

FILED
FULTON COUNTY
COMMON PLEAS COURT
2011 MAY 27 P 2:31
PAUL E. MACDONALD
CLERK

IN THE COURT OF COMMON PLEAS
FULTON COUNTY, OHIO

STATE OF OHIO, ex rel.	:	
MICHAEL DEWINE,	:	
OHIO ATTORNEY GENERAL	:	Case No. 11CV000126
	:	
	:	
Plaintiff,	:	Judge Barber
	:	
v.	:	
	:	
BAILEY-PVS OXIDES, LLC	:	
	:	
Defendant.	:	

CONSENT ORDER AND FINAL JUDGMENT ENTRY

WHEREAS, Plaintiff, State of Ohio, through Michael DeWine, Attorney General of Ohio ("Plaintiff"), has filed the Complaint in this action against Bailey-PVS Oxides, LLC (hereinafter "Defendant") to enforce Ohio's hazardous waste laws found in Chapter 3734 of the Revised Code and the rules adopted thereunder; and Plaintiff and Defendant having consented to the entry of this Order; and

WHEREAS, the State of Ohio and Defendant resolved the issues stated in the Complaint without further delay.

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. DEFINITIONS

1. As used in this Consent Order:

A. **“Closure Plan”** means a closure plan that has been approved by the Director.

The approved closure plan may be a closure plan approved by the Director as submitted by Defendant, or a closure plan approved by the Director after being submitted by Defendant and modified by the Director.

B. **“Clean Closure”** means the owner or operator has, in closure, either:

1. Demonstrated to Ohio EPA’s satisfaction that suspected contaminants cannot be detected, cannot be detected above naturally occurring background levels, or cannot be detected above regulatory levels; or

2. Through a risk assessment, demonstrated to Ohio EPA’s satisfaction that any remaining contamination is at levels low enough that it does not pose a threat to human health or the environment.

C. **“Consent Order”** means this Consent Order and Final Judgment Entry and all appendices attached hereto. In the event of conflict between this Consent Order and any appendix, the Consent Order shall control.

D. **“Defendant”** means Bailey-PVS Oxides, LLC.

E. **“Director”** means Ohio’s Director of Environmental Protection.

F. **“Effective Date”** means the date the Fulton County Court of Common Pleas enters this Consent Order.

- G. **“Facility”** refers to the facility where the alleged treatment, storage, disposal, or other placement of hazardous waste was conducted by Defendant at the facility located at 6191 County Road 10, Delta, Ohio, Fulton County, Ohio, property parcel number 29-056472-02.
- H. **“Ohio EPA”** means the Ohio Environmental Protection Agency.
- I. **“Plaintiff”** means the State of Ohio by and through the Attorney General of Ohio.
- J. **“Post-Closure Plan”** means a plan that identifies those activities that will be carried on after closure of each disposal unit and the frequency of those activities.

II. JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action, pursuant to Revised Code Chapter 3734 and the rules adopted thereunder. This Court has jurisdiction over the parties. Venue is proper in this Court. The Complaint states a claim upon which relief can be granted.

III. PERSONS BOUND

3. The provisions of this Consent Order shall apply to and be binding upon Defendant, its agents, officers, employees, assigns, successors in interest and any other person who would be bound pursuant to Rule 65(D) of the Ohio Rules of Civil Procedure, including any person acting in concert or participation with them. Defendant is ordered and enjoined to

provide a copy of this Consent Order to each contractor they employ to perform work itemized herein.

IV. SATISFACTION OF LAWSUIT AND RESERVATION OF RIGHTS

4. Except as otherwise provided in this Consent Order, compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability of Defendant to Plaintiff for all claims alleged in the Complaint.

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

- A. Seek relief for claims or conditions not alleged in the Complaint;
- B. Seek relief for claims or conditions alleged in the Complaint that occur after the entry of this Consent Order;
- C. Enforce this Consent Order through a contempt action or otherwise for violations of this Consent Order;
- D. Bring any action against Defendant or against any other person, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. §9601, et seq. and/or Revised Code 3734.20 through 3734.27 to: (1) recover natural resource damages, and/or (2) order the performance of, and/or recover costs for any removal, remedial or corrective activities not conducted pursuant to the terms of this Consent Order.

- E. Take any action authorized by law against any person, including Defendant, to eliminate or mitigate conditions at the Facility that may present an imminent threat to the public health or welfare, or the environment.
- F. Nothing in this Consent Order shall constitute or be construed as satisfaction of civil liability, a covenant not to sue, and/or a release regarding the claims alleged in the Complaint, against any person, firm, trust, joint venture, partnership, corporation, association, or other entity not a signatory to this Consent Order. The State also specifically reserves against any entity that is not a signatory to this Consent Order.

6. The State also specifically reserves its right to sue against any entity that is not a signatory to this Consent Order.

7. Nothing herein shall restrict the right of Defendant to raise any administrative, legal or equitable claim or defense with respect to such further actions reserved by the State in this Section. However, Defendant shall not assert and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim splitting or other defenses based upon any contention that the claims raised by the State in the subsequent proceeding were, could, or should have been brought in the instant case.

V. CLOSURE AND OTHER INJUNCTIVE RELIEF

8. Upon the Effective Date of this Consent Order, Defendant is hereby permanently enjoined and ordered to immediately comply with all applicable provisions of the Ohio hazardous waste laws and rules as set forth in Revised Code Chapter 3734, Ohio Adm. Code Chapters 3745-50 through 3745-69, and Ohio Adm. Code Chapters 3745-270 through 3745-279.

9. Upon the Effective Date of this Consent Order, Defendant is ordered and enjoined to comply with the requirements of Ohio Adm. Code 3745-55-11 which requires Defendant to close each and every area of the Facility where hazardous waste is or was located, both on-site and off-site, in a manner that minimizes the need for further maintenance and controls, minimizes or eliminates, to the extent necessary to prevent threats to human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated run-off, or hazardous waste decomposition products to the ground or surface waters or to the atmosphere, and complies with the closure requirements of Ohio Adm. Code 3745-55-10 through 3745-55-20.

10. To implement compliance with Ohio Adm. Code 3745-55-11, within sixty (60) days of the Effective Date of this Consent Order, Defendant is ordered and enjoined to submit to Ohio EPA, at the addresses set forth in Section VI of this Consent Order, a Closure Plan in accordance with Ohio Administrative Code 3745-55-10 through 3745-55-20 for the Facility.

11. Within thirty (30) days of completion of closure, Defendant is ordered and enjoined to submit certification of closure to Ohio EPA, pursuant to Ohio Adm. Code 3745-55-15 and a survey plat, pursuant to Ohio Administrative Code 3745-55-16 (if necessary).

12. All Closure and Post-Closure Plans developed for the Facility shall be enforceable under this Consent Order as though fully incorporated herein.

Closure Cost Estimate, Financial Assurance and Financial Responsibility

13. Within thirty (30) days after the approval of the Closure Plan for the Facility, Defendant is ordered and enjoined to submit to Ohio EPA detailed updated closure cost estimates which are calculated pursuant to Ohio Adm. Code 3745-55-42.

14. Within thirty (30) days after the approval of the Closure Plan for the Facility, Defendant is ordered and enjoined to submit to Ohio EPA documentation of closure cost estimates and financial assurance for closure pursuant to Ohio Adm. Code 3745-55-42 and 3745-55-43.

15. Within thirty (30) days after the approval of the Closure Plan for the Facility, Defendant is ordered and enjoined to submit to Ohio EPA documentation demonstrating financial responsibility pursuant to Ohio Adm. Code 3745-55-47.

VI. SUBMITTAL OF DOCUMENTS

16. All documents required to be submitted to Ohio EPA pursuant to this Consent Order shall be submitted to the following addresses, or to such addresses as Ohio EPA may hereafter designate in writing:

Ohio EPA
Division of Hazardous Waste Management
50 W. Town St., Suite 700
Columbus, OH 43215
ATTN: Manager, Compliance Assurance Section

Ohio EPA
Northwest District Office
347 N. Dunbridge Rd.
Bowling Green, OH
ATTN: DHWM Manager

VII. CIVIL PENALTY

17. Defendant is ordered and enjoined to pay to the State of Ohio a total civil penalty in the amount of Forty-Five Thousand Dollars (\$45,000.00) according the following payment schedule:

- First payment of Five Thousand, Six Hundred and Twenty-Five Dollars (\$5,625.00) will be due within sixty (30) days of the Effective Date of this Consent Order
- Quarterly payments of Five Thousand, Six Hundred and Twenty-Five Dollars (\$5,625.00) will follow no later than the following dates: July 1, 2011; October 1, 2011; January 1, 2012; April 1, 2012; July 1, 2012; October 1, 2012; and January 1, 2013.

18. The civil penalty required to be paid under this Consent Order shall be paid by delivering to Plaintiff, c/o Karen Pierson, or her successor at the Office of the Attorney General of Ohio, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, a cashier's or certified check in that amount payable to the order of "Treasurer, State of Ohio" and shall include a reference to "AG EAGO No. 346339". This civil penalty shall be deposited into the Hazardous Waste Clean-up Fund created by Ohio Revised Code 3734.28.

VIII. STIPULATED PENALTIES

19. In the event that Defendant fails to comply with any requirement or deadline contained in this Consent Order, or any requirement or deadline contained in any document approved in accordance with this Consent Order, the Defendant is liable for and shall 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 deadline of this Consent Order, up to and including thirty (30) days, one hundred dollars (\$100) per day for each requirement or deadline not met.

B. For each failure to comply with a requirement or deadline of this Consent Order, from thirty-one (31) to sixty (60) days, two hundred and fifty dollars (\$250) per day for each requirement or deadline not met.

C. For each day of each failure to comply with a requirement or deadline of this Consent Order, over sixty (60) days, five hundred dollars (\$500) per day for each requirement or deadline not met.

20. Any payment required to be made under the provisions of this Section of the Consent Order shall be made by delivering to Plaintiff, c/o Karen Pierson, or her successor, at the Office of the Attorney General of Ohio, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, a cashier's or certified check or checks made payable to the order of "Treasurer, State of Ohio," for the appropriate amount within thirty (30) days from the date of the failure to meet the requirement or deadline of this Consent Order. A letter briefly describing the type of violation, deadline or requirement not met and the date upon which the violation of this Consent Order occurred and a reference to "AG EAGO No. 346339" shall accompany the payment of the stipulated penalty.

21. The payment of stipulated penalties and the acceptance of such stipulated penalties by Plaintiff pursuant to this Section shall not be construed to limit Plaintiff's authority to seek additional relief pursuant to Ohio Revised Code Chapter 3734, including civil penalties under Ohio Revised Code 3734.13, or to otherwise seek judicial enforcement of this Consent Order, for the same violation for which a stipulated penalty was paid or for other violations.

22. The parties to this Order agree that the stipulated penalties established in this Section are coercive in nature, and are designed to ensure Defendant's compliance with the terms of this

Order. The parties further agree that the stipulated penalties in this Order are not punishment for past acts or omissions by Defendant regarding the specific terms of this Order.

IX. POTENTIAL FORCE MAJEURE

23. 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 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 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.

24. In any action by the Plaintiff to enforce any of the provisions of this Consent Order, Defendant may raise a defense that its conduct was caused by force majeure events that were beyond Defendant's control including but not limited to 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 commenced by the Plaintiff. At that time, Defendant will bear the burden of proving that any delay was or will be caused by circumstances 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 Defendant of any rights or defenses it may have under applicable law

X. COMPLIANCE WITH APPLICABLE LAWS, PERMITS AND APPROVALS

25. All activities undertaken by Defendant pursuant to this Consent Order shall be undertaken in accordance with the requirements of all applicable federal, state and local laws, rules, regulations and permits or other. Defendant shall submit timely applications and requests for any such permits and approvals. Where such laws appear to conflict with the other requirements of this Consent Order, Defendant is ordered and enjoined to immediately notify Ohio EPA of the potential conflict. Defendant is ordered and enjoined to include in all contracts or subcontracts entered into for work required under this Consent Order, provisions stating that such contractors or subcontractors, including their agents and employees, shall perform all activities required by such contracts or subcontracts in compliance with all applicable laws and rules. This Consent Order is not a permit issued pursuant to any federal, state or local law or rule.

XI. RETENTION OF JURISDICTION

26. This Court shall retain jurisdiction of this action for the purpose of enforcing this Consent Order or in resolving any conflicts concerning the interpretation of this Consent Order.

XII. COSTS

27. Defendant shall pay the court costs of this action.

XIII. ENTRY OF CONSENT ORDER AND JUDGMENT BY CLERK

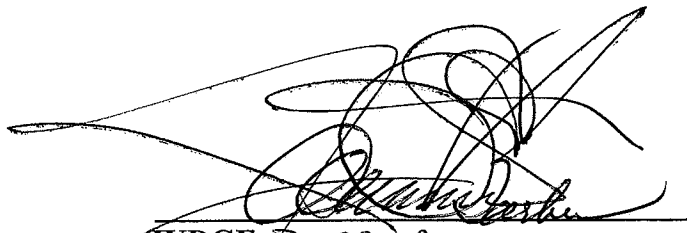
28. Upon signing of this Consent Order by the Court, the clerk is directed to enter it upon the journal. Within three (3) days of entering the judgment upon the journal, the clerk is directed to serve upon all parties notice of the judgment and its date of entry upon the journal in the manner prescribed by Rule 5(B) of the Ohio Rules of Civil Procedure and note the service in the appearance docket.

XIV. AUTHORITY TO ENTER INTO THE CONSENT ORDER

29. Each signatory for a corporation represents and warrants that he or she has been duly authorized to sign this document and so bind the corporation to all terms and conditions thereof.

IT IS SO ORDERED:

5-27-11
DATE



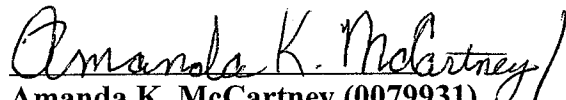
JUDGE BARBER
FULTON COUNTY
COURT OF COMMON PLEAS

Copies Served 5/31/2011
Paul E. MacDonald, Clerk
By TR

APPROVED:

**MICHAEL DEWINE
OHIO ATTORNEY GENERAL**

By:


Amanda K. McCartney (0079931)
Brian A. Ball (0078285) *f.k.*
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3400
Telephone: (614) 466-2766
Facsimile: (614) 644-1926
Attorneys for Plaintiff

By:

ISI - ATTACHED
NAME
On behalf of **Bailey-PVS Oxides, LLC**

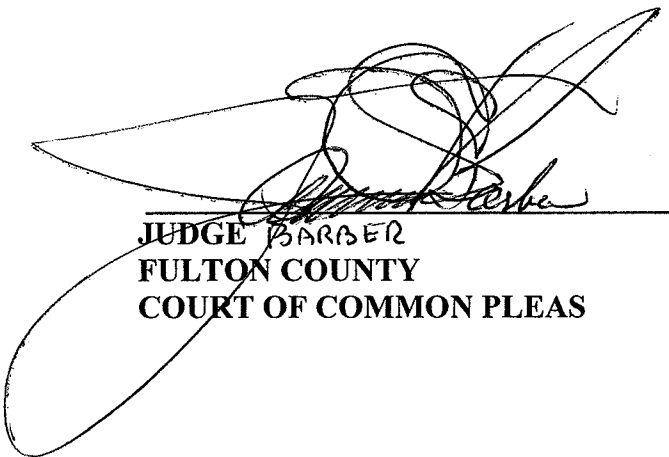
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DATE


JUDGE BARBER
FULTON COUNTY
COURT OF COMMON PLEAS


APPROVED:

**MICHAEL DEWINE
OHIO ATTORNEY GENERAL**

By:

151 - ATTACHED
**Amanda K. McCartney (0079931)
Brian A. Ball (0078285)
Assistant Attorneys General**

By:


NAME
On behalf of **Bailey-PVS Oxides, LLC**
Richard A. Barcelona
CEO