

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In The Matter Of:

[Name] : [Subject]
[Address] :

CONSENT ORDER AND AGREEMENT

This Consent Order and Agreement is entered into this _____ day of _____ 2000, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department") and [Name of Operator] ("Operator").

The Department has found and determined the following:

A. The Department is the agency with the duty and authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations ("rules and regulations") promulgated thereunder.

B. [Identify operator; i.e. name, business, address. Is there a corporation, partnership and/or individuals?]

C. [State a link between the operator and the site; e.g. owner, operator, transporter, generator and the nature of the operator's activities at the site which have resulted in a violation].

D. [Identify the site with name, address and description including geography, brief site history and possibly exhibit ("Site")].

E. [Identify permit or permits at issue].

F. [State the additional facts necessary to describe the circumstances which are relevant to this CO&A, without stating legal conclusions].

G. [Quote or summarize the specific statutory or regulatory provisions which are relevant to the matters at issue without drawing conclusions as to the legality of the Operator's actions].

H. [Summarize how Operator's activities at the site violate or are subject to the quoted statutes and regulations, citing appropriate sections and specific dates of violations].

I. The violations described in Paragraph H constitute unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611; a statutory nuisance under Section 601 of the Clean Streams Law, 35 P.S. § 691.601; and subjects [Operator] to civil penalty liability under Section 605 of the Clean Streams Law, § 691.605.

After full and complete negotiation of all matters set forth in this Consent Order and Agreement and upon mutual exchange of covenants contained herein, the parties desiring to avoid litigation and intending to be legally bound, it is hereby ORDERED by the Department and AGREED to by [Operator] as follows:

1. Authority. This Consent Order and Agreement is an Order of the Department authorized and issued pursuant to Section 5 of the Clean Streams Law, 35 P.S. § 691.5; and Section 1917-A of the Administrative Code, 71 P.S. § 510-17.

2. Findings.

a. [Operator] agrees that the findings in Paragraph A through ___ are true and correct and, in any matter or proceeding involving [Operator] and the Department, [Operator] shall not challenge the accuracy or validity of these findings.

b. The parties do not authorize any other persons to use the findings in this Consent Order and Agreement in any matter or proceeding.

3. Corrective Action. [Actions to be required of Operator. Include a final compliance date].

[Optional]

4. Civil Penalty Settlement. [Operator] consents to the assessment of a civil penalty of \$_____, which shall be paid in full [upon signing/pursuant to the following schedule: _____]. This payment is in settlement of the Department's claim for civil penalties for the violations set forth in Paragraph H, above, covering the period from _____ to _____. The payment shall be made by corporate check or the like made payable to [identify specific fund] and sent to [identify where the check should be sent].

[Optional]

5. Stipulated Civil Penalties.

a. In the event [Operator] fails to comply in a timely manner with any term or provisions of this Consent Order and Agreement, [Operator] shall be in violation of this Consent Order and Agreement and, in addition to other applicable remedies, shall pay a civil penalty in the amount of \$_____ per day for each violation.

b. Stipulated civil penalty payments shall be payable monthly on or before the fifteenth day of each succeeding month, and shall be forwarded as described in Paragraph 4 (Civil Penalties) above.

c. Any payment under this paragraph shall neither waive the [Operator]'s duty to meet its obligations under this Consent Order and Agreement nor preclude the Department from commencing an action to compel [Operator]'s compliance with the terms and conditions of this Consent Order and Agreement. The payment resolves only [Operator]'s liability for civil penalties arising from the violations of this Consent Order and Agreement for which the payment is made.

d. [Except for violations in Paragraph(s) _____,] stipulated civil penalties shall be due automatically and without notice. [No stipulated civil penalty will be owed for violations of Paragraph(s) _____, if the violations are corrected within ___ days of notice from the Department].

COMMENT: The penalties which are not due until after notice, are limited to minor requirements or violations which the Operator cannot correct until notified by the Department (e.g., correction of deficiencies in a status report). This will not apply to most obligations under the Consent Order and Agreement.

5. Stipulated Civil Penalties.

a. In the event [Operator] fails to comply in a timely manner with the provisions of Paragraph(s) ____ [Operator] shall be in violation of this Consent Order and Agreement and, in addition to other applicable remedies, shall pay a civil penalty in the amount determined under the following schedule:

(i) For any violation of Paragraph(s) _____, \$_____ per day for each violation;

(ii) For any violation of Paragraph (s) ____, \$____ per day for the first ____ days of each violation, and \$____ per day for each violation extending beyond the first ____ days.

b. Stipulated civil penalty payment shall be payable monthly on or before the fifteenth day of each succeeding month, and shall be forwarded as described in Paragraph 4 (Civil Penalties) above.

c. Any payment under this paragraph shall neither waive the [Operator]'s duty to meet its obligations under this Consent Order and Agreement nor preclude the Department from commencing an action to compel [Operator]'s compliance with the terms and conditions of this Consent Order and Agreement. The payment resolves only [Operator]'s liability for civil penalties arising from the violation of this Consent Order and Agreement for which the payment is made.

d. [Except for violations of Paragraph(s),] stipulated civil penalties shall be due automatically and without notice. [No stipulated civil penalty will be owed for violations of Paragraph(s) ____, if the violations are corrected within ____ days of notice from the Department].

COMMENT: The penalties which are not due until after notice, are limited to minor requirements or violations which the Operator cannot correct until notified by the Department (e.g., correction of deficiencies in a status report). This will not apply to most obligations under the Consent Order and Agreement.

6. Additional Remedies.

a. In the event [Operator] fails to comply with any provision of this Consent Order and Agreement, the Department may, in addition to the remedies prescribed herein, pursue any remedy available for a violation of an order of the Department, including an action to enforce this Consent Order and Agreement.

b. The remedies provided by this paragraph and Paragraph 5 (Stipulated Civil Penalties) are cumulative and the exercise of one does not preclude the exercise of any other. The failure of the Department to pursue any remedy shall not be deemed to be a waiver of that remedy. The payment of a stipulated civil penalty, however, shall preclude any further assessment of civil penalties for the violation for which the stipulated penalty is paid.

[c. The Department will not pursue any remedy, other than a stipulated civil penalty, for a violation of Paragraph(s) ____, if the violation is corrected within ____ days].

COMMENT: The final subparagraph is only available for minor violations (e.g., the untimely submission of a monthly report).

7. Reservation of Rights. The Department reserves the right to require additional measures to achieve compliance with applicable law. [Operator] reserves the right to challenge any action which the Department may take to require those measures.

8. Liability of Operator. [Operator] shall be liable for any violations of the Consent Order and Agreement, including those caused by, contributed to, or allowed by its officers agents, employees, or contractors. [Except as provided in Paragraph 9(c)] [Operator] also shall be liable for any violation of this Consent Order and Agreement caused by, contributed to, or allowed by its successors and assigns.

9. Transfer of Site.

a. The duties and obligations under this Consent Order and Agreement shall not be modified, diminished, terminated or otherwise altered by the transfer of any legal or equitable interest in the [Site] or any part thereof.

b. If [Operator] intends to transfer any legal or equitable interest in the [Site] which is affected by this Consent Order and Agreement, [Operator] shall serve a copy of this Consent Order and Agreement upon the prospective transferee of the legal and equitable interest at least thirty (30) days prior to the contemplated transfer and shall simultaneously inform the [Regional/District] Office of the Department of such intent.

[Optional]

c. The Department in its sole discretion may agree to modify or terminate [Operator]'s duties and obligations under this Consent Order and Agreement upon transfer of the [Site]. [Operator] waives any right that it may have to challenge the Department's decision in this regard.

10. Correspondence with Department. All correspondence with the Department concerning this Consent Order and Agreement shall be addressed to:

Name
Title
Street Address
City, State and ZIPCODE
Phone and Facsimile

11. Correspondence with [Operator]. All correspondence with [Operator] concerning this Consent Order and Agreement shall be addressed to:

Name
Title
Street Address
City, State and ZIPCODE
Phone and Facsimile

[Operator] shall notify the Department whenever there is a change in the contact person's name, title, or address. Service of any notice or any legal process for any purpose under this Consent Order and Agreement, including its enforcement, may be made by mailing a copy by first class mail to the above address.

[Optional]

12. Force Majeure.

a. In the event that [Operator] is prevented from complying in a timely manner with any time limit imposed in this Consent Order and Agreement solely because of a strike, fire, flood, act of God, or other circumstance beyond [Operator]'s control and which [Operator], by the exercise of all reasonable diligence, is unable to prevent, then [Operator] may petition the Department for an extension of time. An increase in the cost of performing the obligations set forth in this Consent Order and Agreement shall not constitute circumstances beyond [Operator]'s control. [Operator]'s economic inability to comply with any of the obligations of this Consent Order and Agreement shall not be grounds for any extension of time.

b. [Operator] shall only be entitled to the benefits of this paragraph if it notifies the Department within five (5) working days by telephone and within ten (10) working days in writing of the date it becomes aware or reasonably should have become aware of the event impeding performance. The written submission shall include all necessary documentation,

as well as a notarized affidavit from an authorized individual specifying the reasons for the delay, the expected duration of the delay, and the efforts which have been made and are being made by [Operator] to mitigate the effects of the event and to minimize the length of the delay. The initial written submission may be supplemented within ten working days of its submission. [Operator]'s failure to comply with the requirements of this paragraph specifically and in a timely fashion shall render this paragraph null and of no effect as to the particular incident involved.

c. the Department will decide whether to grant all or part of the extension requested on the basis of all documentation submitted by [Operator] and other information available to the Department. In any subsequent litigation, the [Operator] shall have the burden of proving that the Department's refusal to grant the requested extension was an abuse of discretion based upon the information then available to it.

13. Severability. The paragraphs of this Consent Order and Agreement shall be severable and should any part hereof be declared invalid or unenforceable, the remainder shall continue in full force and effect between the parties.

14. Entire Agreement. This Consent Order and Agreement shall constitute the entire integrated agreement of the parties. No prior or contemporaneous communications or prior drafts shall be relevant or admissible for purposes of determining the meaning or extent of any provisions herein in any litigation or any other proceeding.

15. Attorney Fees. The parties shall bear their respective attorney fees, expenses and other costs in the prosecution or defense of this matter or any related matters, arising prior to execution of this Consent Order and Agreement. [For purposes of this paragraph, related matters will be limited to the following: _____].

16. Modifications. No changes, additions, modifications, or amendments of this Consent Order and Agreement shall be effective unless they are set out in writing and signed by the parties hereto.

17. Titles. A title used at the beginning of any paragraph of this Consent Order and Agreement may be used to aid in the construction of that paragraph, but shall not be treated as controlling

[In Appropriate Cases]

18. Hazardous Sites Cleanup Act. [Operator] agrees that failure to comply with the provisions of Paragraph(s) ____ of this Consent Order and Agreement constitutes a failure to comply with an "enforcement action" as provided in Section 1301 of the Hazardous Sites Cleanup Act, the Act of October 18, 1988, P.L. 756, 35 P.S. § 6020.1301.

19. Decisions Under Consent Order. [Except as provided in Paragraph(s) _____,] Any decision which the Department makes under the provisions of this Consent Order and Agreement, including a notice that stipulated civil penalties are due, is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa. C.S. § 101. Any objection which [Operator] may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

COMMENT: The finality of most decisions is postponed so that the Operator is not forced to file numerous appeals to protect its rights. The exception is for

previously identified decisions for which the right to appeal has been specifically preserved.

[Optional]

20. Dispute Resolution.

a. [Operator] may initiate dispute resolution under this paragraph, in response to any decision required of the Department under Paragraph(s) _____.

b. To initiate dispute resolution, [Operator] shall provide written notice to the Department within ten (10) days of the decision in dispute. [Operator] shall have an additional ten days to provide the Department with a written list of objections to the decision in dispute, the relevant facts, analysis and opinions and other supporting data ("Statement of Position"). The Department shall have twenty (20) days to provide its Statement of Position.

c. Within the twenty (20) day period following receipt of the Department's Statement of Position, the _____ Program Manager and the [Operator]'s _____ shall confer in an attempt to resolve the dispute. In the event the parties are unable to resolve the dispute within this period, the Statements of Position shall be provided to the Department's _____ [Regional/Director] to issue a final decision resolving the dispute.

d. During the pendency of the dispute resolution procedures set forth in Subparagraphs (b) and (c), any obligation to be performed under this Consent Order and Agreement which is the subject of such dispute and any associated activities whose performance is directly dependent upon the resolution of the dispute shall be postponed for a period of time not to exceed the actual time taken to resolve the dispute pursuant to Subparagraphs (b) and (c) or as otherwise agreed by the parties. All other obligations and activities shall be completed in accordance with the terms of this Consent Order and Agreement.

e. Any time period for dispute resolution set forth herein may be extended by written agreement of the parties.

[Optional. Used only if Paragraph 19 (Decisions Under Consent Order) specifies decisions from which the right of appeal has been preserved].

f. For decisions which are specified as appealable to the Environmental Hearing Board under Paragraph 19 (Decisions Under Consent Order), [Operator] must either appeal the decision to the Board within thirty (30) days of its receipt, or initiate dispute resolution in the manner set forth in this paragraph and in all events before the expiration of the 30 day appeal period. If dispute resolution is initiated before the expiration of the appeal period, the initial decision shall be suspended until the Department makes a final decision under Subparagraph (c).

[Optional]

21. Termination. The obligations of Paragraph(s) _____ shall terminate [on _____] [when the Department determines that [Operator] has complied with the requirements of _____] [for _____ consecutive quarters of sampling] [for _____ consecutive months].

[Optional]

22. Resolution. Attached hereto as Appendix A is a resolution of the [Board of Supervisors] of [Municipality] authorizing its signatories below to enter into this Consent Order and Agreement on its behalf.

[Optional]

23. Execution of Agreement. This Consent Order and Agreement may be signed in counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Consent Order and Agreement to be executed by their duly authorized representatives. The undersigned representatives of [Operator] certify under penalty of law, as provided by 18 Pa. C.S. § 4904, that they are authorized to execute this Consent Order and Agreement on behalf of [Operator]; that [Operator] consents to the entry of this Consent Order and Agreement as a final ORDER of the Department; and that [Operator] hereby knowingly waives its right to appeal this Consent Order and Agreement and to challenge its content or validity, which rights may be available under Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514; the Administrative Agency Law, 2 Pa. C.S. § 103(a) and Chapters 5A and 7A; or any other provisions of law. (Signature by [Operator]'s attorney certifies only that the agreement has been signed after consulting with counsel.)

FOR [OPERATOR]:

FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION:

Name
Title

Name
Title

Name
Title

Name
Attorney for [Operator]]

Name
Assistant Counsel

COMMENT: If the Operator is a corporation, this document must be signed by both (1) the President or Vice President *and* (2) the Secretary or Treasurer, unless a resolution from the Board of Directors is attached that authorizes the signatory to sign on behalf of the corporation.