

FILED  
LORAIN COUNTY

IN THE COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

700 N. HOPE ST. ACB 11-531  
JIM PETRO  
ATTORNEY GENERAL OF OHIO  
RON NABAKOWSKI

CASE NO. 04CV138842

JUDGE Mc Gough

Plaintiff,

vs.

THE CITY OF AMHERST

Defendant.

---

---

**CONSENT ORDER**

---

---

The Plaintiff State of Ohio, by its Attorney General (hereinafter "Plaintiff" or "State of Ohio") and Defendant, City of Amherst (hereinafter "Defendant" or "Amherst"), 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 "O.R.C.").

**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 both personal and subject matter jurisdiction over the parties. The Complaint states a claim upon which relief can be granted against Amherst under O.R.C. Chapter 6111 and the rules promulgated thereunder, and venue is proper in this Court.

## **II. PARTIES**

2. The provisions of this Consent Order shall apply to and be binding upon Amherst, Amherst's agents, officers, employees, assigns, successors in interest and others bound by Rule 65(D) of the Ohio Rules of Civil Procedure who are acting in concert and/or privity with Amherst. Amherst shall provide a copy of this Consent Order to each general contractor and consultant it employs to perform the work itemized herein. Amherst 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 Amherst has operated its wastewater treatment plant (hereinafter "WWTP") and sewer system in such a manner as to result in violations of the requirements of the National Pollution Discharge Elimination System (hereinafter "NPDES") Permit issued to it by the Director of the Ohio Environmental Protection Agency (hereinafter "Director") and in violation of the water pollution control laws of the State of Ohio. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Amherst for all claims regarding all violations alleged in the Complaint, including any continuing violations through the date of entry of this Consent Order that are properly reported to the Director, as well as the claims for injunctive relief and civil penalties.

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 Amherst or other appropriate persons for claims or conditions not alleged in the Complaint, including violations which occur after the filing of the Consent Order, nor shall anything in this Consent Order limit the right of Amherst 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 Amherst, to eliminate or mitigate conditions that may present a threat to the public health, welfare or the environment.

#### **IV. PERMANENT INJUNCTION**

5. Amherst is hereby permanently enjoined and immediately ordered to comply with the requirements of O.R.C. Chapter 6111 and the rules adopted thereunder, and the terms and conditions of its currently effective NPDES Permit No. 3PD00001\*ID and any renewals or modifications thereof, except as otherwise provided in this decree.

6. Between the effective date of this Consent Order and December 31, 2004, Amherst shall comply with the limits set forth in **Attachment A** for: Total Suspended Solids; Ammonia Nitrogen (summer); Total Phosphorus; Total Recoverable Copper; and CBOD<sub>5</sub>.

#### **V. CONSTRUCTION SCHEDULE**

7. No later than February 1, 2004, Amherst shall initiate construction of the improvements to the wastewater treatment plant consistent with PTI number 90-712, approved by the Director on August 4, 2003.

8. No later than November 1, 2004, Amherst shall have completed all construction of the improvements to the wastewater treatment plant consistent with PTI number 90-712, approved by the Director on August 4, 2003, necessary to meet the final effluent limitations contained in its currently effective NPDES Permit No. 3PD00001\*ID, or any renewals or modifications thereof.

9. No later than November 8, 2004, Amherst shall notify the Ohio Environmental Protection Agency, Northeast District Office, in writing, that it has completed all construction of the improvements in accordance with the above paragraphs in this Section.

10. No later than January 1, 2005, Defendant's treatment works shall meet the final effluent limitations contained in its currently effective NPDES Permit No. 3PD00001\*ID, or any renewals or modifications thereof.

#### **VI. REPORTING REQUIREMENT**

11. Amherst is immediately ordered to submit a written progress report to the following address, on a quarterly basis, beginning on April 1, 2004. Defendant will provide quarterly reports to the Ohio EPA until all the requirements set forth in Paragraph 8 have been achieved. :

Ohio EPA  
Northeast District Office  
Division of Surface Water  
2110 East Aurora Road  
Twinsburg, Ohio 44087  
ATTN: Charles E. Allen (or his successor)

Any Permit to Install or NPDES permit applications or revisions, or other reporting and/or review requirements of Section V requiring Ohio EPA approval, consent or acceptance shall be sent to the same address and individual listed above.

#### **VII. COMPLIANCE NOT DEPENDENT ON GRANTS OR LOANS**

12. Performance with the terms of this Consent Order by Amherst is not conditioned on the receipt of any federal or state grant, loan or funds. In addition, Amherst's performance is not excused by the failure to obtain or shortfall of any federal or state grant, loan or funds, or by the processing of any applications for the same.

### **VIII. CIVIL PENALTY**

13. Within thirty (30) days of the effective date of this Consent Order, it is hereby ordered that Amherst shall pay to the State of Ohio a civil penalty of fifteen-thousand dollars (\$15,000). The civil penalty shall be paid by delivering a certified check for the appropriate amount made payable to:

“Treasurer, State of Ohio,”  
Ohio Attorney General’s Office  
Environmental Enforcement Section  
30 East Broad Street, 25th Floor  
Columbus, Ohio, 43215-3428  
ATTN: Administrative Assistant or successor

### **IX. SUPPLEMENTAL ENVIRONMENTAL PROJECT**

14. In lieu of an additional civil penalty, and in furtherance of the mutual objectives of the State of Ohio and Amherst in improving the waters of the State and the environment, Amherst will perform a supplemental environmental project that will cost no less than one-hundred and thirty-thousand dollars (\$130,000). By August 1, 2004, Amherst will submit to Ohio EPA for approval a proposal for the supplemental environmental project. This proposal will include a complete technical description and a schedule for the work. Once approved, this project and schedule will become an enforceable part of this Consent Order. If Amherst is unable to provide Ohio EPA with an acceptable proposal for a supplemental environmental project by February 1, 2005, then it shall pay to the State of Ohio at the address set forth above one-hundred and thirty-thousand dollars (\$130,000).

## **X. STIPULATED PENALTIES**

15. In the event that the Amherst fails to meet any requirement of this Consent Order, and/or any failure to comply with Amherst's NPDES permit terms or conditions, Amherst shall pay a stipulated penalty according to the following schedule:

(a) For each day of each failure to meet a requirement of this Consent Order and/or failure to comply with Amherst's NPDES permit term or condition up to thirty (30) days - five hundred dollars (\$500.00) per day per requirement not met;

(b) For each day of each failure to meet a requirement of this Consent Order and/or failure to comply with Amherst's NPDES permit term or condition from thirty-one (31) to sixty (60) days - seven hundred and fifty dollars (\$750.00) per day per requirement not met; and

(c) For each day of each failure to meet a requirement of this Consent Order and/or failure to comply with Amherst's NPDES permit term or condition over sixty (60) days - one thousand dollars (\$1000.00) per day per requirement not met; and

16. Any payment required to be made under the provisions of Section X, Paragraph 13 of this Consent Order shall be made by delivering to Administrative Assistant or successor, at the address set forth in Section VIII, Paragraph 11, 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." Amherst shall also state in writing the specific failure of the Consent Order and/or NPDES permit term and condition which was not complied with, and the date(s) of non-compliance. Payment of stipulated penalties and acceptance of such stipulated penalties by Plaintiff for specific violations pursuant to this Section of the Consent Order shall not be construed to limit Plaintiff's authority to seek additional relief pursuant to R.C. Chapter 611 or to otherwise seek judicial enforcement of this Consent Order.

## **XI. POTENTIAL FORCE MAJEURE**

17. If any event occurs which causes or may cause a delay in Amherst's compliance with any requirement of this Consent Order, Amherst shall notify the Director 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 the Director 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 Amherst to prevent or minimize the delay, and the timetable by which those measures will be implemented. Amherst shall adopt all reasonable measures to avoid or minimize any such delay.

18. In any action by the Plaintiff to enforce any of the provisions of this Consent Order, Amherst 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 limitations, 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 Amherst 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 commenced by the Plaintiff. At that time, Amherst will bear the burden of proving that any delay was or will be caused by circumstances entirely beyond the control of Amherst. Unanticipated or increased costs associated with the implementation of any action required by this Consent Order, or a change in Amherst's financial circumstances, shall not constitute circumstances entirely beyond the control of Amherst or serve as a basis for an extension of time under this Consent Order. Failure by Amherst 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 Amherst'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 Amherst qualifies for an extension of a subsequent date or dates. Amherst 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 Amherst of any rights or defenses it may have under applicable law.

## **XII. RETENTION OF JURISDICTION**

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

## **XIII. COSTS**

20. Amherst is hereby immediately ordered to pay the court costs of this action.

## **XIV. AUTHORITY TO ENTER INTO THE CONSENT ORDER**

21. Each signatory for Amherst represents and warrants that he/she has been duly authorized to sign this document and to so bind Amherst to all terms and conditions thereof. Each signatory for Amherst shall submit with this Consent Order an authenticated and certified resolution from Amherst establishing that he/she is so empowered to sign for and bind Amherst.

## **XV. ENTRY OF CONSENT ORDER AND FINAL JUDGMENT BY CLERK**

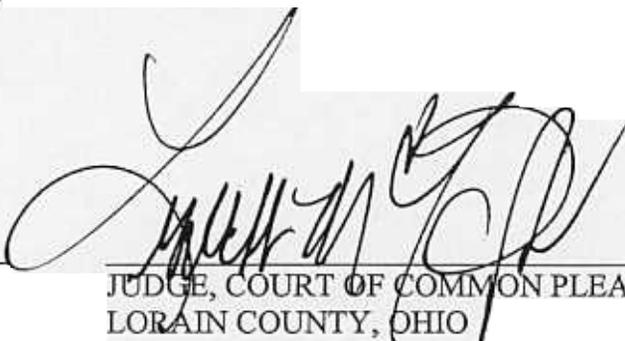
22. The Parties agree and acknowledge that final approval by the Plaintiff and Amherst, and entry of this Consent Order is subject to the requirement of 40 C.F.R. §123.27(d)(2)(iii), which provides for notice of the lodging of this Consent Order, opportunity for public comment, and the consideration of any public comment. The Plaintiff and Amherst reserve the right to withdraw consent to this Consent Order based on comments received during the public comment

period. Amherst shall pay the cost of publishing the public notice within thirty (30) days of receipt of a bill or notice from the Director.

23. 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.

IT IS SO ORDERED

DATE \_\_\_\_\_



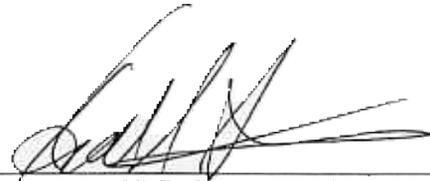
\_\_\_\_\_  
JUDGE, COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

**APPROVED:**

JIM PETRO  
ATTORNEY GENERAL OF OHIO

BY.  6-17-04

LAUREN C. ANGELL (0041615)  
DANIEL J. MARTIN (0065249)  
Assistant Attorneys General  
Environmental Enforcement Section  
30 East Broad Street, 25th Floor  
Columbus, Ohio 43215-3428  
Telephone: (614) 466-2766  
Facsimile: (614) 644-1926  
E-Mail: langell@ag.state.oh.us  
dmartin@ag.state.oh.us



\_\_\_\_\_  
KENNETH S. STUMPHAUZER (0013380)  
Law Director, City of Amherst  
5455 Detroit Road  
Sheffield Village, Ohio 44054  
Telephone: (440) 930-4001  
Facsimile: (440) 934-7205  
E-Mail: kstumphauzer@b-olaw.com

*Counsel for Defendant*

*Counsel for Plaintiff*

CITY OF AMHERST, OHIO

By: David A. Taylor  
DAVID A. TAYLOR, Mayor  
Authorized Representative of  
City of Amherst, Ohio

And By: Dennis Clotz  
Dennis Clotz, Safety-Service Director  
City of Amherst, Ohio

ATTACHMENT A

## COMPLIANCE LIMITS

Outfall - 001

| <u>Effluent Characteristic</u>           | <u>Discharge Limitations</u>  |         |        |         |                  |        |         | <u>Monitoring Requirements</u> |               |                   |
|--|-------------------------------|---------|--------|---------|------------------|--------|---------|--------------------------------|---------------|-------------------|
| Parameter                                | Concentration Specified Units |         |        |         | Loading** kg/day |        |         | Measuring Frequency            | Sampling Type | Monitoring Months |
|  | Maximum                       | Minimum | Weekly | Monthly | Daily            | Weekly | Monthly |                                |               |                   |
| 00530 - Total Suspended Solids - mg/l    | -                             | -       | 30     | 20      | -                | 255.8  | 170.6   | 3/Week                         | Composite     | All               |
| 00610 - Nitrogen, Ammonia (NH3) - mg/l   | -                             | -       | 12.0   | 8.0     | -                | 102.3  | 68.2    | 3/Week                         | Composite     | Summer            |
| 00610 - Nitrogen, Ammonia (NH3) - mg/l   | -                             | -       | 12.8   | 8.5     | -                | 109.2  | 72.5    | 3/Week                         | Composite     | Winter            |
| 00665 - Phosphorus, Total (P) - mg/l     | -                             | -       | 2.3    | 1.5     | -                | 19.5   | 12.7    | 1/Week                         | Composite     | All               |
| 01119 - Copper, Total Recoverable - ug/l | 34                            | -       | -      | 21      | -                | -      | -       | 1/Month                        | Composite     | All               |
| 80082 - CBOD 5 day - mg/l                | -                             | -       | 24     | 16      | -                | 204.6  | 136.4   | 3/Week                         | Composite     | All               |

\*\* Note: The above loadings are based upon the current average daily design flow of 2.25 MGD.