

FILED  
JAMES BONINI  
CLERK

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

U.S. DISTRICT COURT  
SOUTHERN DIST. OHIO  
EAST. DIV. COLUMBUS

JUN 10 PM 2:49

STATE OF OHIO, ex rel.  
MICHAEL DEWINE,  
OHIO ATTORNEY GENERAL  
Environmental Enforcement Section  
30 E. Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215,

Plaintiff,

v.

OTTERBEIN UNIVERSITY  
C/O REBECCA D. VAZQUEZ-SKILLINGS  
Statutory Agent  
1 South Grove Street  
Westerville, Ohio 43081

and

UNITED STATES OF AMERICA  
UNITED STATES DEPARTMENT OF  
DEFENSE, and ROBERT M. GATES  
in his capacity as SECRETARY OF THE  
DEPARTMENT OF DEFENSE  
1400 Defense Pentagon  
Washington, DC 20301-1400

Defendants.

CASE NO.:

2 : 11 cv 508

JUDGE:

JUDGE SARCOUS

MAGISTRATE JUDGE KEMP

COMPLAINT

NATURE OF THE ACTION

1. This is a civil action for cost recovery brought by the State of Ohio on relation of its Attorney General and at the request of the Director of the Ohio Environmental Protection Agency.
2. Plaintiff State of Ohio ("the State") seeks reimbursement of and declaratory

judgment for its response costs from Defendants Otterbein University (“Otterbein”) and the United States of America Department of Defense (“DOD”), incurred, and to be incurred, at the former Kilgore Manufacturing facility consisting of an approximately 40-acre parcel located at 600 North Spring Road, Westerville, Delaware County, Ohio and any areas where contamination has migrated (“Site”). This relief is sought pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), as amended, 42 U.S.C. §§ 9601 *et seq.*

3. The State seeks injunctive relief, pursuant to Ohio Rev. Code § 6111.07(B), Ohio Rev. Code § 3734.13(C), and Ohio Rev. Code § 3734.20 to compel Defendants Otterbein and DOD to implement investigation and remediation at the Site.

4. The State seeks injunctive relief pursuant to Ohio Rev. Code § 6111.04, Ohio Rev. Code § 6111.07 (A) and (B), and Ohio Rev. Code § 6111.09(A) for the unpermitted discharges of contaminants into surface and ground water at the Site.

5. The State seeks injunctive relief pursuant to Ohio Rev. Chapter 3767 for the contamination at the Site.

6. The State seeks injunctive relief pursuant to common law nuisance and common law ultrahazardous activity for the contamination at the Site.

## PARTIES

### **A. The Plaintiff and the Plaintiff’s Relator**

7. The Plaintiff is the State of Ohio, which holds all natural resources, including the air, lands, and waters located within its political boundaries, in trust for the benefit of its citizens. The State is responsible for the health, safety and welfare of the citizens of Ohio. As trustee of

the natural resources located within its boundaries, the State owes a fiduciary duty to its citizens to protect and preserve its natural resources. As trustee of these natural resources, the State has been injured by the pollution of these resources with the wastes deposited at the Site.

8. Plaintiff's relator is Michael DeWine, Attorney General of Ohio. By virtue of his office, Attorney General Michael DeWine is the chief legal officer of the State of Ohio. Plaintiff's relator instigates this action on behalf of the State of Ohio and at the request of Chris Korleski, the Director of Environmental Protection of the State of Ohio ("Director"), who is charged under Ohio law with the responsibility of protecting the air, lands and waters located within the State's boundaries from pollution, degradation and contamination.

**B. The Defendants**

9. Defendant Otterbein is a non-profit corporation organized under the laws of the State of Ohio (Ohio Charter Number 305210), with its principal location at One South Grove Street, , Westerville, Delaware County, Ohio 43081.

10. Defendant DOD is a federal governmental entity operating under the laws of the United States of America, with its principal location at 1400 Defense Pentagon, Washington, D.C. 20301-1400.

11. Defendants Otterbein and DOD are each a "person," as defined by 42 U.S.C. § 9601(21) and Ohio Rev. Code § 3734.01(G), Ohio Rev. Code § 6111.01(I), and Ohio Rev. Code § 1.59.

**JURISDICTION**

12. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question), 42 U.S.C. § 9613(b) (CERCLA), and 28 U.S.C. § 2201 (declaratory judgment). The

Court has jurisdiction over the State's claims under Ohio law pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction).

### VENUE

13. Venue is appropriate in this Court pursuant to 28 U.S.C. §1391(b)(2) and Local Rule 82.1(c) and (d).

### GENERAL ALLEGATIONS

14. Defendant Otterbein is the "owner and/or operator," as defined by 42 U.S.C. § 9601(20)(A), of the 110-acre property located at 600 North Spring Road, Westerville, Delaware County, Ohio. The Site, an approximately 40-acre parcel, is located in the eastern portion of the 110-acre property.

15. The property is owned by Defendant Otterbein, which received the property as part of the donation of the 110-acre Kilgore Manufacturing Company property from the Kilgore Manufacturing Company ("Kilgore") in 1962.

16. Kilgore purchased the 110-acre property in December 1941. Prior to 1941, the 110-acre property was farmland.

17. Between 1941 and 1961, Kilgore, by contract, agreement, or otherwise with DOD, used the 110-acre property for the production and storage of ordnance and pyrotechnics including, but not limited to, primary explosives, hand grenades, primers, detonators, hand grenade fuses, land mines, M1 flame throwers, flare pistols, rocket launchers, explosive caps and numerous types of illuminating flares.

18. According to a May 1998 amended Phase I report of the 110-acre property, Kilgore managed waste and off-specification materials on-site by burial or burning.

19. The May 1998 amended Phase I report identified a number of chemicals used or disposed of by Kilgore during the manufacturing operations at the 110-acre property.

20. The May 1998 amended Phase I report provided the following list of chemicals of concern on the Site: volatile organic compounds, perchlorate/chlorate, nitrate/nitrite, metals, sulfide/sulfate, thiocyanate, pesticides, herbicides and polycyclic aromatic hydrocarbons.

21. The 2005 preliminary Phase II report listed elevated concentrations of antimony, arsenic, lead, barium, cadmium, chromium, sulfate, vanadium, perchlorate, and phosphorus in soil samples. Additionally, some soils have a pH low enough to be classified as corrosive and at least one soil sample has exceeded the Toxicity Characteristic Leaching Procedure (TCLP) regulatory level for chromium.

22. The 2005 preliminary Phase II report listed concentrations of antimony, arsenic, barium, beryllium, cadmium, chromium (total), mercury, and thallium above public drinking water maximum contaminant levels in ground water samples. Lead and copper were above the public drinking water action level in ground water samples. Barium, selenium, cadmium, and other metals were above detection limits.

23. The 2005 preliminary Phase II report listed concentrations of antimony, acetone, 2-butanone, bis(2-ethylhexyl)phthalate, diethyl phthalate, chromium (total) and other metals above detection limits in surface water samples.

24. According to the 2005 preliminary Phase II report, scattered munitions components continue to be discovered on the Site. UXB International, Inc. performed an unexploded ordnance threat and chemical and explosive soil assessments at four areas of the Site in 2000. The report stated that the overall threat assessment of the Site is medium and that it

presents a potential health threat to the population if not cleared. One soil sample was found to be flammable and another produced smoke when heated.

25. The contaminants at the Site are “hazardous substances” as defined by 42 U.S.C. § 9601(14), and have been stored and used at the former Kilgore facility.

26. As the result of the generation of wastes at the Site, the Site is a “facility,” as defined by 42 U.S.C. § 9601(9), and includes all areas where “hazardous substances,” as defined by 42 U.S.C. § 9601(14), have been deposited, stored, disposed of, placed, or otherwise come to be located.

27. Hazardous substances have been “released,” as that term is defined by 42 U.S.C. § 9601(22), during Defendants’ ownership and/or operation of the Site.

28. The Site is a hazardous waste facility, solid waste facility or other location where hazardous waste was treated, stored or disposed, as defined in Ohio Rev. Code § 3734.20.

29. Because of their quantity, concentration, physical or chemical characteristics, the contaminants found at the Site are “hazardous waste” as defined under Ohio Rev. Code § 3734.01(J), or “industrial waste” or “other wastes” as defined under Ohio Rev. Code § 6111.01(C) and (D).

30. The ground and surface waters at and from the Site are “waters of the state” as defined in Ohio Rev. Code § 6111.01(H).

31. Conditions at the Site constitute a substantial threat to public health or safety or are causing or contributing or threatening to cause or contribute to air or water pollution or soil contamination as provided in Ohio Rev. Code § 3734.20(B).

32. The migration and threatened migration of contaminants to soil, ground water, or surface water at or from the Site constitutes a discharge to “waters of the state,” as the term is defined in Ohio Rev. Code § 6111.01(H).

33. Ohio EPA initiated enforcement against Defendants through a referral of the case to the Ohio Attorney General’s Office in April 2008.

34. Ohio EPA has incurred and continues to incur response costs, not inconsistent with the national contingency plan, in connection with the Site.

35. The general allegations set forth in Paragraphs 1 through 34 are hereby incorporated into each Count of this Complaint as if fully restated therein.

**COUNT ONE**

**RECOVERY OF PAST RESPONSE COSTS UNDER CERCLA**

36. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides liability for costs against the following listed persons:

- (1) the owner and operator of a . . . facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . .
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment

facilities, . . . or sites selected by such person, from which there is a release or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --

(A) all costs of removal or remedial action incurred by . . . a state . . . not inconsistent with the national contingency plan . . . [.]

37. Defendant Otterbein is the owner of the Site.

38. Defendant DOD contracted or otherwise arranged with Kilgore for the manufacture, treatment and disposal of hazardous substances at the Site. Subsequently, Defendant DOD also arranged with Defendant Otterbein for the further treatment and disposal of hazardous substances at the Site.

39. From at least 1998 through the present, the State has responded, as defined by 42 U.S.C. § 9601(25), to releases and/or the threat of releases at the Site and has incurred response costs not inconsistent with the national contingency plan.

40. Pursuant to 42 U.S.C. § 9607(a)(1)(A) and (a)(2)(A), Defendants are liable to the State for all of the unpaid past response costs not inconsistent with the national contingency plan that the State has incurred at the Site.

## **COUNT TWO**

### **RECOVERY OF FUTURE RI/FS RESPONSE COSTS UNDER CERCLA**

41. Paragraphs 36 through 39 are incorporated into this Count as if fully restated herein.

42. The State will incur future response costs not inconsistent with the national contingency plan with respect to oversight of a Remedial Investigation and Feasibility Study to

be performed by the Defendant Otterbein.

43. Pursuant to 42 U.S.C. § 9607(a)(1)(A) and (a)(2)(A), Defendants are liable to the State for all of the future response costs not inconsistent with the national contingency plan that the State will incur at the Site with respect to oversight of the Remedial Investigation and Feasibility Study to be performed by the Defendant Otterbein.

### **COUNT THREE**

#### **RECOVERY OF FUTURE RD/RA RESPONSE COSTS UNDER CERCLA**

44. Paragraphs 36 through 39 are incorporated into this Count as if fully restated herein.

45. The State will incur future response costs not inconsistent with the national contingency plan with respect to oversight of a Remedial Design and Remedial Action expected to be performed by the Defendant Otterbein.

46. Pursuant to 42 U.S.C. § 9607(a)(1)(A) and (a)(2)(A), Defendants are liable to the State for all of the future response costs not inconsistent with the national contingency plan that the State will incur at the Site with respect to oversight of the Remedial Design and Remedial Action expected to be performed by the Defendant Otterbein.

### **COUNT FOUR**

#### **UNPERMITTED DISCHARGES OF INDUSTRIAL WASTES AND/OR OTHER WASTES INTO WATERS OF THE STATE**

47. Ohio Revised Code § 6111.04 prohibits any person from causing pollution or placing or causing to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state, and any such action is hereby declared to be a

public nuisance, except in such cases where the Director has issued a valid and unexpired permit, or renewal thereof.

48. As a result of the manufacturing/industrial activity at the Site, industrial wastes and/or other wastes were discharged from the Site into ground water at or within the vicinity of the Site property.

49. Surface waters and ground water at or within the vicinity of the Site are waters of the State.

50. At all times relevant hereto, no permit, issued by the Director, authorized the discharge of industrial waste and/or other wastes into the ground water at and in the vicinity of the Site, as described in this Count.

51. The unpermitted discharge of industrial waste and/or other wastes into ground water at, around, and emanating from the Site has caused and continues to cause "pollution," as defined by Ohio Rev. Code § 6111.01(A), of waters of the State.

52. The acts and omissions alleged in this Count constitute violations of Ohio Rev. Code § 6111.07(A), for which Defendants are subject to injunctive relief pursuant to Ohio Rev. Code § 6111.07(B).

#### **COUNT FIVE**

#### **CAUSING OR CONTRIBUTING TO WATER POLLUTION AND/OR SOIL CONTAMINATION**

53. Ohio Revised Code § 3734.20(B) provides that if the Director determines that conditions at a hazardous waste facility, solid waste facility, or other location where hazardous waste was treated, stored, or disposed of constitute a substantial threat to public health or safety

or are causing or contributing to or threatening to cause or contribute to air or water pollution or soil contamination, the Director shall initiate appropriate action under Ohio Rev. Code Chapter 3704, Ohio Rev. Code Chapter 3734 or Ohio Rev. Code Chapter 6111 or seek any other appropriate legal or equitable remedies to abate the pollution or contamination or to protect public health or safety.

54. The Site is a hazardous waste facility or other a location where hazardous waste was treated, stored, and/or disposed of.

55. The Director has determined that conditions at the Site constitute a substantial threat to public health or safety or are causing or contributing to or threatening to cause or contribute to water pollution or soil contamination.

56. As a result of the conditions that exist at the Site, Plaintiff is entitled to injunctive relief pursuant to Ohio Rev. Code § 3734.20 against Defendants to abate the pollution or contamination and/or to protect public health or safety.

### **COUNT SIX**

#### **STATUTORY NUISANCE**

57. Ohio Revised Code § 3767.13(B) provides that no person shall cause or allow offal, filth, or noisome substances to be collected or remain in any place to the damage or prejudice of others or of the public.

58. Ohio Revised Code § 3767.13(C) provides that no person shall corrupt or render unwholesome or impure, a water course, stream, or water.

59. The wastes disposed at the Site have caused the pollution of soils, surface water and ground water at the Site.

60. Since at least 1998, Defendants' conduct, as described in this Complaint and the consequences thereof have constituted a statutory nuisance, as defined in Ohio Rev. Code § 3767.01 and 3767.13, for which the Plaintiff is entitled to injunctive relief pursuant to Ohio Rev. Code § 3767.02 through Ohio Rev. Code § 3767.06.

### **COUNT SEVEN**

#### **COMMON LAW NUISANCE**

61. From at least 1999 and continuing to the present, Defendants have polluted the soil, surface water, and ground water at the Site.

62. The actions described above have caused an unreasonable interference with the health, wealth, welfare and property of the neighboring public and constitute a common law public nuisance for which the Defendants are subject to injunctive relief prohibiting the creation and continuance of said nuisance.

### **COUNT EIGHT**

#### **ULTRAHAZARDOUS ACTIVITY**

63. Defendants have disposed of, caused and/or allowed the storage, treatment and/or disposal of solid and hazardous wastes and/or hazardous substances, industrial wastes and other wastes at the Site. This non-natural accumulation of solid and hazardous wastes and/or hazardous substances, industrial wastes and other wastes will likely cause damage if it escaped from the Site and in fact has escaped and caused damage to soil, surface water, and ground water at the Site and caused a threat to public health. Therefore, such activity constitutes a common law ultrahazardous activity to the citizens of the State of Ohio.

64. By reason of Defendants' conduct of this common law ultrahazardous activity, the

State of Ohio has suffered damage, and Defendants are liable for mandatory and prohibitory injunctive relief.

**PRAYER FOR RELIEF**

Based on the foregoing, Plaintiff State of Ohio respectfully requests that the Court award Plaintiff the following relief from Defendants:

A.. Pursuant to 42 U.S.C. § 9607, order Defendants to reimburse the State for its response costs not inconsistent with the national contingency plan that have been incurred and that will be incurred by the State to address releases and threatened releases of hazardous substances at the Site.

B. Issue a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring that Defendants are liable for all response costs not inconsistent with the national contingency plan incurred, and to be incurred, by the State to address the releases and threatened releases at the Site.

C. Issue an order permanently enjoining Defendants from violating Ohio Rev. Code Chapter 3734 and Ohio Rev. Code Chapter 6111 and the rules promulgated and adopted thereunder, and any Orders issued by the Director.

D. Issue an order permanently enjoining Defendants and their agents, representatives, employees, successors, or assigns, under the names that they presently use or any other names they use through any corporate or other device, and those acting in concert and participation with Defendants directly or indirectly, from engaging in the acts or practices of which Plaintiff complains.

E. Issue an injunction, pursuant to Ohio Rev. Code § 6111.07(B), Ohio Rev. Code § 3734.13(C), Ohio Rev. Code § 3734.20, and Ohio Rev. Code § 3767.02 through Ohio Rev. Code § 3767.06, to prohibit Defendants from placing hazardous wastes, industrial wastes and other wastes in places so as to cause contamination of soil, surface waters and ground water and to implement an Ohio EPA approved investigation and remedial action for the Site to remediate the soil, ground water and surface water contaminated by hazardous wastes, industrial wastes and other wastes and to establish financial assurance for the corrective action.

F. Issue an injunction pursuant to common law nuisance and common law ultrahazardous activity, requiring Defendants to investigate and remediate pursuant to a workplan approved by Ohio EPA, soil, surface water, and ground water contamination at the Site and to pay the costs of the State overseeing the investigation and remediation.

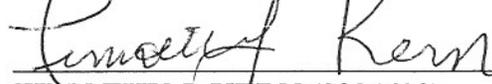
G. Order Defendants to pay the costs of this action, including reasonable attorney fees assessed by the Office of the Attorney General.

H. Retain jurisdiction of this suit for the purpose of making any Order or Decree the Court may deem necessary at any time to enforce and administer Defendants' compliance with, and to carry out, this Court's judgment.

I. Grant any other relief this Court deems to be just, equitable and appropriate in this case.

Respectfully submitted,

**MICHAEL DEWINE**  
**OHIO ATTORNEY GENERAL**

A handwritten signature in black ink that reads "Timothy J. Kern". The signature is written in a cursive style and is positioned above a horizontal line.

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