

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 ) Civil Action No. 1:01-CV-6  
 )  
 v. )  
 )  
 MONONGAHELA POWER COMPANY, )  
 INC. (D/B/A ALLEGHENY )  
 POWER), )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

CONSENT DECREE

I. BACKGROUND

A. Plaintiff, United States of America, through the

Attorney General, on behalf of the Administrator of the Environmental Protection Agency ("EPA"), filed a civil Complaint on January 18, 2001, against Defendant Monongahela Power Company, Inc. (d/b/a Allegheny Power) ("Allegheny Power"), pursuant to the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. §§ 1251-1387, as amended by the Oil Pollution Act of 1990, Pub. L. 101-380 ("CWA") and 40 C.F.R. § 112.4(a). The Complaint alleges, inter alia, that Allegheny Power is liable for the discharge of oil into the navigable waters of the United States, on or about April 11, 1998, in violation of Sections 301 and 311 of the CWA, 33 U.S.C. §§ 1311, 1321. The discharge occurred when a large transformer failed at Allegheny Power's Belmont Substation, located in Pleasants County, West Virginia. Further, the Complaint alleges that Allegheny Power violated 40 C.F.R. § 112.4 by failing to submit its Spill Prevention Control and Countermeasures ("SPCC") Plan and any amendments thereto to EPA as required after the discharge.

B. The Complaint seeks (i) civil penalties pursuant to Section 311(b)(7) of the CWA, 33 U.S.C. § 1321(b)(7), with respect to the discharge, (ii) civil penalties pursuant to Section 311(b)(7) and 40 C.F.R. § 112.4 with respect to the failure to submit the SPCC Plan and any amendments thereto and (iii) injunctive relief pursuant to Section 309(b) of the CWA, 33

U.S.C. § 1319(b).

C. By stipulation and agreement, and as approved by order of the Court, the Parties agreed to extend the time for Allegheny Power to answer the Complaint and agreed to pursue settlement discussions during the period covered by the extension.

D. On January 31, 2001, as part of the Parties' settlement negotiations, EPA conducted an inspection of the Belmont Substation, pursuant to 40 C.F.R. Part 112, to determine the adequacy of Allegheny Power's SPCC Plan. As a result of the EPA inspection, Allegheny Power has agreed to implement measures, which are included in Section V of this Consent Decree, to ensure that it remains in compliance with the SPCC regulations.

E. Allegheny Power, by entering into this Consent Decree or by taking any action in accordance with it, does not admit any liability with respect to the allegations set forth in the Complaint or with respect to the "matters addressed" in this Consent Decree, and entry into this Consent Decree shall not be construed as an admission of liability for any purpose. Further, neither this Consent Decree nor the Complaint shall be deemed as an admission in any respect to any third party.

F. The Parties agree, and this Court finds by entering this Consent Decree, that the Parties have negotiated this Consent Decree in good faith; that implementation of the Consent Decree will avoid prolonged and potentially complicated

litigation between the Parties; that this Consent Decree represents a settlement of Defendant's liability for the "matters addressed" in this Consent Decree; and that this Consent Decree is fair, reasonable, and in the public interest.

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

## **II. JURISDICTION AND VENUE**

1. This Court has jurisdiction over Defendant and the subject matter of this action, pursuant to Sections 309(b) and (d) and 311(b) (7) (E) of the CWA, 33 U.S.C. §§ 1319(b) and (d) and 1321(b) (7) (E), and pursuant to 28 U.S.C. §§ 1331, 1345 and 1355. Venue is proper in this judicial District, pursuant to Sections 309(b) and 311(b) (7) (E) of the CWA, 33 U.S.C. §§ 1319(b) and 1321(b) (7) (E), and pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1395, because Defendant is located in and is doing business in this District, and because the violations that are the subject of this action occurred in this judicial District. For purposes of this Consent Decree, Allegheny Power waives any objections and defenses that it may have to jurisdiction of the Court or to venue in this District.

## **III. PARTIES BOUND**

2. This Consent Decree applies to, and is binding upon, the United States and upon Allegheny Power, its officers, directors, agents, servants, employees, successors or assigns. Any change in Allegheny Power's ownership, including ownership of

the Belmont Substation, or corporate status shall in no way alter Allegheny Power's responsibilities under this Consent Decree.

3. Allegheny Power shall provide a copy of this Consent Decree to any contractor and consultant, if any, that Allegheny Power retains to perform work associated with the remedial measures set forth in Section V of this Consent Decree, upon execution of any contract relating to such work.

#### **IV. DEFINITIONS**

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in the CWA or in regulations promulgated thereunder shall have the meaning assigned to them in those authorities. Whenever terms listed below are used in this Consent Decree, the following definitions shall apply.

a. "Belmont Substation" or "Substation" shall mean the Belmont Substation, owned and operated by Defendant, located in Pleasants County, West Virginia.

b. "Consent Decree" shall mean this written agreement.

c. "Day" shall mean a calendar day. 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.

d. "Defendant" shall mean the Monongahela Power Company, Inc. (d/b/a Allegheny Power) ("Allegheny Power").

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

f. "Interest" shall mean the federal judgment rate computed in accordance with 28 U.S.C. § 1961.

g. "Matters Addressed" in and covered by this Consent Decree shall mean the April 11, 1998, discharge, as described in Allegheny Power's response, dated April 21, 1998, to EPA's request pursuant to Section 308(a) of the CWA, 33 U.S.C. § 1318(a); the allegations set forth in the Complaint in this action related to the April 11, 1998, discharge and the failure to submit the SPCC Plan in accordance with 40 C.F.R. § 112.4 and payment of a civil penalty related thereto; and implementation of the remedial measures described in Section V below.

h. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter. "Sub-Paragraph" shall mean a portion of this Consent Decree identified by a lower case letter.

i. "Parties" shall mean the Plaintiff United States and Defendant Allegheny Power in this action.

j. "Plaintiff" shall mean the United States of America including its departments, agencies and

instrumentalities.

k. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

#### **V. REMEDIAL MEASURES**

5. Defendant has implemented measures, as described below in sub-Paragraph 5.a, and shall complete/implement the additional measures described below in sub-Paragraphs 5.b-f and Paragraph 8 to address the requirements set forth in 40 C.F.R. § 112.7.

a. Replacement of Transformers at the Belmont Substation. The April 11, 1998, discharge of oil at the Belmont Substation occurred when one of three 765kV Power Transformers (27,670 gallons capacity each) at the Substation failed. Defendant replaced the 765kV Power Transformer (Serial Number H-40994), which failed, with a new power transformer at a cost of approximately \$2,340,000. In addition, on its own initiative, Defendant replaced the two other 765kV Power Transformers (27,000 gallons capacity each) at the Substation.

b. Installation of Sump Pumps Around 500-138 kV Transformers. Defendant will add sump pumps to the existing containment pits around the three 500-138 kV Transformers at the Substation to keep the pits free of rainwater. The pumps will be relayed to shut off if a problem occurs with respect to a transformer, thereby preventing oil from being pumped out of the

pit.

c. Installation of Valves on Certain Drains.

Defendant shall add valves to all drains that exit the Substation's fenced area. The purpose of the valves will be to close the drains in the event of a discharge of oil and to prevent/restrict oil from flowing through the drains and out of the Substation.

d. Installation of Containment for the 138 kV Circuit Breakers. Defendant shall construct a soil/stone berm within the 138 kV switchyard as indicated on Drawing 503-616, which was previously provided to and reviewed by EPA. The purpose of the berm will be to contain any oil flowing across the yard surface in the event of a discharge from one of the circuit breakers.

e. Upgrading of Containment for the 500-138 kV transformers. Defendant shall upgrade the containment around the three 500-138 kV transformers at the Belmont Substation to provide the same containment around these three transformers as proposed for the three large 765 kV transformers. The upgraded containment for the three 500-138 kV transformers shall be lined and provide for at least 110% containment volume of the largest of these three transformers.

f. Use of Temporary Containment Related to the Underground Diesel Fuel Storage Tank (Number 001). To address a possible spill when fuel is being delivered to the Substation,

Defendant shall provide temporary containment by placing booming during delivery times. Prior to the next date for delivery of fuel to the Belmont Substation, Allegheny Power shall determine the type of booming that will be used, and at least 65 days prior to purchasing such booming, Allegheny Power shall provide notice to EPA for review and comments. Such notice shall describe the type of booming, including at least its characteristics and specifications. EPA shall provide any comments on such notice to Allegheny Power within 30 days after receipt of the notice.

6. Appendix A, attached hereto, provides a description of each of the remedial measures set forth above in sub-Paragraphs 5.b-f, including projected dates for the completion/implementation of each measure.

7. Defendant shall complete/implement all of the measures described in sub-Paragraphs 5.b-f no later than June 1, 2002, including appropriate testing of all equipment to ensure that it functions properly.

8. Within 45 days from entry of this Consent Decree, Defendant Allegheny Power shall amend its SPCC Plan, consistent with Paragraph 5.f and 40 C.F.R. Part 112, to include a description of the temporary containment that will be used during the delivery of fuel to fill the underground storage tank. In addition, as each of the measures described in sub-Paragraphs 5.b-e, is completed/implemented, Defendant shall amend its SPCC

Plan to include a description of each measure. Further, upon completion/implementation of all of the remedial measures under Section V, Defendant shall, consistent with Paragraph 24, attach a copy of the amended/updated SPCC Plan to the required Final Report.

**VI. COMPLETION OF THE SOIL REMEDIATION ACTIVITIES  
APPROVED AND BEING SUPERVISED BY THE STATE**

9. Shortly after the April 11, 1998, discharge, and prior to the filing of the Complaint in this civil action, Allegheny Power commenced activities to remove oil in soil in and around the Belmont Substation. Allegheny Power submitted an "Oil Spill Cleanup and Remediation Action Plan," to the State of West Virginia Division of Environmental Protection ("WVDEP"), which was subsequently amended ("Remediation Plan"). The WVDEP approved the Remediation Plan now being implemented by Allegheny Power. All references to the Remediation Plan in this Consent Decree shall mean the Remediation Plan and all amendments thereto as approved by the WVDEP.

10. Allegheny Power shall complete implementation of the Remediation Plan under the supervision of the WVDEP. The uncompleted soil remediation activities shall be completed no later than June 1, 2002. If Allegheny Power is unable to fully implement the Remediation Plan by the June 1, 2002 deadline, because the WVDEP requires that Allegheny Power perform additional clean-up activities, Allegheny Power shall provide

notice to EPA at least 30 days prior to June 1, 2002. Such notice shall include a description of any activities which remain to be completed, the projected revised completion date, a statement of the reasons why the original completion date must be extended, and a signed statement from the WVDEP approving the projected revised completion date.

11. The Parties agree that Allegheny Power shall fully comply with the Remediation Plan prior to termination of this Consent Decree pursuant to Section XXI below. Notice of full and satisfactory compliance with the Remediation Plan, endorsed by the WVDEP, shall be included as part of the Allegheny Power's Final Report under Section IX.

12. The Remediation Plan was approved by the WVDEP and had been substantially implemented prior to the initiation of this civil action. EPA has not been involved in the approval process or review of work being performed under the Remediation Plan. EPA reserves the right to review and comment on any final submission made to the WVDEP showing the clean-up activities performed under the Remediation Plan. If any dispute arises between the Parties related to EPA's review of and comments on such final submission, Section XV (Dispute Resolution) shall apply.

## **VII. CIVIL PENALTIES**

13. Within thirty (30) days of entry of this Consent Decree, Allegheny Power shall pay to the United States a total civil penalty in the amount of Two Hundred Fifty-Two Thousand Dollars (\$252,000.00). For purposes of this Consent Decree, EPA has determined that the total penalty amount shall be allocated as follows: (a) \$205,754 for the April 11, 1998, discharge, pursuant to Section 311(b)(7) of the CWA, 33 U.S.C. § 1321(b)(7), and (b) \$46,246 for failure to submit the required SPCC Plan in compliance with 40 C.F.R. Part 112.

14. Payment of the total penalty amount of \$252,000 shall be made by FedWire Electronic Funds Transfer ("EFT") payable to "Oil Spill Liability Trust Fund" and shall be made in accordance with instructions provided to Allegheny Power by Plaintiff following the lodging of the Consent Decree. Payment shall reference this civil action, EPA Region III, and DOJ Case Number 90-1-1-06477. Allegheny Power shall send notice to EPA and DOJ in accordance with Section XIII (Notices and Submissions) that payment has been made. Notice shall also be sent to the following:

Commander of the National Pollution  
Fund Center  
United States Coast Guard  
Ballston Common Office Building  
Suite 1000  
4200 Wilson Boulevard  
Arlington, VA 22203

Docket Clerk (3RC00)

U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

15. Interest and other charges. If Allegheny Power fails to timely make the total penalty payment required under Paragraph 13 of this Consent Decree, then, commencing the day after the payment is due, Defendant shall be liable for Interest on the unpaid balance until the amount due is paid.

16. If the civil penalty is not paid when due, the United States shall be deemed a judgment creditor for purposes of collection of any unpaid amounts of the civil penalty and applicable stipulated penalties and Interest. Further, Allegheny Power shall be liable for the costs of enforcement and collection pursuant to the Federal Debt Collection Procedure Act, 28 U.S.C. § 3001 et seq. If Interest or costs of enforcement and collection are due, payment shall be made in accordance with instructions provided by Plaintiff.

**VIII. STIPULATED PENALTIES**

17. Allegheny Power shall be liable for stipulated penalties to Plaintiff for failure to comply with the requirements of this Consent Decree as specified below. "Comply" or "Compliance" by Allegheny Power shall include completion of the measures and or activities required under this Consent Decree in accordance with applicable requirements of law, including but not limited to 40 C.F.R. Part 112, and all requirements of this

Consent Decree within the specified times or dates established by and approved under this Consent Decree.

18. Stipulated penalties shall accrue per violation per day as specified below.

a. For failure to pay the civil penalty amount when due, Allegheny Power shall pay stipulated penalties as follows:

<u>Period of Noncompliance</u>	<u>Penalty</u>
1st to 15th day	\$1000.00 per day per violation
16th to 30th day	\$1500.00 per day per violation
After 30th day	\$2000.00 per day per violation

b. For failure to comply with any of the requirements of Section V (Remedial Measures), Allegheny Power shall pay stipulated penalties as follows:

<u>Period of Noncompliance</u>	<u>Penalty</u>
1st to 15th day	\$1000.00 per day per violation
16th to 30th day	\$1500.00 per day per violation
After 30th day	\$2000.00 per day per violation

c. For failure to comply with any requirement under Section IX (Reporting Requirements/EPA Inspection), Allegheny Power shall pay \$500.00 per day per violation.

d. For any other violation of this Consent Decree, Allegheny Power shall pay \$500.00 per day per violation.

19. All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "Oil Spill Liability Trust Fund." Each payment shall reference this civil action, EPA Region III, and DOJ Case Number 90-1-1-

06477 and shall be tendered to:

Commander of the National Pollution  
Fund Center  
United States Coast Guard  
Ballston Common Office Building  
Suite 1000  
4200 Wilson Boulevard  
Arlington, VA 22203

Copies of each check and transmittal letter shall be sent to the DOJ and EPA persons identified in Section XIII (Notices and Submissions) and to the Docket Clerk (3RC00), U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103-2029. Stipulated penalties incurred under this Consent Decree shall be tendered within thirty (30) days of Defendant's receipt of the demand, unless Defendant contests the demand in accordance with the dispute resolution provisions of this Consent Decree. If Defendant invokes the dispute resolution provisions in this Consent Decree, it shall deposit any disputed penalty in an interest-bearing escrow account within ten (10) days of invoking dispute resolution. The stipulated penalties that are the subject of the dispute, as well as interest earned, shall be released in a manner consistent with the terms of the resolution of the dispute within sixty (60) days after the dispute is resolved. Stipulated penalties for any continuing violation shall continue to accrue during the resolution of any dispute.

20. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent

Decree.

21. The stipulated penalties herein shall be in addition to any other remedies or sanctions that may be available to the United States by reason of Allegheny Power's failure to comply with the requirements of this Consent Decree or any provision of federal or state law.

22. If Defendant fails to pay stipulated penalties when due, Interest shall begin to accrue on the date of demand made pursuant to Paragraph 19.

**IX. REPORTING REQUIREMENTS/EPA INSPECTION**

23. Not later than January 10, 2002, Allegheny Power shall submit to EPA an Interim Report that describes the actions that have been taken and the actions that will be taken with respect to the completion/implementation of each of the remedial measures identified in Section V. In addition, the Interim Report shall identify any problems, including but not limited to operational and mechanical ones, that have been encountered with respect to the completion/implementation of any of the remedial measures and discuss how each problem has been or will be addressed, and whether the problem will delay final completion/implementation of the remedial measure by the required date.

24. Not later than July 15, 2002, Allegheny Power shall submit to EPA a Final Report. The Final Report shall include the following:

a. documentation showing that all of the remedial measures described in Section V have been completed/implemented;

b. documentation showing that all equipment items have been tested and operate properly, and that any new and/or expanded containment meets applicable standards;

c. a copy of Allegheny Power's SPCC Plan related to the Belmont Substation showing that the SPCC Plan has been appropriately modified/updated to include the remedial measures completed/implemented under this Consent Decree and that it conforms with the requirements set forth in 40 C.F.R. Part 112; and

d. a copy of the notice that certifies that the Remediation Plan has been fully implemented, as approved or endorsed by the WVDEP, and a copy of the final submission (or appropriate documentation) provided to the WVDEP showing the work performed under the Remediation Plan.

25. Within forty-five (45) days after receipt of the Final Report, EPA shall advise Allegheny Power in writing whether an inspection will be performed at the Belmont Substation to verify that the remedial measures required under Section V and as addressed in the Final Report have been completed/implemented and operate properly and/or meet applicable standards. If EPA decides, in its discretion, to perform said inspection, the notice shall propose a date and time for the inspection. Unless

otherwise agreed to by the Parties, the Final Inspection shall be performed not later than seventy-five days after receipt of the Final Report. If any issues are raised as a result of the EPA inspection, the Parties shall attempt to resolve them amicably. Any disputes shall be subject to the dispute resolution process.

**X. CERTIFICATION**

26. Any notice, report, certification, data or other document required to be submitted by Allegheny Power under this Consent Decree, which discusses, describes, demonstrates, supports any finding, or makes any representation concerning Allegheny Power's compliance or non-compliance with this Consent Decree, shall be signed and certified by a responsible official, as defined in 40 C.F.R. § 122.22. The certification of the responsible official shall be in the following form:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, 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.

Signature: \_\_\_\_\_

Printed/Typed:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Telephone No.: \_\_\_\_\_

**XI. ACCESS**

27. The United States and its contractors, consultants and employees shall have authority to enter any property of the Belmont Substation at all reasonable times for the purposes of monitoring the progress of activities required under this Consent Decree; and verifying any data or information submitted in accordance with the terms of this Consent Decree. This provision in no way limits or otherwise affects any right of entry or access held by the United States pursuant to the CWA and any other applicable federal and state laws, regulations, and permits.

**XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

28. In consideration of the compliance measures that have been and will be implemented under Section V and the civil penalty payment that will be made by Defendant under the terms of this Consent Decree, the United States covenants not to sue or to take administrative action against Defendant for the "matters addressed" in this Consent Decree. This covenant not to sue shall take effect after receipt by the United States of the civil

penalty payment, any Interest, and payment of all stipulated penalties, if due, and subject to Defendant's compliance with the requirements of this Consent Decree. This covenant not to sue is conditioned upon the complete and satisfactory performance by Defendant of its obligations under this Consent Decree. This covenant not to sue extends only to Defendant and does not extend to any other person.

29. The United States' covenant not to sue does not extend to any matters other than those expressly included in the definition of "matters addressed," pursuant to sub-Paragraph 4.g. The United States reserves, and this Consent Decree is without prejudice to, all rights against Defendant with respect to all matters other than those expressly specified in the covenant not to sue.

30. The United States may, inter alia, file separate actions for statutory penalties and/or injunctive relief against Defendant for violations of any provision of federal or state law that occurred, except for "matters addressed" in this Consent Decree. However, nothing herein shall preclude the United States from filing a separate action to seek appropriate statutory penalties and/or injunctive relief, as permitted by law, for violations of this Consent Decree.

31. In any subsequent administrative or judicial proceeding initiated by the United States for civil penalties or injunctive

relief, Allegheny Power shall not assert, and may not maintain, any defense or claim based upon 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 in the subsequent proceeding should have been brought in the instant case; provided, however, that nothing affects the enforceability of the covenant not to sue set forth in Paragraph 28.

32. Allegheny Power covenants not to sue, and agrees not to assert any claims or causes of action, against the United States under the CWA, OPA, or any other federal or state law or regulations with respect to the Consent Decree, the discharge that occurred on or about April 11, 1998, or any response activities taken by Allegheny Power or any person on its behalf, including without limitation, any direct or indirect claim for reimbursement under any provision of law.

33. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any response actions authorized by law. Further, the United States retains all authority and reserves all rights under the SPCC regulations. However, nothing in this Paragraph affects the enforceability of the covenant not to sue set forth in Paragraph 28.

34. The United States, by consent to the entry of this

Consent Decree, does not warrant or aver in any manner that Allegheny Power's complete and satisfactory compliance with this Consent Decree will constitute or result in compliance with the CWA or any other law or regulation.

35. Nothing in this Consent Decree is intended to nor shall be construed to operate in any way to resolve any criminal liability issues with respect to any person, including Defendant.

36. This Consent Decree does not limit or affect the rights of the United States or Defendant against any third party (party not part of this Consent Decree), nor does it limit the rights of such third parties against Defendant, except as provided by law.

### **XIII. NOTICES AND SUBMISSIONS**

\_\_\_\_37. Whenever, under the terms of this Consent Decree, notice is required to be given or a document 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 Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, and Defendant, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division

U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: United States v. Monongahela Power  
Company, Inc.--90-1-1-06477

As to U.S. Environmental Protection Agency:

Julia Gutreuter (3RC42)  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

Paula Curtin  
Spill Enforcement Coordinator  
Removal Enforcement and Spill Section  
U.S. Environmental Protection Agency  
Region III  
1060 Chapline Street  
Wheeling, WVA 26003

Regina Starkey (3HS32)  
SPCC Coordinator  
Removal Enforcement and Oil Section  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

As to Settling Defendant:

Norbert J. Smith  
Senior Attorney  
Allegheny Energy  
4350 Northern Pike  
Monroeville, Pennsylvania 15146-2841

**XIV. RECORD RETENTION/ACCESS TO INFORMATION**

38. Until ten years after termination of this Consent Decree, Allegheny Power shall preserve and retain all records and documents now in its possession or control or which come into its

possession or control which relate in any manner to the April 11, 1998, discharge and the performance of the compliance measures required under Section V (Remedial Measures) regardless of any corporate retention policy to the contrary.

39. At any time prior to termination of this Consent Decree, and for ten years thereafter, Allegheny Power shall provide to the United States, upon request, copies of all documents and information within its possession and control or that of its contractors or agents containing factual information relating to the April 11, 1998, discharge and implementation of this Consent Decree, including without limitation, reports, correspondence, or other documents or information related to the discharge and work performed pursuant to Section V (Remedial Measures).

40. Allegheny Power may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with 40 C.F.R. Part 2. Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Allegheny Power that the documents or information are not confidential under applicable law, the public may be given

access to such documents or information without further notice to Allegheny Power.

41. Allegheny Power may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Allegheny Power asserts such a privilege in lieu of providing documents, it shall provide to the United States the following: i) the title of the document, record, or information, ii) the date of the document, record, or information, iii) the name and title of the author of the document, record, or information, iv) the name and title of each addressee and recipient, v) a description of the subject of the document, record, or information, and vi) the privilege asserted. However, no documents, reports or other information created or generated pursuant to the requirements of this or any other consent decree with the United States shall be withheld on the grounds that they are privileged, nor shall any claim of confidentiality be made with respect to such documents, reports, or information. If a claim of privilege applies only to a portion of a document, the document shall be provided to Plaintiff in redacted form to mask the privileged information only. Allegheny Power shall retain all records and documents that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the

Allegheny Power's favor.

42. Allegheny Power hereby certifies that it has not knowingly altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents, or other information relating to its potential liability for the claims alleged by the United States since notification of potential liability by the United States or the filing of the Complaint.

43. Nothing in this Consent Decree shall limit the access and information-gathering authorities and rights of the United States under any federal authorities and rights of the United States under any federal law or regulation, including without limitation, related enforcement authorities under the CWA.

#### **XV. DISPUTE RESOLUTION**

44. Informal Dispute Resolution. If any dispute arises between the Parties with respect to this Consent Decree, the Parties shall in the first instance pursue resolution of the dispute through informal negotiations. A dispute shall be considered to have arisen when one Party sends the other a written Notice of Dispute, which at a minimum, shall identify the specific provision of the Consent Decree at issue and provide that Party's position on said issues and the factual, legal or other support for said position. The Party who receives such a Notice shall, within thirty (30) days upon receipt thereof, provide a written response to the Notice, and said response, at a

minimum, shall state the Party's position with respect to the factual, legal and other support alleged in the Notice.

45. The informal negotiation period shall not exceed 60 days from the time the dispute arises, unless it is modified by written agreement of the Parties.

46. If the Parties' informal dispute resolution negotiations are not successful, either Party may petition the Court concerning the dispute. Said petition shall set forth the nature of the dispute and a proposal for resolution. The non-petitioning Party shall have thirty (30) days to file its response, and may advocate one or more alternative proposals for resolution of the dispute.

47. In any dispute for the resolution of which the procedure under this Section is invoked, Allegheny Power shall have the burden of showing that the position of the United States is arbitrary and capricious or otherwise not in accordance with applicable law or this Consent Decree.

48. In proceedings on any dispute governed by this Section, Allegheny Power shall have the burden of demonstrating that its actions or positions have been taken in accordance with and in compliance with, the terms, conditions, requirements and objectives of this Consent Decree and the Clean Water Act. The legal standard applicable to any such dispute shall be the standard provided by applicable law.

49. The invocation of the dispute resolution process under this Section, including petitioning the Court for relief, if necessary, shall not extend, postpone or affect in any way any obligation of Allegheny Power under the Consent Decree, not directly involved in the dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 19. Notwithstanding the stay of payment, stipulated penalties shall accrue from the day of noncompliance with any applicable provision of this Consent Decree. In the event that Allegheny Power does not prevail on the disputed issue, penalties may be assessed and paid as provided in Section VIII (Stipulated Penalties).

**XVI. RETENTION OF JURISDICTION**

50. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

**XVII. MODIFICATIONS**

51. This Consent Decree contains the entire agreement between the Parties. This Consent Decree may not be enlarged, modified, or altered, unless such modifications are made in writing and approved by the Parties and the Court.

**XVIII. LOGGING AND OPPORTUNITY FOR PUBLIC COMMENT**

52. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

53. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

**XIX. EFFECTIVE DATE**

\_\_\_\_ 54. The effective date of this Consent Decree shall be the date upon which it is entered by the Court.

**XX. COSTS OF SUIT**

55. Each Party shall bear its own costs and attorney's fees in this action.

**XXI. TERMINATION**

56. Upon completion of the compliance measures described in Sections V and VI, Allegheny Power shall submit to EPA a Final Report, as required under Section IX. Not earlier than one hundred and twenty days after submission of the Final Report to

the EPA, and provided (1) that all obligations related to payment of civil penalties, stipulated penalties and Interest associated therewith have been met, (2) that all other obligations under the Consent Decree have been met, and (3) that any disputes, including any related to the EPA inspection under Paragraph 25 have been resolved under Section XV, Allegheny Power may apply to the Court for termination of the Consent Decree. At least 10 days prior to seeking termination of the Consent Decree, Allegheny Power shall provide notice to the United States. Any such application or motion shall demonstrate that all requirements of the Consent Decree have been satisfied. The United States shall have thirty (30) days from receipt of such application or motion to file a response.

**XXII. SIGNATORIES/SERVICE**

57. The undersigned representative of Defendant and the Chief/Deputy Chief of the Environmental Enforcement Section, Environment and Natural Resources Division of the United States Department of Justice each certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

58. Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent

Decree. Defendant hereby agrees 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.

SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2001.

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United States District Judge

The undersigned approves and enters into this Consent Decree, in the matter of United States v. Monongahela Power Company, Inc. (d/b/a Allegheny Power), C.A. No. 1:01-CV-6:

FOR THE UNITED STATES OF AMERICA:

\_\_\_\_\_  
BENJAMIN FISHEROW  
Deputy Chief  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20044

\_\_\_\_\_  
Date \_\_\_\_\_ W.

\_\_\_\_\_  
NATHANIEL DOUGLAS  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20044

\_\_\_\_\_  
Date \_\_\_\_\_

PATRICK M. FLATLEY  
United States Attorney  
Northern District of West Virginia

\_\_\_\_\_  
Assistant United States Attorney  
Northern District of West Virginia  
1100 Main Street  
Wheeling, West Virginia 26003

\_\_\_\_\_  
Date \_\_\_\_\_

FOR THE ENVIRONMENTAL PROTECTION AGENCY:

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SYLVIA K. LOWRANCE  
Acting Assistant Administrator  
Office of Enforcement and  
Compliance Assurance  
U.S. Environmental Protection  
Agency  
Washington, D.C. 20460

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Date

FOR THE ENVIRONMENTAL PROTECTION AGENCY:

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DONALD S. WELSH  
Regional Administrator  
U.S. Environmental Protection  
Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

Date \_\_\_\_\_

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WILLIAM C. EARLY  
Regional Counsel  
U.S. Environmental Protection  
Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

Date \_\_\_\_\_

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GUTREUTER  
Assistant Regional Counsel  
U.S. Environmental Protection  
Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

Date \_\_\_\_\_

\_\_\_\_\_  
JULIA

The undersigned approves and enters into this Consent Decree, in the matter of United States v. Monongahela Power

Company, Inc. (d/b/a Allegheny Power), C.A. No. 1:01-CV-6:

FOR DEFENDANT ALLEGHENY POWER:

\_\_\_\_\_  
Date

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

Norbert J. Smith  
Senior Attorney  
Allegheny Energy  
4350 Northern Pike  
Monroeville, Pennsylvania 15146-2841