IN THE COURT OF COMMON PLEAS
ATHENS COUNTY, OHIO

STATE OF OHIO ex rel. MICHAEL DEWINE, OHIO ATTORNEY GENERAL, Plaintiff, v. JAMES BRENT HAYES and J.B. HAYES EXCAVATING & PIPELINE, INC., Defendants.	: : : : : : : : : : : : : : : :	CASE NO. 10 CI 0182 JUDGE WARD

CONSENT ORDER

Plaintiff, the State of Ohio ("Plaintiff"/"State"), by and through its counsel, Attorney General Michael DeWine, filed a Complaint against Defendants James Brent Hayes and J.B. Hayes Excavating & Pipeline, Inc. ("Defendants") alleging violations of Ohio's Water Pollution Control laws, Ohio Revised Code ("R.C.") Chapter 6111 occurring at four separate sites which, at all times relevant to the Complaint, were owned and/or operated by Defendants, and which are located within Athens County and Vinton County, Ohio. Plaintiff also alleges in its Complaint that Defendants failed to comply with Orders 1, 2, 5 and 7 of Director's Final Findings and Orders ("Director's Orders") issued by the Director of the Ohio Environmental Protection Agency ("Director") on December 30, 2004. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Defendants for all claims alleged in the Complaint.

NOW THEREFORE, without the trial of any issue of fact or law, and upon the consent of

the parties hereto, it is hereby **ORDERED, ADJUDGED** and **DECREED** as follows:

I. DEFINITIONS

1. As used in this Consent Order:

(d) "**Four U.S. Route 50 Buildings Site**" shall mean the piece of property owned/operated by Defendants and located on 16635 U.S. Route 50 in Athens County, Ohio.

(c) "**Hamden Elementary Borrow Pit Site**" shall mean the piece of property owned/operated by Defendants and located next to Hamden Elementary School on State Route 93 in the City of Hamden, Vinton County, Ohio.

(b) "**Harmony Road Borrow Pit Site**" shall mean the piece of property owned/operated by Defendants and located on Harmony Road in Canaan Township, City of Athens, Athens County, Ohio.

(a) "**Hayes Professional Building Site**" shall mean the piece of property owned/operated by Defendants and located at the intersection of U.S. Route 33 and Township Road 655 in Dover Township, City of Athens, Athens County, Ohio.

II. JURISDICTION AND VENUE

2. The Court has jurisdiction over both the parties and the subject matter of this action pursuant to R.C. Chapter 6111. The Complaint states a claim upon which relief can be granted against Defendants under R.C. Chapter 6111. Venue is proper in this Court.

III. PARTIES

3. All terms and provisions of this Consent Order shall apply to and be binding upon the Defendants, Defendants' agents, employees, assigns, successors in interest and any person acting in concert, privity or participation with Defendants. Defendants shall provide a copy of this Consent Order to each general contractor and/or consultant employed to perform work itemized herein and each general contractor shall provide a copy of this Consent Order to each of its subcontractors for such work.

IV. SATISFACTION OF LAWSUIT

4. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Defendants for all claims alleged in the State's Complaint. This Consent Order is in settlement and compromise of disputed claims and nothing in this Consent Order is to be construed as an admission of facts or liability.

V. RESERVATION OF RIGHTS

5. Nothing in this Consent Order, including the imposition of stipulated civil penalties for violations of this Consent Order, shall limit the authority of the State of Ohio to:

(a) Seek any legal or equitable relief from Defendants or any other appropriate person for claims or conditions not alleged in the Complaint, including violations that occur after the filing of the Complaint;

(b) Seek any legal or equitable relief from Defendants or any other appropriate person for claims or conditions alleged in the Complaint that occur or exist on the date of or after the entry of this Consent Order;

(c) Enforce this Consent Order through a contempt action or otherwise seek relief for violations of this Consent Order;

(d) Take any action authorized by law against any appropriate person, including Defendants, to eliminate or mitigate conditions at the Four U.S. Route 50 Buildings Site, the Hamden Elementary Borrow Pit Site, the Harmony Road Borrow Pit Site and the Hayes Professional Buildings Site that may present a threat to the public health or welfare, or the environment; and/or,

(e) Bring any legal or equitable action against any appropriate person other than Defendants for any violation of applicable laws. For the purposes of this Consent Order, and in particular the provisions of this paragraph, the term "person" includes: an individual, corporation, business trust, estate, trust, partnership, association, municipal corporation, interstate body created by compact, and other officers, agents, employees, attorneys, and/or those in active concert or participation with any of them.

VI. PERMANENT INJUNCTION

6. Defendants are hereby permanently enjoined and immediately ordered to comply

with the requirements of R.C. Chapter 6111 and the rules adopted thereunder. Defendants are further hereby permanently enjoined and ordered to immediately comply with the terms and conditions of the April 21, 2008 General National Pollutant Discharge Elimination System Permit for Storm Water Discharges Associated with Construction Activities (the "2008 Permit," attached hereto as Exhibit A), and any renewals or modifications thereof.

7. Defendants are prohibited from causing, permitting, or allowing the installation of a new system for disposing of sewage, sludge, sludge materials, industrial waste, or other wastes without first obtaining a Permit to Install from the Director. Defendants are further prohibited from causing, permitting, or allowing the modification of an existing system for disposing of sewage, sludge, sludge materials, industrial waste, or other wastes, without first obtaining a Permit to Install from the Director.

8. Defendants are hereby enjoined and ordered not to allow any additional connection(s) to the Frito-Lay Building sanitary sewerage system within the Four U.S. Route 50 Buildings Site unless and until the Director has issued a Permit to Install for such connection(s).

VII. COMPLIANCE PROGRAM

Hayes Professional Building, Harmony Road Borrow Pit and Hamden Elementary Borrow Pit Sites

9. Defendants are hereby enjoined and ordered to refrain from commencing or resuming clearing, grading, excavating, grubbing and/or filling activities or earthmoving, or otherwise developing or redeveloping any portion of the Hayes Professional Building Site, the Harmony Road Borrow Pit Site or the Hamden Road Elementary School Borrow Pit Site or any other site in the State of Ohio, in such a manner as to result in the disturbance of at least one or more acres of total land, unless Defendants have first developed a complete and approvable

Stormwater Pollution Prevention Plan and timely submitted a Notice of Intent Application Form for coverage under the 2008 Permit, or under any renewals or modifications thereof, in strict accordance with the applicable permit, and unless the Director has granted Defendants coverage to discharge under the terms of the applicable permit for each Notice of Intent Form submitted.

10. By no later than thirty (30) days following the entry of this Consent Order, Defendants shall submit complete Notice of Termination Applications for the Hayes Professional Building and the Hamden Elementary School Borrow Pit Sites.

Environmental Covenant

11. By no later than thirty (30) days from the entry of this Consent Order, Defendants shall execute an environmental covenant pursuant to R.C. 5301.80 to 5301.92, which is identical in substance to Exhibit B.

12. By no later than forty-five (45) days from the entry of this Consent Order, Defendants shall supply a copy of the signed and executed environmental covenant to Ohio EPA, Attn.: Mark Mann, 50 West Town Street, Suite 700, Columbus, Ohio 43215.

13. By no later than sixty (60) days from the entry of this Consent Order, Defendants shall inform adjacent property owners by letter of the recording of the environmental covenant. At minimum, the letter shall contain a description of the Covenant Area and the Activity and Use Limitations, as described in Exhibit B.

14. By no later than seventy-five (75) days from the entry of this Consent Order, Defendants shall provide a copy of the letter referenced in Paragraph 13 of this Consent Order to Ohio EPA, Attn.: Mark Mann, 50 West Town Street, Suite 700, Columbus, Ohio 43215.

Four U.S. Route 50 Buildings Site

15. By no later than thirty (30) days from the entry of the Consent Order, Defendants

shall hire a qualified consultant to assess the compliance issues pertaining to the sewage treatment systems located on the Four U.S. Route 50 Buildings Site.

16. By no later than sixty (60) days from the entry of the Consent Order, Defendants shall conduct a soil evaluation to determine an acceptable soil absorption field for the soil-based sewage treatment system serving the Shade River Agricultural Building and the Dovetail Solar and Wind Building on the Four U.S. Route 50 Buildings Site and submit the results to Ohio EPA, Southeast District Office, Attn.: Cynthia Yandrich, 2195 Front Street, Logan, Ohio 43138.

17. By no later than ninety (90) days from the entry of this Consent Order, Defendants shall submit complete and approvable after-the-fact Permit to Install applications to the Director for his review and approval, for the sewage treatment systems previously constructed for the Trane/Mountaineer Mechanic Building, the Shade River Agriculture Building, and the Dovetail Solar and Wind Building located on the Four U.S. Route 50 Buildings Site.

18. By no later than ninety (90) days from the entry of this Consent Order, Defendants shall complete all modifications to the sewage treatment system previously constructed for the Frito-Lay Storage Building located on the Four U.S. Route 50 Buildings Site such that the modified sewage treatment system has correctly sized risers, properly placed cleanouts, and adequate inspection ports as is required by Permit to Install Number 06-6335.

19. By no later than one hundred twenty (120) days from the entry of this Consent Order, Defendants shall complete the installation of the sewage treatment system serving the Shade River Agriculture Building and the Dovetail Solar and Wind Building located on the Four U.S. Route 50 Buildings Site.

20. Defendants are prohibited from causing, permitting, or allowing the installation of a new system for disposing of sewage, sludge, sludge materials, industrial waste, or other wastes

without first obtaining a Permit to Install from the Director. Defendants are further prohibited from causing, permitting, or allowing the modification of an existing system for disposing of sewage, sludge, sludge materials, industrial waste, or other wastes, without first obtaining a Permit to Install from the Director.

21. Defendants are hereby enjoined and ordered not to allow any additional connection(s) to the Frito-Lay Building sanitary sewerage system within the Four U.S. Route 50 Buildings Site unless and until the Director has issued a Permit to Install for such connection(s).

VIII. REVIEW OF SUBMITTALS

22. Upon the submission of any Permit to Install application and/or upon the submission of any other documents by Defendants to the Director pursuant to this Consent Order, if the Director determines, in his sole discretion, that the Permit to Install application or other documents are incomplete, not approvable and/or do not meet the requirements of R.C. Chapter 6111, Ohio Administrative Code Chapters 3745-1, 3745-33 and/or 3745-42, the Director shall promptly inform Defendants of the nature of the deficiencies. Thereafter, Defendants shall submit any and all corrections, additions or deletions necessary to address the deficiencies noted by the Director in order for the applications/documents to be complete and/or approvable. Any and all required corrections, additions or deletions shall be submitted to the Director within twenty-one (21) days from the Director's mailing of notice to Defendants that the Permit to Install application or other document(s) are incomplete and/or do not meet the requirements of the rules cited within this paragraph. The Director may issue an approval of the Permit to Install application or other documents, in his sole discretion, with additional terms and conditions as authorized by R.C. 6111.03(J).

IX. CIVIL PENALTY

23. Defendants shall pay to the State of Ohio a civil penalty of **thirty-eight thousand, one hundred twenty-five dollars ($38,125.00)** which shall be paid in installments according to the following schedule:

(a) By no later than May 31, 2012, Defendants shall pay the first installment of **nine thousand, five hundred thirty-one dollars and twenty-five cents ($9,531.25)**.

(b) By no later than September 30, 2012, Defendants shall pay the second installment of **nine thousand, five hundred thirty-one dollars and twenty-five cents ($9,531.25)**.

(c) By no later than January 31, 2013, Defendants shall pay the third installment of **nine thousand, five hundred thirty-one dollars and twenty-five cents ($9,531.25)**.

(d) By no later than May 31, 2013, Defendants shall pay the fourth installment of **nine thousand, five hundred thirty-one dollars and twenty-five cents ($9,531.25)**.

24. The civil penalty shall be paid by delivering certified checks in the above stated amount, made payable to the order of "Treasurer, State of Ohio" to Martha Sexton, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215.

X. STIPULATED PENALTIES

25. In the event that Defendants fail to comply with any requirement of this Consent Order, Defendants are liable for and shall immediately pay stipulated penalties in accordance with the following schedule for each failure to comply:

(a) For each day of each failure to comply with a requirement or meet a deadline from one (1) day to thirty (30) days – two hundred fifty dollars ($250.00) per day per requirement not met;

(b) For each day of each failure to comply with a requirement or meet a deadline from thirty-one (31) days to sixty (60) days – five hundred dollars ($500.00) per day per requirement not met;

(c) For each day of each failure to comply with a requirement or meet a deadline over sixty-one (61) days – seven hundred fifty dollars ($750.00) per day per requirement not met.

26. Payments due under Paragraph 25 shall be made within forty-five (45) days from the date of the failure to meet the applicable deadline or knowledge of the effluent limitation violation. Payments shall be accompanied by a written explanation of the deadline missed and/or the effluent violation. Any payment required to be made under this paragraph shall be made by delivering a certified check or checks for the appropriate amount(s), made payable to "Treasurer, State of Ohio," to Martha Sexton, Environmental Enforcement Section, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400. The payment of stipulated penalties by Defendants and the acceptance of such stipulated penalties by Plaintiff for specific violations pursuant to Section X shall not be construed to limit Plaintiff's authority to seek additional relief or to otherwise seek judicial enforcement of this Consent Order. Further, payment by Defendants shall not be considered an admission of liability on the part of Defendants.

27. The stipulated penalties imposed by Paragraph 25 of this Consent Order may be terminated as to each specific paragraph of this Consent Order, for which stipulated penalties are imposed, only after Defendants have achieved and maintained compliance with all the requirements of that paragraph for a period of twelve (12) consecutive months, have paid all stipulated penalties incurred related to that paragraph, and are current on all civil penalty payments pursuant to Paragraph 23 of the Consent Order. Termination of one paragraph subject to stipulated penalties under this Consent Order shall not terminate the accrual of or the liability for payment of stipulated penalties under any other paragraph. Termination of stipulated penalties under this Consent Order shall only be upon written application by any party, and by order of the Court after the Court has made a determination that the requirements of this paragraph have been satisfied.

XI. COMPLIANCE NOT DEPENDENT ON GRANTS OR LOANS

28. Performance of the terms of this Consent Order by Defendants is not conditioned on the receipt of any Federal or State grants, loans and/or funds. In addition, Defendants' performance is not excused by the failure to obtain or any shortfall of any Federal or State grants, loans and/or funds or by the processing of any applications for the same.

XII. MISCELLANEOUS

29. Nothing in this Consent Order shall affect Defendants' obligation to comply with all applicable federal, state or local laws, regulations, rules or ordinances.

30. Any acceptance by the State of Ohio of any payment, document or other work due hereunder subsequent to the time that the obligation is due under this Consent Order shall not relieve Defendants from the obligations created by this Consent Order.

31. Defendants shall inform the Ohio EPA immediately of any change or the cessation of the business that is the subject of this action.

XIII. EFFECT OF CONSENT ORDER

32. This Consent Order does not constitute authorization or approval for the construction or modification of any physical structure, facility, disposal system, treatment works or sewerage system, or for the placement of fill in streams, wetlands, or other "waters of the state." Authorization or approval for any such construction, modification or fill shall be by permit issued by the Director or other such permits as may be required by applicable federal, state, or local laws, rules, or regulations. This Consent Order is not and shall not be construed as a permit nor shall it in any way relieve Defendants from the obligation to obtain permits or approvals for treatment or disposal of wastewater or to comply with any applicable federal, state or local laws or regulations.

XIV. CONTINUING JURISDICTION

33. This Court shall retain jurisdiction over this action for the purpose of enforcing and administrating Defendants' compliance with this Consent Order.

XV. COSTS

34. Defendants shall pay the court costs of this action.

35. Defendants are hereby ordered to pay the costs incurred by the Ohio EPA for the publication of the Consent Order in Ohio EPA's Weekly Review and a newspaper of general circulation. Defendants shall pay the costs associated with publication by delivering a certified check payable to: "Treasurer, State of Ohio" and with a notation indicating that the funds are going to "Fund 699" on it, in the amount of the costs, to the Fiscal Officer, Ohio EPA, P.O. Box 1049, Columbus, Ohio 43216-1049, within thirty (30) days from the date he receives notice of the costs from Ohio EPA.

XVI. SIGNATORIES

36. The signatory for each Defendant represents and warrants that he has been duly authorized to sign this document and so bind the corporation or individual to all terms and conditions thereof.

XVII. ENTRY OF CONSENT ORDER AND FINAL JUDGMENT BY CLERK

37. The parties agree and acknowledge that final approval by Plaintiff and Defendants and entry of this Consent Order is subject to the requirements of 40 C.F.R. 123.27(d)(1)(iii), which provides for notice of the lodging of the Consent Order, opportunity for public comment, and the consideration of any public comments. Both Plaintiff and Defendants reserve the right to withdraw this Consent Order based on comments received during the public comment period.

38. Pursuant to Rule 58 of the Ohio Rules of Civil Procedure, upon the signing of this Consent Order by the Court, the clerk is hereby directed to enter it upon the journal. Within three

(3) days of entering the judgment upon the journal, the clerk is hereby directed to serve upon the parties a notice of the judgment and its date of entry upon the journal in the manner prescribed by Rule 5(B) of the Ohio Rules of Civil Procedure and note the service in the appearance docket.

IT IS SO ORDERED:

JUDGE WARD

Date

APPROVED:

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

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