

FILED
IN THE COURT OF COMMON PLEAS
CARROLL COUNTY, OHIO

'97 MAY 9 AM 10 29

STATE OF OHIO, ex rel. : CASE NO. 21534
BETTY D. MONTGOMERY, CARROLL COMMON PLEAS
ATTORNEY GENERAL OF OHIO, JAMES S. UNKEFER, JUDGE Martin

Plaintiff, :

vs. :

MILTON E. STUDER :

CONSENT ORDER

Defendant. :

The Complaint in the above-captioned matter having been filed herein, and the Plaintiff State of Ohio by its Attorney General Betty D. Montgomery (hereinafter "Plaintiff") and Defendant Milton E. Studer (hereinafter "Defendant") having consented to the entry of this Consent Order; and

WHEREAS, because Defendant has agreed to perform all the work specified in this Consent Order and the Attachment to this Consent Order to the satisfaction of Ohio EPA, Plaintiff waives 401 Water Quality Certification under the Federal Water Pollution Control Act, 33 U.S.C. 1251, amended, Chapter 6111. of the Ohio Revised Code and Chapter 3745-32 of the Ohio Administrative Code; and

WHEREAS, Plaintiff and Defendant agreed that settlement of this matter is in the public's interest and that entry of this Consent Order is without admission as to allegations set forth in the complaint and to settle and resolve claims which are contested as to validity and amount without further litigation;

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

I. JURISDICTION AND VENUE

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

II. PARTIES

2. The provisions of this Consent Order shall apply and be binding upon the Defendant to the extent specified in Ohio Civil Rule of Procedure 65(D). In the event that Defendant sells or otherwise transfers his interest in the property or any portion thereof, described below in Paragraph 5, Defendant shall provide the purchaser or transferee with a copy of this Order and shall notify Plaintiff of such sale or transfer within ten (10) days of such transfer or sale. Defendant shall provide a copy of this Consent Order to each contractor it employs to perform work itemized herein, and each general contractor shall provide a copy of this Consent Order to each of its subcontractors for such work.

III. SATISFACTION OF LAWSUIT

3. Plaintiff alleges in its Complaint that Defendant has prior to the Entry of this Consent Order, adversely impacted water quality, filled in a wetland, and polluted waters of the State in violation of the water pollution laws of the State of Ohio. Compliance with the terms of this Consent Order, and no other document, shall constitute full satisfaction of any civil liability by Defendant for all claims under such laws alleged in the Complaint. Plaintiff is not seeking civil penalties for the violations alleged in the complaint. Nothing in this Consent Order shall be construed to limit the authority of the State of Ohio to seek relief for claims or conditions not alleged in the Complaint, including violations which occur after the filing of the Complaint.

IV. PERMANENT INJUNCTION

4. Defendant is hereby enjoined and ordered to immediately comply with the requirements of Chapter 6111. of the Ohio Revised Code and the terms and conditions of the rules and regulations adopted under that Chapter, except for the period of time needed to complete the work specified in this Consent Order and only as to the work detailed in this Consent Order.

V. PRELIMINARY INJUNCTION

5. Defendant is enjoined and ordered to create at least 9.363 acres and enhance 7.0 acres of wetlands at the property located at Section 13, Brown Township, Carroll County, further described in Exhibit "A", attached hereto and incorporated herein (hereinafter referred to as "the Site"), in accordance with the mitigation plan dated September 20, 1996 (hereinafter referred to as "the Mitigation Plan"). A copy of the Mitigation Plan is attached hereto as Exhibit "B", which is incorporated by reference and is an enforceable part of this Consent Order. If the wetland creation or enhancement goals specified in the Mitigation Plan are unsuccessful in whole or in part, Ohio EPA will require additional work necessary to achieve 9.63 total acres of wetland creation and 7.0 acres of wetland enhancement. Defendant is enjoined and ordered to perform the additional work required by this paragraph. A determination of whether the wetland creation or enhancement was successful will be made as specified in Paragraph 9 of this Consent Order.

6. Defendant shall, within one year of entry of this Order, complete 9.63 acres of wetland creation and 7.0 acres of wetland enhancement in accordance with the Mitigation Plan.

7. Except as specified in the Mitigation Plan, Defendant is enjoined and ordered to prevent existing jurisdictional wetlands at the Site from becoming adversely impacted by

increasing or decreasing water levels to the degree that the wetland type is altered. This prohibition, however, does not apply to alterations due to rainfall, other precipitation, or actions of third parties who do not act in concert or privity with Defendant.

8. Defendant shall, within thirty (30) days of entry of this Order and again a second time within thirty (30) days of compliance with Paragraph 9 of this Order, place the following restrictive language on the deed on file at the County Recorder's Office for the property or properties which make up the Site:

"All existing wetlands on this property shall be free from being filled, drained or otherwise converted to upland (see "fastland" at 33 C.F.R. 325) use for perpetuity, provided that the property contains jurisdictional wetlands and the existing federal law contains a prohibition against filling, draining, or otherwise converting same to upland. This restriction shall run with the land."

9. Defendant shall, within three years of the date of entry of this Order, arrange for an on-site meeting with representatives of the Ohio EPA to determine if restoration has been completed in accordance with the Mitigation Plan and to determine if creation and enhancement of wetlands was successful. If Ohio EPA determines that the implementation of the wetland Mitigation Plan was not successful, Ohio EPA may order Defendant to perform additional work as specified in Paragraph 5 of this Consent Order. If Ohio EPA orders Defendant to perform additional work, Defendant may petition this Court to make a determination of whether the Defendant has reasonably satisfied the requirements and goals of the Mitigation Plan. In the event that the Court determines that the requirements and goals of the Mitigation Plan have been satisfied, then Ohio EPA may not require Defendant to perform additional work.

10. Defendant is enjoined and ordered to conduct wetland monitoring in accordance

with the Mitigation Plan. Defendant is enjoined and ordered to submit the first monitoring report to Ohio EPA by July 1 of the year after completion of the work described in the Mitigation Plan.

11. Within seven (7) days from the completion date of each time limitation listed in Paragraphs 6 and 8 above, Defendant shall submit to Ohio EPA's Division of Surface Water, in care of Linda Merchant or her successor, a written report stating whether it has performed the action set forth therein.

12. This Consent Order does not constitute authorization or approval of the construction of any physical structure or facilities (with the exception of the lake as described in the Mitigation Plan), or the modification of any existing treatment works or sewer system. Approval for any such construction or modification shall be by permit issued by Ohio EPA or other such permits as may be required by applicable federal, state, or local laws, rules or regulations.

VI. STIPULATED PENALTIES

13. In the event that Defendant fails to meet any of the requirements of this Consent Order set forth in Paragraphs 5 through 11, including any scheduled time limitation within those paragraphs, then Defendant shall immediately and automatically be liable for and shall pay a stipulated penalty according to the following payment schedule. For each day of each failure to meet a requirement- \$50.00 per day per requirement not met. However, within seven (7) days of any stipulated penalty becoming due, Defendant may write a letter of explanation, which states the grounds upon which Ohio EPA and the Attorney General's Office should consider waiving said penalties.

14. Any stipulated payment required to be made under the provisions of Paragraph 13

of this Consent Order shall be made by delivering to Matthew Sanders, Administrative Assistant, Environmental Enforcement Section of the Attorney General's office, 30 E. Broad Street, 25th floor, Columbus, Ohio 43215-3428, a certified check for that amount, payable to the order of "Treasurer, State of Ohio" due immediately upon violation of any paragraph of this Consent Order.

VII. POTENTIAL FORCE MAJEURE

15. If any event occurs which causes or may cause a delay of any requirements of this Consent Order, Defendant shall notify the Ohio EPA in writing within ten (10) days of the event, describing 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 measures to avoid or minimize any such delay.

16. If any action by the Plaintiff to enforce any of the provisions of this Consent Order, Defendant may raise that it is entitled to a defense that its conduct was caused by reasons entirely beyond its control such as, by way of example and not limitations, act 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 Plaintiff that it is premature at this time to raise and adjudicate the existence of such a defense is at the time that any enforcement action, if any, 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 entirely beyond the control of Defendant. Unanticipated or increased costs associated with the implementation of any action required by this Consent Order, or changed 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 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 with a potential Force Majeure Clause does not constitute a waiver by the Defendant of any rights or defenses it may have under applicable law.

VIII. FACILITY ACCESS

17. As of the date of entry of this Consent Order, Plaintiff and its representatives shall have access at reasonable time to the property and shall have access to the Site or other property controlled by or available to Defendant, for purposes of monitoring compliance with this Consent Order. Nothing in this paragraph shall be construed to diminish any statutory rights and authority for access to the Site by the Director or his authorized representative.

IX. SUBMITTAL OF DOCUMENTS

18. All required documents shall be submitted to:

Director
Ohio Environmental Protection Agency
1800 WaterMark Drive
Columbus, Ohio 43266-0149
Attn: Linda Merchant or her successor,
Division of Surface Water

X. COMPLIANCE WITH APPLICABLE LAWS, PERMITS AND APPROVALS

19. 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 and regulations, and permits. For work both on and off the property, Defendant shall obtain all permits or approvals necessary under applicable federal, state or local laws, and 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 shall immediately notify Ohio EPA of the potential conflict. Defendant shall 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

20. The Court shall retain jurisdiction of this action for the purpose of making any order or decree which it deems appropriate to carry out and oversee the parties' compliance with the terms of this Consent Order.

XII. COSTS

21. Defendant shall pay the costs of this action.

XIII. ENTRY OF CONSENT ORDER AND FINAL JUDGMENT BY CLERK

22. The parties agree and acknowledge that final approval by the Plaintiff and Defendant, and entry of this Consent Order is subject to the requirement of 40 C.F.R. Section

123(d)(1)(iii), which provides for notice of the lodging of this Consent Order, opportunity for public comment, and consideration of any public comment. Both the State and Defendant, reserve right to withdraw this Consent Order based on comments received during the public comment period. Defendant shall pay the cost of publishing the public notice.

23. Pursuant to Rule 58 of the Ohio Rules of Civil Procedure, upon signing of this Consent Order by the Court the clerk is hereby directed to enter it upon the journal. Within three 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:

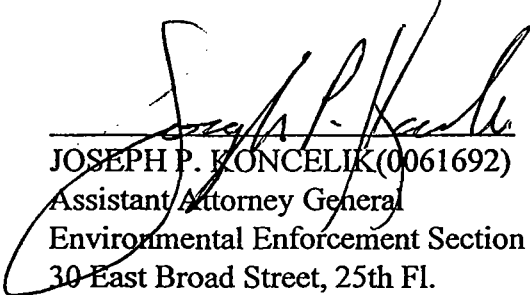
Date: _____

JUDGE, COURT OF COMMON PLEAS
CARROLL COUNTY

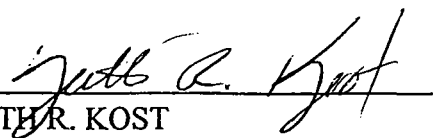
APPROVED

STATE OF OHIO, ex rel.
BETTY D. MONTGOMERY
ATTORNEY GENERAL OF OHIO

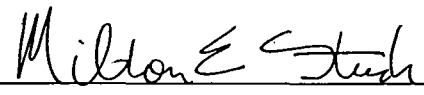
BY:



JOSEPH P. KONCELIK(0061692)
Assistant Attorney General
Environmental Enforcement Section
30 East Broad Street, 25th Fl.
Columbus, Ohio 43215-3428
(614) 466-2766
Counsel for Plaintiff



KEITH R. KOST
Day, Ketterer, Raley, Wright & Rybolt
P.O. Box 24213
Canton, Ohio 44701-4213
(330) 455-0173
Counsel for Defendant



MILTON E. STUDER
Defendant