

IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO

FILED

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STATE OF OHIO, *ex rel.* JIM PETRO,
ATTORNEY GENERAL,

Plaintiff,

vs.

HOLMES BY-PRODUCTS, INC.

Defendant.

CASE NO. 04-CV-041

JUDGE WHITE

CONSENT ORDER

JAMES W. MOSELEY
COMMON PLEAS COURT
HOLMES COUNTY, OHIO

The Plaintiff State of Ohio, by its Attorney General (hereinafter "Plaintiff" or "State of Ohio") and Defendant, Holmes By-Products, Inc. (hereinafter "Defendant"), hereby consent to the entry of this Consent Order in order to resolve the allegations in this matter and pursuant to Chapter 6111 of the Ohio Revised Code (hereinafter "RC").

NOW THEREFORE, without trial or admission of any issue of law or of fact, and upon the consent of the parties hereto, it is hereby **ORDERED, ADJUDGED** and **DECREED** as follows:

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over the parties and the subject matter of this case pursuant to RC Chapter 6111. The Complaint states a claim upon which relief can be granted against the Defendant and venue is proper in this Court.

II. PARTIES

2. The provisions of this Consent Order shall apply and be binding upon the Plaintiff and Defendant, Defendant's agents, officers, employees, assigns, successors in interest and any

person acting in concert or privity with any of them. Defendant shall provide a copy of this Consent Order to each general contractor and consultant it employs to perform the work itemized herein. Defendant shall require each general contractor to provide a copy of this Consent Order to each of its subcontractors for such work.

III. SATISFACTION OF LAWSUIT AND RESERVATION OF RIGHTS

3. Plaintiff alleges that Defendant has operated its wastewater treatment system in such a manner as to result in violations of the water pollution laws of the State of Ohio. Defendant denies such allegations. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Defendant for all claims of violations alleged in the Complaint, including any continuing violations through the date of entry of this Consent Order which are properly reported to Ohio EPA and identified by the State in the Complaint.

4. Nothing in this Consent Order shall be construed so as to limit the authority of the State of Ohio to seek relief against other appropriate persons for claims or conditions alleged in the Complaint. Nothing in this Consent Order shall be construed so as to limit the authority of the State of Ohio to seek relief against Defendant or any other appropriate persons for claims or conditions not alleged in the Complaint, including violations which occur after the filing of the Complaint, nor shall anything in this Consent Order limit the right of Defendant to any defenses it may have for such claims. Similarly, nothing in this Consent Order shall be construed so as to limit the authority of the State of Ohio to undertake any action against any person, including Defendant, to eliminate or mitigate conditions which may present a threat to the public health, welfare or the environment.

IV. PERMANENT INJUNCTION

5. Defendant is permanently enjoined and ordered to comply immediately with all applicable provisions of R.C. Chapter 6111 and the rules promulgated under that chapter.

NPDES PERMIT REQUIREMENT

6. Defendant is enjoined and ordered to comply with all terms and conditions of its NPDES Permit No. 3IK00006 and any renewals and modifications thereof.

CLOSURE OF EXISTING ANAEROBIC LAGOON

7. By no later than December 31, 2008, Defendant shall complete closure of the existing anaerobic lagoon in accordance with its approved Permit to Install No. 02-19594.

OVERFLOWS FROM EXISTING ANAEROBIC LAGOON

8. Defendant is hereby enjoined and prohibited from having any overflow from the coal mine strip cut used as an anaerobic lagoon.

CLASS III CERTIFIED OPERATOR REQUIREMENT

9. By no later than March 15, 2005, Defendant shall retain the services of a Class III certified operator having the proper certificate issued under Ohio Administrative Code 3745-7-05 to be in responsible charge of the operation of Defendant's wastewater treatment system. Defendant shall continue to retain a Class III certified operator so long as the wastewater treatment system remains in operation, unless otherwise agreed to by the parties in writing.

V. REPORTING REQUIREMENT

10. Any report or notification required under this Consent Order shall be sent to Ohio EPA at the following address:

Ohio EPA

Northeast District Office
2110 E. Aurora Road
Twinsburg, OH 44087
Attention: Bryan Schmucker

VI. CIVIL PENALTY

11. Defendant is ordered and enjoined to pay a civil penalty of \$275,000.00 in accordance with the following schedule:

AMOUNT	DATE DUE
\$100,000.00	Within thirty days of entry of this Consent Order
\$50,000.00	On or before the one-year anniversary of the entry of this Consent Order
\$50,000.00	On or before the two-year anniversary of the entry of this Consent Order
\$50,000.00	On or before the three-year anniversary of the entry of this Consent Order
\$25,000.00	On or before the four-year anniversary of the entry of this Consent Order

Each installment of the civil penalty shall be paid by delivering a certified check for the appropriate amount, made payable to "Treasurer, State of Ohio," to be delivered to Amy Laws, Paralegal, or her successor, at the Ohio Attorney General's Office, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio, 43215-3428.

VII. SUPPLEMENTAL ENVIRONMENTAL PROJECT

12. In lieu of paying Fifty Thousand Dollars (\$50,000.00) of additional civil penalty, Defendant shall as a supplemental environmental project permanently employ a qualified individual to serve as Defendant's Environmental Compliance Officer. The Environmental Compliance Officer's job duties shall consist of ensuring Defendant's compliance with all federal, state, and local environmental laws applicable to Defendant's business. The

Environmental Compliance Officer shall, at a minimum, have contractual authority to do the following:

- To monitor Defendant's compliance and implement measures to ensure Defendant's compliance with all applicable permits and environmental laws;
- To take emergency action on behalf of Defendant to prevent environmental violations from occurring as a result of unforeseen events, including but not limited to equipment breakdown, system upsets, or a failure of storage capacity in the wastewater system;
- To take corrective and mitigative action on behalf of Defendant to remedy and minimize environmental impacts that may result from a discovered violation;
- To conduct or retain a third party to conduct a comprehensive environmental audit of Defendant's facility annually;
- To report to Ohio EPA regarding environmental issues at the facility;
- To develop organizational and/or computer systems as needed to keep track of Defendant's environmental reporting obligations and to assist in completing Defendant's reporting obligations;
- To develop an on-site laboratory as needed for purposes of improved operations monitoring.

In order to get credit for this supplemental environmental project, Defendant shall, by no later than March 15, 2005, employ the Environmental Compliance Officer and provide to Ohio EPA at the address listed in paragraph 10 the Officer's name and telephone number and a copy of the Officer's resume and contract of employment. Defendant shall pay a stipulated penalty to the State in accordance with Paragraph 14 of this Consent Order for each day after March 15, 2005 that no person is employed as Defendant's Environmental Compliance Officer. In the event that Defendant hires or retains a different person to serve as Defendant's Environmental Compliance Officer, Defendant shall notify Ohio EPA of the new Officer's name and telephone number, with a copy of that person's resume and contract of employment, within 10 days of the change in personnel.

VIII. STIPULATED PENALTIES

13. Except as provided in paragraphs 14 and 15 below, in the event that the Defendant fails to meet any of the requirements set forth in this Consent Order, Defendant shall pay a stipulated penalty according to the following schedule:

(1) For each day of each failure to meet a requirement of this Consent Order up to thirty (30) days – two hundred dollars (\$200.00) per day per requirement not met;

(2) For each day of each failure to meet a requirement of this Consent Order from thirty-one (31) to sixty (60) days - four hundred dollars (\$400.00) per day per requirement not met;

(3) For each day of each failure to meet a requirement of this Consent Order over sixty (60) days – six hundred dollars (\$600.00) per day per requirement not met.

No stipulated penalty shall attach to violations of paragraph 6 of this Consent Order for the first 180 days following the effective date of Defendant's first NPDES permit. Upon completion of the 180 day period, stipulated penalties shall attach to any or all violations of paragraph 6 in accordance with the above stipulated penalty schedule.

14. In the event of a violation of a 30-day average limitation contained in the NPDES permit issued to Defendant pursuant to paragraph 6 of this Consent Order, Defendant shall pay a stipulated penalty of \$300 per violation of any 30-day average limitation.

15. In the event of a violation of paragraph 8 of this Consent Order, Defendant shall pay a stipulated penalty of one thousand dollars (\$1,000.00) per overflow event per day. For purposes of this paragraph, "per day" is defined as any consecutive 24-hour period.

16. Any payment required to be made under the provisions of Section VII of this Consent Order shall be made by delivering to Amy Laws, Paralegal, or her successor, at the address set forth in Section VI, a certified check or checks, for the appropriate amounts within forty-five (45) days from the date of the failure to meet the requirement of this Consent Order, made payable to "Treasurer, State of Ohio." Defendant shall also state in writing the specific provision of the Consent Order which was not complied with, and the date(s) of non-compliance. The payment of stipulated penalties by Defendant and the acceptance of such stipulated penalties by Plaintiff for specific violations pursuant to Section VI shall not be construed to limit Plaintiff's authority to seek additional relief or to otherwise seek judicial enforcement of this Consent Order.

IX. TERMINATION OF STIPULATED PENALTIES

17. Defendant may move the Court to terminate the stipulated penalty section (Section VIII) as it is applicable to violations of Defendant's NPDES permit (paragraph 6) upon a demonstration by Defendant that: 1) it has paid all penalties required by this Consent Order; and it has achieved and maintained compliance with all terms and conditions of its currently effective NPDES permit or any renewals or modifications thereof, for a period of 24 consecutive months (beginning no earlier than after the completion of the 180 day grace period provided for in paragraph 13). Termination of the stipulated penalty section (Section VIII) as it is applicable to violations of Defendant's NPDES permit (paragraph 6) shall only be by order of the Court upon motion by any party, and a demonstration that the conditions outlined in this paragraph have been met.

X. MISCELLANEOUS

18. Nothing in this Consent Order shall affect Defendant's obligation to comply with all applicable federal, state or local laws, regulations, rules or ordinances. Defendant shall obtain any and all federal, state, or local permits necessary to comply with this Consent Order. This Consent Order does not constitute authorization or approval of the construction of any physical structure or facilities, or the modification of any existing treatment works or sewer system. Approval for any such construction or modification shall be by permit issued by the Ohio EPA or other such permits as may be required by applicable federal, state, or local laws, rules or regulations. This Consent Order does not limit Defendant's right to appeal any permit issued to Defendant pursuant to existing law.

19. Any acceptance by the State of Ohio of any payment, document, or other work due under this Consent Order subsequent to the time that the obligation is due under this Consent Order shall not relieve Defendant from the obligations created by this Consent Order, unless otherwise agreed to by the parties in writing.

20. Defendant shall inform the Ohio EPA of any change of its business addresses or telephone numbers.

XI. POTENTIAL FORCE MAJEURE

21. If any event occurs which causes or may cause a delay in Defendant's compliance with any requirement of this Consent Order, Defendant shall notify the Ohio EPA in writing within ten (10) days from when the Defendant knew, or by the exercise of due diligence should have known, of the event. The notification to Ohio EPA shall describe in detail the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken by the Defendant to prevent or minimize the delay, and the timetable by which those measures

will be implemented. Defendant shall adopt all reasonable measures to avoid or minimize any such delay.

22. In any action by the Plaintiff to enforce any of the provisions of this Consent Order, Defendant may raise that it is entitled to a defense that its conduct was caused by reasons entirely beyond its control such as, by way of example and not limitation, acts of God, strikes, acts of war or civil disturbances. While the Plaintiff does not agree that such a defense exists, it is, however, hereby agreed upon by Defendant and the Plaintiff that it is premature at this time to raise and adjudicate the existence of such a defense and that the appropriate point at which to adjudicate the existence of such a defense is at the time, if ever, that a court proceeding to enforce this Consent Order is brought by the Plaintiff. At that time, Defendant will bear the burden of proving that any delay was or will be caused by circumstances entirely beyond the control of Defendant. Unanticipated or increased costs associated with the implementation of any action required by this Consent Order, or a change in Defendant's financial circumstances, shall not constitute circumstances entirely beyond the control of Defendant or serve as a basis for an extension of time under this Consent Order. Failure by Defendant to timely comply with the notice requirements of this Section shall render this Section void and of no force and effect as to the particular incident involved and shall constitute a waiver of Defendant's right to request an extension of its obligations under this Consent Order based on such incident. An extension of one date based on a particular incident does not mean that Defendant qualifies for an extension of a subsequent date or dates. Defendant must make an individual showing of proof regarding each incremental step or other requirement for which an extension is sought. Acceptance of this Consent Order without a Force Majeure Clause does not constitute a waiver by Defendants of any rights or defenses it may have under applicable law.

XII. RETENTION OF JURISDICTION

23. The Court will retain jurisdiction of this action for the purpose of administering or enforcing Defendant's compliance with this Consent Order.

XIII. COSTS

24. Defendant is hereby immediately ordered to pay the court costs of this action.

XIV. ENTRY OF CONSENT ORDER AND FINAL JUDGMENT BY CLERK

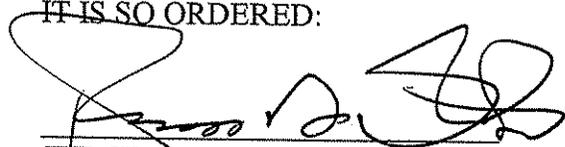
25. The parties agree and acknowledge that final approval by the Plaintiff and Defendant, and entry of this Consent Order, is subject to the requirement of 40 C.F.R. §123.27 (d)(2)(iii), which provides for notice of the lodging of this Consent Order, opportunity for public comment, and the consideration of any public comment. The Plaintiff and Defendant reserve the right to withdraw consent to this Consent Order based on comments received during the public comment period. Defendant shall pay the cost of publishing the public notice within thirty (30) days of receipt of a bill or notice from Ohio EPA.

26. 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 all parties 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.

XV. SIGNATORIES

27. Each of the undersigned representatives for the Parties represents that he/she is fully authorized to enter into the terms and conditions of this Consent Order and legally bind the respective Party to this document.

IT IS SO ORDERED:



**JUDGE WHITE,
HOLMES COUNTY
COURT OF COMMON PLEAS**

3/29/2005
DATE

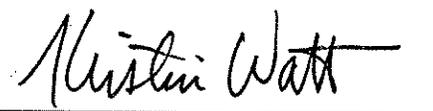
APPROVED:

**JIM PETRO
ATTORNEY GENERAL**

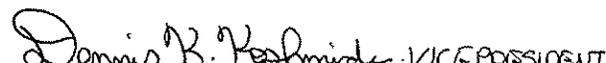
By: 

Kristina Erlewine (0071469)
Teri J. Finfrock (0037903)
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3400
Telephone: (614) 466-2766
Telefax: (614) 752-2441
Attorneys for State of Ohio

**VORYS, SATER, SEYMOUR
AND PEASE LLP**

By: 

Kristin L. Watt (0042333)
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-6400
Telefax: (614) 464-6350
Attorney for Holmes By-Products, Inc.

By:  **VICE PRESIDENT**
*Authorized Representative of
Defendant Holmes By-Products Co., Inc.*