

**IN THE COURT OF COMMON PLEAS
UNION COUNTY, OHIO**

STATE OF OHIO, ex rel.	:	CASE NO.
BETTY D. MONTGOMERY	:	
ATTORNEY GENERAL OF OHIO,	:	JUDGE
Environmental Enforcement Section	:	
30 East Broad St., 25th Floor	:	
Columbus, Ohio 43215-3428,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
THE SCOTTS COMPANY	:	
14110 Scottslawn Road	:	
Marysville, Ohio 43041,	:	
	:	
Defendant.	:	

CONSENT ORDER AND FINAL JUDGMENT

**BETTY D. MONTGOMERY,
ATTORNEY GENERAL OF OHIO**

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APPENDICES

- Appendix A: Map of the Facility and the Site.
- Appendix B: Index of RCRA Corrective Action Guidance Documents.
- Appendix C: Approved RFI Workplan.
- Appendix D: Site-Specific Corrective Measures Implementation Scope of Work.
- Appendix E: Pond 3 Closure.

I. INTRODUCTION

1. Plaintiff, the State of Ohio, by and through its counsel, Attorney General Betty D. Montgomery, and at the written request of the Director of Environmental Protection, filed a Complaint (hereinafter "Complaint") against The Scotts Company (hereinafter "Scotts" or "Defendant") pursuant to Ohio Revised Code ("Ohio R.C.") Chapters 3734 and 6111, and the regulations adopted thereunder.

2. WHEREAS, the State of Ohio's Complaint alleges that activities conducted at Defendant's facility located in Union County, including its wastewater treatment plants, former landfills, ponds, and broadcast areas have resulted in releases of pollution and contamination at the Site; and

3. WHEREAS, the State of Ohio's Complaint alleges that Defendant's operation of its former wastewater treatment plants resulted in violations of the discharge limitations and monitoring requirements of NPDES Permit No.4IF00000*HD; and various operations and activities carried out at Defendant's facility have resulted in pollution of waters of the state; and

4. WHEREAS, the State of Ohio's Complaint alleges that as a result of having held an interim hazardous waste facility permit, Defendant is required to take corrective action under Ohio R.C. Chapter 3734, Ohio R.C. Chapter 6111, and the Resource Conservation and Recovery Act, ("RCRA"), 42 U.S.C. 6921, et seq., to address past on-site releases of RCRA regulated-wastes. The Defendant is also required to take certain measures to prevent and abate prohibited discharges to waters of the State pursuant to R.C. Chapter 6111.

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

II. OBJECTIVES OF PARTIES AND PURPOSES OF CONSENT ORDER

6. In entering into this Consent Order, the principal objectives of Plaintiff and Defendant, are: [1] to institute required controls of the sources of releases or potential releases to sediment and waters of the State from the Immediate Units of Concern ("IUC"), and [2] to implement for the Site and IUCs, including Impacted portions of Crosses Run, such corrective actions and remedial measures as are necessary to protect human health, aquatic life, and the environment; and [3] to require the operation of the Facility to be in compliance with the applicable requirements of Chapters 3734 and 6111 of the Revised Code.

III. JURISDICTION AND VENUE

7. The Court has jurisdiction over the parties and the subject matter of this action pursuant to Ohio R.C. Chapters 3734 and 6111. The Complaint states a claim upon which relief can be granted against Defendant and venue is proper in this Court.

IV. DEFINITIONS

8. Unless otherwise stated, all terms used in this Consent Order shall have the same meaning as used in Ohio R.C. Chapters 3734 and/or 6111 and the regulations adopted thereunder. In addition, the following terms are defined as follows:

- A. **"Additional Work"** means any work in addition to the tasks defined in the approved workplans and other requirements of this Consent Order that Ohio EPA or Defendant may determine may be necessary to accomplish and maintain objectives one [1] and two [2] of Section II [Objectives of Parties and Purposes of Consent Order] of this Consent Order.
- B. **"Additional Work Workplan"** means those documents that are to be submitted to Ohio EPA by Defendant pursuant to Section IX.A.5 ("Additional Work") of this Consent Order. Each Workplan required to be submitted to Ohio EPA pursuant to Section IX.A.5 ("Additional Work") of this Consent Order shall include a detailed description of the proposed activities; a time schedule for conducting those activities; and any special or unusual personnel and equipment needs likely to affect the schedule or Work.

- C. **"Consent Order"** means this Consent Order and Final Judgment Entry and all appendices hereto. In the event of conflict between this Consent Order and any appendix, the Consent Order shall control.
- D. **"Constituents of Concern"** means those constituents identified pursuant to the approved RFI Workplan.
- E. **"Contractor"** means a contractor retained by or on behalf of Defendant pursuant to this Consent Order.
- F. **"Defendant" or "Scotts"** means The Scotts Company.
- G. **"Director"** means Ohio's Director of Environmental Protection and the Director's authorized representatives.
- H. **"Facility,"** for purposes of this Consent Order, shall have the same meaning as Ohio R.C. 3734.01, and is confined to the main plant area and the waste treatment, storage and disposal areas, the waste water treatment and disposal areas, and shall include the portions of Defendant's property used for fertilizer, herbicide and pesticide formulation, all of which are situated on approximately 800 acres and located approximately 12 miles northwest of Columbus, Ohio on Scottslawn Road, Marysville, Ohio 43041 as indicated on the map attached as Appendix A .
- I. **"Immediate Units of Concern"** (IUCs) include the following units located at the Site: Landfills 1 through 5, and Field Broadcast Areas

1 and 2, former Ponds 2, 3, 6, 7, and 8, including the ditch leading to former Pond 2 and Impacted portions of Crosses Run.

- J. **"Impacted"** means environmental media which shall be determined by a human health and ecological risk assessment analysis using approved methodologies to represent unacceptable risks, as referred to in the approved RFI Workplan.
- K. **"NPDES Permit"** means National Pollutant Discharge Elimination System permit issued in accordance with Ohio Adm. Code Chapter 3745-33.
- L. **"OCAP"** means "Ohio EPA Corrective Action Program Guidance".
- M. **"Ohio EPA"** means the Ohio Environmental Protection Agency.
- N. **"Person"** means any state or federal government including any political subdivision, department, agency, institution, or instrumentality thereof; an individual; corporation; business trust; estate; trust; partnership; association; municipal corporation; interstate body created by compact; and their officers, agents, employees, and/or any person acting in concert, privity or participation with any of them.
- O. **"Plaintiff"** means the State of Ohio by and through the Attorney General's Office.
- P. **"PTI"** means a permit to install issued in accordance with Ohio Adm. Code Chapter 3745-31.

- Q. **"RCRA"** means the Resource Conservation and Recovery Act, 42 U.S.C. Section 6921, et seq.
- R. **"Site"** means the land upon which the Facility is located, the Impacted portions of Crosses Run, and any area that is being investigated by Scotts as part of the RFI Workplan, Appendix C to this Order. Additionally, Site includes those areas indicated on the map attached as Appendix A and areas where material(s) have migrated or threaten to migrate from those areas indicated on the map.
- S. **"Waste Material"** means (1) any "hazardous waste" as that term is defined in Ohio R.C. 3734.01 or Ohio Administrative Code ("OAC") 3745-50-10 or 3745-51-03; (2) any "hazardous constituent or constituents" as that term is defined in OAC 3745-51-10 and listed in the appendix to OAC 3745-51-11; (3) any "sewage" as that term is defined in Ohio R.C. 6111.01; (4) any "solid waste" as that term is defined in Ohio R.C. 3734.01; (5) any "industrial waste" as that term is defined in Ohio R.C. 6111.01; and (6) any "other waste" as that term is defined in Ohio R.C. 6111.01.
- T. **"Work"** means all activities Defendant is required to perform under this Consent Order.

V. CALCULATION OF TIME

9. In computing any period of time under this Consent Order, where the last day would fall on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday or legal holiday.

VI. PERSONS BOUND

10. The provisions of this Consent Order shall apply to and be binding upon Defendant, its agents, officers, employees, assigns, successors in interest and any person acting in concert, privity or participation with it; provided, however, that Defendant's officers, directors, employees, agents or employees of any contractor or consultant engaged by Defendant to carry out Work to be performed pursuant to this Consent Order shall only be responsible to take action under this Consent Order in their corporate capacity and shall not be personally responsible for obligations assumed under this Consent Order.

11. Defendant shall provide a copy of this Consent Order to each key employee, consultant or Contractor employed to perform Work referenced herein.

VII. SATISFACTION OF LAWSUIT

12. Plaintiff alleges in its Complaint that Defendant operates and has operated its Facility and conducts and has conducted activities at the Site in such a manner as to result in numerous violations of the discharge limitations and monitoring requirements of its NPDES Permit No. 4IF00000*HD as well as unpermitted discharges and other activities in violation of Ohio's water pollution laws, Ohio R.C. Chapter 6111, and the regulations adopted thereunder, including but not limited to the Water Quality

Standards, OAC Chapter 3745-1, the Permit to Install regulations, OAC Chapter 3745-31 and the NPDES regulations, OAC Chapter 3745-33. Plaintiff further alleges that as a result of having held an interim hazardous waste facility permit, Defendant is also required to take corrective action under R.C. Chapter 3734, R.C. Chapter 6111, rules promulgated under those chapters and RCRA to address releases of Waste Materials from the IUCs to the Site. Defendant denies the allegations of Plaintiff's Complaint.

13. Except as expressly provided herein, compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Defendant for all claims alleged in the State's Complaint.

VIII. RESERVATION OF RIGHTS

14. 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 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 for claims or conditions alleged in the Complaint which arise anew after the entry of this Consent Order.
- C. Seek any legal or equitable relief for claims or conditions alleged in the Complaint not addressed under this Consent Order.

- D. Enforce this Consent Order through a contempt action or otherwise seek relief pursuant to the terms of the Consent Order for violations of this Consent Order;
- E. Take any action authorized by law against any Person, including Defendant, to eliminate or mitigate conditions at the Facility, Site, or the surrounding areas that may present a threat to the public health or welfare, or the environment;
- F. 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 R.C. 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; and/or
- G. Bring any legal or equitable action against any Person other than Defendant.

15. By entering into this Consent Order, Defendant does not waive any rights, claims or defenses which it might have in any action identified in paragraph 14 of this Consent Order. Nothing in this Consent Order shall constitute or be construed as a waiver of any defense Defendant may have in any other claim, cause of action, or demand in law or equity brought by any other Person not subject to this Consent Order for any liability arising from, or related to, events or conditions at the Site or Facility. Nothing in this Consent Order shall constitute or be construed as a waiver of any

affirmative defense, claim, counterclaim, or cross-claim that Defendant may have in any claim, cause of action or demand in law or equity arising from alleged injury to the person or property of any agent, employee or contractor of Plaintiff arising from or received while in the course of performing their official duties relating to the implementation of this Consent Order.

IX. INJUNCTIVE RELIEF

IX.A. Corrective Actions

16. For purposes of conducting the Corrective Action pursuant to this Consent Order, Defendant is hereby enjoined and ordered as follows:

IX.A.1. RCRA Facility Investigation

17. On November 25, 1998, Defendant submitted a RCRA Facility Investigation ("RFI") Workplan for the IUCs and Crosses Run to Ohio EPA for approval. Subsequent responses to the Ohio EPA's comments and revisions to the RFI Workplan have also been submitted by Defendant. By letter dated March 24, 2000, Ohio EPA approved Defendant's RFI Workplan. The approved RFI Workplan is attached as Appendix C, which is incorporated by reference as if fully set forth herein.

18. Within 120 days after completing implementation of the approved RFI Workplan, Defendant shall submit to Ohio EPA a Final RFI Report in accordance with the guidance documents listed in Appendix B of this Consent Order and as outlined below:

- 1) Purpose and Objectives: The Final RFI Report shall include a summary that identifies the purpose and objectives of the RFI and the Final RFI Report.
- 2) Data Presentation and Analysis: The Final RFI Report shall present the data gathered during the investigation. The report should also identify any gaps in the data. The methods used to gather, analyze, and summarize the data should also be described. The nature and extent of contamination discovered during the investigation shall be discussed in the report. Receptors or potential receptors of any contaminants detected shall be identified by using a conceptual site model or diagram. Evidence to support that the data meets the data quality objectives established in the RFI Workplan shall be included.
- 3) Evaluation of Data Against Cleanup Standards: In the absence of applicable generic cleanup standards, baseline risk assessments will be performed for human health and the environment. If Scotts utilizes site-specific risk assessments, all methodologies and assumptions used to perform them shall be identified. Any cleanup standards developed through these risk assessments shall also be identified.
- 4) Summary - Identify Potential Remedies/Future Course of Action:

- a. The Final RFI Report Summary shall explore and describe one of the following options for each unit or media, including Crosses Run:
 1. A presumptive remedy for one or more of the units or media.
 2. Identifying the units or media for which a corrective measures study or limited corrective measures study is necessary.
 3. A finding of no further action for one or more of the units or media.
- b. Defendant shall evaluate the need for any necessary interim measures. All interim measures used on-site shall be evaluated for their effectiveness and what role the interim measures shall play in the overall corrective action.

19. If the results of an RFI show unacceptable human health or ecological risks to be present in Crosses Run, the Defendant is permanently enjoined and ordered to conduct additional investigations necessary to characterize the surface water and sediment, both upstream and downstream of the Scotts Facility for the Constituents of Concern. Defendant is permanently enjoined and ordered to take corrective measures to eliminate any unacceptable human health or ecological risks to be present in Crosses Run. Any sediment remediation or removal or management necessary to eliminate the unacceptable human health or ecological risk in those portions of Crosses Run included in the Site shall be done in conjunction and consistent with schedules governing the

RCRA corrective action, and shall, for constituents of concern, result in attainment of chemical water quality criteria in the water column.

IX.A.2 Corrective Measures Study

20. If an approved RFI Report, or an approved report summarizing the additional investigations conducted pursuant to paragraph 19 of this Consent Order, recommends that a Corrective Measures Study be conducted, the Corrective Measures Study shall be submitted within 180 days of the approval of either the RFI Report or the report summarizing additional investigations, whichever is approved later.

21. The corrective measures chosen for each unit or media, including Crosses Run, must meet both the threshold and balancing criteria for corrective measures found in Chapter 5 of the OCAP.

22. The corrective measures chosen for Crosses Run or for any unit or media affecting Crosses Run, must result, for Constituents of Concern, in attainment of the chemical water quality criteria in the water column.

IX.A.3 Corrective Measures Implementation

23. Within 30 days after receiving Ohio EPA's written approval of the Final RFI Report submitted February 16, 2001, additional investigations relating thereto conducted pursuant to paragraph 19 of this Consent Order, and any Corrective Measures Studies relating thereto, Defendant shall submit to Ohio EPA a schedule for conducting Corrective Measures Implementation ("CMI") for each IUC requiring action or additional investigation. The schedule shall include dates for the submission of those items indicated in Section XI of Appendix D. The CMI shall be conducted in a manner

consistent with the site-specific CMI Scope of Work contained in Appendix D to this Order, RCRA and its implementing regulations, R.C. Chapter 3734 and regulations promulgated thereunder, R.C. Chapter 6111 and the regulations promulgated thereunder, the OCAP and the other relevant guidance documents listed in Appendix B. All plans identified in Appendix D shall be subject to approval by Ohio EPA pursuant to the procedures set forth in Section XIII (“Review of Submittals”), unless otherwise indicated in Appendix D.

24. Within forty-five [45] days after receiving Ohio EPA's written approval of the schedule for conducting the CMI, Defendant shall begin implementation of the CMI as approved by Ohio EPA in accordance with the implementation schedules contained therein.

25. Within sixty [60] days after completing the CMI for an individual IUC, Defendant shall submit to Ohio EPA a construction completion report demonstrating that the CMI for that IUC was completed in a manner consistent with the site-specific CMI Scope of Work contained in Appendix D to this order, RCRA and the regulations promulgated thereunder, R.C. Chapter 3734 and regulations promulgated thereunder, R.C. Chapter 6111 and regulations promulgated thereunder, the OCAP, and the other relevant guidance documents listed in Appendix B.

26. Within sixty [60] days after completing implementation of the approved CMI for all IUCs, Defendant shall submit to Ohio EPA a Final CMI Completion Report. The Final CMI Completion Report shall describe the results of implementing the CMI, and shall be written in a manner consistent with the site-specific CMI Scope of Work contained in Appendix D to this order, RCRA and the regulations promulgated

thereunder, R.C. Chapter 3734 and regulations promulgated thereunder, R.C. Chapter 6111 and regulations promulgated thereunder, the OCAP, and the other relevant guidance documents listed in Appendix B.

IX.A.4. Notice of Threat and Interim Measures

27. If while in the course of implementing this Consent Order, Defendant identifies a condition that presents an immediate threat to human health or the environment that:

- A. arises from a source currently at the Site, whether or not identified at the time the consent order is entered; or
- B. emanates from the site now or in the future from a source currently at the Site, whether or not identified at the time the consent order is entered,

Defendant shall verbally notify Ohio EPA and begin implementing Interim Measures ("IM") to address the threat immediately. Defendant shall notify Ohio EPA in writing no later than five [5] days after identification of such conditions, summarizing the immediacy and magnitude of the threat and any actions Defendant has taken or will take to address the threat. The IM shall be consistent with all relevant guidance documents listed in Appendix B, and shall be integrated into any long term solution for corrective measures implemented at the Site unless such incorporation is determined by Ohio EPA to be incompatible with implementing a corrective measure. Within 30 days after implementing IM, Defendant is ordered and enjoined to submit to Ohio EPA an IM Report that identifies interim measures performed by Defendant to mitigate the threat. Following receipt of Defendant's IM Report, if Ohio EPA determines that any

Additional Work is necessary to address or mitigate the immediate threat, Ohio EPA will notify Defendant and the Additional Work shall be implemented in accordance with Ohio EPA's written direction and the IM Report modified accordingly following implementation.

28. If during the implementation of this Consent Order, Ohio EPA identifies a condition that presents an immediate threat to human health or the environment that:

- A. arises from a source currently at the Site, whether or not identified at the time the consent order is entered; or
- B. emanates from the site now or in the future from a source currently at the Site, whether or not identified at the time the consent order is entered,

and Ohio EPA notifies Defendant of the threat and the need for Defendant to respond to that immediate threat, Defendant shall implement IM to address the threat immediately.

Defendant shall notify Ohio EPA in writing, no later than five [5] days after Ohio EPA notifies Defendant of the immediate threat, summarizing the immediacy and magnitude of the threat and any actions Defendant has taken or will take to address the threat.

The IM measures shall be consistent with all the relevant guidance documents listed in Appendix B, and shall be integrated into any long term solution for corrective measures at the Site unless such incorporation is determined by Ohio EPA to be incompatible with implementing a corrective measure. Within thirty [30] days after implementing IM, Defendant shall submit to Ohio EPA an IM Report that identifies the interim measures performed by Defendant to mitigate the immediate threat. Following receipt of Defendant's IM Report, if Ohio EPA determines that any Additional Work is necessary to

address or mitigate the threat, Ohio EPA will notify Defendant and the Additional Work shall be implemented in accordance with Ohio EPA's written direction and the IM Report modified accordingly following implementation.

29. If Defendant claims that a condition at or emanating from the Site does not satisfy any of the criteria in Paragraphs 27.A and B and 28.A and B, Defendant shall have the burden of proving that claim in any action to enforce the terms of this Consent Order.

IX.A.5. Additional Work

30. This section applies to all of Section IX.A and IX.C.1 [Habitat Restoration]. Ohio EPA or Defendant may determine that in addition to the tasks defined in the approved workplans and other requirements of this Consent Order identified in Sections IX.A and Section IX.C.1 ("Habitat Restoration"), Additional Work may be necessary to accomplish and maintain compliance with objectives one [1] and two [2] of Section II [Objectives of Parties and Purposes of Consent Order] of this Consent Order. In the event that Ohio EPA determines that Additional Work is necessary to achieve and maintain compliance with those objectives of this Consent Order, Ohio EPA will orally notify Defendant and submit a written request to it explaining the need for and detailing the nature of the Additional Work. Within thirty [30] days of receipt of written notice from Ohio EPA that Additional Work is necessary, Defendant shall prepare and submit an Additional Work Workplan for Ohio EPA's review and approval for the performance of the Additional Work in conformance with this Consent Order, RCRA and the regulations promulgated thereunder, R.C. Chapter 3734 and regulations promulgated thereunder, R.C. Chapter 6111 and regulations promulgated thereunder, the OCAP, and the other

relevant guidance documents listed in Appendix B. Upon approval of the Additional Work Workplan by Ohio EPA pursuant to Section XIII (Review of Submittals), Defendant shall implement the Additional Work Workplan in accordance with the schedules contained therein.

31. In the event that Defendant determines that Additional Work is necessary to achieve and maintain the objectives of this Consent Order, Defendant shall submit a written request for approval, including a schedule for preparation of an Additional Work Workplan, to Ohio EPA explaining the need for and detailing the nature of the Additional Work prior to performing the Additional Work. Upon agreement by Ohio EPA of Defendant's request, Defendant shall develop an Additional Work Workplan in conformance with the approved schedule, this Consent Order, RCRA and the regulations promulgated thereunder, R.C. Chapter 3734 and regulations promulgated thereunder, R.C. Chapter 6111 and regulations promulgated thereunder, the OCAP, and the other relevant guidance documents listed in Appendix B. Upon approval of the Additional Work Workplan by Ohio EPA pursuant to Section XIII ("Review of Submittals"), Defendant shall implement the Additional Work Workplan in accordance with the schedules contained therein.

32. In the event that Additional Work is necessary to accomplish any task described in any approved workplan, the deadline for completing such task(s) shall be that deadline described in the schedule contained in the approved Additional Work Workplan.

33. Defendant may invoke the procedures set forth in Section XVI ("Dispute Resolution") to dispute any determination by the Ohio EPA that Additional Work is necessary to achieve and maintain the objectives of this Consent Order.

IX.A.6 Remediation on ODOT's Easement and Fee Property

34. Defendant shall take such steps as are necessary to link and integrate its remediation efforts on Landfill 3 to those conducted to date by the Ohio Department of Transportation on the Ohio Department of Transportation's easement and fee simple property on the Northeast side of State Route 33. This connection shall be made in a manner protective of human health and the environment and, to the extent not already planned or completed, Defendant shall submit plans, including schedules, to Ohio EPA for review and approval. Plans for work required by this section shall be submitted in concurrence with plans for work on other portions of Landfill 3. Work required by this section shall be performed in concurrence with work on other portions of Landfill 3.

IX.B. Recycle 1 System Compliance

35. The Defendant is hereby enjoined and ordered to comply with all applicable requirements for the Recycle I system.

IX.C. Surface Water Compliance

36. For purposes of conducting Surface Water Compliance work pursuant to this Consent Order Defendant is hereby enjoined and immediately ordered as follows:

37. Except as otherwise provided in this Consent Order, Defendant is permanently enjoined and ordered to immediately comply with the applicable provisions

in Ohio's water pollution control laws, Ohio R.C. Chapter 6111, the regulations adopted thereunder, including but not limited to, the Permit to Install regulations contained in OAC Chapter 3745-31, the terms and conditions of its expired NPDES Permit No.4IF00000*HD until such time as a renewal permit is issued, and the terms and conditions of any renewals or the modifications of any subsequent NPDES permits.

IX.C.1 Habitat Restoration

38. In conjunction with submission of the schedule for conducting the CMI, Defendant shall submit a plan for implementation of habitat restoration in Crosses Run ("Habitat Restoration Plan"). The plan shall include a schedule of implementation and be subject to review and approval by Ohio EPA. Defendant shall implement the Habitat Restoration Plan consistent with the schedule as approved.

39. By letter dated July 28, 2000, and pursuant to Ohio Adm. Code 3745-27-13, Defendant applied for permission to remove sediment from approximately four hundred feet of Crosses Run adjacent to Landfill 3 and to place the sediment on Landfill 3. On August 11, 2000, Ohio EPA authorized that application with conditions. To the extent not already completed, Defendant shall conduct that activity in accordance with the July 28, 2000 letter and the conditions of Ohio EPA's approval thereof. That activity shall be carried out in conformance with this Consent Order, the approved RFI Workplan, RCRA and the regulations promulgated thereunder, R.C. Chapter 3734 and regulations promulgated thereunder, R.C. Chapter 6111 and regulations promulgated thereunder, the OCAP, all other workplans, the other relevant guidance documents listed in Appendices B and D and in a manner that assures that Section IX.C.1 ("Habitat

Restoration”) can be fully and effectively implemented to satisfy the objectives of this Consent Order.

IX.C.2. Wastewater Treatment Plants

40. Defendant has ceased, and is permanently enjoined from, operating its Wastewater Treatment Plants operating under NPDES Permit No. 4IF00000*HD (“WWTPs”) and the wastewater treatment units for the Recycle I System (outfall 010) in such a manner as to discharge any sewage, industrial waste or other wastes directly to waters of the state or into any other recycle systems at the Facility unless properly permitted.

41. Defendant has eliminated outfalls 001, 002, 003, 004, and 005, as identified in Defendant's NPDES Permit No. 4IF00000*HD, by connecting to the City of Marysville sanitary sewer system. Defendant currently is not authorized to discharge any waste materials associated with the Recycle I System to the City of Marysville sewer system.

42. Defendant is permanently enjoined to properly operate and maintain any wastewater treatment or pretreatment equipment necessary so that any discharges from the Facility to the City of Marysville sanitary sewer system are in compliance with the City of Marysville pretreatment program and Ohio law. Defendant is permanently enjoined to operate in compliance with the City of Marysville pretreatment program and Ohio law. Any change in the method of disposal of the waste materials from the Recycle I system occurring after the date of entry of this Consent Order shall only occur in full compliance with applicable state and federal law.

IX.C.3 Stormwater Pollution Prevention Plan

43. Defendant has filed an application for an individual stormwater NPDES permit with Ohio EPA.

44. Within six months of the entry of this Consent Order, Defendant shall submit to Ohio EPA for review and comment a comprehensive plan for the implementation of best management practices for the control of storm water runoff ("Stormwater Pollution Prevention Plan" or "SWPPP"). The SWPPP shall include provisions for the comprehensive monitoring of surface water quality in order to demonstrate the efficacy of the management practices and controls contained in the SWPPP. This comprehensive monitoring shall provide for both identification of sources and quantification of wet weather loadings of ammonia, phosphorus, pesticides, and herbicides in terms of constituents discharged via stormwater runoff to Crosses Run from: (a) all property on which Defendant, or its predecessors or successors in interest, conduct or conducted any industrial activity and the research laboratory buildings; and (b) all property where Defendant or its predecessors or successors in interest have created a point source by altering the natural flow patterns of stormwater sheet flow through grading or other activities. Potential loading sources to be addressed by Best Management Practices shall include, but not be limited to storage and containment areas, loading and unloading practices, nutrient pond management practices, former field broadcast areas, and former solid waste management units. In the event the SWPPP is submitted before the NPDES Stormwater permit is issued, the SWPPP shall be subject to Section XVI ("Dispute Resolution"). After the NPDES Stormwater permit is issued, the SWPPP shall no longer be subject to Dispute Resolution. If Ohio EPA

issues its acceptance of the SWPPP, Defendant shall within ninety (90) days implement the Stormwater Pollution Prevention Plan. The Defendant shall have an ongoing obligation to maintain and implement a SWPPP, however the amendment or alteration of the SWPPP after Ohio EPA's acceptance thereof shall not be subject to this Consent Order.

IX.C.4 Containment - Water Stop Devices

45. Defendant is enjoined and ordered to render the in-stream spill containment devices, also known as the "water stops", installed on Crosses Run inoperable by removing the gates from the containment devices in accordance with a schedule to be included, reviewed and implemented with the SWPPP. Defendant shall amend its Spill Prevention and Counter-Measure Control Plan to account for changes in spill control occurring as a result of the implementation of this Consent Order.

IX.C.5 Above Ground Storage Tanks 5 and 5A

46. On November 13, 1998, Ohio EPA issued PTI Application No. 01-7821 to Scotts for the closure of the Above Ground Storage Tanks (AST) 5, and 5A. Scotts has supplied documentation to Ohio EPA indicating that it has gone forward with closure. Defendant is ordered and enjoined to complete the closure of AST 5 and 5A in accordance with PTI Application No. 01-7821 within 60 days of the entry of this consent order.

IX.C.6. POND 3

47. On October 22, 1999, Defendant submitted to Ohio EPA's Central District Office an application for a PTI for Closure of Pond 3 that included the disposal of Pond 3 wastewaters generated from the vermiculite expansion process (also known as Recycle 4 waste stream) and the solidification in place and capping of the solids that have accumulated in Pond 3 during its operation. Subsequently Defendant has submitted additional data characterizing the constituents present in the vermiculite solids and other solids in Pond 3 and further data related to groundwater. Defendant has submitted a PTI application for Closure of Pond 3. This application is required to provide for closure of Pond 3 that at a minimum is consistent with the performance standards set forth in Appendix E to this Consent Order. This application is required to include: a) land application of the wastewater in the Pond in accordance with an approved nutrient management program; b) relocation of the vermiculite solids located in close proximity to Crosses Run in order to facilitate the creation of a 10 ft wide barrier wall between the solids and the stream bank; c) construction of the cap and barrier wall using soils that meet particle size distribution and permeability requirements contained in Appendix E; d) the cap shall be at least 2 feet thick with a minimum slope of 4%; e) testing verification and proper monitoring before, during, and upon completion of the construction to insure specifications are met; establishment of a dense vegetative cover; post closure care adequate to maintain the cap and monitor the groundwater in the vicinity. If the application fails to satisfy the requirements set forth in this paragraph or Appendix E, Ohio EPA may require Defendant to submit a new or amended PTI application. If Ohio EPA requires Defendant to submit a new or amended PTI

application, Defendant shall submit such PTI application within forty five (45) days of the date upon which Ohio EPA issues its request. Defendant shall complete closure on Pond 3 in accordance with the PTI as approved no later than December 1, 2001.

48. Defendant shall maintain two feet of freeboard at all times in Pond 3 until September 30, 2001. Thereafter Defendant shall maintain three feet of freeboard in Pond 3 at all times until this unit is closed.

IX.D. SAMPLING AND DATA AVAILABILITY

49. Defendant is ordered and enjoined to notify Plaintiff not less than five [5] working days in advance of all sample collection activity related to this Consent Order, unless associated with testing for an occurrence Scotts believes is potentially associated with an immediate threat to human health or the environment, at which time Scotts will immediately notify Ohio EPA of such testing. Upon Ohio EPA's request, Defendant shall allow split and/or duplicate samples to be taken by Ohio EPA. Defendant shall allow Ohio EPA to take any and all additional samples Ohio EPA deems necessary for its oversight of Defendant's implementation of the Work required by this Order. Defendant may take split and/or duplicate samples of any samples Ohio EPA takes as part of its oversight of Defendant's implementation of the Work.

50. Within ten [10] working days after receipt of sampling data, Defendant shall submit to Ohio EPA copies of the results of any and all sampling and/or tests or other data, including but not limited to raw data and original laboratory reports, generated by or on behalf of Defendant with respect to the implementation of this Consent Order. When or if Defendant or its consultants prepare a report concerning the

quality or accuracy of the raw data and/or laboratory reports, Defendant shall also submit to Ohio EPA any such report. Should Defendant discover an error in any such report or raw data, Defendant shall notify Ohio EPA of such discovery and provide the correct information upon submission of the report or data or within twenty [20] working days of discovery, which ever is earlier.

X. ACCESS

51. Defendant is ordered and enjoined to allow Ohio EPA access at all reasonable times to the Facility and the Site to which access is required for the implementation of this Consent Order, to the extent access to the Site is controlled by Defendant. Access under this Consent Order shall be for the purposes of conducting any activity related to this Consent Order.

52. To the extent that the Site or any other property to which access is required for the implementation of this Consent Order is owned or controlled by persons other than Defendant, Defendant shall use its best efforts to secure from such persons access for Defendant and Plaintiff and/or Ohio EPA as necessary to effectuate this Consent Order. For the purposes of this Paragraph, best efforts with respect to Plaintiff or Ohio EPA shall be limited to inclusion of Ohio EPA in Defendant's proposed access agreement and reasonable follow-up, including addressing questions or concerns with respect to the proposed access agreement, denials or failure to respond. In no case shall Defendant be required to incur any additional monetary obligations in order to secure access for Ohio EPA. Copies of all access agreements obtained by Defendant shall be provided promptly to Ohio EPA. If any access required to effectuate this Consent Order is not obtained within thirty [30] days after the entry of this Consent

Order, or within thirty [30] days after the date Ohio EPA notifies Defendant in writing that additional access beyond that previously secured is necessary, Defendant shall promptly notify Ohio EPA in writing of the steps Defendant has taken to attempt to obtain access. Plaintiff may, as it deems appropriate, assist Defendant in obtaining access. Failure by Defendant to gain access despite best efforts, and any delay resulting therefrom, will not be considered a violation of this Consent Order.

53. Notwithstanding any provision of this Consent Order, the State of Ohio retains all of its access and inspection rights and authorities, including enforcement authorities related thereto, under any applicable statute or regulations.

XI. PROGRESS REPORTS AND NOTICE

54. Unless otherwise directed by Ohio EPA, Defendant shall submit a written progress report to Ohio EPA by the twentieth day of every other month following the entry of this Consent Order. At a minimum, the progress reports shall identify the Site and/or Facility and activity and:

- A. Describe the status of the Work during the reporting period;
- B. Describe difficulties encountered during the reporting period and actions taken to address any difficulties;
- C. Describe activities planned for the next two months;
- D. Identify changes in key personnel;
- E. List target and actual completion dates for each element of activity, including project completion;
- F. Provide an explanation for any deviation from any applicable schedules; and

- G. For the reporting period, indicate the volume of contaminated soil removed, the volume of contaminated sediment removed, and how much contaminated ground water was pumped and where such contaminated media were disposed of.

Beginning 36 months after the entry of this consent order, Defendant may request an alternative reporting frequency from Ohio EPA and such alternative reporting frequencies shall be used upon the concurrence of Ohio EPA. Any request for an alternative reporting frequency shall be delivered to all Ohio EPA personnel referenced in Section XII [Submittal of Documents and Notices]. In addition, Ohio EPA may at any time require such alternative reporting frequencies as it deems appropriate.

XII. SUBMITTAL OF DOCUMENTS AND NOTICES

55. Documents and written notifications that are required to be submitted to Plaintiff or Ohio EPA pursuant to this Consent Order shall be sent by certified mail return receipt requested, or equivalent, to the appropriate Ohio EPA office at the addresses listed below:

Ohio EPA, Central District Office
Attn: DSW Enforcement Group Leader
3232 Alum Creek Drive
Columbus, Ohio 43207

Ohio EPA, Central District Office
Attn: RCRA Group Leader
3232 Alum Creek Drive
Columbus, Ohio 43207

Ohio EPA
Lazarus Government Center
Division of Hazardous Waste Management
Attn: Manager, Compliance Assurance Section
P.O. Box 1049
Columbus, Ohio 43216-1049

Ohio EPA
Lazarus Government Center
Division of Surface Water
Attn: Enforcement Coordinator
P.O. Box 1049
Columbus, Ohio 43216-1049

Documents and written notifications that are to be submitted to Defendant shall be sent by certified mail return receipt requested, or equivalent to:

Gary Daugherty
Director, Corporate Environmental Engineering
The Scotts Company
41 S. High Street
Suite 3500
Columbus, Ohio 43215

Richard P. Fahey
Kristin L. Watt
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

56. Oral Notices required to be given to the Plaintiff by this Consent Order shall be given by notifying the RCRA Group Leader in Ohio EPA's Central District Office and/or DSW Enforcement Group Leader in Ohio EPA's Central District Office, whichever is the appropriate office.

57. Either party may change the name and/or address of its contact person(s) by sending written notice of the relevant change(s) to the other party.

XIII. REVIEW OF SUBMITTALS

58. Every document required to be submitted to Ohio EPA under this Consent Order is subject to the review and approval of Ohio EPA in accordance with this Consent Order and applicable State and federal laws. In addition, all documents submitted pursuant to Sections IX.A. (“Corrective Action”) and IX.C.1 (“Habitat Restoration”) are also subject to review and approval in accordance with the guidance documents listed in Appendix B. Upon Ohio EPA’s review of any workplan, report, or other item required to be submitted pursuant to this Consent Order, Ohio EPA may in its sole discretion: (a) approve the submission in whole or in part; (b) approve the submission upon specified conditions; (c) disapprove the submission in whole or in part; (d) notify Defendant of deficiencies; or (e) any combination of the above.

59. If Ohio EPA disapproves a submission in whole or in part, Ohio EPA will notify Defendant of the deficiencies in writing. Defendant shall within thirty [30] working days of receipt of Ohio EPA’s written notice, or if supplemental field, laboratory, or other investigatory work is performed, within thirty [30] working days of completion of such work, or such longer period of time as specified in writing, correct the deficiencies and resubmit to Ohio EPA for approval a revised submission. The revised submission shall incorporate the uncontested changes, additions, and/or deletions specified by Ohio EPA in its notice of deficiency. Notwithstanding the notice of deficiency, Defendant shall proceed to take any action(s) required by the approved portion(s) of the submission.

60. If Ohio EPA does not approve a revised submission, in whole or in part, Ohio EPA may again require Defendant to correct the deficiencies and incorporate all changes, additions, and/or deletions within fourteen [14] days, or such time period as

specified by Ohio EPA in writing. In the alternative, Ohio EPA may modify or disapprove the revised submission. Defendant retains the right to assert through dispute resolution in accordance with Section XVI ("Dispute Resolution") that the revised submission was not deficient.

61. In the event of approval by the Ohio EPA of any submission, Defendant shall proceed to take any action required by the submission. In the event of approval upon condition, or modification by the Ohio EPA of any submission, Defendant may either proceed to take any action required by the submission as conditionally approved or modified by Ohio EPA, or invoke dispute resolution in accordance with Section XVI ("Dispute Resolution").

XIV. ACCESS TO INFORMATION

62. Except as provided in Paragraph 64, Defendant shall provide to Plaintiff or Ohio EPA, upon request, copies of all documents and information within its possession, control or ability to control, including those of its contractors or agents, relating to events or conditions at the Facility or Site which are pertinent to this Order including, but not limited to manifests, reports, correspondence, or other documents or information related to the work required under this Consent Order.

63. Defendant may assert a claim that documents or other information submitted to Plaintiff or Ohio EPA pursuant to this Consent Order are confidential under the provisions of OAC 3745-50-30(A) or Section 6111.05. If no such claim of confidentiality accompanies the documents or other information when it is submitted to Plaintiff or Ohio EPA, it may be made available to the public without notice to Defendant. Plaintiff reserves the right to dispute the claim of confidentiality and respond

to any request for an *in camera* review prior to the decision by the court regarding the existence of the privilege.

64. Defendant may assert that certain documents or other information are privileged under the attorney-client or any other privilege recognized by state law or applicable federal law. If Defendant makes such an assertion, it shall provide Plaintiff with the following:

- A. the title of the document or information;
- B. the date of the document or information;
- C. the name and title of the author of the document or information;
- D. the name and title of each addressee and recipient;
- E. a general description of the contents of the document or information; and
- F. the privilege being asserted by Defendant.

To the extent that Defendant asserts that providing any of the information set forth in this paragraph would itself disclose privileged information, Defendant shall submit such information to the Court to enable the Court to conduct an *in camera* review and rule on the validity of Defendant's claim of privilege. If Defendant provides information to the Court pursuant to the preceding sentence, Defendant shall indicate to Plaintiff the categories (A through F, *supra*) to which the information pertains and will provide to Plaintiff all documents and portions thereof for which no claim of privilege has been made. Plaintiff reserves the right to dispute the claim of privilege and respond to any request for an *in camera* review prior to the decision by the court regarding the existence of the privilege.

65. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical monitoring, or laboratory or reports concerning the quality or accuracy of the raw data and/or laboratory reports.

66. Defendant shall preserve for the duration of the performance of Work pursuant to this Consent Order and for a minimum of five [5] years after Plaintiff's acceptance of Defendant's certification of completion and compliance with this Consent Order, all documents and other information within its possession, control or ability to control, including those of its contractors or agents, which in any way relate to the Work performed pursuant to this Consent Order notwithstanding any document retention policy to the contrary. Defendant may preserve such documents by microfiche, or other electronic or photographic device. At the conclusion of this document retention period, Defendant shall notify Plaintiff at least sixty [60] days prior to the destruction of these documents or other information; and upon request, shall deliver such documents and other information to Plaintiff.

XV. INDEMNITY

67. Defendant agrees to indemnify, save, and hold harmless the State of Ohio from any and all claims or causes of action arising from, or on account of, the State of Ohio's oversight activities pursuant to this Consent Order during the duration of this Consent Order and/or acts or omissions of Defendant, their officers, employees, receivers, trustees, agents, or assigns, in carrying out any oversight activities pursuant to this Consent Order. The State of Ohio agrees to provide notice to Defendant within Ninety [90] days of receipt of any claim which may be the subject of indemnity as provided in this Section. During such 90 day period the State shall take all necessary

action to defend the claims and preserve any defenses, including filing any required pleadings. The State of Ohio's failure to comply with the requirements of this Section shall constitute a waiver of the State's claim for indemnification if, and only if, Defendant is prejudiced by that failure to comply. The Parties shall cooperate with each other in the defense of any such claim or action against the State. The State of Ohio shall not be considered a party to and shall not be held liable under any contract entered into by Defendant in carrying out the activities pursuant to this Consent Order.

XVI. DISPUTE RESOLUTION

68. The provisions of the Dispute Resolution Section shall only be applicable to the following portions of this Consent Order: Section IX.A ("Corrective Actions"), Section IX.C.1(Habitat Restoration), Section IX.C.3 (Stormwater Pollution Prevention Plan) and Section IX.C.6 (Pond 3). Additionally, the provisions of the Dispute Resolution Section shall be applicable to Section XII ("Review of Submittals") if the submittal relates to Section IX.A ("Corrective Actions"), Section IX.C.1 ("Habitat Restoration"), Section IX.C.2 ("Stormwater Pollution Prevention Plan") and Section IX.C.6 (Pond 3). This Dispute Resolution Section shall also be applicable to Section XIX ("Stipulated Penalties"), but only to the extent that the Defendant has a dispute regarding the factual issue of whether an approved deadline contained in the schedule of any Ohio EPA approved schedule was not met. The amount of any stipulated penalty owed for each day of violation is not subject to dispute resolution under this Section.

69. The parties shall, whenever possible, operate by consensus. In the event that a disagreement exists about the adequacy or disapproval of any Additional Work

Workplan, deliverable or any report, or disagreement about the conduct of the Work performed under Section IX.A of this Consent Order, Ohio EPA and Defendant shall have ten [10] working days from the date dispute arises to negotiate in good faith an attempt to resolve the differences. The dispute arises when either Ohio EPA provides a brief written notice of dispute to Defendant, or vice-versa. This ten working day period may be extended by mutual agreement of the parties.

70. In the event Ohio EPA and Defendant are unable to reach consensus on the dispute, then Ohio EPA and Defendant shall reduce their positions to writing within fifteen [15] working days of the end of the good faith negotiations referenced in the preceding paragraph. Those written positions shall be immediately exchanged by Ohio EPA and Defendant. Following the exchange of written positions, the parties shall have an additional fifteen [15] working days to resolve their dispute. If Ohio EPA concurs with the position of Defendant, then the Workplan, report or other deliverable shall be modified consistent with Defendant's position as agreed to by Ohio EPA.

71. If Ohio EPA does not concur with the position of Defendant, Ohio EPA shall notify Defendant in writing. Upon receipt of such written notice, Defendant shall have seven days to forward a request for resolution of the dispute, along with a written statement of the dispute, to the appropriate Section Manager of either Ohio EPA's Division of Hazardous Waste Management or Division of Surface Water. The statement of dispute shall be limited to a concise presentation of Defendant's position on the dispute. The Ohio EPA, within seven days of receiving notice of the request for resolution of the dispute, may submit a written statement of the dispute. The Section Manager, or his/her designee will resolve the dispute based upon and consistent with

this Consent Order, and State law including R.C. Chapters 3734 and 6111, and the regulations promulgated thereunder, and other appropriate state and federal laws, and issue his/her written decision stating Ohio EPA's formal position as soon as practicable but in no event later than within thirty [30] days of Defendant's request for dispute resolution under this paragraph. This is intended as an informal process, and the section manager may request additional information from either party to the extent he/she believes such information may aid in understanding and resolving issues in the dispute.

72. The pendency of dispute resolution set forth in this Section shall not affect the time period for completion of Work, unless otherwise provided, except that upon written mutual agreement of the parties, any time may be extended as appropriate under the circumstances.

73. If Defendant does not agree with the Section Manager's resolution of the dispute either party may within fourteen [14] days of receipt of notice of the Section Manager's resolution petition this Court. In a court proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the decision by Plaintiff is unlawful and unreasonable under applicable law or is inconsistent with this Order.

74. If either Defendant or Plaintiff believes that the dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, either party may petition the Court for relief without following the dispute resolution procedures of this Section.

75. Within thirty [30] days of resolution of any dispute, Defendant shall incorporate the resolution and final determination in the RFI Workplan, Additional Workplan(s), or other deliverable schedule or procedures and proceed to implement this Consent Order accordingly.

76. Unless expressly provided for in this Consent Order, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under paragraph 68 of this Consent Order, which is the first paragraph of this section. However, the procedures set forth in this Section shall not apply to actions by the State of Ohio to enforce obligations of Defendant that have not been disputed in accordance with this Section.

XVII. LAND USE NOTICE AND CONVEYANCE OF TITLE

77. Within thirty [30] days after the entry of this Consent Order, Defendant shall record a notice with the County Recorder's Office for Union County, Ohio on the deed(s) to all property which is part of the Site and owned by Defendant. The notice shall reference the existence of this Consent Order and shall describe any disposal areas, storage areas and monitoring or containment devices relating to the IUCs or the Recycle 1 system currently present on Defendant's property and any disposal areas, storage areas and monitoring or containment devices relating to the IUCs or the Recycle 1 system which Defendant plans to install in the future. Defendant shall update the notice as needed to maintain accuracy.

78. Defendant shall assure that no portion of the Site will be used in any manner which would adversely affect the integrity of any containment or monitoring systems at the Site; provided, however, that a planned activity conducted on the Site

which could adversely affect the integrity of any such systems implemented pursuant to the Order may be conducted if Defendant gives Ohio EPA at least thirty [30] days prior notice and implements protective measures or protective alternatives, including those required in writing by Ohio EPA . Defendant shall notify Ohio EPA and the Attorney General's Office, Environmental Enforcement Section by registered mail at least [30] days in advance of any conveyance of any interest in real property owned by Defendant which is known to comprise the Facility. Defendant's notice shall include the name and address of the grantee and a description of the provisions made for continued maintenance of containment and monitoring systems. In no event shall the conveyance of any interest in the property that includes, or is a portion of, the Site release or otherwise affect the liability of Defendant to comply with its obligations under this Consent Order.

XVIII. CIVIL PENALTY

79. Defendant is ordered and enjoined to pay to the State of Ohio a total civil penalty in the amount of Two Hundred Seventy Five Thousand Dollars (\$275,000.00). This amount shall be paid by delivering to Plaintiff, c/o Jena Suhadolnick, or her successor at the Office of the Attorney General of Ohio, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, two cashier's or certified checks, one in the amount of Two hundred Sixty Five Thousand Dollars (\$265,000) and the other in the amount of Ten Thousand Dollars (\$10,000), payable to the order of "Treasurer, State of Ohio" within thirty (30) days from the effective date of this Consent Order.

XIX. STIPULATED PENALTIES

80. The following items shall be deemed critical path milestones:
- A. All requirements established in Section IX.A [Corrective Action], including Sections IX.A.1-6;
 - B. All requirements established in Section IX.C [Surface Water Compliance], including Sections IX.C.1-6;

In addition, Defendant shall propose critical path milestones within all plans required to be submitted pursuant to Section IX.A [Corrective Action] and IX.C.1 [Habitat Restoration] of this Consent Order. The proposed critical path milestones shall be subject to review and revision by Ohio EPA pursuant to Section XIII [Review of Submittals] and subject to Section XVI [Dispute Resolution] to the same extent as the document in which the proposed critical path milestone is contained.

81. In the event that Defendant fails to satisfy the requirements for a critical path milestone, 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 meet a deadline up to and including 15 days —Two Hundred Fifty Dollars (\$250.00) per day for each requirement or deadline not met.
- B. For each day of each failure to comply with a requirement or meet a deadline from 16 to 30 days -- Five Hundred Dollars (\$500.00) per day for each requirement or deadline not met.

- C. For each day of each failure to comply with a requirement or meet a deadline from 31 to 60 days — Seven Hundred Fifty Dollars (\$750.00) per day for each requirement or deadline not met.
- C. For each day of each failure to comply with a requirement or meet a deadline after 60 days -- One Thousand Dollars (\$1,000.00) per day for each requirement or deadline not met.

82. In the event that Defendant fails to satisfy any requirement imposed only by paragraph 37 of this Consent Order, 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 meet a deadline up to and including 15 days —One Hundred Fifty Dollars (\$150.00) per day for each effluent limitation, permit term or condition, requirement or deadline not met.
- B. For each day of each failure to comply with a requirement or meet a deadline from 16 to 30 days -- Three Hundred Dollars (\$300.00) per day for each effluent limitation, permit term or condition, requirement or deadline not met.
- C. For each day of each failure to comply with a requirement or meet a deadline after 30 days – Five Hundred Dollars (\$500.00) per day for each effluent limitation, permit term or condition, requirement or deadline not met.

83. Payments required by this section shall be paid within thirty [30] days after the violation by delivering a certified check payable to "Treasurer, State of Ohio," to

Administrative Assistant, Environmental Enforcement Section, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, along with a letter summarizing the violations and dates for which the penalty is paid.

XX. TERMINATION OF STIPULATED PENALTIES

84. The provisions of this Consent Order set forth in Paragraph 82 requiring the payment of stipulated penalties for violations of requirements imposed only by Paragraph 37 of this Consent Order may be terminated upon a demonstration by Defendant that: 1) it has maintained substantial compliance with Section IX.C of this Consent Order for a period of thirty-six consecutive months, as determined solely by Plaintiff in its prosecutorial discretion; 2) it has completed the requirements outlined in Sections IX.C.2-5; and 3) it has paid all penalties required by this Consent Order.

85. If during the three (3) year period (thirty-six consecutive months) set forth in Paragraph 84, Defendant fails to meet the condition required in Paragraph 84(1), the three (3) year period (thirty-six consecutive months) will begin anew on the first date after such failure that the Defendant is back into substantial compliance with the terms and conditions in Section IX.C of this Consent Order, as determined solely by Plaintiff in its prosecutorial discretion. Any of Defendant's subsequent failures to maintain compliance with the terms and conditions in Section IX.C of of this Consent Order, shall be treated in the same manner, with the three (3) year period (thirty-six consecutive months) beginning anew from the date Defendant comes back into substantial compliance, as determined solely by Plaintiff in its prosecutorial discretion.

86. Termination of the stipulated penalty provisions of Paragraph 82 of this Consent Order shall be only by order of the Court upon application by any party, and a demonstration that the conditions outlined in Paragraph 84 have been met.

XXI. MISCELLANEOUS

87. 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. The parties acknowledge and agree that the issuance, renewal, modification, denial or revocation of permit(s) and the issuance of other orders or actions of the director of Ohio EPA are not subject to challenge or dispute before this Court but, rather, shall be subject to challenge under R.C. Chapters 119 and/or 3745.

88. 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 Defendant from the obligation created by the Consent Order.

89. Nothing in this Consent Order shall constitute or be construed as a release from any claim, cause of action, or demand in law or equity against any Person not subject to the Consent Order for any liability arising from, or related to event or conditions at the Site or Facility.

90. Defendant shall inform Plaintiff of any change of its business name, addresses or telephone numbers, or the cessation of business.

XXII. COSTS

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

XXIII. MODIFICATION AND TERMINATION OF THIS CONSENT ORDER

92. No modification shall be made to this Consent Order without the written agreement of the Parties and the Court.

93. Defendant may seek to terminate this Consent Order, with the exception of the document retention obligations set forth in Section XIV (Access to Information), at any time after completion of all Work required to be performed pursuant to this Consent Order. Defendant may seek such termination only by filing a motion with this Court pursuant to Rule 60(B)(4) of the Ohio Rules of Civil Procedure. The Plaintiff reserves its right to oppose said motion. Said motion may only be granted if the requirements of Rule 60(B)(4) are satisfied and (1) Plaintiff agrees to the termination, or (2) upon a demonstration by Defendant that the Work required to be performed by Defendant pursuant to this Consent Order has been completed.

XXIV. RESOLUTION OF INCONSISTENCIES

94. Should Defendant identify any inconsistencies among any of the laws, rules, regulations, guidance, permits or orders which will affect any of the Work required by this Consent Order, Defendant shall provide written identification to the Plaintiff of each such inconsistency, a description of its effect on the Work to be performed, and Defendant's recommendation, along with the rationale for each recommendation, as to which requirement should be followed. Defendant shall implement the affected Work based upon Ohio EPA's discretion in resolving any such inconsistencies.

95. Defendant's compliance with the orders or directions of State or Federal governmental officials in the exercise of such officials' legal authority shall not be deemed a violation of this Consent Order.

XXV. DELAYED PERFORMANCE

96. If any event occurs which causes or may cause a material and consequential delay in Defendant's compliance with any requirement identified in or pursuant to Section XIX [Stipulated Penalties], 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 delay. 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.

XXVI. POTENTIAL OF FORCE MAJEURE

97. In any action by the State of Ohio to enforce any of the provisions of this Consent Order, Defendant may raise at that time the question of whether it is entitled to a defense that its conduct was caused by circumstances beyond its control or ability to control such as, by way of example and not limitations, acts of God, strikes, acts of war or civil disturbances. While the State of Ohio does not agree that such a defense exists, it is, however, hereby agreed upon by Defendant and the State of Ohio 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 proceeding to enforce this Consent Order is commenced by the State. At that time, Defendant will bear the burden of proving that any delay was or will be caused by circumstances beyond the control or ability to control of Defendant. Unanticipated or increased costs associated with the implementation of any action

required by this Consent Order, or changes in Defendant's financial circumstances, shall not constitute circumstances beyond the control or ability to control of Defendant. Failure by Defendant to timely comply with the notice requirements of Section XXIV [Delayed Performance] 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 of any rights or defenses that the Defendant may have under applicable law.

XXVII. CONTINUING JURISDICTION

98. This Court shall retain jurisdiction over this action for the purpose of enforcing and administering Defendant's compliance with this Consent Order.

XXVIII. ENTRY OF CONSENT ORDER AND FINAL JUDGMENT BY CLERK

99. The parties agree and acknowledge that final approval by Plaintiff and Defendant and entry of this Consent Order is subject to the requirements of 40 CFR 123.27(d)(2)(iii), which provides for notice of the lodging of the Consent Order, opportunity for public comment, and the consideration of any public comments. Both the State and the Defendant, reserve the right to withdraw this Consent Order prior to its

entry by the Court as a final judgment based on comments received during the public comment period.

100. Upon signing of this Consent Order by the Court, the clerk is hereby directed to enter it upon the journal. Within three days after entering the judgment upon the journal, the clerk is hereby directed to serve upon the 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

RICHARD E. PARROTT
JUDGE, UNION COUNTY
COURT OF COMMON PLEAS

APPROVED:

BETTY D. MONTGOMERY,
ATTORNEY GENERAL OF OHIO

RICHARD P. FAHEY (0013131)
KRISTIN L. WATT (0042333)
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Counsel for Plaintiff
State of Ohio

THE SCOTTS COMPANY

By: **G. Robert Lucas II, Executive Vice President,**
General Counsel and Corporate Secretary
Authorized Representative of The Scotts Company