employees, agents, or representatives with knowledge of relevant facts concerning their compliance with this Consent Decree.

47. Until 10 years after the entry of this Consent Decree, Settling Defendants shall preserve and retain all records and documents now in their possession or control, or which come into their possession or control, that relate in any manner to: (i) the claims alleged in the Complaint; or (ii) Settling Defendants' compliance with this Consent Decree. At the conclusion of this document retention period, Settling Defendants shall notify the United States and the State at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States or the State, Settling Defendants shall deliver any such records or documents to the United States or the State.

a. ARCG II and Railroads may assert business confidentiality claims covering part or all of the documents or information submitted to the Plaintiffs under this Consent Decree, to the extent permitted by and in accordance with 40 C.F.R. Part 2 (with respect to information or documents submitted to the United States) and in accordance with applicable state law (with respect to information or documents submitted to the State). For documents or information determined to be confidential by Plaintiffs, the United States will afford the documents or information confidentiality protection as provided by 40 C.F.R. Part 2, Subpart B, and the State

will afford the documents or information confidentiality protection as provided by applicable state law. If no claim of confidentiality accompanies documents or information when they are submitted to the Plaintiffs, the public may be given access to such documents or information without further notice in accordance with 40 C.F.R. Part 2, Subpart B or applicable state law.

b. Settling Defendants may assert that certain documents and information are privileged under the attorney-client privilege or any other privilege recognized by law. If Settling Defendants assert such a privilege in lieu of providing documents, Settling Defendants shall provide the Plaintiffs with the following: (i) the title of the document; (ii) the date of the document; (iii) the name and title of the author of the document; (iv) the name and title of each addressee and recipient; (v) a description of the contents of the document; and (vi) the privilege asserted by Settling Defendants. No documents or information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

48. The United States acknowledges that each Settling Federal Agency is subject to all applicable Federal record retention laws, regulations and policies.

XII. FORCE MAJEURE

49. “Force majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the obligation. The requirement that the Settling Defendants exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring

and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. “Force Majeure” does not include financial inability to complete any requirements of this Consent Decree.

50. If any event occurs or has occurred that may delay the performance of an obligation of any Settling Defendant under this Consent Decree, whether or not caused by a force majeure event, the Party or Parties whose performance may be affected by the event shall notify orally the Trustees, within 3 days of when such Party or Parties first knew that the event might cause a delay. Within 14 days thereafter, such Party or Parties shall provide to the Trustees a written notice setting forth: an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the rationale for attributing such delay to a force majeure event if such a claim may be asserted by the Party or Parties submitting the notice; and a statement as to whether, in the opinion of the Party or Parties submitting the notice, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Party or Parties submitting such notice shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure of any Party to comply with the above requirements shall preclude such Party from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. For purposes of this Section, circumstances known, or that should have been known, by any ARCG II member, any entity controlled by any ARCG II member or any contractor retained by ARCG II for purposes of this Consent Decree, shall be deemed to be known by all ARCG II

members, and circumstances known, or that should have been known, by either of the Railroads, any entity controlled by either of the Railroads, or any contractor retained by Railroads for purposes of this Consent Decree, shall be deemed to be known by both Railroads.

51. If the Trustees agree that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by the Trustees, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If the Trustees do not agree that the delay or anticipated delay has been or will be caused by a force majeure event, the Trustees will notify the Settling Defendants in writing of their decision. If the Trustees agree that the delay is attributable to a force majeure event, the Trustees will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

52. Settling Defendants may invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution) to contest any decision of the Trustees under this Section, provided that they shall do so no later than 15 days after receipt of notice of the Trustees' decision. In any such proceeding, the Settling Defendants invoking dispute resolution shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that such Settling Defendants

complied with the requirements of Paragraphs 49 and 50, above. In any case where this burden is carried by the Party or Parties asserting the force majeure claim, the delay at issue shall be deemed not to be a violation of the affected obligation of this Consent Decree identified to Trustees and the Court.

XIII. DISPUTE RESOLUTION

53. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree; provided, however, that: nothing in this Consent Decree shall be construed to authorize any Party to dispute any action or determination of the Trustees: (a) disapproving, modifying, or conditionally approving, any provision (other than the proposed implementation schedule) in any Workplan submitted pursuant to Section VI, above; or (b) in selecting or carrying out any natural resource restoration activities or in managing or expending funds pursuant to Section X (Trustee-Sponsored Natural Resource Restoration Activities). The procedures set forth in this Section shall not apply to actions by Trustees to enforce obligations of any Settling Defendants that have not been disputed in accordance with this Section. Nor shall this Section apply to disputes between or among Settling Defendants and the Settling Federal Agencies under this Consent Decree.

54. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when the Party contesting the action or determination of the Trustees sends the Trustees a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 30 Days from the date the dispute arises, unless that period is modified by written agreement of the Parties to the dispute. If

the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the Trustees shall be considered binding unless, within 30 Days after the conclusion of the informal negotiation period, the Party contesting the action or determination of the Trustees (the “Disputing Party”) invokes formal dispute resolution procedures as set forth below.

55. Formal Dispute Resolution. The Disputing Party shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the Trustees a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting the Disputing Party’s position and any supporting documentation relied upon by the Disputing Party. The Trustees shall serve their Statement of Position within 45 Days of receipt of the Disputing Party’s Statement of Position. The Trustees’ Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the Trustees.

a. An administrative record of the dispute shall be maintained by the Trustees and shall contain all Statements of Position, including supporting documentation, submitted pursuant to this Section. Where appropriate, the Trustees may allow submission of supplemental Statements of Position by the parties to the dispute.

b. The Regional Director of FWS and the Director of Ohio EPA or their designees will jointly issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 55.a. This decision shall be binding upon the Disputing Party, subject only to the right to seek judicial review pursuant to Paragraph 56.

56. The Disputing Party may seek judicial review of the dispute by filing with the Court and serving on the Trustees, in accordance with Section XIX of this Consent Decree (Notices and Submissions), a motion requesting judicial resolution of the dispute. The motion must be filed within 10 Days of receipt of the administrative decision pursuant to Paragraph 55.b. The motion shall contain a written statement of the Disputing Party's position on the matter in dispute, including the Disputing Party's position concerning the applicable Standard of Review to be applied by the Court pursuant to Paragraph 58.a or b, below, together with any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

57. The Trustees shall respond to the Disputing Party's motion within the time period allowed by the Local Rules of this Court. The Disputing Party may file a reply memorandum, to the extent permitted by the Local Rules.

58. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 55 pertaining to the adequacy or appropriateness of implementation schedules, or any other items requiring approval by the Trustees under this Consent Decree; the adequacy of the performance of restoration activities undertaken pursuant to Sections VI and VII of this Consent Decree; and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, the Disputing Party shall have the burden of demonstrating, based on the administrative record, that the administrative resolution of the dispute by the Regional Director

FWS and the Director of Ohio EPA, or their designees, is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 55, the Disputing Party shall bear the burden of demonstrating that its position complies with this Consent Decree and better furthers the objectives of the Consent Decree.

59. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of any Settling Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 64. If the Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIV (Stipulated Penalties).

XIV. STIPULATED PENALTIES

60. Settling Defendants shall be liable to Plaintiffs for stipulated penalties in the amounts set forth below in this Paragraph for failure to comply with the requirements of this Consent Decree specified below, unless excused pursuant to Section XII (Force Majeure). “Compliance” shall include completion of activities under this Consent Decree or any work plan approved under this Consent Decree in accordance with all applicable requirements of law, this Consent Decree, any applicable Statement of Work, and any plans approved by Trustees pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

a. The following stipulated penalties shall accrue per violation per day for each failure to submit a timely or adequate Restoration Workplan pursuant to Paragraphs 8 or 9:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$1,500	31st day and beyond

b. The following stipulated penalties shall accrue per violation per day for each failure to establish and record any Environmental Covenant in accordance with Paragraph 14 or 27:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 14th day
\$2,500	15th through 30th day
\$5,000	31st day and beyond

c. The following stipulated penalties shall accrue per violation per day for each failure to implement any approved Restoration Workplan in accordance with Paragraphs 10 or 23:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$1,500	31st day and beyond

d. The following stipulated penalties shall accrue per violation per day for each failure to make any payment required pursuant to Paragraphs 35 or 36:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$1,500	31st day and beyond

61. All 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 the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section VIII (Review and Approval of Workplans and Other Submissions), during the period, if any, beginning on the 31st day after the Trustees' receipt of such submission until the date that the Trustees notify Settling Defendants of any deficiency; (2) with respect to a decision by the Regional Director of FWS and the Director of Ohio EPA or their designees under Paragraph 55.b of Section XIII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to Trustees' Statement of Position is received until the date that the Regional Director of FWS and the Director of Ohio EPA or their designees issue a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XIII (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

62. Following the Trustees' determination that Settling Defendants have failed to comply with applicable requirements of this Consent Decree, the Trustees may give such Settling

Defendants written notification of the same, describing the noncompliance, and a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether the Trustees have notified the Settling Defendants of a violation.

63. All stipulated penalties shall be due and payable within 30 days of Settling Defendants' receipt of a demand for payment of the penalties unless Settling Defendants invoke the Dispute Resolution procedures under Section XIII (Dispute Resolution). For any noncompliance referred to in Paragraph 60.a - c, above, one-half of the stipulated penalty amount due shall be paid to the United States, and one-half of the stipulated penalty amount due shall be paid to the State of Ohio as specified below in this Paragraph. All stipulated penalties pursuant to Paragraph 60.d, above, for failure to make any payments due to any Federal Trustee pursuant to Section IX shall be paid to the United States, as specified in Paragraph 63.a. All stipulated penalties pursuant to 60.d, above, for failure to make any payments to State Trustees pursuant to Section IX shall be paid to the State of Ohio as specified in Paragraph 63.b.

a. All stipulated penalties due to the United States shall be paid by certified or cashier's check made payable to the United States Treasury and sent to the United States Attorney for the Northern District of Ohio and sent to:

801 West Superior Avenue
Suite 400
Cleveland, OH 44113-1852

b. All stipulated penalties due to the State of Ohio shall be paid by certified or cashier's checks made payable to "Treasurer, State of Ohio" and sent to Martha Sexton, Paralegal, or her successor at the Office of the Attorney General of Ohio, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215.

c. Copies of the transmittal letters and checks shall be sent to the United States and to the State in the manner provided by Section XIX (Notices and Submissions).

64. Penalties shall continue to accrue as provided in Paragraph 61 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of the Trustees that is not appealed to this Court, accrued penalties determined to be owing shall be paid to the Trustees within 15 days of the agreement or the receipt of the Trustees' decision;

b. If the dispute is appealed to this Court and the Trustees prevail in whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to be owed to the Trustees within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any Party, Settling Defendants shall pay all accrued penalties determined by the District Court to be owing to the United States or the State into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to the Trustees or to Settling Defendants to the extent that they prevail.

65. If Settling Defendants fail to pay stipulated penalties when due, Plaintiffs may institute proceedings to collect the penalties, as well as Interest. Settling Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of a demand for payment made by the Plaintiffs.

66. The payment of penalties shall not alter in any way Settling Defendants' obligation to complete the performance of any tasks required under this Consent Decree.

67. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Decree or of the statutes and regulations upon which it is based, including but not limited to injunctive relief, and civil and criminal sanctions. Nor shall anything in this Consent Decree be construed as prohibiting, altering, or in any way limiting the ability of the DOI, FWS, NOAA or the State to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Decree or of the statutes and regulations upon which it is based.

68. Notwithstanding any other provision of this Section, the Plaintiffs may, in their unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XV. COVENANTS BY PLAINTIFFS

69. Except as provided in Paragraphs 72 and 73, Plaintiffs covenant not to sue the Settling Defendants for Natural Resource Damages pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607 (a)(4)(C), Section 311(f)(4) and (5) of the CWA, 33 U.S.C. §1321(f)(4) and (5), or state law. With respect to each Settling Defendant, this covenant not to sue is conditioned upon the satisfactory performance of such Settling Defendant's obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

70. Except as specifically provided in Paragraphs 72 and 74, DOI, FWS and NOAA covenant not to take administrative action against the Settling Federal Agencies for Natural Resource Damages pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607 (a)(4)(C), and Section 311(f)(4) and (5) of the CWA, 33 U.S.C. §1321(f)(4) and (5). These covenants by DOI, FWS and NOAA shall take effect upon the receipt of the payments required by Paragraph 37.a of Section IX (Payments For Assessment Costs And Trustee-Sponsored Natural Resource Restoration Activities). These covenants by DOI, FWS and NOAA are conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. DOI's, FWS' and NOAA's covenants extend only to the Settling Federal Agencies and do not extend to any other person.

71. Except as specifically provided in Paragraphs 72 and 75, the State of Ohio covenants not sue or issue administrative findings and orders against the United States for Natural Resource Damages pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607 (a)(4)(C), Section 311(f)(4) and (5) of the CWA, 33 U.S.C. §1321(f)(4) and (5), or state law. The State's covenants shall take effect upon the receipt of the payment required by Paragraph 37.b of Section IX (Payments For Assessment Costs And Trustee-Sponsored Natural Resource Restoration Activities). The State's covenants are conditioned upon the satisfactory performance by the Settling Federal Agencies of their obligations under this Consent Decree. The State's covenants extend only to the United States and do not extend to any other person.

XVI. RESERVATION OF RIGHTS BY PLAINTIFFS

72. General Reservations of Rights. The covenants set forth in Section XV (Covenants by Plaintiffs) do not pertain to any matters other than those expressly specified in

Paragraphs 69 - 71, above. The United States and the State reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendants, and DOI, FWS, NOAA and the State reserve, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies, with respect to all other matters. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve all rights against Settling Defendants, and DOI, FWS, NOAA and the State reserve all rights against Settling Federal Agencies, with respect to:

- a. claims based on a failure by any Settling Defendant or Settling Federal Agency to meet a requirement of this Consent Decree;
- b. liability for any other damages that are not within the definition of Natural Resource Damages;
- c. liability for any injury to, or destruction or loss of, Natural Resources resulting from implementation of the GLLA Project, if the habitat restoration component of the GLLA Project is not completed in accordance with the Ashtabula River Great Lakes Legacy Act Project Agreement, and the Great Lakes Legacy Act Restoration Project Construction Services Ashtabula River Area of Concern (CH2MHill September 2009);
- d. liability of any person arising from any injury to Natural Resources resulting from any release or disposal of hazardous substances by such person after the date of lodging of this Consent Decree, but not including any liability arising from further migration of previously released hazardous substances present in the environment in the Ashtabula River Area as of June 18, 2008;
- e. liability pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), and state law, to implement any response actions relating to the Ashtabula

River Area or reimburse any response costs incurred in connection with response actions relating to the Ashtabula River Area; and

f. criminal liability.

73. Special Reservations Regarding Natural Resource Damages. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve the right to institute proceedings against any Settling Defendant in this action or in a new action seeking recovery of Natural Resource Damages, including costs of damages assessments, based on: (i) conditions, including but not limited to the release of hazardous substances at or to the Ashtabula River Area, previously unknown to the Trustees, that are discovered after the date of lodging of this Consent Decree, and that cause or contribute to new or additional injuries to, losses of, or destruction of Natural Resources, or new or additional service losses (“Unknown Conditions”); or (ii) information concerning the release of hazardous substances or the resulting injuries to Natural Resources, previously unknown to the Trustees, that is received, in whole or in part, after the date of lodging of this Consent Decree and that, together with any other relevant information, indicates that there are new or additional injuries to, losses of or destruction of Natural Resources, or new or additional service losses (“New Information”). For purposes of this Paragraph, the information and conditions known to the Trustees shall include only the information and the conditions set forth in the administrative record supporting the Restoration Plan, and any additional information of which the Trustees became aware between the date of issuance of the final Restoration Plan and the date of lodging of the Consent Decree regarding conditions in the Ashtabula River Area on or before June 18, 2008 or regarding injuries, losses or destruction of Natural Resources, or the services they provide, resulting from such conditions.

74. Special Reservations By NOAA, FWS and DOI Regarding Natural Resource Damages. Notwithstanding any other provision of this Consent Decree, DOI, FWS and NOAA reserve the right to take administrative action against Settling Federal Agencies for the recovery of Natural Resource Damages, including costs of damages assessments, based on: (i) conditions, including but not limited to the release of hazardous substances at or to the Ashtabula River Area, previously unknown to the DOI, FWS and NOAA, that are discovered after the date of lodging of this Consent Decree, and that cause or contribute to new or additional injuries to, losses of, or destruction of Natural Resources, or new or additional service losses (“Unknown Conditions”); or (ii) information concerning the release of hazardous substances or the resulting injuries to Natural Resources, previously unknown to the DOI, FWS and NOAA, that is received, in whole or in part, after the date of lodging of this Consent Decree and that, together with any other relevant information, indicates that there are new or additional injuries to, losses of or destruction of Natural Resources, or new or additional service losses (“New Information”). For purposes of this Paragraph, the information and conditions known to the DOI, FWS and NOAA shall include only the information and the conditions set forth in the administrative record supporting the Restoration Plan, and any additional information of which the Trustees became aware between the date of issuance of the final Restoration Plan and the date of lodging of the Consent Decree regarding conditions in the Ashtabula River Area on or before June 18, 2008 or regarding injuries, losses or destruction of Natural Resources, or the services they provide, resulting from such conditions.

75. Special Reservations By The State Regarding Natural Resource Damages. Notwithstanding any other provision of this Consent Decree, the State reserves the right to

institute proceedings against the Settling Federal Agencies in this action or in a new action seeking recovery of Natural Resource Damages, including costs of damages assessments, based on:

(i) conditions, including but not limited to the release of hazardous substances at or to the Ashtabula River Area, previously unknown to the State, that are discovered after the date of lodging of this Consent Decree, and that cause or contribute to new or additional injuries to, losses of, or destruction of Natural Resources, or new or additional service losses (“Unknown Conditions”); or (ii) information concerning the release of hazardous substances or the resulting injuries to Natural Resources, previously unknown to the State, that is received, in whole or in part, after the date of lodging of this Consent Decree and that, together with any other relevant information, indicates that there are new or additional injuries to, losses of or destruction of Natural Resources, or new or additional service losses (“New Information”). For purposes of this Paragraph, the information and conditions known to the State shall include only the information and the conditions set forth in the administrative record supporting the Restoration Plan, and any additional information of which the Trustees became aware between the date of issuance of the final Restoration Plan and the date of lodging of the Consent Decree regarding conditions in the Ashtabula River Area on or before June 18, 2008 or regarding injuries, losses or destruction of Natural Resources, or the services they provide, resulting from such conditions.

**XVII. COVENANTS BY SETTLING DEFENDANTS
AND SETTLING FEDERAL AGENCIES**

76. Covenants Not to Sue By Settling Defendants. Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States or the State, or their contractors or employees, with respect to Natural Resource Damages, including payments made under Section IX of this Consent Decree, or any liability for costs

incurred in connection with any response actions undertaken in the Ashtabula River Area pursuant to the Great Lakes Legacy Act, 33 U.S.C. § 1268, including but not limited to: (i) any direct or indirect claims for reimbursement of any payment for Natural Resource Damages based on Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613 or (ii) any claim against the United States or the State pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, relating to Natural Resource Damages or any response actions undertaken in the Ashtabula River Area pursuant to the Great Lakes Legacy Act, 33 U.S.C. § 1268. These covenants not to sue shall not apply in the event that the United States or the State brings a cause of action against Settling Defendants pursuant to the reservations set forth in Paragraphs 72 and 73, above, but only to the same extent and for the same matters, transactions, or occurrences as are raised in the claims asserted by the United States or the State pursuant to such reservations.

77. Covenant by Settling Federal Agencies. Settling Federal Agencies hereby agree not to assert any direct or indirect claim for reimbursement of any payment for Natural Resource Damages based on Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613; and covenant not to sue the Settling Defendants or the State under Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, with respect to Natural Resource Damages, including payments made under Section IX of this Consent Decree, or any liability for costs incurred in connection with any response actions undertaken in the Ashtabula River Area pursuant to the Great Lakes Legacy Act, 33 U.S.C. § 1268. These covenants shall not apply in the event that DOI, FWS, and/or NOAA take administrative action against Settling Federal Agencies pursuant to the reservations set forth in Paragraphs 72 or 74, above, but only to the same extent and for the same matters, transactions, or occurrences as are raised in the administrative actions taken by DOI, FWS, and/or NOAA

pursuant to such reservations. Nor shall these covenants by Settling Federal Agencies apply in the event the State brings a claim and/or administrative action against the Settling Federal Agencies pursuant to the reservations set forth in Paragraphs 72 or 75, above, but only to the same extent and for the same matters, transactions, or occurrences as are raised in the claims or actions brought by the State pursuant to such reservations.

78. a. Reservations of Rights By Settling Defendants

(1) Except as provided in Paragraph 76, above, Settling Defendants reserve the right to assert and maintain claims against any person for recovery of any costs incurred in connection with any response actions undertaken in the Ashtabula River Area pursuant to the Great Lakes Legacy Act, 33 U.S. C. § 1268, and the Water Resources Development Act, 33 U.S.C. § 1272.

(2) Railroads reserve the right to assert and maintain any and all claims they may have relating to Natural Resource Damages, including contribution claims, against the following persons:

American Premier Underwriters, Inc.
Triad Salvage, Inc.
Acme Scrap Iron and Metal Company
Columbia Iron and Metal Company

b. Waiver of Certain Claims Against Other Persons. Except as provided in Paragraph 78.a.(2), above, each Settling Defendant agrees not to assert any claim and to waive all claims or causes of action that it may have against any person not a party to this Consent Decree for all matters relating to Natural Resource Damages, including for contribution; provided, however, that each Settling Defendant reserves the right to assert and pursue all claims or causes of action (including contribution claims) against any such person: (1) relating to any liability

with respect to claims asserted by the United States, DOI, NOAA, or the State pursuant to reservations of rights in Paragraphs 72 or 73, but only to the same extent and for the same matters, transactions, or occurrences as are raised in the claims of the United States, DOI, NOAA, or the State pursuant to such reservations of rights; and (2) relating to any Natural Resource Damages in the event such person first asserts, and for so long as such person pursues, any claim or cause of action against such Settling Defendant relating to Natural Resource Damages.

XVIII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

79. The Parties agree, and by entering this Consent Decree this Court finds, that each Settling Defendant and Settling Federal Agency is entitled, as of the Effective Date of the Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), or other federal law, for matters addressed in this Consent Decree. The “matters addressed” in this Consent Decree are Natural Resource Damages, as defined herein.

80. Each Settling Defendant agrees that with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify, in writing, the United States and the State within 10 days of service of any complaint on them. In addition, each Settling Defendant shall notify the United States and the State within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a Court setting a case for trial.

81. Waiver of Claim-Splitting Defenses.

a. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, or Natural Resource Damages or other relief

related to the Ashtabula River Area, the Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by Plaintiffs set forth in Section XV.

b. In any subsequent administrative or judicial proceeding initiated by the State for injunctive relief, or Natural Resource Damages or other relief related to the Ashtabula River Area, the Settling Federal Agencies shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by Plaintiffs set forth in Section XV.

XIX. NOTICES AND SUBMISSIONS

82. Whenever, under the terms of this Consent Decree, written notice is required to be given or a plan, report or other submission is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree.

As to the United States:

For the Department of Justice:

Chief, Environmental Enforcement Section (DJ #90-11-2-210/1)
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

For DOI:

Office of the Solicitor
U.S. Department of the Interior
Three Parkway Center, Suite 385
Pittsburgh, PA 15220

For NOAA:

General Counsel's Office for Natural Resources/NE
NOAA Office of General Counsel
55 Great Republic Drive
Gloucester, MA 01930

For the Settling Federal Agencies:

Chief, Environmental Defense Section (DJ # 90-11-6-16703)
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, DC 20026-3986

As to the State:

For the Ohio Attorney General's Office:

Timothy J. Kern
Assistant Attorney General
Environmental Enforcement Section
Ohio Attorney General's Office
30 East Broad Street - 25th Floor
Columbus, Ohio 43215

For Ohio EPA:

Ohio EPA
Division of Emergency and Remedial Response
Northeast District Office
2110 Aurora Road
Twinsburg, Ohio 44087
ATTN: Regan Williams

As to ARCG II:

Joseph A. Heimbuch
de maximis inc.
2975 Bee Ridge Road
Suite C
Sarasota, FL 34239

Joseph D. Lonardo
Vorys, Sater, Seymour & Pease, LLP
1909 K Street, N.W. , 9th Floor
Washington, D.C. 20006-1152

Ralph E. Cascarilla
Walter & Haverfield, LLP
1301 East Ninth Street
Cleveland, Ohio 44114-1821

As to Railroads:

For Norfolk Southern Railway Company and Norfolk Southern Corporation:

Karin Stamy
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Russ McDaniel
Norfolk Southern Corporation
1200 Peachtree Street, NE Box 13
Atlanta, GA 30309

For Consolidated Rail Corporation and Conrail Inc.:

Jonathan M. Broder
Consolidated Rail Corporation
1717 Arch Street, 32nd Floor
Philadelphia, PA 19103

83. Certification of Notices and Submissions. All notices and submissions required by this Consent Decree to be submitted by or on behalf of any Settling Defendant(s) shall be certified by a responsible official or designated representative of the respective Settling Defendant(s), and accompanied by the following certification:

I certify that the information contained in or accompanying this submission is true, accurate and complete. This certification is based on my personal preparation, review, or analysis of the submission, and/or supervision of persons who, acting on my direct instructions, made the verification that the submitted information is true, accurate and complete.

XX. TERMINATION

84. Request for Termination.

a. ARCG II may serve upon Plaintiffs a Request for Termination of Consent Decree With Respect to ARCG II, together with supporting information, once: (1) ARCG II has paid all amounts due pursuant to Paragraphs 19, 35 and 39, and all accrued stipulated penalties as

required by this Consent Decree; (2) ARCG II has completed all requirements of Section VI (ARCG II Restoration Projects), including the establishment of Environmental Covenants on all Restoration Properties and Additional Restoration Properties acquired pursuant to this Consent Decree; and (3) Trustees have approved the Restoration Completion Report submitted pursuant to Section VI.

b. Railroads may serve upon Plaintiffs a Request for Termination of Consent Decree With Respect to Railroads, together with supporting information, once: (1) Railroads have paid all amounts due pursuant to Paragraphs 36 and 39, and all accrued stipulated penalties as required by this Consent Decree; (2) Railroads have completed all requirements of Section VII (Railroads Restoration Project), including the establishment of an Environmental Covenant; and (3) Trustees have approved the Restoration Completion Report submitted pursuant to Section VII.

85. Following receipt by Plaintiffs of any Request for Termination pursuant to the preceding Paragraph, Plaintiffs may confer informally with the requesting Party to resolve any question or disagreement concerning whether such Party has satisfied the applicable criteria under Paragraph 84 for termination of this Consent Decree. If Plaintiffs agree that the applicable criteria have been satisfied by the requesting Party, Plaintiffs and the requesting Party shall submit for the Court's approval a joint stipulation terminating the Decree with respect to the requesting Party.

86. If Plaintiffs do not agree that the requesting Party has satisfied the applicable criteria under Paragraph 84 for termination of this Consent Decree, the requesting Party may invoke Dispute Resolution under Section XIII of this Decree. However, the requesting Party

shall not seek dispute resolution of any dispute regarding termination, under Paragraph 55 of Section XIII (Dispute Resolution), until 60 days after service of its Request for Termination.

87. The provisions set forth in Paragraph 47 and in Sections XV (Covenants by Plaintiffs), XVI (Reservation of Rights by Plaintiffs), XVII (Covenants by Settling Defendants and Settling Federal Agencies), and XVIII (Effect of Settlement/Contribution Protection) will remain enforceable notwithstanding termination of this Consent Decree.

XXI. PUBLIC COMMENT

88. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days, for public notice and comment in accordance with the provisions of 28 C.F.R. § 50.7. The United States and the State reserve the right to withdraw or withhold their consent if the comments received disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate.

XXII. EFFECTIVE DATE AND RETENTION OF JURISDICTION

89. This Consent Decree shall take effect upon entry by the Court; provided, however, that Settling Defendants shall be bound upon the lodging of this Consent Decree to comply with obligations of Settling Defendants specified in this Consent Decree as accruing upon lodging.

90. The Court shall retain jurisdiction to modify and enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

XXIII. APPENDICES

91. The following Appendices are attached to and incorporated into this Consent

Decree:

Appendix A	Map of the Ashtabula River Area
Appendix B	List of Restoration Properties
Appendix C	Natural Resource Restoration Plan and Environmental Assessment for the Ashtabula River and Harbor Site
Appendix D	Scope of Work for ARCG II Restoration Workplans
Appendix E	Environmental Covenant Template
Appendix F	Trustee Memorandum of Understanding (MOU)
Appendix G	Railroads Restoration Workplan

XXIV. CONSENT DECREE MODIFICATIONS

92. Any material modification of this Consent Decree shall be made by agreement of the Parties to this Consent Decree and in writing, and shall not take effect unless approved by the Court. Any non-material modification of this Decree shall be made by agreement of the Parties to this Consent Decree and in writing, and shall not take effect until filed with the Court. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this Consent Decree.

93. The provisions of this Consent Decree are not severable. The Parties' consent hereto is conditioned upon the entry of the Consent Decree in its entirety without modification, addition, or deletion except as agreed to by the Parties.

94. Unanticipated or increased costs or expenses associated with the implementation of actions called for by this Consent Decree and economic hardship or changed financial circumstances shall not serve as a basis for modifications of this Consent Decree.

XXV. SIGNATORIES/SERVICE

95. The undersigned representatives of the Settling Defendants and the State, and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice each 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 such Party to this document.

96. Settling Defendants hereby agree not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States or the State has notified Settling Defendants in writing that they no longer support entry of the Consent Decree.

97. Settling Defendants shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on their behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to service of a summons.

XXVI. FINAL JUDGMENT

98. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, the State, and the Settling Defendants.

SO ORDERED THIS _____ DAY OF _____, _____.

United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR THE UNITED STATES OF AMERICA

Date: 1/31/12

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

Date: 2/1/12

STEVEN J. WILLEY (Ohio 0025361)
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

Date: 3/30/12

DANIEL DERTKE
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

UVGXGP 'F GVVGNDCJ
United States Attorney
Northern District of Ohio

Date: _____

s/ Steven Paffilas
STEVEN PAFFILAS
Assistant United States Attorney
Northern District of Ohio
801 W. Superior Ave., Suite 400
Cleveland, Ohio 44113
(216) 622-3698

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR THE STATE OF OHIO

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

Date: MARCH 30, 2012

Timothy J. Kern *TJ*
Assistant Attorney General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT CABOT CORPORATION

Date: 7/22/2010

(

Signature

Typed Name: Brian A. Berube
Title: Vice President & General Counsel
Address: Cabot Corporation
Two Seaport Lane, Suite 1300
Boston, MA 02210

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: Gerard A. Caron
Title: Counsel
Address: Cabot Corporation
Two Seaport Lane, Suite 1300
Boston, MA 02210

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT DETREX CORPORATION

Date: 7-20-10

Signature

Typed Name: ROBERT M. CURRIE

Title: VICE PRESIDENT, GENERAL COUNSEL & SECRETARY

Address: 24901 NORTHWESTERN HIGHWAY, #410

SOUTHFIELD, MI 48075

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: _____

Title: _____

Address: _____

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT ELKEM METALS ~~COMPANY~~
~~INC~~ COMPANY - ASHTABULA LP

Date: 7/27/10

Signature

Typed Name: Mark Nilsen

Title: President

Address: Airport Office Park, Building 2
400 Rouser Road
Moon Township, PA 15108

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: _____

Title: _____

Address: _____

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY

Date: 8-5-10


Signature

Typed Name: Jacqueline S. Cooper

Title: Assistant Corporate Secretary

Address: 76 S. Main Street

Akron, OH 44308

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: CT Corporation System

Title: _____

Address: 1300 East Ninth St., Suite 1010

Cleveland, OH 44114

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT GENCORP, INC.

Date: 8/5/11

Signature 

Typed Name: Chris W. Conley

Title: V.P., Environmental Health & Safety

Address: GenCorp Aerojet

P.O. Box 13222

Sacramento, CA 95813-6000

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: David Rymph

Title: Director, Environmental Remediation

Address: 820 Starkweather

Plymouth, MI 48170

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT MALLINCKRODT, LLC

Date: 2/21/10

Signature

[Handwritten Signature]
al d
mvr

Typed Name: Patricia H. Duft

Title: Vice President

Address: 675 McDonnell Blvd

Hazelwood, MO 63042

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: Gayle Hoopes

Title: Senior Environmental Health and Safety Counsel

Address: 675 McDonnell Blvd

Hazelwood, MO 63042

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT MILLENNIUM INORGANIC CHEMICALS, INC.

Date: 7-26-10

Signature

Typed Name: Scott Strayer

Title: Site Director - Ashtabula Complex

Address: 2900 Middle Road

Ashtabula Ohio 44004

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: CT Corporation

Title: _____

Address: 351 West Camden Street

Baltimore, Md. 21201

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT OLIN CORPORATION

Date: 7/30/10

Signature

Typed Name: Curtis M Richards

Title: V.P. Environment, Health & Safety

Address: Olin Corporation

3855 North Ocoee St, Suite 200

Cleveland, TN 37312

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: George H Pain

Title: V.P. General Counsel & Secretary

Address: Olin Corporation

190 Carondelet Plaza, Suite 1530

Clayton, MO 63105

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT RMI TITANIUM COMPANY,
INC.

Date: 8/5/2010

Signature

Typed Name: Rick Mason

Title: Director, Safety & Environmental

Address: RMI TITANIUM COMPANY, INC.

1000 Warren Avenue

Niles, OH 44446

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: _____

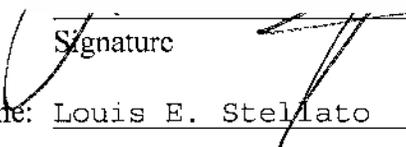
Title: _____

Address: _____

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT THE SHERWIN-WILLIAMS COMPANY

Date: July 21, 2010


Signature

Typed Name: Louis E. Stellato

Title: Senior Vice President, General Counsel & Secretary

Address: 101 W. Prospect Avenue

Cleveland, OHIO 44115-1075

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: Allen J. Danzig

Title: Associate General Counsel – Environmental

Address: 101 W. Prospect Avenue

Cleveland, OHIO 44115-1075

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT UNION CARBIDE CORPORATION

Date: Aug. 9, 2010

Signature



Typed Name: Margaret Lattin Bazany

Title: Authorized Representative

Address: 100 Independence Mall West
Philadelphia, PA 19106

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: CT Corporation

Title: _____

Address: 1300 E. 9th Street
Cleveland, OH 44114
216-621-4270

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT CBS OPERATIONS, INC.

Date: August 2, 2010

Signature

Typed Name: Eric J. Sobczak

Title: Vice President and Assistant Secretary

Address: 20 Stanwix Street, 10th Floor

Pittsburgh, PA 15222

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: _____

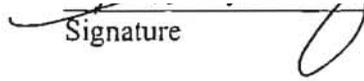
Title: _____

Address: _____

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT NORFOLK SOUTHERN CORPORATION

Date: 8/27/2010


Signature

Typed Name: David F. Julian

Title: Vice President, Safety & Environmental

Address: 1200 Peachtree St. NE

Box 73

Atlanta, GA 30309

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: Jeffrey H. Burton

Title: General Counsel - Operations

Address: Three Commercial Place

Norfolk, VA 23510

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT CONRAIL, INC.

Date: August 16, 2010

Signature

Typed Name: Jonathan M. Broder
 Title: Vice President-Corporate Development & Chief Legal Officer
 Address: 1717 Arch Street
32nd Floor
Philadelphia, PA 19103

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: Jonathan M. Broder
 Title: Vice President-Corporate Development & Chief Legal Officer
 Address: 1717 Arch Street
32nd Floor
Philadelphia, PA 19103

THE UNDERSIGNED PARTY enters into this Consent Decree Regarding Ashtabula River Area Natural Resource Damages:

FOR DEFENDANT CONSOLIDATED RAIL CORPORATION

Date: August 16, 2010

Signature 

Typed Name: Jonathan M. Broder
Vice President-Corporate Development &
Title: Chief Legal Officer
Address: 1717 Arch Street
32nd Floor
Philadelphia, PA 19103

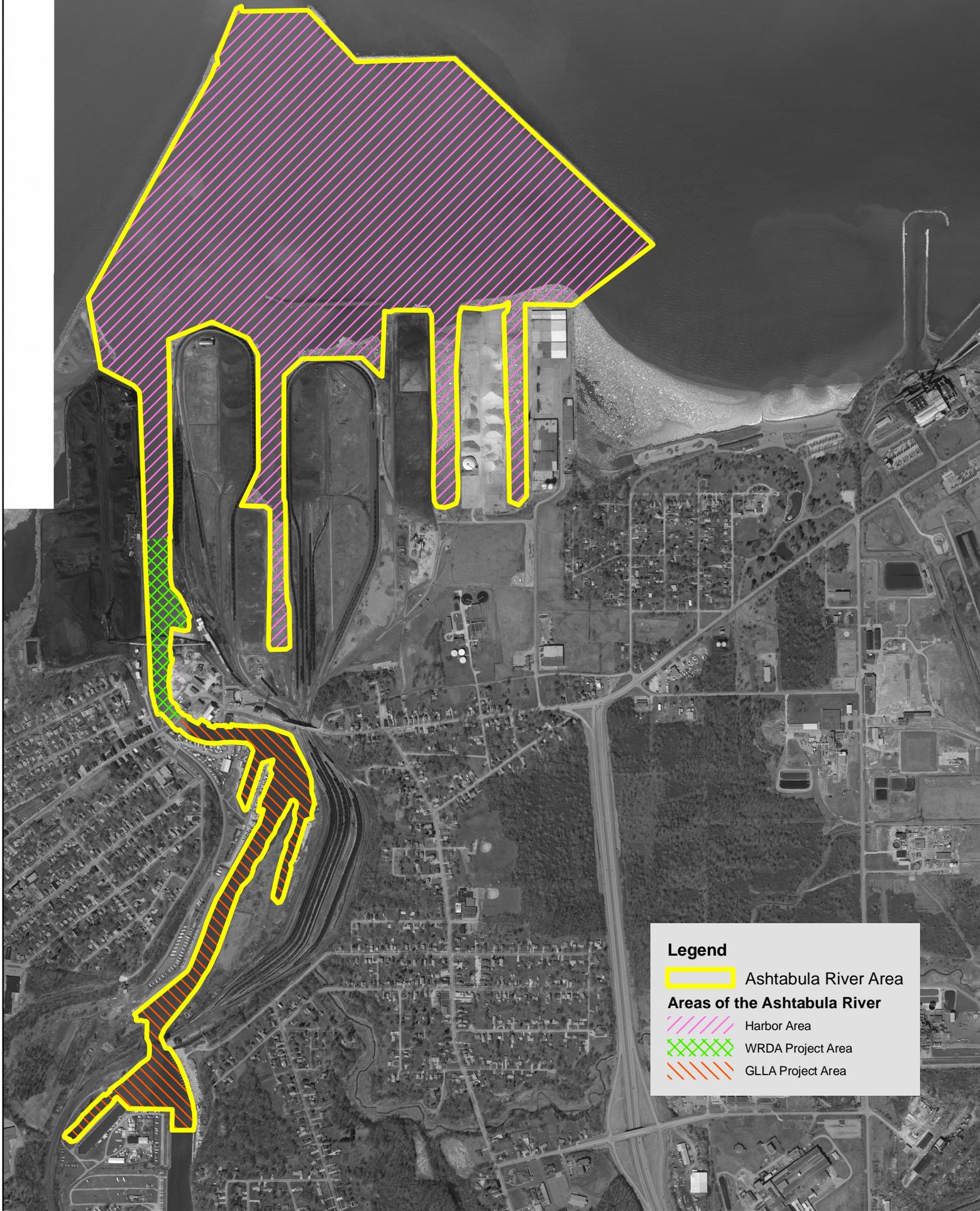
Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Typed Name: Jonathan M. Broder
Vice President-Corporate Development &
Title: Chief Legal Officer
Address: 1717 Arch Street
32nd Floor
Philadelphia, PA 19103

Appendix A

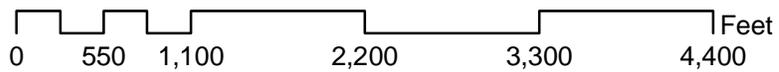
Map of the Ashtabula River Area

Ashtabula River Area



Legend

-  Ashtabula River Area
- Areas of the Ashtabula River**
-  Harbor Area
-  WRDA Project Area
-  GLLA Project Area



APPENDIX B

List of Restoration Properties

1. Richard and Eva Caylor Property, Diane Lane off E. South Ridge Road, Ashtabula Township (Parcel No. 03-008-00-024-00) and Plymouth Township (Parcel No. 42-001-00-013-00), Ashtabula County, Ohio.
2. Mario and Patricia Guarracino Property, Harmon Hill Road, Ashtabula Township, Ashtabula County, Ohio (Parcel No. 03-015-00-019-00).
3. Ancillary Estate of Walter Kightlinger and Katherine Kightlinger Trust Property, State Line Road, Richmond Township, Ashtabula County, Ohio (Parcel No. 45-001-00-002-00).
4. Robert and Lallita Bush Property, 5260 Arbor Drive, Richmond Township, Ashtabula County, Ohio (Parcel No. 27-023-00-016-15).
5. Allen and Alice Shiner Properties, State Line Road, Richmond Township, Ashtabula County, Ohio (Parcel Nos. 45-001-00-003-00 and 45-001-003-01).
6. Ashtabula Township Park Commission [former CDM] Property, East 24th Street, City of Ashtabula, Ashtabula County, Ohio (Parcel No. 05-314-00-002-00).

Appendix C

Natural Resource Restoration Plan & Environmental Assessment for the Ashtabula River and Harbor Site

**Final Natural Resource Restoration Plan
&
Environmental Assessment
for the
Ashtabula River and Harbor Site**

September 14, 2009

Prepared by:

**U.S. Fish and Wildlife Service, Region 3
Ecological Services
6950 Americana Parkway, Suite H
Reynoldsburg, OH 43068**

and

**Ohio EPA
Division of Emergency & Remedial Response
Northeast District Office
2110 East Aurora Road
Twinsburg, OH 44087**



TRUSTEES: State of Ohio
Ohio Environmental Protection Agency
Department of the Interior
U.S. Fish and Wildlife Service

LEGAL AUTHORITY: Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (as amended), 42 U.S.C. § 9601, *et seq.*

am Federal Water Pollution Control Act (Clean Water Act) (as amended), 33 U.S.C. § 1251, *et seq.*

Natural Resource Damage Assessment, 43 C.F.R. Part 11

National Environmental Policy Act, 42 U.S.C. §§4321-4347

RESPONSIBLE
FEDERAL AGENCIES: Region 3, U.S. Fish and Wildlife Service, lead agency
National Oceanic and Atmospheric Administration

RESPONSIBLE
STATE AGENCIES: Ohio Environmental Protection Agency, lead agency
Ohio Department of Natural Resources

CONTACT: David DeVault
NRDA Case Manager
U.S. Fish and Wildlife Service
Fort Snelling, MN 55111
612-713-5340

Regan Williams
Site Coordinator
Ohio EPA Northeast District Office
Twinsburg, OH 44087
33
Re

DATE: September 14, 2009

TABLE OF CONTENTS

SECTION 1 INTRODUCTION AND SUMMARY	5
SECTION 2 PURPOSE AND NEED FOR RESTORATION	6
2.1 The Ashtabula River and Harbor Site – Summary of Release History	6
2.2 Natural Resource Injuries	6
2.3 Authority and Legal Requirements	7
2.4 Overview of Damage Determination	8
SECTION 3 RESTORATION ALTERNATIVES	9
3.1 Alternative A: No Action	9
3.2 Alternative B: Natural Resource Based Restoration (Preferred Alternative)	9
3.2.1 Wetland, Flood Plain, Riparian and Associated Upland Habitat Preservation, Reestablishment or Enhancement Projects	10
3.2.2 Fishery Resource Enhancement Projects	12
3.3 Alternative C: Augmentation of Human Use Related Natural Resource Services in the Ashtabula Watershed and Adjacent Lake Erie	12
3.3.1 Breakwall Lighthouse and Projects that Provide Fishing Access to the Ashtabula River and Harbor, and Lake Erie	13
3.3.2 Interpretive Educational Center	13
3.4 Alternatives B and C: Criteria and Priorities for Restoration Project Categories	13
3.4.1 Technical Feasibility	13
3.4.2 Benefit Scope	13
3.4.3 Quantifiable Benefits	14
3.4.4 Potential Impacts	14
3.4.5 Other Project Support	14
3.4.6 Voluntary Land Acquisition/Easements	14
3.4.7 Tribal Cultural Resources	14
3.5 Preferred Alternative	15
3.6 Summary of Alternative Actions	15
SECTION 4 AFFECTED ENVIRONMENT	15
4.1 Physical Characteristics	16
4.2 Biological Environment	16
4.2.1 Habitat/Vegetation	16
4.2.2 Listed, Proposed, and Candidate Species	16
4.2.3 Other Fish and Wildlife Species	18
4.3 Land Use	19
4.4 Cultural Resources	20
4.5 Local Socioeconomic Conditions	20

SECTION 5 ENVIRONMENTAL CONSEQUENCES	20
5.1 Alternative A: No Action	20
5.1.1 Habitat Impacts	20
5.1.2 Biological Impacts	20
5.1.3 Listed, Proposed, and Candidate Species	20
5.1.4 Cultural Resources	20
5.1.5 Environmental Justice	21
5.1.6 Socioeconomic Impacts	21
5.1.7 Cumulative Impacts	21
5.2 Alternative B: Natural Resource Based Restoration (Preferred Alternative)	21
5.2.1 Habitat Impacts	21
5.2.2 Biological Impacts	22
5.2.3 Listed, Proposed, and Candidate Species	22
5.2.4 Cultural Resources	23
5.2.5 Environmental Justice	23
5.2.6 Socioeconomic Impacts	24
5.2.7 Elements Common to All Impacts	24
5.2.8 Cumulative Impacts	24
5.3 Alternative C: Augmentation of Human Use Related Natural Resource Services in the Ashtabula Watershed and Adjacent Lake Erie	24
5.3.1 Habitat Impacts	25
5.3.2 Biological Impacts	25
5.3.3 Listed, Proposed, and Candidate Species	25
5.3.4 Cultural Resources	25
5.3.5 Environmental Justice	25
5.3.6 Socioeconomic Impacts	25
5.4 Summary of Environmental Consequences for Each Alternative	26
SECTION 6 CONSULTATION AND COORDINATION WITH THE PUBLIC AND OTHERS	28
6.1 National Historic Preservation Act Compliance	26
6.2 Endangered Species Act Compliance	27
6.3 Public Participation	27
SECTION 7 PUBLIC COMMENT ON DRAFT RESTORATION PLAN & ENVIRONMENTAL ASSESSMENT	27
SECTION 8 AUTHORS AND REVIEWERS	40
SECTION 9 REFERENCES CITED	41
APPENDIX A: USFWS Intra-Service Section 7 Biological Evaluation Form	42
APPENDIX B: Aerial Photos of Ashtabula 1938 and 1994	43
APPENDIX C1 and C2: Public Comments and Transcript of April 22, 2008 Public Meeting	44

SECTION 1

INTRODUCTION AND SUMMARY

This Final Restoration Plan and Environmental Assessment (RP/EA) has been prepared by State and Federal natural resource Trustees to address natural resources injured and ecological services lost due to releases of hazardous substances at the Ashtabula River and Harbor Site (the Site).

The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.* [CERCLA, or more commonly known as the federal “Superfund” law) and the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.* (more commonly known as the Clean Water Act or (CWA)] authorize States, Indian Tribes, and certain Federal agencies that have authority to manage or control natural resources, to act as “Trustees” on behalf of the public, to restore, rehabilitate, replace, and/or acquire natural resources equivalent to those injured by hazardous substance releases. The Department of the Interior’s Natural Resource Damage Assessments (NRDA) regulations are set forth at 43 C.F.R Part 11.

The State of Ohio, represented by the Ohio Environmental Protection Agency (Ohio EPA) and the United States Department of the Interior (DOI), represented by the United States Fish and Wildlife Service (USFWS) (collectively, referred to as the Trustee Council) have worked together, in a cooperative process, with Trustee Advisors¹ to determine what is necessary to address natural resource injuries caused by past releases of polychlorinated biphenyls (PCBs) and other hazardous substances at the Site.

The State of Ohio and the United States are considering entering into a negotiated settlement with the Potentially Responsible Parties (PRPs) in which the PRPs would implement various projects to restore, replace, rehabilitate and/or acquire the equivalent of the natural resources injured at the Site, and/or the services those resources provide. This RP/EA is directed solely at the identification of restoration projects intended to compensate the public for injuries to natural resources at the Ashtabula River and Harbor Site². The Fields Brook portion of the Site was settled separately and the “Final Natural Resource Restoration Plan & Environmental Assessment for the Fields Brook Superfund Site” was released in July 2004.

In summary, the purpose of this Final RP is to present the Trustees Preferred Alternative to accomplish the goal of restoring, rehabilitating, replacing and/or acquiring the equivalent of those natural resources, and the services those resources provide that have been injured in the Ashtabula River and Harbor. Public comments are being sought on this Final RP/EA and will be considered and incorporated in the Final RP/EA as appropriate.

¹ The Trustee Council Advisors, per the 1998 Fields Brook Memorandum of Understanding (which includes the Ashtabula River and Harbor), include the United States Department of Justice; the United States Department of the Interior Solicitor’s Office; the United States Department of Commerce, represented by the National Oceanic and Atmospheric Administration; the United States Environmental Protection Agency; the United States Coast Guard; the Ohio Attorney General; and, the Ohio Department of Natural Resources (ODNR).

² The Site is defined as the Ashtabula River from the Upper Turning Basin to the Harbor Mouth.

SECTION 2

PURPOSE AND NEED FOR RESTORATION

2.1 The Ashtabula River and Harbor Site – Summary of Release History

The Ashtabula River is located in northeast Ohio, flowing in a northwesterly direction to its confluence with Lake Erie at the City of Ashtabula, Ohio. The drainage basin covers approximately 355 km². Tributaries include Fields Brook, Hubbard Run, Strongs Brook, and Ashtabula Creek. The City of Ashtabula, with a population of 20,962³, is the only significant urban center in the watershed. The rest of the drainage basin is primarily rural and agricultural. There is concentrated industrial development around Fields Brook and to the east of the River mouth. The Ashtabula Harbor, located at the mouth, is a significant Great Lakes Harbor. Commodities such as limestone, iron, coal and other bulk commodities regularly transit the Harbor. The Ashtabula River, downstream of Fields Brook, is heavily contaminated with hazardous substances including PCBs, polycyclic aromatic hydrocarbons (PAHs) and heavy metals. Sources include industrial facilities located along Fields Brook, as well as historical ship building and scrapping activities, spills and accidents at adjacent rail yards, and activities associated with bulk cargo shipping.

Fields Brook, the source of much of the contamination in the Ashtabula River, is on the National Priorities List (NPL) of uncontrolled hazardous waste sites (Superfund) and is being remediated under that authority. Fields Brook is a small tributary entering the Ashtabula River from the east at approximately river mile 1.8. Manufacturing along Fields Brook, ranging from metal fabrication to chemical production, has occurred since the early 1940s. The decades of manufacturing activity and waste management practices at industrial facilities resulted in the discharge or release of a variety of hazardous substances to Fields Brook, which have migrated downstream, contaminating the Ashtabula River and Harbor Site.

In 1994, as an alternative to the impending designation of the Ashtabula River as an operable unit of the Fields Brook Superfund Site, the Ashtabula River Partnership (Partnership) was formed to facilitate a voluntary cleanup. The Partnership is comprised of more than 50 public and private “partners.” Public Partners include the U.S. Army Corps of Engineers (USACE), the U.S. Environmental Protection Agency (U.S. EPA), the USFWS, and Ohio EPA. Private Partners include local industries, several of which have been named PRPs at the Site.

The contaminated portion of the Ashtabula River and Harbor is being remediated using funds provided by some of the RPs at the Fields Brook Superfund Site, the U.S. EPA (Great Lakes Legacy Act), Ohio EPA, and the USACE. Remedial dredging is underway and completion is expected in 2008.

2.2 Natural Resource Injuries

Injuries to surface water resources, fishery resources, and avian resources have occurred. An estimated 511 acres of the Ashtabula River and Harbor have been contaminated by hazardous substances.

³ Population is based on 2000 census data.

Toxic contaminants have wide ranging effects on aquatic and terrestrial life. Acute (short term) effects may include the death of birds, fish and other animals, and death or low growth rate in plants. Chronic (long term) effects on aquatic life may include shortened lifespan, reproductive problems, lower fertility, and changes in appearance or behavior. Many hazardous substances, including PCBs, are categorized as persistent bioaccumulative toxics (PBTs). They degrade very slowly in the environment, accumulate in living things, and magnify as they move up the food chain. General information on potential effects of the hazardous substances detected can be found in the Agency for Toxic Substances and Disease Registry (ATSDR) fact sheets (www.atsdr.cdc.gov) and the U.S. EPA ECOTOX database (www.epa.gov/ecotox).

Reports on specific injuries at the Site can be found at <http://www.fws.gov/midwest/AshtabulaNRDA/>. Additional information on surface water resources injured can be found in Ohio EPA's 2006 biological study of the lower Ashtabula River at http://www.epa.state.oh.us/dsw/document_index/psdindx.html.

2.3 Authority and Legal Requirements

This Final RP/EA has been prepared jointly by Ohio EPA and the USFWS. Each of these Agencies is a designated natural resources Trustee under Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section 311 of the CWA, 33 U.S.C. § 1321, and other applicable law, including Subpart G of the National Contingency Plan (NCP), 40 C.F.R. §§ 300.600-300.615. As a Trustee, each Agency is authorized to act on behalf of the public to assess natural resource injuries and recover damages for injuries to natural resources and losses of natural resource services attributed to releases of hazardous substances. The Federal Authorized Official (AO) is the DOI official delegated the authority to act on behalf of the Secretary of the Department of the Interior to conduct a natural resource damage assessment and restoration (NRDAR). The AO is the Region 3 Regional Director for the U.S. Fish and Wildlife Service, and represents the interests of the Department, including all affected Bureaus. In accordance with 42 U.S.C. § 9607(f)(2)(B), the Director of Ohio EPA has been designated the natural resource Trustee by the Governor of Ohio pursuant to letter dated July 20, 2007.

The purpose of the EA is to consider alternative actions to restore, rehabilitate, replace, and/or acquire the equivalent of any natural resources injured and natural resource services lost as a result of releases of PCBs and other hazardous substances into the Ashtabula River and Harbor Site, pursuant to applicable State and Federal laws and regulations. This document will also serve as the RP for implementing the selected Alternative as required under the NRDA regulations.

The Alternative selected in the RP must be consistent with statutory mandates and regulatory procedures that specify that recovered damages are used to undertake feasible, safe, and cost-effective projects that address injured natural resources, consider actual and anticipated conditions, have a reasonable likelihood of success, and are consistent with applicable laws and policies.

2.4 Overview of Damage Determination

DOI has adopted regulations under CERCLA and the CWA establishing procedures for assessing natural resource damages. The NRDA regulations are codified at 43 C.F.R. Part 11.

As defined in the NRDA regulations, injury is an adverse biological, chemical, or physical effect on natural resources, such as death, decreased population, or lost services (*i.e.*, fishing or hunting opportunities, ecosystem functions). Damages are the estimated value of the injured resources. The objective of the NRDA process is to compensate the public through environmental restoration for injuries to natural resources that have been caused by releases of hazardous substances into the environment. Under Section 107(f)(1) of CERCLA, damage settlements can only be used to restore, rehabilitate, replace, and/or acquire the equivalent of trust resources injured, destroyed, or lost as a result of the release of hazardous substances.

Accordingly, this Final RP/EA has been developed to evaluate and, ultimately, select restoration projects designed to compensate the public for damages that occurred to natural resources at the Site. The RP/EA is not intended to completely quantify the extent of restoration needed. Implementation of selected restoration projects will occur over a period of time, dependent upon the project type.

The NRDA regulations provide that restoration plans should consider ten factors when evaluating and selecting projects to restore or replace injured natural resources. The following factors will be used to select an Alternative and to compare projects within an Alternative. (See 43 C.F.R. § 11.82)

1. Technical feasibility
2. The relationship of the expected costs of the Alternative to the expected benefits
3. Cost-effectiveness
4. The results of actual or planned response actions
5. The potential for additional injury resulting from the proposed actions
6. The natural recovery period
7. Ability of the resources to recover with or without alternative actions
8. Potential effects of the action on human health and safety
9. Consistency with relevant Federal, State, and Tribal policies
10. Compliance with applicable Federal, State, and Tribal laws

As discussed, the selected Alternative must restore, rehabilitate, replace and/or acquire the equivalent of those natural resources injured by the discharge or release of PCBs and other hazardous substances at the Site. Because the Site is a complex community of invertebrates, fish, wildlife, plants and humans, the Trustees intend to consider as much of the watershed as possible and address areas of potential improvement for the ecosystem as a whole.

Based on the recommendations of the Trustee Council and input from the public, the Authorized Official will select one of the Alternatives and will determine, based on the facts and recommendations contained herein, and public comment, whether this EA is adequate to support a Finding of No Significant Impact (FONSI), or whether an Environmental Impact Statement (EIS) is required.

SECTION 3

RESTORATION ALTERNATIVES

3.1 Alternative A: No Action

The No Action Alternative, required by the National Environmental Policy Act (NEPA), consists of expected conditions under current programs pursued outside the NRDA process. It is the baseline against which other actions can be compared. If this Alternative were implemented, the Trustee Council would not initiate specific actions to restore injured natural resources or compensate the public for ongoing natural resource injuries caused by releases of hazardous substances into the environment. Existing environmental degradation not directly related to hazardous substance releases would continue to occur (land development, shoreline hardening, etc.), and perhaps worsen under Alternative A. The State and Federal agencies would continue to manage, conserve and protect the Ashtabula River and Harbor as outlined in current programs and regulations and within current budget constraints. The public would not be compensated for injuries to natural resources.

3.2 Alternative B: Natural Resource Based Restoration (Preferred Alternative)

CERCLA authorizes trustees to replace and/or acquire natural resources equivalent to those injured by hazardous substance releases, in lieu of or in addition to, restoring or rehabilitating the injured natural resource.

Alternative B involves projects that would restore and replace injured and lost natural resources, while concurrently providing enhanced ecosystem and public use services to compensate for injuries caused by releases of hazardous substances. Projects within this Alternative could be implemented anywhere in the State of Ohio with a preference for projects in the watershed of the Ashtabula River and Harbor. Alternative B projects are focused on maintaining the important linkages between the physical, chemical and biological properties of the overall ecosystem and the services it provides. These projects include the following: (1) enhancement and preservation of riparian, flood plain and upland habitat; (2) enhancement, preservation and reestablishment of wetlands; and (3) improvement of aquatic habitat. Each of these categories of projects is expected to improve and enhance the ecosystem to benefit injured natural resources. Concomitantly, these projects would benefit the public by enhancing active and passive outdoor recreational opportunities. These goals would be accomplished through the acquisition, preservation and restoration of contiguous tracts of valuable habitat, where feasible, which would be made available to the public for active and/or passive recreational use. This holistic approach supports the goal of restoring, replacing and rehabilitating injured resources, and enhancing outdoor recreational activities.

The Trustee Council anticipates that ecological priorities for all restoration project categories under Alternative B will be influenced primarily by the following key factors:

- 1) Relationship to injuries (restoration opportunities that address services and values similar to those lost due to the release of hazardous substances are preferred);
- 2) Quality of restoration opportunities (projects with substantial ecological opportunities are preferred);

- 3) Ecological function/hydraulic connectivity (areas in proximity to the Ashtabula River and Harbor are preferred); and,
- 4) Cost and cost-effectiveness (projects with lower cost per restored or replaced services or values are preferred).

Prior to the selection and implementation of any Site specific actions, the Trustees will review the specific projects to determine if they comply with all applicable requirements: NEPA, Historic Preservation Act, Endangered Species Act, Americans with Disabilities Act, etc.

3.2.1 Wetland, Flood Plain, Riparian and Associated Upland Habitat Preservation, Reestablishment or Enhancement Projects

Restoration projects under this Alternative would concentrate on the need to preserve and enhance certain properties adjacent to the Ashtabula River. Protection and restoration of riparian habitat and associated wetlands and ecologically associated uplands would foster and promote increased spawning and nursery habitats, and nesting and foraging opportunities for a wide variety of fish, birds and other wildlife. Such projects will also reduce erosion and resultant sediment loading to the Ashtabula River. Restoration projects described in Alternative B would provide ecological functions similar to, but not necessarily the same as those injured by hazardous substances.

Wetland, flood plain, riparian, and ecologically associated upland protection and enhancement would help replace habitats that have been impaired or destroyed in the Ashtabula River and Harbor area. The Trustee Council will focus its efforts on areas where hydraulic alterations, invasive species, or other modifications have destroyed or impaired former wetlands, flood plain habitat, and/or ecologically associated upland habitats. The Trustee Council's wetland, flood plain, riparian, and upland habitat reestablishment and enhancement strategy would include active restoration projects such as improving existing flood plain, establishing and/or preserving wetlands, establishing interconnections between surface water and wetlands, and removing invasive plant species. Low impact techniques such as closing off drainage ditches, disrupting (or not repairing) drain tile systems, and reestablishing wetland and flood plain plants and other native vegetation in order to reestablish natural characteristics that have been eliminated would also be utilized, as appropriate. The Trustee Council intends to target restoration of degraded wetland, riparian, and upland habitats located in coastal areas, within flood plains, and adjacent to existing valuable natural areas. Wetland, flood plain, riparian and ecologically associated upland reestablishment and enhancement projects that will improve water quality (including reducing loadings of suspended sediments) and provide habitat for biological resources are preferred. If a specific restoration project uses alternative techniques or involves more development than described in this section, a Site specific NEPA determination would be made.

3.2.1.1 Acquisition of Natural Areas

Alternative B recognizes the significance of preserving the riparian, wetland, flood plain and upland habitat of the Ashtabula River and Harbor area. To achieve this goal, the Trustee Council will focus its efforts on identifying, acquiring and preserving parcels of land with the following attributes: (1) coastal areas; (2) areas with commercial and/or residential development pressure; (3) contiguous parcels; and, (4) areas of high natural quality. Areas with high natural quality or "natural areas" are those parcels of land that significantly contribute to the ecological qualities of

the Ashtabula River and Harbor watershed. Once preserved and protected, lost and injured resources are restored, and public recreational activities, both active and passive, improve.

The Trustee Council will select specific areas for preservation based upon the following criteria: (1) the ecological value of the habitat; (2) the ability to improve the habitat; (3) the ability to preserve the habitat; (4) the geographical and ecological diversity of the parcel; (5) local and regional development plans; (6) the ability to find willing sellers; and, (7) citizens' concerns and comments. Preservation of properties would be achieved through fee title purchase from willing land owners, subject to an Environmental Covenant and/or through the purchase of Conservation Easements. Those properties that could be preserved in perpetuity will be considered a higher priority than those with a fixed duration. Land acquired will be conveyed to individual State, Federal or local governmental agencies, land trusts, or non-governmental conservation organizations following specific procedures and standards for each entity.

While the primary purpose of the preservation of land is to protect and preserve fish and wildlife habitats, portions of the acquired properties will likely be available to the public for passive and/or active recreational opportunities. The parcels may be available to serve as fishing spots, or for other activities such as wildlife viewing, hiking, or hunting. Acquisition of appropriately selected properties will, in general, contribute to a successful restoration of the Ashtabula River and Harbor, and promote its ecological stability.

3.2.1.2 Invasive Species Removal and Planting of Native Species

Restoration projects under Alternative B may include the replanting and reestablishment of native species on properties acquired through fee title, subject to an Environmental Covenant, and on properties where a Conservation Easement has been secured. Reestablishment efforts will focus on restoring natural areas that are in a somewhat degraded natural condition. In some instances, the reestablishment of native species may be suggested for properties or portions of properties owned by local Park districts. Native species will be reestablished once non-native species have been removed and eradicated. The removal of non-native species and planting of native species will enhance ecosystem function and, as a result, enhance the ecosystem functions provided to the natural resources and the public.

3.2.1.3 CDM Property

In June 2006, the Trustees provided the Ashtabula Township Park Commission (ATPC) with funds from the Fields Brook Natural Resource Damages settlement to purchase a 37-acre tract of land from the CDM Development Corporation (CDM). The property is subject to an Environmental Covenant, which preserves the property in perpetuity for conservation purposes. Under Alternative B, the Trustees would implement restoration and rehabilitation activities on the property to further enhance its ecosystem services. The restoration could include the following: (1) the reestablishment of a hydrological connection between the wetlands and the Ashtabula River, either directly or through the use of a water control device; (2) the removal of exotic and non-native species on approximately six acres; (3) the reestablishment of native species on six acres of wetlands; (4) the construction of an elevated boardwalk along the upland side of the wetlands; (5) the construction of a canoe launch; and, (6) improvement of the gravel parking lot along 24th Street.

These projects will provide enhanced ecosystem services and improve public access to the River. On the ecological side, the reestablished and connected wetlands will provide spawning and nursery habitat for fish, as well as nesting areas for wetland birds. This will increase and improve the functioning of the ecosystem. The construction of the boardwalk and canoe launch will improve public access and provide opportunities for environmental education through passive recreational use.

3.2.2 *Fishery Resource Enhancement Projects*

The abundance and diversity of fish species that once inhabited the Ashtabula River and Harbor is very different from the fishery currently observed due to anthropogenic effects, including effects of pollutants. Data collected prior to the remediation currently underway in the Ashtabula River indicated that the fish community was impaired, and did not meet the ecoregional biocriteria for Warm Water Habitat in Ohio. The data evidenced that highly pollution-tolerant species were abundant in certain sampling locations on the River.

In light of the data described above, the Trustees have proposed projects designed to achieve healthy, self-sustaining native fish populations in the Ashtabula River and Harbor area. Projects in Alternative B will, therefore, focus on the following: (1) acquisition of tracts of land along the Ashtabula River, which will help to reduce sediment loading, and thereby provide direct benefits to the fishery; (2) establishment of a hydrological connection between the wetlands and the River on the CDM property, which will provide a significant spawning and nursery area for fish; and, (3) restoration of certain existing wetlands, which will provide improved foraging opportunities.

3.3 *Alternative C: Augmentation of Human Use Related Natural Resource Services in the Ashtabula Watershed and Adjacent Lake Erie*

Alternative C involves projects that would provide services the same as, or similar to, those human use services lost through injuries to natural resources. The projects can be divided into two components: enhancements to the Breakwall Lighthouse and projects that provide fishing access to the Ashtabula River and Harbor and Lake Erie; and, construction of an educational interpretative center at Walnut Beach and other environmental educational opportunities. Alternative C projects would not restore, replace and/or rehabilitate injured or lost natural resources. The Trustee Council expects that priorities for all restoration projects or categories of projects under Alternative C will be influenced primarily by the following key factors:

- 1) Relationship to injuries (restoration opportunities that address services and values similar to those lost due to the release of hazardous substances are preferred);
- 2) Quality of restoration opportunities (projects with substantial ecological opportunities are preferred);
- 3) Ecological function/hydraulic connectivity (areas in proximity to the Ashtabula area and the restoration area are preferred); and
- 4) Cost and cost-effectiveness (projects with lower cost per restored or replaced services or values are preferred).

Under this Alternative, prior to the selection and implementation of any Site specific actions, the Trustees will review the specific projects to determine if they comply with all applicable requirements: NEPA, Historic Preservation Act, Endangered Species Act, Americans with Disabilities Act, etc.

3.3.1 *Breakwall Lighthouse and Projects that Provide Fishing Access to the Ashtabula River and Harbor, and Lake Erie*

This category of projects would provide human use services the same as, or similar to those lost through natural resource injuries, but would not enhance the injured natural resources. Projects within Alternative C would be implemented in the County of Ashtabula, with an emphasis on the adjacent shoreline of Lake Erie. Alternative C projects include the following: (1) improvements to the Breakwall Lighthouse; (2) construction of a walkway to the Breakwall Lighthouse; (3) construction of restroom facilities near the Breakwall Lighthouse; and, (4) construction of a transient boat dock. The cost of these projects has been estimated to be approximately \$8 million. The projects proposed in Alternative C, particularly the walkway and transient boat dock, could provide increased access to the public for active recreational opportunities, including fishing. The combined projects could enhance tourism to the County of Ashtabula. However, none of the proposed projects promote the holistic approach of restoring natural resources, while enhancing outdoor recreational activities.

3.3.2 *Interpretive Educational Center*

The Trustees have received a proposal to construct an Interpretive Educational Center at Walnut Beach. The cost of the proposed Interpretive Educational Center has been estimated to be approximately \$2.25 million. Educational displays at the Center could explain the Lake Erie ecosystem, invasive plant control, fish species, and the Ashtabula River Partnership.

3.4 Alternatives B and C: Criteria and Priorities for Restoration Project Categories

3.4.1 *Technical Feasibility*

Projects that use reliable, proven methods are preferred to those that rely on experimental, untested methods. Other factors that can affect project success, such as validity of assumptions inherent to the project approach, will also be considered by the Trustee Council.

3.4.2 *Benefit Scope*

Restoration projects that provide a broad scope of measurable ecological benefits to a wide geographic area of fish or wildlife population are favored over those that are focused on a limited set of benefits to a limited area or population. Restoration projects with a high ratio of expected ecological benefits to expected cost are preferred. This aspect may be assessed relative to other proposed projects that benefit the same resource. Projects that provide natural resource services through protection, and/or enhancement of the natural resources providing those services are preferred over projects designed solely to provide services. Projects that benefit more than one injured natural resource are expected to be given priority. Wherever possible, natural habitat functions which are self-sustaining and essential to maintain the habitat will be restored, enhanced

and/or protected. If projects provide equal benefits, those with minimal operation and maintenance activities will be preferred.

3.4.3 *Quantifiable Benefits*

Projects expected to provide quantifiable benefits and likely to achieve success will have a higher priority than projects that do not. Restoration projects should include an evaluation of success and a monitoring component to determine the effectiveness of restoration actions in providing the public with similar services and values to those lost because of releases of hazardous substances into the environment. A timeline outlining the implementation and progression of the restoration project will be used by the Trustee Council to determine completion and success of the project. Overall success of the RP will depend upon success of each restoration project.

3.4.4 *Potential Impact*

Preference will be given to projects that avoid or minimize additional natural resource injury or environmental degradation. The Trustee Council will require that requisite permits are obtained and comply with applicable regulations. All projects selected for implementation will be expected to comply with applicable and relevant laws, policies and regulations. To assure that Federally and State-listed threatened or endangered species will not be adversely affected, or proposed species are not jeopardized, the Trustee Council will require that the guidelines outlined in Appendix A are followed during implementation of NRD restoration activities.

3.4.5 *Other Project Support*

Preference is expected to be given to projects or aspects of Trustee Council projects that are not already being implemented or have insufficient funding under other programs. Although the Trustee Council may use restoration planning efforts completed by other programs, preference is given to projects that would not otherwise be implemented without NRD restoration funds.

3.4.6 *Voluntary Land Acquisition/Easements*

Preservation of habitats through acquisition of land or Conservation Easements will only be from willing sellers or participants. Landowners are, and will be, under no obligation to sell land to the government agencies or other organizations associated with the Trustee Council. Neighbors adjacent to land purchased for preservation under this RP will retain all of their current rights to their land. Land acquisitions may be conducted by government agencies using settlement moneys, or directly by settling PRPs. The government agencies are required to pay fair market value for land purchased. Fair market value would be determined through established appraisal procedures.

3.4.7 *Tribal Cultural Resources*

The preservation or restoration of specific areas or resources that have appreciable cultural value to Indian tribes are important to the Trustee Council. A search of the Native American Consultant Database maintained by the National Park Service identified no Indian tribes with relevant interest in Ashtabula County.

3.5 Preferred Alternative

The Trustee Council has recommended Alternative B as the Preferred Alternative. The direct provision of human use related natural resource services provided for in Alternative C would be less cost effective and more limited in scope than provision of those services through natural resource protection and enhancement. In order to concentrate funds on restoring resources that were impacted by the release of PCBs and other hazardous substances at the Ashtabula Site, Alternative B is recommended as the Preferred Alternative for this Final RP/EA. The final decision on the selected Alternative will be made by the State and Federal Authorized Officials based on recommendations from the Trustee Council staff and input from the public.

3.6 Summary of Alternative Actions

Table 1: Comparison of Alternatives A, B & C

Actions	Alternative A	Alternative B	Alternative C
	No Action	Natural Resource Based Restoration (Preferred Action)	Augmentation of Human Use Related Natural Resource Services
Restore, rehabilitate, replace and/or acquire the equivalent of natural resources injured from the release of hazardous substances into the environment and services those resources provide	No	Yes	Partial. Limited replacement of services. No restoration of resources.
Rehabilitate wetlands, flood plains, riparian and associated upland habitat	No	Yes	No
Improve aquatic habitat and near-shore habitat	No	Yes	No
Provide for enhancement of abundance and diversity of self-sustaining fish populations	No	Yes	No
Preservation of wetlands, flood plain, riparian and associated upland habitat	No	Yes	No
Improve outdoor recreational opportunities/enhance public awareness	No	Yes	Yes

SECTION 4

AFFECTED ENVIRONMENT

The terrestrial, wetland, and aquatic habitats of the Ashtabula EA area support a wide diversity of birds, fish, and mammals, including many rare, threatened, and endangered species. The health of the ecosystem and the quality of its habitats are vital to the invertebrates, plants, fish,

and wildlife of the area. Public uses and enjoyment of these resources also depend on the health and quality of the Ashtabula EA area.

4.1 Physical Characteristics

The restoration area is located in northeastern Ohio in Ashtabula County, 55 miles east of Cleveland. The Ashtabula River drainage basin covers approximately 355 Km² with the River entering the Central Basin of Lake Erie at the City of Ashtabula. South of the City of Ashtabula land use is a mixture of agriculture and forest. Immediately south of the City of Ashtabula, in the Ashtabula River Gulf area, is the 405 acre Indian Trails Park owned and operated by the Ashtabula Township Parks Commission. The Park encompasses four miles of the Ashtabula River creating a unique park setting characterized by scenic vistas and aquatic life, adjacent flood plain, upland hardwood forests, wetlands, sensitive wildflowers and wildlife habitat. The bedrock in the area slopes towards Lake Erie and varies in depth from 0-60 feet. The predominant soils in the area are silt and clay. This area is impermeable glacial till. The climate of the restoration area is seasonal and continental, with an average July high air temperature of 82.4 degrees Fahrenheit, and an average January low air temperature of 17.6 degrees Fahrenheit. Annual precipitation is approximately 36.6 inches.

4.2 Biological Environment

4.2.1 Habitat/Vegetation

Upstream of the City of Ashtabula, habitat consists of a mixture of agricultural lands and forest dominated by maple (*Acer sp.*), black cherry (*Prunus serotina*), ash (*Fraxinus sp.*), and oak (*Quercus sp.*) trees. “High quality” natural forest (primarily comprised of native species) exists on the east valley wall of the Ashtabula River just south of the mouth of Fields Brook. Non-native species, including garlic mustard (*Allaria petiolata*) and Japanese honeysuckle (*Lonicera japonica*) exist as the under-story vegetation in the forest south of Fields Brook (around Riverside Marina). West of the Ashtabula River mouth (near Walnut Beach) there is an important sand dune system. The sand dunes, dominated by beach grass, have been cited by a Cleveland Museum of Natural History Curator as one of the finest beach grass dunes in Ohio (Ashtabula River Partnership 2001).

4.2.2 Listed, Proposed, and Candidate Species

The Ashtabula Site falls within range of the Indiana bat, piping plover, and clubshell mussel, Federally-listed endangered species. An endangered species is any species that is in danger of extinction throughout all or a significant portion of its range. A threatened species is likely to become endangered in the foreseeable future. A candidate species is a species for which the USFWS has sufficient information on their biological status and threats to propose listing them as endangered or threatened under the Endangered Species Act, but for which development of a proposed listing regulation is precluded by other higher priority listing activities.

The Federally-listed species discussed above are potentially present in the restoration area boundaries for both Alternative B and C. The following sections provide additional information on Federally-listed species.

4.2.2.1 Birds

Piping plover (*Charadrius melodus*) habitat includes sand or pebble beaches with sparse vegetation along the shore of Lake Erie. The piping plover was designated as endangered in the Great Lakes watershed in December 1985. The decline in piping plover populations has been linked to natural and human caused factors such as high water levels, eroding beaches, and commercial and residential beach front. Critical habitat for the piping plover was designated in 2001 at Headlands Dune in neighboring Lake County and Sheldon Marsh in north central Ohio's Erie County. Critical habitat is an area that is essential for the conservation of a threatened or endangered species that may require special management and protection.

A bald eagle (*Haliaeetus leucocephalus*) nest has been documented in southern Ashtabula County at Rock Creek. Bald eagles build large stick nests lined with soft materials such as grass, leaves, and Spanish moss. Nests are used for several years by the same pair of eagles, with the birds adding materials each year. The bald eagle was designated as endangered in the lower 48 states in March of 1967 due to declining populations resulting from chemical usage, shooting and persecution of individual birds, and the loss of nesting habitat due to development along the coast and near inland rivers and waterways. After years of protection, decrease in chemical usage in the United States, and education against shooting eagles, there has been an increase in eagle populations. The bald eagle was reclassified as threatened in 1995. In 2007, the bald eagle was de-listed, but is protected under various Federal statutes.

4.2.2.2 Mammals

The Indiana bat (*Myotis sodalis*) was designated as endangered throughout its range in March of 1967. Limestone caves are used for winter hibernation. The decline of this species has been attributed mainly to human disruption and commercialization of roosting caves. During the summer months, the bats roost in trees which have exfoliating bark, and dead or live trees with split tree trunks and/or branches, and cavities (that may be used as maternity or male roost areas). Stream corridors, riparian areas, and upland woodlots provide forage sites.

4.2.2.3 Aquatic Organisms

The clubshell mussel (*Pleurobema clava*) was designated as endangered throughout its entire range in January of 1993. Impacts to this species include runoff and channelization, domestic and commercial pollution, in-stream sand and gravel mining, impoundment, and zebra/quagga mussel infestation. These mussels occur in small rivers and streams in clean sweep sand and gravel. They have been found to bury themselves in clean, loose sand to a depth of 2-4 inches. The fish host species for the larvae is the striped shiner. This mussel was last observed in southern Ashtabula County, Wayne Township, in the Pymatuning Creek watershed by ODNR in August of 1993.

4.2.2.4 Reptiles

The eastern massasauga (*Sistrurus catenatus*) was elevated to Federal Candidate status in 1999. Destruction and modification of habitat is the main threat to this species. The massasauga is a small to medium-sized snake that inhabits various wetland types as well as dry, well-drained

sandy uplands. This snake has been previously documented in Ashtabula County (2003 is the latest observation recorded by ODNR in the County).

4.2.2.5 State-Listed Species

In addition to Federally-listed endangered and threatened species, the state of Ohio Department of Natural Resources Division of Natural Areas and Preserves maintains a database of rare plants and animals. The following general listing categories are used: (1) *endangered* - a native species or subspecies threatened with extirpation from the State: this danger may result from one or more causes, such as habitat loss, pollution, predation, interspecific competition or disease; (2) *threatened* - a species or subspecies whose survival in Ohio is not in immediate jeopardy, but to which a threat exists: continued or increased stress will result in its becoming endangered; and, (3) *species of concern* - a species or subspecies which might become threatened in Ohio under continued or increased stress, or a species or subspecies for which there is some concern but for which information is insufficient to permit an adequate status evaluation. In Ashtabula County, there are 32 endangered, 34 threatened, and 13 species of special concern. Section 4.2.3 discusses some of these and other Ohio species. The Ohio Natural Heritage Database includes the following state threatened and endangered fish, wildlife, and plants that could be found in the Ashtabula River watershed: barn owl (*Tyto alba*), burbot (*Lota lota*), Great Lakes crayfish (*Orconectes propinquus*), mourning warbler (*Oporornis philadelphia*), sora (*Porzana carolina*), spotted turtle (*Clemmys guttata*), Virginia rail (*Rallus limicola*), American beach grass (*Ammophila brviligulata*), sea rocket (*Cakile edentula*), and inland beach pea (*Lathyrus japonicus*).

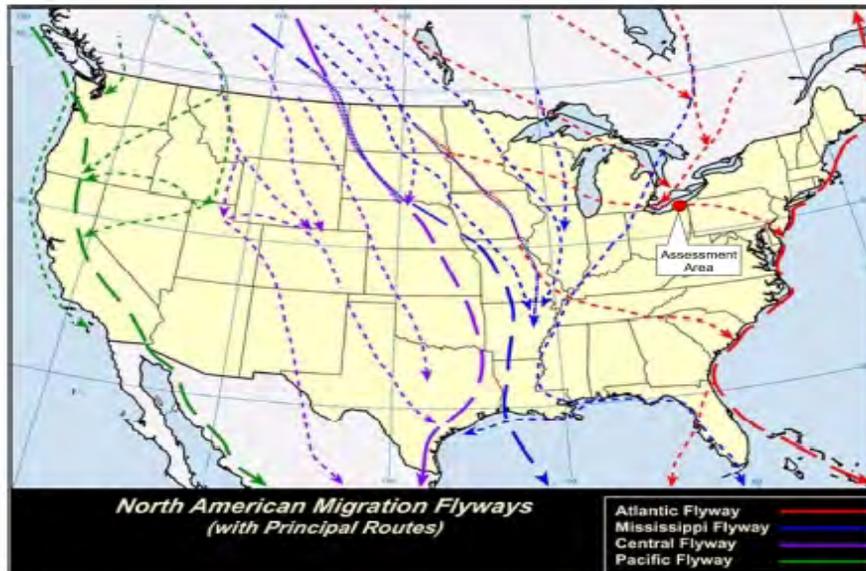
4.2.3 Other Fish and Wildlife Species

The following section provides a general list of fish and wildlife found in the Ashtabula area. Additional species may be found. The Ashtabula River and Harbor contain a variety of habitats and a diverse assemblage of fish and wildlife species, which have been exposed to and/or injured by hazardous substances. The Ashtabula Harbor is located on both the Atlantic and the Mississippi flyways, with over three million ducks and geese using this corridor (see Figure 4). Many migratory bird species nest on the outer breakwalls and wetlands near the river. These include, but are not limited to, the osprey (*Pandion haliaetus*), wood duck (*Aix sponsa*), Canada goose (*Branta canadensis*), common merganser (*Mergus merganser*), great blue heron (*Ardea herodias*), cliff swallow (*Hirundo pyrrhonta*), tree swallow (*Tachycineta bicolor*), Caspian tern (*Sterna caspia*), Forster's tern (*Sterna forsteri*), common tern (*Sterna hirundo*), mallard (*Anas platyrhynchos*), black duck (*Anas rubripes*), lesser scaup (*Aythya affinis*), and kingfisher (*Ceryle alcyon*). Numerous additional species of migratory neotropical songbirds inhabit the area seasonally. Bobcat (*Lynx rufus*) and black bear (*Ursus americanus*), both State-listed species, were documented in Ashtabula County in 2000. Smaller mammals likely to use the Ashtabula area include opossum (*Didelphis virginiana*), eastern cottontail rabbit (*Sylvilagus floridanus*), eastern chipmunk (*Tamias striatus*), woodchuck (*Marmota monax*), eastern gray squirrel (*Sciurus gireus*), red fox (*Vulpes fulva*), striped skunk (*Mephitis mephitis*), and raccoon (*Procyon lotor*).

Fish species in, or seasonally using the Ashtabula River and Harbor include, but are not limited to, least brook lamprey (*Lampetra aepyptera*), northern bigeye chub (*Notropis amblops*), rosyface shiner (*Notropis rubellus*), mimic shiner (*Notropis volucellus*), spottail shiner (*Notropis*

hudsonius), emerald shiner (*Notropis atherinoides*), black redhorse (*Moxostoma duquesnei*), silver redhorse (*Moxostoma anisurum*), white sucker (*Catostomus commersoni*), rainbow darter (*Etheostoma caeruleum*), Johnny darter (*Etheostoma nigrum*), log perch (*Percina caprodes*), walleye (*Stizostedion vitreum*), yellow perch (*Perca flavescens*), white bass (*Morone chrysops*), smallmouth bass (*Micropterus dolomieu*), pumpkinseed (*Lepomis gibbosus*), white crappie (*Pomoxis annularis*), common carp (*Cyprinus carpio*), brown bullhead (*Ictalurus nebulosus*), alewife (*Alosa pseudoharangus*), rainbow smelt (*Osmerus mordax*), freshwater drum (*Aplodinotus grunniens*), lake sturgeon (*Acipenser fulvescens*), coho salmon (*Oncorhynchus kisutch*) and Chinook salmon (*Oncorhynchus tshawytscha*). Rainbow smelt (*Osmerus mordax*), rainbow trout (*Oncorhynchus mykiss*), coho salmon (*Oncorhynchus kisutch*) and Chinook salmon (*Oncorhynchus tshawytscha*) are anadromous fish species. Great Lakes populations of lake trout (*Salvelinus namaycush*), yellow perch (*Perca flavescens*), lake sturgeon (*Acipenser fulvescens*), walleye (*Stizostedion vitreum*), and forage fish are nationally significant fish stocks pursuant to the Great Lakes Fish and Wildlife Restoration Act. Four fish species of Special Concern in Ohio have been listed in the Ashtabula River lacustruary. These are the Great Lakes muskellunge, blacknose shiner, lake sturgeon, and the northern brook lamprey. In addition, a variety of reptile and amphibian species are potentially present at Ashtabula, including snapping turtle (*Chelydra serpentina*), green frog (*Rana clamitans*), and eastern milk snake (*Lampropeltis triangulum*) (U.S. FWS 2001).

Figure 4: North American Migration Flyways – Atlantic flyway through Ashtabula County, Ohio (map modified from <http://birdnature.com/allflyways.html>)



4.3 Land Use

The Ashtabula area is comprised of a mix of agricultural, residential, industrial, and undeveloped land. Approximately 75% of land use in Ashtabula County is agricultural/rural. Less than ten percent was residential in 1980, with the City of Ashtabula the only major urbanized area. Aerial photos comparing overall land use in the Fields Brook and Ashtabula River area between 1938 and 1994 is presented in Appendix B.

4.4 Cultural Resources

Historically, along the banks of the Ashtabula River, there were large conical mounds in which human skeletons were found. The mounds have since been destroyed (Ashtabula River Partnership 2001). As of November 1, 2003, the County of Ashtabula contains 36 properties listed on the National Register of Historic Places, of which nine are in the City of Ashtabula.

4.5 Local Socioeconomic Conditions

According to the U.S. Census Bureau, Ashtabula County and the City of Ashtabula had 102,728 and 20,962 people respectively in 2000. The City of Ashtabula is the only major urban center in the watershed. There are several parks in the City of Ashtabula area. Agriculture and rural areas can be found throughout the remainder of the drainage basin. Ashtabula Harbor is located at the mouth of the Ashtabula River on the south shore of Lake Erie, and is an important commercial harbor on Lake Erie. Land use in the Harbor area includes industrial, commercial, residential, park, public use, and marina. Commodities such as iron ore, coal, other bulk commodities, and general cargo transit the Harbor. Approximately 4.0 million tons of ore and 6.0 million tons of coal are transported per year (Ashtabula River Partnership 2001).

SECTION 5

ENVIRONMENTAL CONSEQUENCES

5.1 Alternative A: No Action

5.1.1 *Habitat Impacts*

Under Alternative A, no habitat would be restored, enhanced, or preserved beyond what the Trustees are currently doing within mandates, policies and restricted budgets. Loss of habitat due to development and other sources of environmental degradation not related to hazardous substance releases is expected to continue to occur. The public would not be compensated for injuries to natural resources from the releases of hazardous substances into the environment.

5.1.2 *Biological Impacts*

Fish and wildlife harmed by releases of hazardous substances into the environment would not be restored, rehabilitated, replaced and/or the equivalent acquired. Populations of fish and wildlife species that rely on wetlands for spawning and nurseries would not increase sufficiently to compensate for past losses.

5.1.3 *Listed, Proposed, and Candidate Species*

Negative impacts to listed species would not be reduced under this Alternative.

5.1.4 *Cultural Resources*

No cultural resources have been identified.

5.1.5 *Environmental Justice*

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 Federal Register 7629 (1994)), directs Federal agencies to incorporate environmental justice in their decision making process. Federal agencies are directed to identify and address as appropriate, any disproportionately high and adverse environmental effects of their programs, policies and activities on minority or low-income populations.

Under the No Action Alternative, wildlife viewing and environmental education opportunities would not improve through enhancement projects. While affluent individuals can afford travel and pay for alternatives, low-income individuals are less capable of doing so.

5.1.6 *Socioeconomic Impacts*

This Alternative would not result in any positive indirect impacts on the local economy. This Alternative would not result in additional lands that could provide increased recreational opportunities and related economic development in the area.

5.1.7 *Cumulative Impacts*

If this Alternative was implemented, the cumulative impacts would be adverse to the environment. The exclusive reliance on regulations and policies do not necessarily provide for long term preservation of valuable wetland and upland habitats. The upper watershed of the Ashtabula River includes many different habitats, such as flood plain forests, dry upland forests, and hemlock ravines. Numerous palustrine emergent and forested wetland areas are located throughout the Ashtabula area, including Ashtabula Township. Deep open water fisheries exist inside and outside the stone breakwaters of Ashtabula Harbor. Birds use the shoreline along Ashtabula Harbor as Lake Erie migration corridor habitat. Impacts to these and other resources would continue due to historical and on-going development. No fishery resource enhancement projects would be implemented under the No Action Alternative, thus further impacting the fishery. The loss and degradation of coastal and riparian wetlands would contribute to the continued instability of the fish community in the Ashtabula River and Harbor. The continued loss of habitat could also adversely affect migratory birds that use the area for resting grounds, and nesting area for those species that remain for the nesting season.

5.2 *Alternative B: Natural Resource Based Restoration (Preferred Alternative)*

5.2.1 *Habitat Impacts*

Preserving, restoring or enhancing riparian, wetland, flood plain and upland habitats improves ecological functions that are essential for many fish and wildlife species. In addition, habitat restoration and preservation also improve public use and enjoyment of these resources. Benefits of aquatic and near-shore habitat improvements or enhancement would include improved water quality, reduced sediment loadings, restored habitat for fish and wildlife species, and increased ecological productivity. Improving the quality of vegetation and habitat for fish and birds would provide similar, though not the same ecological functions as those injured by hazardous

substances. These and other long-term benefits outweigh any adverse impacts associated with specific habitat restoration or enhancement methods.

Under Alternative B, there would be minimal short-term impacts to habitat due to the manipulation of soil required to complete wetland and aquatic habitat restoration and enhancement projects. Some permanent impacts could occur if habitat is destroyed to construct trails, boat ramps, or other public use facilities. However, these same projects would also be directed to control and monitor human impacts on those resources.

5.2.2 *Biological Impacts*

The restoration alternatives would benefit many different species of fish and wildlife found in the area. Preservation, reestablishment and enhancement of wetland, flood plain, riparian, associated upland and aquatic habitats would benefit such species as waterfowl, rails, terns, songbirds, osprey, mink, beaver, and northern pike. Fishery resource enhancement projects would benefit species such as the black redhorse, rock bass, and smallmouth bass leading to the development of a balanced, healthy fish community. Through the habitat quality improvement projects there would be an increase in shallow waters and beds of submergent and emergent vegetation providing habitat for migrating waterfowl, feeding areas for shorebirds, waterbirds and many species of fish found in the area. There would be minimal negative impacts to biological resources from human disturbance in relation to use of preserved areas and natural resource based public use projects. The public use projects would also protect and potentially minimize human disturbance to fish and wildlife by controlling human impacts on those resources.

5.2.3 *Listed, Proposed, and Candidate Species*

Federal and State-listed or endangered species would receive further protection and aid in the recovery of the species if this Alternative was implemented. Wetland, flood plain, riparian, associated upland and aquatic habitat preservation would most likely benefit bald eagles, eastern massasaugas, and Indiana bats. Protective measures (Appendix A) would be taken during implementation of any projects. Adherence to the restrictions should provide for no adverse effects on the listed species.

5.2.3.1 Birds

Bald eagle nesting and prey species could be directly or indirectly reestablished, enhanced, or preserved through the restoration alternatives. Alternative B could include protection or acquisition of habitat needed by the piping plover for nesting.

5.2.3.2 Mammals

The Indiana bat may use stream corridors or uplands restored or acquired under Alternative B. State-listed endangered species such as the black bear or the bobcat may use lands restored or acquired under Alternative B.

5.2.3.3 Reptiles

Populations of the federal candidate species eastern massasauga snake, and the State-listed (threatened) spotted turtle (*Chlemmys guttata*), have been affected by habitat fragmentation and encroachment throughout their range. These species may benefit from projects involving restoration of habitats such as wetlands and associated uplands.

5.2.3.4 Aquatic Organisms

The least brook lamprey, rosyface shiner, big eye chub, mimic shiner, and black redhorse are pollution sensitive State-listed declining species, which are found in the Ashtabula River. The Ashtabula River is one of the last rivers in Ohio that supports a strong population of big eye chub. Protection of riparian forests and aquatic resources will help maintain the presence of these species. The clubshell mussel and other mussel species [i.e. State-threatened black sandshell (*Ligumia recta*)] require clean waterways. Mussel populations may return to surrounding waterways once aquatic and near-shore habitat restoration projects improve overall water quality in the area.

5.2.3.5 Plants

Although there are no known Federally-listed plant species, there are many State-listed plant species within Ashtabula Township and Ashtabula County. Per the Ohio Department of Natural Resources Natural Heritage database, there are 26 State-listed endangered and 30 State-listed threatened plant species in Ashtabula County. These species include American beach grass (*Ammophila brvigulata*), deer's tongue arrowhead (*Sagittaria rigida*), inland beach pea (*Lathyrus japonicus*), northern blue-eyed grass (*Sisyrinchium montanum*), Schweinitz' umbrella sedge (*Cyperus schwein-itzii*), and sea rocket (*Cakile edentula*). Wafer ash (*Ptelea trifoliata*) is a dune shrub found along Lake Erie that is otherwise rarely found east of Cleveland. The giant swallowtail butterfly is often found in association with the wafer ash.

5.2.4 Cultural Resources

Projects covered under this document such as plugging drainage ditches, breaking tile systems, stabilizing stream banks, acquiring wetlands, and development for public uses or other eventual development on acquired lands have the potential to affect properties meeting the criteria for the National Register of Historic Places and other cultural resources. The Trustees are in the process of determining specific areas for wetland restorations, stream bank stabilization, and land acquisition. When these project areas have been determined, and prior to making final decisions about these projects, the Field Supervisor, Reynoldsburg Ecological Field Office, will initiate consultation with the Ohio State Historic Preservation Officer and, with the assistance of the USFWS Regional Historic Preservation Officer, will complete the Section 106 process as described in 36 Code of Federal Regulations Part 800.

5.2.5 Environmental Justice

Wetland, flood plain, riparian and upland preservation would involve transactions with willing landowners. No minority or low-income populations would be displaced or negatively affected in any way. While the primary purpose of the restoration of this land is for fish and wildlife,

portions of the acquired properties may be used by the public for active and passive natural resource based recreational and educational activities, such as fishing and/or wildlife viewing. Aquatic habitat improvement would also enhance recreational opportunities in and around the Ashtabula River and Harbor.

5.2.6 *Socioeconomic Impacts*

The overall quality of life for the surrounding communities would improve with the restoration of the area. Protection of wetlands, riparian, flood plains and uplands would provide wildlife viewing, fishing and hunting, and help create positive economic impacts on the local economy. Aquatic habitat improvements or enhancements would provide more opportunities for public enjoyment of natural resources.

Land acquisition procedures would involve transactions with willing sellers who would be paid fair market value. There would be little or no impact on the market price or on landowners in the area who choose not to sell. There would be minimum effects on the local economy and tax base because the areas identified for preservation are currently undeveloped.

5.2.7 *Elements Common to All Impacts*

Other impairments to the ecosystem such as pollution associated with development would continue to affect the area where restoration projects would be implemented. These additional sources of impact may also inhibit the ability of the natural resources to fully recover or may negatively impact other restoration projects undertaken by the Trustee Council.

5.2.8 *Cumulative Impacts*

Cumulative impacts from habitat restoration or enhancement implemented under Alternative B would positively affect the region as a whole. Despite the existence of laws and regulations designed to minimize wetland and aquatic habitat losses and impacts, threats to wetlands and aquatic habitat from indirect impacts, cumulative small scale impacts, or surrounding land use changes still exist. Partnering with various State and Federal programs (EPA's Section 319 Clean Water Act State Grants, National Coastal Wetlands Conservation Grants, etc.) that already contribute to improving the health of the ecosystems and watersheds will aid in restoring more habitats and increasing fish and wildlife populations.

Migratory birds would benefit from this Alternative because there would be more undisturbed areas for spring and fall migration resting and feeding stopovers, as well as nesting habitat for other bird species. This Alternative would contribute to the stabilization of fish communities by implementing appropriate fishery resource projects such as restoring fish spawning and nursery habitats.

5.3 *Alternative C: Augmentation of Human Use Related Natural Resource Services in the Ashtabula Watershed and Adjacent Lake Erie*

5.3.1 *Habitat Impacts*

Under this Alternative there would be no improvement of habitats for fish and wildlife. Construction of structures to improve human access may actually result in habitat loss and subsequent losses in biological productivity.

5.3.2 *Biological Impacts*

Under this Alternative biological productivity would not be increased, and fish, birds, and other wildlife would not benefit. The potential loss of habitat may likely result in decreases in biological productivity and increased ecosystem fragmentation.

5.3.3 *Listed, Proposed, and Candidate Species*

No benefits would be derived by listed, proposed, or candidate species.

5.3.4 *Cultural Resources*

Projects covered under this document have the potential to affect properties meeting the criteria for the National Register of Historic Places and other cultural resources. With the exception of the CDM Property, specific project sites have not been determined. When these project areas have been determined, and prior to making final decisions about these projects, the Field Supervisor, Reynoldsburg Ecological Field Office, will initiate consultation with the Ohio State Historic Preservation Officer and, with the assistance of the USFWS Regional Historic Preservation Officer, will complete the Section 106 process as described in 36 Code of Federal Regulations Part 800.

5.3.5 *Environmental Justice*

Land acquisitions and other activities would involve transactions with willing landowners. No minority or low-income populations would be displaced or negatively affected in any way. Provision of fishing piers and other structures could improve access for lower income individuals.

5.3.6 *Socioeconomic Impacts*

The overall quality of life for the surrounding communities would improve with the restoration of the area. Augmentation of human use related services would help create positive economic impacts on the local economy.

5.4 Summary of Environmental Consequences for Each Alternative

Table 2: Comparison of Alternative A, B & C Environmental Consequences

Attributes	Alternative A No Action	Alternative B Natural Resource Based Restoration (Preferred Alternative)	Alternative C Augmentation of Human Use Related Natural Resource Services
Wetlands	Expected continued net loss of habitat	Increase of wetland habitat	Expected continued net loss of habitat
Uplands associated with wetlands	Expected continued net loss of habitat	Increase of upland habitat associated with wetlands	Expected continued net loss of habitat
Aquatic and near-shore habitat	Expected continued degradation and loss of habitat	Increase of aquatic habitat	Expected continued degradation and loss of habitat
Fish resources	Expected populations would remain unbalanced for a greater length of time	Expected increase diversity of fish community and populations	Populations would remain unbalanced for a greater length of time
Wildlife resources	Expected continued harm and decrease of numbers	Expected increase in populations	Expected continued harm and decrease of numbers
Listed threatened or endangered species	Expected negative impacts would continue	Expected to provide further recovery of species in the area	Expected negative impacts would continue
Cultural resources	N/A	Adverse impacts are possible	Adverse impacts are possible
Surface water	Expected to remain degraded due to sediment and nutrient loading and historic pollution in sediment	Expected increase in surface water quality	Expected to remain degraded due to sediment and nutrient loading and historic pollution in sediment
Environmental justice issues	No opportunities for increased quality of life	Expected increased quality of life in Ashtabula Township/County	Expected increased quality of life in Ashtabula Township/County
Socioeconomic issues	Expected local economy would remain the same or decrease due to continued injury without restoration	Local economy could potentially increase due to restoration	Local economy could potentially increase due to restoration
Recreational use Environmental education and resource enjoyment	No enhancement or increase of low impact recreational opportunities or environmental education	Increase opportunities for wildlife/bird viewing, fishing as well as enhancement of understanding of the ecosystem	Increased opportunities for fishing
Cumulative impacts	Potential decrease in populations of migratory birds, continued degraded fishery and continued loss of wetland and associated upland habitat in the EA area	Expected increase populations of migratory birds and greater diversity in the fish community; some ecosystem functions are to be restored or compensated	Potential decrease in populations of migratory birds, continued degraded fishery and continued loss of wetland and associated upland habitat in the area

SECTION 6

CONSULTATION AND COORDINATION WITH THE PUBLIC AND OTHERS

6.1 National Historic Preservation Act Compliance

The USFWS' Project Leader for Reynoldsburg Ecological Services will provide the State Historic Preservation Officers with this Final RP/EA as part of the public review and comment process.

6.2 Endangered Species Act Compliance

This Final RP/EA complies with Section 7 of the Endangered Species Act (ESA) of 1973 as amended, 16 U.S.C. § 1531, *et seq.*, and its implementing regulation (50 C.F.R. 402) (Appendix A).

6.3 Public Participation

Public review of the Final RP/EA is an integral component of the assessment and restoration planning process. Through the public review process, the Trustees sought public comment on the actions proposed to restore injured natural resources or replace lost resource services as detailed in Section 7.

SECTION 7

PUBLIC COMMENT ON DRAFT RP/EA

This section summarizes public comments received on the Initial Restoration Plan and Environmental Assessment (RP/EA), and provides the Trustees' responses to the comments. The RP/EA was released to the public on March 25, 2008. Comments were received both during the public meeting held on April 22, 2008 and during the public comment period through April 30, 2008.

In total, 36 comments were received on the draft RP/EA. The commenters included both private citizens and those representing various organizations with an interest in the Ashtabula River and Harbor RP/EA (Ashtabula Lighthouse Society; Ashtabula Marine Museum; Ashtabula River Partnership; Ashtabula Township Park Commission; and Western Reserve Land Conservancy). The Responsiveness Summary does not repeat each comment verbatim. Rather, the comments are summarized and grouped into categories. Copies of the original comments are provided in Appendix C of the RP/EA.

Overall, the comments fell into four categories:

- General comments on the Ashtabula RP/EA and/or the natural resource damage assessment (NRDA) process
- Comments on Alternative B (Natural Resource Based Restoration)
- Comments on Alternative C (Augmentation of Human Use Related Natural Resource Services)
- Comments on both Alternative B and Alternative C

I. General comments on the RP/EA for Ashtabula River and Harbor and/or NRDA process:

1. **Comment:** *One commenter questioned why the public hearing was not held in the City of Ashtabula (at Kent State University). The commenter stated that the citizens of Ashtabula had suffered from (Ashtabula River and Harbor) pollution as cancer deaths in East Ashtabula were much higher than normal.*

Response: The Trustees recognize the interest of the Ashtabula City residents in the Ashtabula River restoration, and the Trustees have been committed to public outreach and involvement of the citizens of the Ashtabula area throughout the natural resource damage assessment (NRDA) process. The Trustee representatives attempted to schedule the RP/EA meeting at the Kent State University branch campus, but a room of sufficient size was unavailable during the time period that the public meeting was planned. As a result, the meeting was held at Lakeside High School, which is also within the City of Ashtabula. The Trustees met the public involvement requirement for the draft plan pursuant to the federal regulations (43 CFR Part 11).

Questions relating to excess human cancer risk in the Ashtabula area are beyond the scope of the RP/EA, which is focused on the restoration of injured natural resources. To the extent that the commenter has concerns over cancer risks associated with contamination in the Ashtabula River, such concerns may be presented to the Ohio Department of Health (contact Dr. Robert Frey, at 614-466-1069).

2. **Comment:** *One commenter felt that the public and elected representatives in Ashtabula County should participate in NRDA settlement negotiations. Another commenter also expressed concerns regarding the lack of public input in the NRDA settlement negotiations, which he understood to be a “barter style settlement,” as opposed to a financial settlement. This commenter felt the Trustees would “roll over and settle for just a slap on the wrist,” and that the Trustees had made up their minds on the alternative to be implemented prior to the meeting and that the meeting was only a formality.*

Response: Public comments are not a formality. The regulations⁴ provide for and encourage public involvement at appropriate stages in the NRD process. The Trustees provided the opportunity for public comment on the November 2002 Assessment Plan, as well as this RP/EA. Specific studies⁵ conducted during the assessment were also made available to the public. After receipt, the Trustees carefully consider all public input, including that from elected officials, prior to recommending or selecting natural resource restoration projects. The Trustees also respond to all public comments and as appropriate, explain the rationale if the suggestion(s) made by the commenter(s) was not adopted. Although settlement negotiations are typically confidential, with participation limited to representatives of the parties to the proceeding or proposed proceeding, if the Trustees reach agreement with potentially responsible parties on terms of a proposed settlement of natural resource damage claims relating to the Ashtabula River, the public will have an opportunity to comment on any proposed settlement, and the United States and the State of Ohio will

⁴ 43 CFR 11.81.

⁵ The studies are: PCBs and HCBs in Ashtabula river water, January 30, 2004; Fish Consumption Advisory Report, December 2005; Fish Health Study, July 2006. See: <http://www.fws.gov/midwest/AshtabulaNRDA/>.

consider and respond to any comments received, before the settlement is presented to the court for consideration.

Detailed discussion of the proposed settlement terms is beyond the scope of this Responsive Summary on the RP/EA (as well as being premature, since the parties have not reached agreement on proposed settlement terms at this point). The Trustees are committed to ensuring adequate compensation to the public for injured natural resources in the Ashtabula River, and will not enter into a proposed settlement unless they believe it provides such compensation.

- 3. Comment:** *One commenter complained about the Norfolk Southern Coal Terminal impacts on the environment, including filling wetlands, blocking access to the waterfront and emitting “chronic coal dust emissions”. This commenter inquired about the status of negotiations with Norfolk Southern and whether the company had opted out of settlement (negotiations). The commenter also stated that he has (as an individual) established ponds to replace habitat allegedly destroyed by Norfolk Southern and other coal terminal operators. Two commenters also expressed concerns about dust and noise from Norfolk Southern coal operations in the lower river and felt it conflicted with Ashtabula’s designation as a scenic river.*

Response: Regulatory compliance concerns relating to coal pile operations or filling of wetlands are outside the scope of this RP/EA⁶. Any specific questions on Norfolk Southern coal pile operations may be addressed to Ohio EPA’s Division of Air Pollution Control; questions regarding filled wetlands and surface water issues may be addressed to Ohio EPA’s Division of Surface Water (both at 330-963-1290).

The Trustees’ understanding is that the scenic river designation does not extend to the lower river in the area of the coal piles. Questions regarding the scenic river designation may be addressed to the Ohio Department of Natural Resources (ODNR, attention, Assistant Scenic River Manager at 440-992-5845).

The status of settlement negotiations undertaken by the Trustees is outside the scope of the RP/EA. However, the Trustees are engaged in discussions with representatives of various potentially responsible parties, including Norfolk Southern, regarding natural resource damage claims.

- 4. Comment:** *One commenter stated that the method used to evaluate the loss of natural resources was biased against Alternative C and that the Trustees “should come up with a new approach that recognizes that compensating the public for the loss of their natural resources is...as important and...deserving...as restor(ing) the resource.” He believed that the companies were “essentially” paying “punitive damages...at this point.” This commenter suggested using weighted factors that support “both...objectives of compensating the public and restoring the resources.” Other commenters concurred that the methodology was biased to “fish & game” and placed “little or no value on human use.”*

⁶ However, if restoration projects are proposed in the vicinity of the coal piles, the Trustees will evaluate the impact of the coal piles, if any, on the ability of a restoration project to achieve its objectives.

Response: Under CERCLA ⁷, natural resource damage settlements can only be used to “restore, replace, or acquire the equivalent” of trust resources injured, destroyed, or lost as a result of the release of hazardous substances. The natural resources injured in the Ashtabula area are the surface waters of the River and Harbor, the fishery, and avian resources. Thus, the Trustees are required by law to evaluate the projects based on their ability to “restore, replace, or acquire the equivalent” of the surface waters, fishery and avian resources injured in the Ashtabula River and Harbor.

The NRDA regulations⁸ require that the Trustees consider ten factors when evaluating the restoration options. The ten factors are: technical feasibility; the relationship of the expected costs of the Alternative to the expected benefits; cost-effectiveness; the results of actual or planned response actions; the potential for additional injury resulting from proposed actions; the natural recovery period; ability of the resources to recover without alternative actions; potential effects of the action on human health and safety; consistency with relevant Federal and State policies; and compliance with applicable Federal and State laws. (See Section 2.4 of this RP/EA for additional information.) Additionally, the Trustees identified four priorities (relationship of the restoration projects to the injuries; quality of restoration opportunities; ecological function; and cost and cost-effectiveness) as key in selecting appropriate restoration projects (See 3.2 of this RP/EA for additional information). Although human use was not explicitly weighted as a factor, it was considered when evaluating the Alternatives. Restoration projects carried out under the NRDA are intended to compensate for loss of services including fishing, bird watching and other active and/or passive recreational activities.

When both Alternative B and Alternative C were evaluated with respect to the ten regulatory factors and four restoration plan priorities, the Trustees concluded that Alternative B is the preferred option. Alternative B enhances ecosystem functionality and public use, and meets the objective of restoring the injured natural resources (See Section 3.5 of this RP/EA for additional information). Alternative C is focused solely on enhancement of human use services.

Finally, the purpose of the NRDA is to seek compensation for losses resulting from injuries to Trust resources; punitive damages are not a part of the NRDA process. NRDA settlements thus do not represent a fine or punitive payment, but instead are meant to restore, replace, and/or acquire the equivalent of the injured resource or resource services.⁹

5. **Comment:** *One commenter noted that Alternative A would not help restore the beneficial uses of the Ashtabula River nor help to delist the river as an area of concern.*

Response: The Trustees concur with the comment. However, the Trustees are obliged by

⁷ Section 107(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9607(f)(1).

⁸ See 43 CFR §11.82.

⁹ Responsible parties are required to compensate the public for “injury to, destruction of, or loss of natural resources...resulting from such a release [of a hazardous substance].” CERCLA § 107(a)(4)(C), 42 U.S.C. §9607(a)(4)(C).

the National Environmental Policy Act (NEPA)¹⁰ to present a “no action” alternative; hence, Alternative A was presented as required.

6. **Comment:** *One commenter asked whether NRDA monies had been awarded for the beach cleaner acquired by the City of Ashtabula; he believed the beach cleaner had been used to eliminate some of the threatened and endangered species in the Walnut Beach area.*

Response: No NRDA funds were expended for the beach cleaner; it is the Trustees’ understanding that it was purchased with private funds. Concerns regarding elimination of threatened and endangered species may be addressed to ODNR, Division of Natural Areas and Preserves, North Regional Manager (Gary Obermiller at 440-839-1561).

7. **Comment:** *(Fields Brook funds use) Two commenters asked “why hasn’t the portion of the Fields Brook settlement funds that is still available been set aside for Ashtabula Township (Brockway property) human use (capitalized) and left out of this equation.”*

Response: A separate restoration plan has been developed for Fields Brook, and accordingly, discussion of the Fields Brook settlement proceeds is outside the scope of this RP/EA. However, the Trustees may use the available Fields Brook NRDA funds for restoration projects in the Ashtabula watershed, as described in the “Final Natural Resource Restoration Plan & Environmental Assessment for the Fields Brook Superfund Site.” A copy of that plan is available at <http://www.fws.gov/midwest/AshtabulaNRDA/>. It may also be obtained by calling Regan Williams at 330-963-1210 or Dave DeVault at 612-713-5340.

8. **Comment:** *One commenter asked for a detailed map of the area displaying specific locations of the injured habitat; areas dredged; and targeted (wetlands) restoration. The commenter requested that the map should include privately owned property and man-made structures as well as terrain elevations, wooded areas and other habitat features and be provided on-line (web access) as an adobe document.*

Response: Once an NRDA settlement has been reached and restoration projects have been identified, the Trustees will provide as much detailed information as possible on an Ashtabula NRDA internet site, so that information regarding the restoration projects is readily accessible by the public.

II. Comments on Alternative B (Natural Resource Based Restoration)

II (a). Support for Alternative B:

9. **Comment:** *Several individual commenters and commenters representing various organizations (Ashtabula Township Parks Commission; Ashtabula River Partnership; and Western Reserve Land Conservancy) expressed support for Alternative B as the plan that would best protect and/or restore natural resources in the Ashtabula area.*

Response: The Trustees agree that Alternative B would protect and restore natural resources in the area and would best meet the requirement that any settlement be used to restore, rehabilitate, replace, and/or acquire the equivalent of trust resources injured, destroyed, or lost as

¹⁰ 42 U.S.C. §4321 *et seq.*

a result of the release of hazardous substances.

10. **Comment:** *Commenters noted that the lower Ashtabula River had been designated as an Area of Concern (AOC) by the International Joint Commission (IJC) and that the Ashtabula River Partnership (ARP) had been formed to facilitate dredging of contaminated sediment from the river. The implementation of Alternative B (along with the completion of the dredging project) was critical to accomplish the delisting of the AOC. The six beneficial use impairments (BUIs) (restrictions on fish and wildlife consumption; degradation of fish and wildlife populations; fish tumors and other deformities; benthic degradation; restriction on dredging activities; and loss of fish and wildlife habitat) identified in the Ashtabula AOC needed to be addressed to accomplish de-listing. They believed that Alternative B with its focus on habitat restoration and protection would help address the BUIs and thus further the goal of de-listing the Ashtabula River as an AOC and remove a stigma.*

Response: The Trustees support the objective of de-listing of the lower Ashtabula River as an AOC and believe that the restoration projects, when implemented, will advance this goal.

11. **Comment:** *The Ashtabula Township Park Commission (ATPC) represented by their Chairman supported the acquisition and restoration of land within the Ashtabula River watershed, and indicated the ATPC's willingness to hold title to properties that are within Indian Trails Park or could be added to the Park system. As the stewards of Lakeshore Park and Indian Trails Park in Ashtabula and current owners of the CDM property, the ATPC has developed a Master Plan to enhance active and passive uses of ATPC holdings. The goals in this Master Plan and the ATPC mission to permanently preserve water quality, recreational value and natural resources of the River and its watershed coincide with many of the RP/EA objectives. The ATPC is therefore willing to help meet the RP/EA goals. Further, as ATPC is a public entity, any expenditure of public monies and success of the restoration plans could also be easily monitored in the ATPC holdings. Finally, the ATPC has been working with the Ohio Department of Natural Resources and supports the designation of the Ashtabula as a scenic river.*

Response: The Trustees have worked with the ATPC in the past and are willing to work with them in the future on projects that, by restoring natural resources and providing enhanced public access, will benefit the Ashtabula area and local community.

12. **Comment:** *One commenter noted that Alternative B would also enhance the local economy by promoting nature-based tourism, and improving boating access and fishing opportunities. Another commenter stated that while he understands public interest in using funds for an economic stimulus project, the "long term economic stimulus...from the fisheries and eco-tourism will be an on-going revenue stream for the community." This commenter emphasized the positive connection between green space and property values and noted that there should not be a struggle between economic stimulus and restoration projects since the goals were identical; if a "vibrant" fishery could be restored and the riparian corridors protected, then this fishery would fund and finance continued economic development.*

Response: The Trustees' focus is on restoring, replacing, and/or acquiring the injured natural resources, so economic impacts were not explicitly evaluated in this RP/EA. The

Trustees concur that there is research in coastal areas and riverine systems cited in peer-reviewed publications that indicates that aquatic habitat restoration and protection (including of the riparian zone) has led to increased economic benefits. Research in the Great Lakes also indicates that property values have increased as a result of sediment remediation and associated natural resource improvements. The Trustees thus anticipate that implementing Alternative B will provide both environmental and economic benefits to the local community.

13. **Comment:** *One commenter noted that the local fishery would be greatly enhanced by restoring and creating wetlands in the watershed. The commenter also noted that absent post-remedy restoration, the river might require several decades to recover. One commenter discussed historic impacts on the Ashtabula River and recommended protection of wildlife resources in the area. Specific suggestions ranged from fish stocking to litter control. Another commenter stated that the actions to provide fish habitat under Alternative B would need to be implemented before pursuing Alternative C (promoting fishing).*

Response: The Trustees believe that projects to promote healthy fish population(s) in the Ashtabula River and Harbor are an important part of NRDA restoration. The Trustees agree that creation and/or restoration of wetlands have the potential to enhance the local fishery. The Trustees also concur with the scientific premise that absent post-remedy restoration, the ecosystem may not achieve full ecological functionality or will take substantially longer to recover. The specific suggestions provided will be considered when individual restoration projects are evaluated.

14. **Comment:** *One commenter asked “what are the acres that (the Trustees) want to see restored” (under Alternative B).*

Response: Generally, the Trustees are focusing on restoring, replacing and/or acquiring wetlands, riparian habitat and ecologically associated uplands in proximity to the Ashtabula River and Harbor. The number of acres to be acquired and restored will depend on the ecological functionality and services provided by the particular restoration project(s), which is not known at this point. Overall, the Trustees propose to restore, replace and/or acquire sufficient habitat acreage to compensate for injury to natural resources.

15. **Comment:** *One commenter requested that the restoration plan specifically address the Gulf Area, and asked whether it could be made into a Federal Park to support year-round recreation.*

Response: Creation of a National Park is beyond the jurisdiction and authority of the Trustees. The Trustees recognize that the Ashtabula River Gulf Area in the Indian Trails Park System is a significant natural and cultural resource. As noted in the response to comment #15, the Trustees are willing to work with the ATPC on restoration projects in the area.

16. **Comment:** *Another commenter supported the restoration plan for the CDM (Brockway) property area, and suggested connecting it to the Indian Trails Parks system (Greenways Trail) to provide enhanced public access and encourage tourism; a small educational center or kiosk could be added to augment educational opportunities. Two commenters asked how*

much money had been awarded to the ATPC for the CDM property acquisition, and what other monies were awarded from the (NRDA) source.

Response: In accordance with the Final Natural Resource Restoration Plan & Environmental Assessment for the Fields Brook Superfund Site, the Brockway (also known as CDM) property was purchased for \$275,000 by the ATPC with funds provided from the Fields Brook NRDA settlement; no other NRDA funds have been expended on the property to date. These funds were provided under a Cooperative Agreement between the ATPC and the U.S. Fish and Wildlife Service. Thus, the property has already been incorporated into the Indian Trails park system. Future plans call for construction of a boardwalk, which could be connected to the existing trail system; some type of educational kiosk may also be possible.

17. **Comment:** *Two commenters preferred Alternative B, but supported only the acquisition of the Walnut Beach area as having the greatest potential for eco-tourism and preservation of threatened and endangered species. They believed that removing the coal pile would address a fire hazard and along with removal of Phragmites, help restore natural fauna and flora in the area. Another commenter also suggested acquiring dune lands and swales in and around Walnut Beach, and improving public access to that area.*

Response: The Trustees concur that the Walnut Beach area has tremendous ecological potential, if restored. Pursuant to the Final Natural Resource Restoration Plan & Environmental Assessment for the Fields Brook Superfund Site, the Trustees previously selected a restoration project for the Walnut Beach area, to be funded from the Fields Brook NRDA settlement. The Trustees put substantial effort into the design(s) of a project to eliminate invasive plants and establish native vegetation in the Walnut Beach area. The Fields Brook natural resource restoration account still has sufficient funds to undertake the Walnut Beach restoration project. However, implementation of the project will require a Cooperative Agreement between the City of Ashtabula and the U.S. Fish and Wildlife Service in order to transfer funds for the work, provide access to the project area, and address other legal issues.

In summary, the Trustees would like to move forward with projects at Walnut Beach, and look forward to cooperation and participation from the City of Ashtabula to make the project(s) possible.

18. **Comment:** *Another commenter cited the importance of acquiring, restoring and rehabilitating habitat closest to the mouth of the Fields Brook and downstream to the harbor, and specifically supported the 5 ½ Slip and adjoining peninsula projects as “prime candidates”.*

Response: The Trustees concur that restoring the 5 ½ Slip and adjoining peninsula would provide valuable riparian, upland and possibly wetland habitat in some of the only “soft” shoreline area(s) in the lower river. Accordingly, discussions regarding potential restoration projects are occurring with property owner(s) in this area.

19. **Comment:** *One commenter wanted the “armored” river bank (for the 1st mile from the mouth at Lake Erie) to be returned to a natural state and accessible to the public.*

Response: The Trustees do not presently have plans for stream bank restoration downstream of the Fifth Street Bridge because, as the commenter points out, the entire reach is armored and this portion of the river is a commercial navigation channel. The Trustees are therefore focusing on areas further upstream, where there is more potential for establishing quality shallow stream bank habitat.

20. **Comment:** *One commenter would like Strong Brook restored to serve as a natural spawning area for Lake Erie fish species.*

Response: The Trustees believe that the possibility of on-going injury in specific areas should play a role in project selection. For most of its length, Strong Brook is a culverted storm sewer and has recently been found to be contaminated with polychlorinated biphenyls (PCBs). Ohio EPA and U.S. EPA have been working to address the PCB sources, and to ensure that the Brook does not present a threat of recontamination to the Ashtabula River. Restoration options are thus limited in Strong Brook and the Trustees are not, at this time, considering any restoration projects in Strong Brook.

21. **Comment:** *One commenter asked why restoration projects could not be conducted in the Fields Brook area, particularly since cleanup had already been accomplished in this area.*

Response: Fields Brook is a Superfund Site with ongoing remedial activities. Additional sources of contamination in Fields Brook have been discovered post-remedy, and efforts are still on-going to address these sources. Accordingly, implementation of restoration projects along the Brook could interfere with remedial projects and could, potentially, result in additional releases of hazardous substances. Nonetheless, the Trustees, along with Ohio EPA's Division of Surface Water, evaluated the ecological habitat in the Fields Brook to identify potential opportunities for restoration. The Trustees determined that no restoration opportunities were available directly on the Brook. The Trustees noted that the Brook itself has been remediated under U.S. EPA oversight to maximize ecological functionality. In the lower reaches, Fields Brook is a primarily industrialized area with minimal opportunities for restoration; in the upper reaches, good quality ecological habitat is already present, and restoration is not necessary. Therefore, the Trustees chose to use the Fields Brook NRDA settlement funds to implement projects elsewhere in the Ashtabula area.

II (b). Opposition to Alternative B

22. **Comment:** *One commenter pointed out that there were limited actions that could be taken to restore the damaged portions of the Ashtabula River and the watershed. The commenter noted that much of the riverbank from the 24th Street Bridge downstream, as well as most of the immediate area of the Lake Erie shoreline to the east and west of the river mouth is industrialized and/or owned by private entities that would not be amenable to restoring fish habitat in the area.*

Response: The Trustees agree with the commenter that much of the riverbank and shoreline is industrialized and/or owned by private entities, and therefore restoration potential is limited downstream of the 24th Street Bridge. Because of these circumstances, the Trustees have determined that habitat protection through acquisition or other conservation measures will meet restoration objectives. There may be opportunities in this area to restore valuable

habitat, such as the restoration of the 5 ½ Slip and other projects. The Trustees are in the process of identifying and evaluating these restoration opportunities.

23. **Comment:** *One commenter felt that if the river was cleaned up, fish would return on their own (i.e., restoration was unnecessary).*

Response: The Trustees agree that some natural recovery will occur, but natural resource restoration projects can increase the rate and extent of that recovery. Restoration and protection of existing wetlands and riparian habitat, as well as creation of new wetlands and fish spawning and nursery areas will increase the overall biological productivity of the Ashtabula River. This will result in an improved fishery, and partially compensate the public for past losses. Implementation of Alternative B will also ensure that natural areas will be preserved, that otherwise could be lost to development. The Trustees will weigh both the short-term and long-term costs and benefits of each restoration action to determine if specific/individual proposed restoration plan(s) will help return the river to ecological functionality.

III. Comments on Alternative C (Augmentation of Human Use Related Natural Resource Services)

III (a). Support for Alternative C

24. **Comment:** *Several commenters supported enhanced human access to the waterfront. The commenters generally believed that Alternative C would provide immediate benefits in the form of access to and appreciation for the harbor area and lighthouse by both current and future generations. Specific projects supported by the commenters include improvements to the Breakwall Lighthouse, walkway(s) to the Lighthouse and along Walnut Beach; an interpretative educational center at Walnut Beach; and canoe launches and providing handicapped access in the form of ramps on fishing piers and walkways. In general, commenters' opinions were divided on whether (i) a portion or (ii) all of any settlement should be spent on Alternative C. One commenter suggested, at a minimum, funding a feasibility study for Lighthouse/Walnut Beach access projects.*

Response: The Trustees carefully considered the projects proposed by some local community members and organizations. These projects have been designated as Alternative C under the RP/EA. In their analysis, the Trustees evaluated the nexus between those projects and the statutory¹¹ and regulatory¹² requirements that projects restore, replace, and/or acquire the equivalent of the resources injured from release(s) of hazardous substances into the environment. The Trustees determined that, although projects under Alternative C could potentially provide economic and educational benefits to the Ashtabula area, those projects are not nearly as favorable to the restoration of impaired resources as the types of projects selected by the Trustees. Additional responses on the specific projects are provided below, and in Response # 27.

¹¹ Section 107(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9607(f)(1).

¹² 43 C.F.R. § 11.81.

- The Breakwall lighthouse project, as proposed to the Trustees, includes improvements to the lighthouse, construction of a walkway to the lighthouse, and construction of a transient boat dock. Construction of the walkway and the transient boat dock could provide fishing access, and therefore, provide services similar to those lost due to fishery injuries. Based on information presented by the consultant to the City of Ashtabula in a November 15, 2006 meeting with the Trustee representatives, the estimated cost of the project is around \$8,000,000.¹³
- The Trustees believe that the estimated cost and benefits of the Breakwall Lighthouse project are not nearly as favorable to the restoration of impaired resources as the types of projects selected by the Trustees – which include protection and restoration of important habitat units, direct streambank restoration, in-stream aquatic habitat restoration, restoration of ecologically significant hydraulically connected wetlands, and increased public access to resources for ecologically sensitive use and enjoyment. The Trustees strongly believe that these types of projects will more directly address injuries caused by hazardous substances through water quality improvements, increased productivity of fishery and avian resources, and enhanced fishing and recreational opportunities for the public. For these reasons, the Trustees have not selected Alternative C as the Preferred Alternative.
- The Trustees will consider incorporating canoe launches into the proposed restoration plans under Alternative B, to the extent feasible.

25. **Comment:** *Two commenters cited the Fox River settlement as an example of how projects could be tailored to meet the needs of the ecosystem while expanding public access; one of these commenters provided drawings and maps supporting a more expansive set of projects.*

Response: The Trustees believe that projects which include habitat restoration, wetland creation, riparian protection, boat launch facilities and trails will help restore natural resources in the Ashtabula River ecosystem and expand public access. Thus, the projects proposed for the Ashtabula NRDA are consistent with restoration projects in other NRDA settlements including Fox River, although on a scale that is consistent with the available funds, restorations opportunities, and impacts at the respective sites. Specific suggestions to balance ecological restoration with human use will be considered when individual projects are implemented.

26. **Comment:** *Two commenters wanted a portion of any monetary settlement to be used to help revive the tourism industry.*

Response: The Trustees have a legal obligation under CERCLA to ensure that restoration funds are used only for appropriate restoration projects. The Trustees are not permitted to provide NRDA funds to revive the tourism industry. However, the Trustees anticipate that the enhancement of ecological habitat proposed in Alternative B will result in improvements to the fishery and avian resources that may lead to increased tourism in the area.

¹³ The \$8,000,000 cost estimate is based on information provided by the City of Ashtabula consultant in the November 15, 2006 meeting with the Trustee representatives.

27. **Comment:** *Two commenters supported the educational center at Walnut Beach, stressing that the youth and future generations needed to be educated so that the problems (contamination in the river) would not occur again. Another commenter felt that future generations should be taught conservation and ecology at the Lake.*

Response: The natural resource damage provisions of CERCLA provide that recovered damages are to be used “only to restore, replace, or acquire the equivalent” of injured natural resources. Specific restoration projects can, and have at other sites, included environmental education as a component of natural resource protection and restoration. However, environmental education projects cannot and should not be implemented in lieu of available and appropriate projects to directly restore, rehabilitate, or replace impaired public natural resources. The proposed educational facility at Walnut Beach is estimated to cost \$2,250,000.¹⁴ As illustrated in the proposed restoration plan, the Ashtabula River watershed offers numerous opportunities to address hazardous substance impacts to natural resources through habitat acquisition and protection in the riparian corridor, direct streambank restoration, in-stream aquatic habitat restoration, the re-establishment of ecologically important hydraulically connected wetlands, along with the provisions for increased public access to resources for ecologically sensitive public use and enjoyment. Additionally, the Trustees may be able to incorporate cost-effective interpretive signage promoting environmental education into some of the projects proposed under Alternative B, to the extent possible. The Trustees believe that these types of projects will provide more cost effective, more appropriate, and more demonstrable benefits to the injured resources than the construction of an education facility at Walnut Beach.

III (b). Opposition to Alternative C

28. **Comment:** *One commenter stated that Alternative C would be a waste of the funds as the walkway could be destroyed by conditions in the area; the commenter expressed concerns about personal safety if the walkway was used in bad weather. One commenter was of the opinion that Alternative C would “likely create a maintenance nightmare for future generations.” One commenter pointed out the difficulty of maintaining break wall walkways and learning centers and the long term stewardship and (financial) commitment necessary for such enterprises.*

Response: The Trustees plan to spend settlement funds on projects that will provide natural resource and public use enhancement services to offset the loss of similar services resulting from injuries to natural resources. Specific restoration projects should meet the regulatory criteria in 43 C.F.R. Part 11, and the criteria identified in the Restoration Plan.

29. **Comment:** *Two commenters felt that Alternative C projects would not benefit the natural environment or, while “admirable public works projects” would not help to repair injuries to the environment.*

Response: The Trustees concur that the projects proposed under Alternative C will not provide natural resource and public use enhancement services to offset the loss of similar

¹⁴ The \$2,250,000 cost estimate is based on information provided by the City of Ashtabula consultant in the November 15, 2006 meeting with the Trustee representatives.

services resulting from release(s) into the environment. Specific restoration projects should meet the criteria outlined in the Restoration Plan and the regulatory and statutory objectives, including the cost-effectiveness of the project(s). The Trustees believe that the projects proposed in Alternative B for natural resource based restoration will maximize the benefits from NRDA restoration, including the restoration of lost services.

30. **Comment:** *One commenter urged the Trustees to “think ahead” and consider how long a restroom facility would last, versus the “once-in-a-generation opportunity” to restore the river, and the lasting impacts from such a restoration.*

Response: The Trustees evaluated all of the alternatives for long-term benefits (in terms of restoring injured natural resources) as required by the regulations and concluded that Alternative B would best achieve this objective.

IV. Comments on both Alternative B & Alternative C

31. **Comment:** *Some commenters believed that while restoring the ecosystem was important, any settlement of the natural resource damages should be divided between Alternative B and Alternative C. Commenters were divided on how much of the settlement should focus on Alternative B versus Alternative C; opinions ranged from the “primary portion” to 50% or an “appropriate weight” going to Alternative B. One commenter said that since “100% of the clean-up was done in the City of Ashtabula...there (should) be more projects within the city limits.”*

Response: Please see previous responses to comments, including Comment # 24, on the Trustees’ ability to fund projects under Alternative C.

The Trustees have selected restoration projects that maximize the benefits to the ecological community, and compensate for lost services to the public, in a cost-effective manner. The criterion of cost-effectiveness is a tool to evaluate the proposed benefits of a project versus its expected cost. In proposing projects, the Trustees carefully considered the ecological functionality of the Ashtabula River and Harbor, and the benefits that the projects provide to the ecosystem. Ecological functionality is not bound by city limits; thus, even projects that are outside city limits can provide significant improvements to the Ashtabula River and Harbor’s natural resources and services. Projects that provide the maximum environmental benefit to natural resources and accompanying lost services, at the most reasonable cost, have been selected as the Preferred Alternative.

SECTION 8

AUTHORS AND REVIEWERS

Prepared by:

David DeVault
NRDA Case Manager
U.S. Fish & Wildlife Service
1 Federal Drive
Ft. Snelling, MN 55111

List of Primary Reviewers:

Sheila Abraham
NRDA Coordinator
Ohio Environmental Protection Agency
Northeast District Office
2110 East Aurora Road
Twinsburg, OH 44087

Dave Altfater
Fishery Biologist
Ohio Environmental Protection Agency
Division of Surface Water
Environmental Assessment Unit
Groveport Field Office
4675 Homer Ohio Lane
Groveport, OH 43125

Paul Anderson
Aquatic Biologist
Ohio Environmental Protection Agency
Division of Surface Water
Northeast District Office
2110 East Aurora Road
Twinsburg, OH 44087

Kelly Bakayza, Esq.
Office of the Solicitor
U.S. Department of the Interior
Three Parkway Center, Suite 385
Pittsburgh, PA 15220

Mary M. Knapp
Supervisor
Division of Ecological Services
U.S. Fish & Wildlife Service

6950 Americana Parkway, Suite H
Reynoldsburg, OH 43068-4127

Mark Navarre, Esq.
Supervising Attorney
Ohio Environmental Protection Agency
Legal Office
50 West Town Street
Columbus, OH 43216-1049

Matthew Smith
Assistant Scenic River Manager
Ohio Department of Natural Resources
Division of Natural Areas & Preserves
3441 North Ridge West
Ashtabula, OH 44004

Regan (Sig) Williams
Site Coordinator
Ohio Environmental Protection Agency
Northeast District Office
2110 East Aurora Road
Twinsburg, OH 44087

SECTION 9

REFERENCES CITED

1. Ashtabula River Partnership. 2001. Preliminary Final Comprehensive Management Plan.
2. Fields Brook Consent Decree. 1999. *United States v. GenCorp, Inc. et al.*, Case no. 5:89-CV-1866, U.S. District Court, N.D. Ohio, E.D. (2 Consent Decrees) July 7, 1999.
3. U.S. Fish and Wildlife Service. Sept. 1987. Preliminary Natural Resource Survey, Fields Brook Site, Ashtabula County, Ohio.
4. U.S. Fish and Wildlife Service. 2001. Pre-Assessment Screen for the Ashtabula River and Harbor.

APPENDIX A
USFWS Intra-Service Section 7 Biological Evaluation Form