

IN THE DISTRICT COURT OF DAWSON COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel.,
MICHAEL J. LINDER, Director
DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Plaintiff,

v.

PIERCE ENTERPRISES, INC. D/B/A
EXIT 231 TRUCK WASH,

Defendant.

Case No.

G11-139

CONSENT DECREE

COMES NOW the parties, Plaintiff, the Nebraska Department of Environmental Quality ("NDEQ" or "Department"), proceeding on its Complaint filed herein and appearing through its Counsel, Jon C. Bruning, Attorney General, and the Defendant, Pierce Enterprises, Inc. d/b/a Exit 231 Truck Wash ("Defendant"), and each party having consented to the making and entering of this Consent Decree without trial, the Court finds that the Consent Decree should be and hereby is entered.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. The Court has jurisdiction of the parties and the subject matter of this action pursuant to Environmental Protection Act, Neb. Rev. Stat. § 81-1501 *et seq.* (Reissue 2008, Supp. 2009), and all rules and regulations and orders promulgated thereunder.
2. Defendant operates a commercial truck wash located at 42778 Road 755, Lexington, NE 68850 ("Facility"). The Facility stores wastewater in lagoons located on site and land applies the wastewater.
3. NDEQ alleges that, prior to May 2008, and continuing through to the present time, Defendant operated a disposal system and land applied without obtaining the necessary permit(s) from the Department in violation of Title 119 of the Nebraska

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DAWSON COUNTY

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CLERK OF DISTRICT COURT

Administrative Code, and Title 123 of the Nebraska Administrative Code, "Rules and Regulations for the Design, Operation, Maintenance of Wastewater Works." In addition, NDEQ alleges that Defendant violated an administrative order of the NDEQ dated August 24, 2007 which required submittal of plans and specifications for a wastewater treatment/storage facility by February 1, 2008, and to commence construction by May 1, 2008.

4. Defendant does not admit and expressly denies any liability to the State of Nebraska arising out of the transactions or occurrences alleged in the Complaint or this Consent Decree.

5. The parties agree that settlement of this matter is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving their dispute. The parties desire to conclude this case without trial or adjudication of any issues of fact or law, without this Consent Decree constituting an admission by Defendant with respect to such issues.

6. This Consent Decree shall be in full satisfaction of all claims between the parties alleged in NDEQ's Complaint and the prior administrative enforcement actions. The parties also agree to release any and all civil, criminal or administrative claims or actions arising out of the same transaction or occurrences referenced above and in NDEQ's Complaint and the prior administrative enforcement actions, provided that such claims were known to NDEQ, or were reasonably ascertainable from information in NDEQ's possession, as of the date of the filing of the Consent Decree.

7. IT IS THEREFORE ORDERED that Defendant shall pay to the Clerk of the District Court of Dawson County a civil penalty in the amount of \$41,500.00 pursuant to

Neb. Rev. Stat. §81-1508.02, together with court costs in the amount of \$82.00. Said penalty is to be handled pursuant to Article VII, Section V, of the Nebraska Constitution, and shall be deemed due and owing as follows:

A. \$1,500.00 of the civil penalty shall be paid to this Court no more than 30 days from the entry of this Consent Decree by the Court.

B. \$40,000.00 of the said penalty shall be paid to this Court no more than 24 months from the entry of this Consent Decree by the Court. However, if Defendant complies with all applicable environmental statutes and regulations as well as the timelines set forth below for completion of construction of new wastewater facilities as shown on the approved plans and specifications for this Facility or permanent closure of the current lagoon system at the Facility, payment of the \$40,000.00 in civil penalties will be waived:

(i) Within 2 months of entry of this Consent Decree, Defendant shall permanently cease to operate the current lagoon system at the Facility and complete closure of the wastewater facilities pursuant to Title 123 within 12 months of entry of this Consent Decree; or

(ii) Within 3 months of entry of this Consent Decree, if Defendant decides to continue operations, Defendant shall commence construction of the project described in the approved plans and specifications and complete construction within 18 months of entry of this Consent Decree.

Defendant may seek to modify the approved construction plans. If NDEQ approves the modification, Defendant will still be required to complete the approved lagoon upgrades within 18 months of entry of this Consent Decree.

C. The timelines set forth above in paragraph 7 (B) are subject to modification by mutual agreement of the parties or by an approved "force majeure event." For purposes of this Consent Order, a "force majeure event" is described as any event arising from causes wholly beyond the control of Defendant, any entity controlled by Defendant (including, without limitation, Defendant's contractors and subcontractors), or any entity in active participation or concert with Defendant with respect to the obligations to be undertaken by Defendant pursuant to this Consent Decree, that delays or prevents compliance with any terms, conditions or schedules in this Consent Decree. Defendant shall use its best efforts to meet the deadlines including best efforts to avoid any force majeure event, to mitigate any force majeure event as it is occurring, and after it has occurred, to the greatest extent possible. Force majeure does not include financial inability to complete the work or a failure to achieve the requirements detailed in Defendant's construction permit or closure of the wastewater lagoons consistent Neb. Admin. Code Title 123.

If a force majeure event occurs which causes or may cause a delay in meeting the timelines established above in paragraph 7 (B), Defendant shall notify NDEQ in writing within ten (10) business days of the time Defendant first knew, or within thirty (30) days of when Defendant reasonably should have known that the event is likely to cause a delay. The notice shall include: (a) an explanation and description of the reasons for the delay; (b) the anticipated length of delay; (c) a description of the activity that will be delayed; (d) all actions taken and to be taken to prevent or minimize the delay; (e) a timetable by which those measures will be implemented; and (f) a schedule

that fully describes when Defendant proposes to meet any timelines established in paragraph 7 (B) which have been or will be affected by the claimed force majeure event.

If NDEQ agrees that the delay has been or will be caused by a force majeure event, the parties may stipulate in writing to an extension of the timelines for the affected activity and shall file the stipulation with the Court. If NDEQ does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, it will notify Defendant in writing of this decision within twenty (20) days of receiving Defendant's notice alleging a force majeure event. Defendant may request this Court's assistance to resolve any dispute over whether an extension of the timelines established in paragraph 7 (B) is warranted.

8. To qualify for the \$40,000.00 waiver of civil penalties as stated in paragraph 7 (B), Defendant will file with the Court, and serve on NDEQ, a showing within fifteen (15) days following the due date of the civil penalties. The showing will certify that Defendant has maintained compliance with all requirements listed in paragraph 7 (B). The State will file a satisfaction of judgment within ten (10) days of receiving Defendant's showing. Subject to paragraph 7 (C), if Defendant violates the requirements in paragraph 7 (B) during the 24 months following the entry of this Consent Decree, NDEQ, in its sole discretion, may file an objection to Defendant's showing. If NDEQ files an objection to Defendant's showing, the determination of this waiver provision will be stayed pending ongoing enforcement proceedings.

9. IT IS FURTHER ORDERED that the Defendant shall pay, as a voluntary supplemental environmental project, the sum of \$1,500.00 into the Attorney General's Environmental Protection Fund to be used for environmental safety, training, public

awareness, or other related uses as permitted by state law, at the sole discretion of the Nebraska Attorney General. This payment shall be paid as a lump-sum payment within thirty (30) days of the entry of the Consent Decree by this Court.

10. This Consent Decree will have no effect on any enforcement action brought by NDEQ against Defendant for future violations of any statutes or regulations. Other than a proceeding brought by NDEQ to enforce this Consent Decree, Defendant does not waive and expressly reserves all of its rights, defenses and claims in any proceeding against it.

11. The undersigned consent without further notice to the form and entry of this Consent Decree.

DATED THIS 3 day of May, 2011, in Dawson County, Nebraska.

BY THE COURT:

Jane R. [Signature]
District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on May 3, 2011

By: Overnight Courier FAX E mailed
 Hand Delivered Other

Signature S. J. [Signature]
mail

STATE OF NEBRASKA, ex rel.,
MICHAEL J. LINDER, Director
NEBRASKA DEPARTMENT OF
ENVIRONMENTAL QUALITY, Plaintiff

By JON C. BRUNING, #20351
Attorney General

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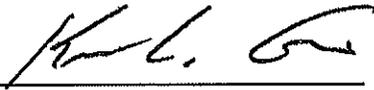
Attorneys for Plaintiff.

PIERCE ENTERPRISES, INC.,
d/b/a Exit 231 Truck Wash, Defendants

By: Shirley A. Pierce
Shirley A. Pierce
President
Pierce Enterprises, Inc.
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Lexington, NE 68850
(308) 324-5456

STATE OF NEBRASKA, ex rel.,
MICHAEL J. LINDER, Director
NEBRASKA DEPARTMENT OF
ENVIRONMENTAL QUALITY, Plaintiff

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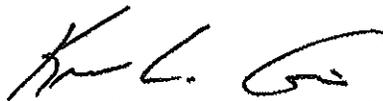
Attorneys for Plaintiff.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Consent Decree has been served upon Defendant by regular United States mail, first class postage prepaid on this 13 day of April, 2011, addressed to the Defendant as follows:

Shirley A. Pierce
Pierce Enterprises, Inc.
42778 Road 755
Lexington, NE 68850

Jeffrey L. Hunter
Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
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Kevin L. Griess
Assistant Attorney General