

02-009

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
Eastern Division

UNITED STATES OF AMERICA, )  
 )  
 THE STATE OF WEST VIRGINIA, )  
 )  
 and )  
 )  
 THE STATE OF OHIO )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 )  
 )  
 Elkem Metals Company L.P., )  
 )  
 Ferro Invest III Inc., general partner, )  
 )  
 Ferro Invest II LLC, general partner, )  
 )  
 and )  
 )  
 Eramet Marietta Inc., )  
 )  
 Defendants. )

CIVIL ACTION NO. 2:03cv528

CONSENT DECREE

The United States of America (on behalf of the United States Environmental Protection Agency) brought this action pursuant to Section 309(b) and (d) of the Clean Water Act, 33 U.S.C. § 1319(b) and (d), for injunctive relief and civil penalties, and the United States of America (on behalf of the United States Department of the Interior), the State of West Virginia,

and the State of Ohio brought this action pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. §§ 9601 *et seq.*, for damages for injuries to natural resources against Defendants Elkem Metals Company L.P., its partners Ferro Invest III Inc. and Ferro Invest II LLC, and Eramet Marietta Inc.

Part I of the Complaint alleges that Elkem Metals Company L.P. ("Elkem Metals") violated Section 301 of the Clean Water Act, 33 U.S.C. § 1311, and the terms and conditions of its applicable National Pollutant Discharge Elimination System ("NPDES") permit at its former Marietta, Ohio, facility.

Part II of the Complaint alleges that Eramet Marietta Inc. ("Eramet Marietta") violated Section 301 of the Clean Water Act, 33 U.S.C. § 1311, and the terms and conditions of its applicable NPDES permit at its Marietta, Ohio, facility.

Part III of the Complaint alleges that Elkem Metals, its general partners Ferro Invest III Inc. and Ferro Invest II LLC, and Eramet Marietta are liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for damages for injury to natural resources in and around the stretch of the Ohio River adjacent to and downstream of the facility, resulting from releases of hazardous substances from the Marietta, Ohio, facility.

Elkem Metals and Eramet Marietta dispute the Plaintiffs' claims for relief, and no part of this Consent Decree shall constitute or be construed as an admission by any Defendant or evidence of: (a) liability with respect to any matter, including without limitation, those dealt with in this Consent Decree or any matter alleged in the pleadings in this action or (b) any factual allegations or legal conclusions stated or implied in the filings in this action.

The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith to settle disputed claims and that this Consent Decree is fair, reasonable, and in the public interest.

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

#### I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, 1355, 42 U.S.C. § 9607(a), and Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b). Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c), 1395(a), Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b), because it is the judicial district in which the Defendants' Marietta, Ohio, facility is located.

#### II. BINDING EFFECT

2. For purposes of this Consent Decree, the term "Eramet Affiliates" refers to the following entities: Eramet Holding Manganese; Comilog SA; Eramet SA; and Compagnie Generale des Matieres Nucleaires (COGEMA).

3. For purposes of this Consent Decree, the term "Elkem Affiliates" refers to the following entities: Elkem AS; Elkem Holding, Inc.; Jebsens Metals, Inc.; Ferro Invest I, Inc.; Elkem Management, Inc.; Elkem Invest Inc.; Ferro Invest II, Inc.; Elkem Limited; Elkem Metals Company; Elkem Holdings, Inc.; Elkem Investment Holdings, Inc.; Elkem Metals, Inc.; and NEH, Inc.

4. The provisions of this Consent Decree, after entry, shall apply to and bind the

United States, the State of West Virginia, the State of Ohio, and Defendants Elkem Metals, Ferro Invest III Inc., Ferro Invest II LLC, and Eramet Marietta (collectively the "Parties"), and their successors and assigns. The signatories for Defendants Elkem Metals, Ferro Invest III Inc., Ferro Invest II LLC, and Eramet Marietta represent that they are fully authorized to enter into the terms and conditions of this Decree and to bind Elkem Metals, Ferro Invest III Inc., Ferro Invest II LLC, and Eramet Marietta legally. Except as provided in Paragraph 25, the Parties agree to be bound by this Consent Decree and not to contest its validity in any subsequent proceeding to implement or enforce its terms.

III. SETTLEMENT OF CLEAN WATER ACT CLAIMS AGAINST ELKEM METALS

5. In consideration of the covenants hereunder and in full and final settlement of Part I of the Complaint in accordance with the terms set forth in Paragraph 6 below, Elkem Metals shall pay a civil penalty of \$225,000 to the United States within thirty days following the Court's entry of this Consent Decree. If such thirtieth day falls on a Saturday, Sunday, or legal holiday, the payment shall be due on the next day that is not a Saturday, Sunday, or legal holiday. Elkem Metals shall pay by Fedwire Electronic Funds Transfer (EFT) to the U.S.

Department of Justice account in accordance with current electronic funds transfer procedures provided to Defendants upon lodging of this Consent Decree, referencing USAO file number, and DOJ case number 90-5-1-1-07310. Any EFTs received at the DOJ lockbox bank after 11:00 a.m. Eastern Time will be credited on the next business day. Within five (5) days following the date of payment, Elkem Metals shall send written notice of payment and a copy of any transmittal documentation to U.S. EPA and DOJ at the addresses in Section VII of this Consent Decree. Failure to timely pay the \$225,000 settlement payment shall subject Elkem Metals to a

\$2,000 per day stipulated penalty and to interest on any such overdue amount accruing from the date payment is due until the date payment is made at the rate prescribed by 28 U.S.C. § 1961. Any such stipulated penalty and interest owed by Elkem Metals to the United States shall be added to and paid in the same manner as the \$225,000 EFT payment required by this Paragraph. Notwithstanding any other provision of this Decree, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

6. Payment by Elkem Metals of the civil penalty in Paragraph 5 resolves the civil claims of the United States against Elkem Metals, Ferro Invest III Inc., and Ferro Invest II LLC, their successors and assigns, their officers acting in their official capacities, and Elkem Affiliates for the alleged violations of the Clean Water Act asserted under Part I of the Complaint filed herein, through the date of lodging this Consent Decree.

IV. SETTLEMENT OF CLEAN WATER ACT CLAIMS AGAINST ERAMET MARIETTA

7. In consideration of the covenants hereunder and in full and final settlement of Part II of the Complaint in accordance with the terms set forth in Paragraph 8 below, Eramet Marietta shall pay a civil penalty of \$525,000 to the United States within thirty days following the Court's entry of this Consent Decree. If such thirtieth day falls on a Saturday, Sunday, or legal holiday, the payment shall be due on the next day that is not a Saturday, Sunday, or legal holiday. Eramet Marietta shall pay by Fedwire Electronic Funds Transfer (EFT) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures provided to Defendants upon lodging of this Consent Decree, referencing USAO file number, and DOJ case number 90-5-1-1-07310. Any EFTs received at the DOJ lockbox bank after 11:00

a.m. Eastern Time will be credited on the next business day. Within five (5) days following the date of payment, Eramet Marietta shall send written notice of payment and a copy of any transmittal documentation to U.S. EPA and DOJ at the addresses in Section VII of this Consent Decree. Failure to timely pay the \$525,000 settlement payment shall subject Eramet Marietta to a \$2,000 per day stipulated penalty and to interest on any such overdue amount accruing from the date payment is due until the date payment is made at the rate prescribed by 28 U.S.C. § 1961. Any such stipulated penalty and interest owed by Eramet Marietta to the United States shall be added to and paid in the same manner as the \$525,000 EFT payment required by this Paragraph. Notwithstanding any other provision of this Decree, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

8. Payment by Eramet Marietta of the civil penalty in Paragraph 7 resolves the civil claims of the United States against Eramet Marietta, its successors and assigns, its officers acting in their official capacities, and Eramet Affiliates for the alleged violations of the Clean Water Act asserted under Part II of the Complaint filed herein, through the date of lodging this Consent Decree.

V. SETTLEMENT OF NATURAL RESOURCE DAMAGES CLAIMS.

9. In consideration of the covenants hereunder and in full and final settlement of Part III of the Complaint in accordance with the terms set forth in Paragraph 13 below, within thirty (30) days following entry of this Decree, Defendants shall pay the United States, the State of West Virginia, and the State of Ohio, as natural resource trustees, a total of \$2,040,000 for injuries to natural resources as alleged in Part III of the Complaint. If such thirtieth day falls on

a Saturday, Sunday, or legal holiday, the payment shall be due on the next day that is not a Saturday, Sunday, or legal holiday. As provided in Section 107(f)(1) of CERCLA, 42 U.S.C. § 9607(f)(1), such funds shall be used jointly by the natural resource trustees to restore, replace, or acquire the equivalent of the allegedly injured natural resources. Payment shall be made in accordance with instructions provided to Defendants upon lodging of this Consent Decree. Failure to timely pay the \$2,040,000 settlement payment shall subject Defendants to a \$2,500 per day stipulated penalty. Any such stipulated penalty owed by Defendants to the natural resource trustees shall be added to and paid with the \$2,040,000 payment required by this Paragraph. Notwithstanding any other provision of this Section, the United States, the State of Ohio, and the State of West Virginia may, in their unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

10. In consideration of the covenants hereunder, within thirty (30) days following entry of this Decree, Defendants shall pay to the United States Department of the Interior \$427,500 as reimbursement for costs incurred by the United States in assessing the alleged injuries to natural resources in Part III of the Complaint. If such thirtieth day falls on a Saturday, Sunday, or legal holiday, the payment shall be due on the next day that is not a Saturday, Sunday, or legal holiday. Payment shall be made in accordance with instructions provided to Defendants upon lodging of this Consent Decree. Failure to timely pay the United States' assessment costs shall subject Defendants to a \$1,000 per day stipulated penalty. Any such stipulated penalty owed by Defendants to the United States shall be added to and paid with the \$427,500 assessment costs payment required by this Paragraph. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any

portion of stipulated penalties that have accrued pursuant to this Consent Decree.

11. In consideration of the covenants herein, within thirty (30) days following entry of this Decree, Defendants shall pay to the State of Ohio \$32,500 as reimbursement for costs incurred by the State of Ohio in assessing the alleged injuries to natural resources alleged in Part III of the Complaint. If such thirtieth day falls on a Saturday, Sunday, or legal holiday, the payment shall be due on the next day that is not a Saturday, Sunday, or legal holiday. Payment shall be made by an official check made payable to "Treasurer, State of Ohio" for \$32,500. The official check shall be mailed to Ohio EPA, Office of Fiscal Administration, P.O. Box 1049, Columbus, Ohio 43216-1049, or hand-delivered to Ohio EPA, Office of Fiscal Administration, 122 S. Front Street, Columbus, Ohio 43215 (Attn.: Brenda Case, Janet Salyers, Ruth Ann Evans) together with a letter identifying the Defendants, the facility and the Case Number of this matter. A copy of the check to shall be sent to Ohio EPA, Division of Surface Water, Supervisor, Fiscal, P.O. Box 1049, Columbus, Ohio 43216-1049. Such payment will be deposited by the State of Ohio into the environmental remediation protection fund established pursuant to ORC §3734.281. Failure to timely pay the State of Ohio's assessment costs shall subject Defendants to a \$1,000 per day stipulated penalty. Any such stipulated penalty owed by Defendants to the State of Ohio shall be added to and paid with the \$32,500 assessment costs payment required by this Paragraph. Notwithstanding any other provision of this Section, the State of Ohio may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

12. In the event Defendants fail to make timely payment of any of the amounts required by this Section V, Defendants shall be liable for interest on the unpaid balance at the

current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The interest shall be calculated from the first day following the date payment is due until the entire outstanding balance has been received.

13. Covenants Not to Sue by Plaintiffs. In consideration of the payments made by the Defendants in this Section V, the United States, the State of West Virginia, and the State of Ohio, on behalf of their respective natural resource trustees, covenant not to sue or take administrative action and agree not to assert any claims or causes of action against the Defendants, their successors and assigns, their officers acting in their official capacities, Elkem Affiliates, and Eramet Affiliates for damages for injuries to natural resources pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, resulting from the discharge of wastewater in 1999 and 2000 from the Defendants' facility in Marietta, Ohio. In consideration of the payments made by the Defendants in this Section V, the United States, on behalf of its natural resource trustees, covenants not to sue or take administrative action and agrees not to assert any claims or causes of action against the Defendants, their successors and assigns, their officers acting in their official capacities, Elkem Affiliates, and Eramet Affiliates for damages for injuries to natural resources pursuant to Section 311 of the Clean Water Act, 33 U.S.C. § 1321, resulting from the discharge of wastewater in 1999 and 2000 from the Defendants' facility in Marietta, Ohio. These Covenants Not to Sue are conditioned upon the complete and satisfactory performance by Defendants of their obligations under this Consent Decree. These Covenants Not to Sue extend only to the Defendants, their successors and assigns, their officers acting in their official capacities, Elkem Affiliates, and Eramet Affiliates and do not extend to any other person.

14. Reservation of Rights. The Covenants Not to Sue set forth in Paragraph 13 do not pertain to any matters other than those expressly specified therein. Except as provided in Paragraph 13, nothing contained herein shall in any way limit or restrict the response and enforcement authority of the United States, the State of West Virginia, or the State of Ohio to initiate appropriate action, either judicial or administrative, with respect to any claim not alleged in the Complaint, including but not limited to the following:

- (1) claims based upon a failure of Defendants to meet the requirements of this Decree;
- (2) claims based upon criminal liability; or
- (3) claims other than as described in Paragraph 13 above or as alleged in the Complaint arising from the past, present, or future disposal, release, or threat of release of hazardous substances or other materials from Defendants' Marietta, Ohio, facility.

Except as provided in Paragraph 17, nothing contained herein shall in any way limit or restrict Defendants' claims, rights, and defenses with respect to any claims not alleged in the Complaint, including but not limited to the foregoing claims.

15. Except as provided in Paragraph 13, nothing in this Decree is intended as a covenant not to sue or a release from liability for any persons or entities not Parties to this Decree. Except as provided in Paragraph 13, the United States, the State of West Virginia, and the State of Ohio expressly reserve all claims, demands, and causes of action, either judicial or administrative, past or future, in law or equity, against any person or entity not a party to this Consent Decree for any matter arising from or in any way relating to injuries to natural resources in the Ohio River in 1999 and 2000.

16. Covenant by Defendants. Defendants, Elkem Affiliates, and Eramet Affiliates

hereby covenant not to sue and agree not to assert any claims or causes of action against the United States, the State of West Virginia, or the State of Ohio with respect to any matter within the scope of the Covenants Not to Sue in Paragraph 13 above, relating to the injuries to natural resources in the Ohio River in 1999 and 2000, as described in Paragraph 13 above, including but not limited to assertion or presentment of any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law, and any other claims under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607, 9613.

17. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

#### VI. EFFECT OF DECREE

18. This Consent Decree is not a permit or a modification of an existing permit and does not relieve Eramet Marietta of any obligation to obtain a permit and comply with the requirements of any permit relating to the Marietta facility. Nothing in this Consent Decree alters Eramet Marietta's obligations to comply with any new permit or modification of any existing permit relating to the Marietta facility, in accordance with applicable federal, state, and local laws and regulations, and nothing herein alters Eramet Marietta's rights, claims, or defenses with respect to such permits, including without limitation any rights to contest any such new permit or modification of any existing permit.

19. This Consent Decree in no way affects or relieves Defendants of their responsibility to comply with any federal, state, or local law or regulation. Nothing contained in

this Consent Decree shall prevent or limit the Plaintiffs' rights to obtain penalties or injunctive relief under the Clean Water Act or other federal statutes or regulations except as expressly specified herein, and nothing contained herein shall prevent or limit the Defendants' rights and defenses to any such claims except as expressly specified herein.

20. This action constitutes a civil action pursuant to 42 U.S.C. § 9607(a) for purposes of 42 U.S.C. § 9613(f)(1), and Defendants are entitled to protection from contribution actions or claims as provided in Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are the natural resource injuries alleged in Part III of the Complaint.

21. Except as expressly specified in Paragraphs 6, 8, and 13, this Consent Decree does not (A) create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree or (B) limit or affect the rights of Defendants or of the Plaintiffs as against any person not a Party to this Consent Decree.

22. The Parties reserve any and all legal and equitable remedies available to enforce the provisions of this Consent Decree.

#### VII. NOTICE

23. Except as specified otherwise, the Parties shall address any notice, report, or other information required by this Decree as specified below. All notices and submissions are effective upon receipt.

As to the United States:

United States Attorney for  
the Southern District of Ohio  
303 Marconi Blvd., Suite 200  
Columbus, OH 43215

and

Chief, Environmental Enforcement Section  
United States Department of Justice  
Environment and Natural Resources  
Division  
DOJ # 90-5-1-1-07310  
P.O. Box 7611  
Washington, DC 20044-7611

and

[for matters related to Clean Water Act compliance]

Branch Secretary – Water Enforcement and Compliance Assurance Branch  
U.S. Environmental Protection Agency - Region 5  
Mail Code WC - 15J  
77 West Jackson Boulevard  
Chicago, Illinois 60604

and

[for matters related to CERCLA natural resource damages]

Steven Barclay  
Office of the Solicitor  
U.S. DOI  
Three Parkway Center, Suite 385  
Pittsburgh, Pennsylvania 15220

As to the State of West Virginia

Frank Jezioro, Director  
West Virginia Division of Natural Resources  
Capitol Complex, Building 3, Room 669  
Charleston, WV 25301

and

West Virginia Attorney General  
Capitol Complex, Building 1, Room E-26  
Charleston, WV 25305.

As to the State of Ohio

Margaret A. Malone  
Assistant Attorney General  
Environmental Enforcement Section  
Office of the Attorney General  
30 East Broad Street / 25th Floor  
Columbus, Ohio 43215-3400

As to Defendants Elkem Metals Company L.P., Ferro Invest III Inc., Ferro Invest II LLC

Geir Kvernmo  
Elkem Metals Company  
Airport Office Park  
Building 2  
400 Rouser Road  
Moon Township, PA 15108-2749

and

Isaac Schulz  
Ulmer & Berne  
1660 West 2nd St.  
Suite 1100  
Cleveland, OH 44113-1448

As to Defendant Eramet Marietta

Robert Flygar  
Eramet Marietta Inc.  
P.O. Box 299  
State Route 7 South  
Marietta, Ohio 45750-0299

and

John Rego  
Jones Day  
901 Lakeside Avenue  
Cleveland, Ohio 44114

VIII. MODIFICATION

24. There shall be no modification of this Consent Decree without written consent of all of the Parties to this Consent Decree and approval by the Court.

IX. PUBLIC COMMENT

25. The United States shall lodge this Consent Decree with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with 28 C.F.R. § 50.7. 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 the Consent Decree is inappropriate, improper, or inadequate. Defendants consent to the entry of this Consent Decree without further notice.

X. CONTINUING JURISDICTION OF THE COURT

26. The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve any disputes arising under the Decree as may be necessary.

XI. TERMINATION

27. Except for the Parties' covenants set forth in Paragraphs 6, 8, 13, and 16, which are not subject to termination, this Consent Decree shall terminate 30 days after Defendants have paid the full amount of payments specified in Sections III, IV, and V of this Consent Decree,

including any stipulated penalties and interest due, and no payments for which Defendants are responsible are outstanding or owed to the United States, the State of West Virginia, or the State of Ohio.

Entered this 19<sup>th</sup> day of April, 2006.

  
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EDMUND A. SARGUS, JR.  
UNITED STATES DISTRICT COURT JUDGE