

**STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER BUREAU**

In the matter of:

ACO-SW08-013
Date Entered: 12.7.09

Smith Paving, Inc.
4090 U.S. 41 West
Marquette, Michigan 49855

ADMINISTRATIVE CONSENT ORDER

This document results from allegations by the Department of Environmental Quality (DEQ), Water Bureau (WB). The DEQ alleges Smith Paving, Inc. (Smith Paving) is causing an earth change activity occurring at Section 17, T48N, R25W, Marquette Township, Marquette County, Michigan, is in violation of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.3101 et seq., and Part 21, Wastewater Discharge Permits rules, promulgated pursuant to Part 31, 1979 AC R 323.2101 et seq., as amended (Part 21); and Part 91, Soil Erosion and Sedimentation Control (SESC), of the NREPA, MCL 324.9101 et seq., (Part 91). Smith Paving is a person, as defined by Section 301 of the NREPA, and which is registered with the Michigan Department of Labor and Economic Growth as a domestic profit corporation, is able to conduct business in the State of Michigan under identification number 014735. Smith Paving and the DEQ agree to resolve the violations set forth herein through entry of an Administrative Consent Order (Consent Order).

I. STIPULATIONS

Smith Paving and the DEQ stipulate as follows:

- 1.1 The NREPA MCL 324.101 et seq. is an act that controls pollution to protect the environment and natural resources in the state.
- 1.2 Pollution Control, Part 31, Water Resources Protection, of the NREPA (Part 31), MCL 324.3101 et seq., and the rules promulgated pursuant thereto, provides for the protection, conservation, and the control of pollution of the water resources of the state.

- 1.3 The DEQ is authorized by Section 3112(4) of Part 31 of the NREPA to enter orders requiring persons to abate pollution, and the director of the DEQ may delegate this authority to a designee under Section 301(b) of the NREPA, MCL 324.301(b).
- 1.4 Part 91, SESC, of the NREPA, (Part 91) MCL 324.9101 et seq. and the rules promulgated pursuant thereto, provides for the control of soil erosion and off-site sedimentation.
- 1.5 Smith Paving and the DEQ agree that the term, "waters of the state" is defined in and is enforceable by the DEQ under this Consent Order in accordance with Section 3101 of Part 31 and the rules promulgated thereunder and is defined in and is enforceable by the DEQ under this Consent Order in accordance with Section 9101 of Part 91 and the rules promulgated thereunder.
- 1.6 Smith Paving consents to the issuance and entry of this Consent Order and stipulates that the entry of this Consent Order constitutes a final order of the DEQ and is enforceable as such under Section 3112(4) of Part 31. Smith Paving agrees not to contest the issuance of this Consent Order, and that the resolution of this matter by the entry of this Consent Order is appropriate and acceptable. It is also agreed that this Consent Order shall become effective on the date it is signed by the chief of the WB, delegate of the director, pursuant to Section 301(b) of the NREPA.
- 1.7 Smith Paving and the DEQ agree that the signing of this Consent Order is for settlement purposes only and does not constitute an admission by Smith Paving that the law has been violated.
- 1.8 The Signatory to this Consent Order on behalf of Smith Paving agrees and attests that he is fully authorized to assure that Smith Paving will comply with all requirements under this Consent Order.

- 1.9 Smith Paving shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section III, Compliance Program, of this Consent Order.

II. FINDINGS

- 2.1 On July 14, 1998, the Marquette County Conservation District, being the County Enforcing Agent (CEA) under Part 91, (Marquette CEA), issued Smith Paving an NOV letter for conducting an unpermitted earth change activity on its property at 40490, U.S. Highway 41 West, Marquette, Michigan. The unpermitted earth change activity resulted in a discharge of sediment to the waters of the state in violation of Part 91 and Part 31. After the unpermitted discharge occurred, SESC Permit No. 189-98 was issued to Smith Paving on December 30, 1998, for the excavation and fill of approximately 3.88 acres necessary for: (1) separate miscellaneous site leveling and recontouring to the north and east of the office building on the property with a sediment basin, (2) the fill of the valley and wetland interface at and upon Smith Paving's property and adjacent landowners with fill slopes to be approximately a 3:1 slope and end at a sediment basin (3) and for wetland mitigation work on the Smith Paving property.
- 2.2 Site inspections completed by the DEQ between 1998 and October 1999 resulted in evidence that Smith Paving was conducting earth change activities outside the limits of SESC Permit No. 189-98 and, therefore, without SESC permit authorization.
- 2.3 On October 1, 1999, the DEQ received a Part 303 permit application from Smith Paving to fill .77 acres of wetland and Wolner Creek. Wolner Creek, a tributary to the Dead River, flows directly adjacent to Smith Paving's property, and then flows into Pesola's Pond.
- 2.4 On October 15, 1999, the DEQ received public comments on the Part 303 permit application from the Marquette CEA stating that the subject request of the Part 303 permit application, filling a wetland and portion of Wolner Creek (stream crossing culvert for a road) had already been completed by Smith Paving at one location, without the DEQ

issuing Smith Paving a Part 303 permit first. This illegal fill activity is a violation of Section 3109 of Part 31 and is a violation of Part 91.

- 2.5 On March 25, 2001, Smith Paving requested that the Marquette CEA increase the size of the permitted earth change activity to 4.88 acres. On March 22, 2002, the Marquette CEA amended SESC Permit No. 189-98 to increase the earth change activity to 4.88 acres and also extended the SESC permit expiration date to December 15, 2006. A condition placed upon the amendment of SESC Permit No. 189-98 required Smith Paving to construct a ditch to collect concentrated storm water discharge, a berm and sediment traps along the entire edge of the toe slope to prevent erosion into the wetland area.
- 2.6 On December 11, 2006, the expiration date of the SESC Permit No. 189-98 was extended by the Marquette CEA to December 31, 2008. The original and the extended SESC permit contained many special conditions for Smith to install SESC measures to prevent the discharge of soil and sediment to the waters of the state.
- 2.7 On March 13, 14, and 22, 2007, the DEQ inspected the Smith Paving property to determine compliance with Part 31 and Part 91. During the inspections, the DEQ determined that the area of earth disturbance was estimated to be over one acre in size and observed discharges of storm water directly to the waters of the state, named Wolner Creek, and to wetlands adjacent to the site.
- 2.8 On March 30, 2007, the DEQ sent Smith Paving a Notice Letter (NL-002597) detailing the violations of Part 31 and Part 91 discovered during the March 13, March 14, and March 22, 2007, compliance inspections. The violations of Part 31 discovered include Smith Paving's violation of 1979 AC R 323.2190, as amended, National permit for storm water discharge from construction activity, (Rule 2190) for earth change activities between one and five acres; and for the discharge of sediment-laden storm water to the waters of the state, named Wolner Creek, and to wetlands adjacent to the site, in violation of Section 3108 and Section 3109 of Part 31. The violations of Part 91 discovered include the failures of the SESC measures that Smith Paving installed on its property thereby resulting in the

discharge of sediment into waters of the state and in violation of Section 9112 and Section 9116 of Part 91.

2.9 The DEQ inspected the Smith Paving property and earth disturbance on April 16, 2008, and April 17, 2008. The DEQ found several violations during the 2008 inspections that were also observed during inspections in 2007. The violations include:

- Sediment was discharging from the site to the Wolner Creek and adjacent wetlands in violation of Part 31, Part 91, and the Part 21 Rules.
- SESC temporary and permanent control measures had failed, filled with sediment, were collapsed, were overwhelmed, were in need of maintenance, or are no longer installed per the SESC plan in violation of Rule 2190, Part 91 and the SESC Permit No. 189-98.
- An oil sheen was observed discharging to the riprap chute, which then discharged to the sediment basin and eventually to the adjacent wetlands, from the vehicle storage area in violation of Part 31.

2.10 The DEQ conducted a site inspection on May 13, 2008, and May 14, 2008. During these inspections, the DEQ determined that the total area of the earth disturbance on the Smith Paving property is 2.47 acres, as measured by the DEQ using a Geographical Positioning Systems (GPS) unit, which subjects Smith Paving to the requirements of Rule 2190. The DEQ observed that a new slope failure occurred between May 1, 2008, and May 13, 2008, in the northern portion of the steep slopes of fill material on the site, resulting in additional sediment discharges in the direction of the wetlands adjacent to the site, extending past the silt fence, in violation of Part 91.

2.11 On March 17, 2009, the DEQ conducted an inspection on the Smith Paving property and observed the unlawful discharge of sediment to the wetlands near the center of the east property line in violation of Part 31, Rule 2190, and Part 91. The northwest section of the detention pond/sediment basin earthen berm and the riprap overflow spillway gully eroded, failed, and discharged sediment to the wetland directly down slope at approximately Section 17, SW $\frac{1}{4}$, SW $\frac{1}{4}$, NW $\frac{1}{4}$, SE $\frac{1}{4}$, SE $\frac{1}{4}$. The wetland is connected to, and

discharges to, a tributary of Wolner Creek. During the inspection, Smith Paving stated that the berm failure and discharge occurred between March 16, 2009 and the morning of March 17, 2009.

- 2.12 On March 18, 2009, the DEQ measured the wetland sediment deposit. The DEQ, Land and Water Management Division (LWMD) estimate the deposit volume to be 272 cubic yards in approximately 5,721 square feet of wetland. The failure of the soil erosion and sedimentation control measures is a violation of Part 91 and resulted in a violation of Part 31 and Rule 2190.
- 2.13 On March 25, 2009, the DEQ sent Smith Paving a VN, Number VN-003939, for the discharge that occurred on March 17, 2009 and requested that Smith Paving submit a copy of the Construction Site Storm Water Operator inspection reports for October 2008 through March 2009 by April 6, 2009.
- 2.14 On April 28, 2009, the DEQ, WB and LWMD conducted an inspection of the Smith Paving property to determine compliance with Part 31 and Part 91 and the March 25, 2009 VN, Number VN-003939. During the inspection, the DEQ observed that an unlawful discharge of sediment to the wetland at the toe of the steep slopes at the north end of the Smith Paving property occurred, in violation of Part 31, Permit-By-Rule, and Part 91. Water from the top of slope ditch and basin(s) discharged to the north riprap chute (built in late 2008). The chute failed from flows eroding unprotected soil along the south edge of the chute and undermining a section of the chute. The wetland is connected to, and discharges to a tributary of Wolner Creek, constituting waters of the state. The LWMD staff estimated the wetland sediment deposit to be 120 feet long by 30 feet wide. A Certified Storm Water Operator inspection report identified that the riprap chute failure and wetland discharge occurred on April 24, 2009.
- 2.15 Additionally, during the April 28, 2009 inspection, the DEQ observed that the March 17, 2009, wetland sediment deposit has migrated approximately 60 feet into additional wetland in violation of the March 25, 2009, DEQ WB Violation Notice No.: VN-003939, Part 31 and Part 91. The two rows of silt fence installed March 18, 2009, to prevent this

additional wetland impact filled with migrating sediment and failed. Six additional rows of silt fence were installed by Smith Paving; but the sediment continued to migrate further into the wetland. The migration of the March 17, 2009 discharge of sediments into 60 additional feet of the wetlands constitutes an additional discharge to the waters of the state, in violation of Part 31 and Part 91.

2.16 On May 7, 2009, the DEQ, WB sent Smith Paving a VN, Number VN-004013, for the discharges of sediment to the waters of the state that occurred on April 24, 2009. The VN identified the violations of Part 31 and Part 91 discovered by the DEQ on April 28 and the ongoing migration of sediment into the wetlands from the March 17, 2009 discharge. The VN requested that Smith Paving:

1. Immediately install and maintain SESC measures to stop further discharge of sediments to surface waters.
2. Immediately install and maintain SESC measures to contain surface water sediment deposits in their current location.
3. Determine with DEQ LWMD the response actions necessary for the north wetland sediment deposit and obtain the required permits or approvals required by LWMD to complete those actions.

III. COMPLIANCE PROGRAM

IT IS THEREFORE AGREED AND ORDERED THAT Smith Paving shall take the following actions to prevent further violations of Part 31:

- 3.1 Smith Paving agrees that it shall comply with Part 31 and Part 91 and the rules promulgated pursuant to Part 31 and Part 91; and SESC Permit No. 189-98. Smith Paving agrees that it shall implement and maintain temporary and permanent SESC measures, including all sediment and storm water basins, to stop additional sediment discharges to waters of the state in accordance with SESC Permit No. 189-98 issued in accordance with Part 91.
- 3.2 Smith Paving shall excavate the sediment from all sediment and storm water control basins when the storage capacity of the basin is no more than 50 percent full, as

determined by a volume measurement of the entire basin, beginning in 2008 and ending in 2015, and until the entire site is permanently stabilized. When the entire site is permanently stabilized, Smith Paving shall submit a written request to the DEQ, WB, at the address in paragraph 3.10 of this Consent Order requesting to cease excavating the sediment basins. Upon Smith's receipt of written DEQ, WB approval, Smith Paving may cease excavation of the sediment basins.

- 3.3 In October, 2008, Smith Paving hired an environmental consultant, who determined and delineated the boundaries between the wetlands located on the Smith Paving property and the adjacent uplands. The consultant physically marked the boundary on the ground with stakes and or flagging ribbon. Smith Paving then submitted an application and appropriate application fee to the DEQ, LWMD, Wetlands, Lakes and Streams Unit, at P.O. Box 30458, Lansing, Michigan 48909-7958 for a Wetland Identification Program (WIP) Level 3 Assessment, to be completed by the LWMD in the Fall of 2009, to confirm the delineation boundaries.
- 3.4 Upon completion of the WIP by the LWMD, LWMD will then send Smith Paving written concurrence with the boundaries. In the event that the LWMD does not concur with the boundaries inspected during the WIP Level 3 Assessment, not later than 30 days after receiving written rejection of the boundaries, Smith Paving's consultant shall adjust the delineation boundaries as directed by LWMD. Not later than 10 days after delineating the boundaries, Smith Paving shall send the LWMD and WB written notification of the new delineation for approval.
- 3.5 Not later than 45 days after receiving written approval from the LWMD of the delineated wetland boundaries, Smith Paving shall have a land survey conducted by a Michigan Licensed land surveyor to permanently record the location of the wetland/upland boundaries and shall provide four copies of the survey map, sealed by the Michigan licensed land surveyor, to DEQ, WB, at the address in paragraph 3.10 of this Consent Order.

- 3.6 Upon entry of this Consent Order and thereafter, Smith Paving shall require its certified construction site storm water inspector to conduct the inspections and complete the required certified storm water inspection reports and logs, as required by Rule 2190. If the DEQ, verbally requests a copy of the certified construction site storm water operator inspection reports while conducting a storm water site inspection, Smith Paving shall make the inspection reports available while the DEQ is physically on the site. If the DEQ requests a copy of the inspection reports in writing, Smith Paving shall submit the inspection reports and a summary of the corrective actions completed on the site, not later than 10 days after the DEQ's request to the address in paragraph 3.10 of this Consent Order
- 3.7 Smith Paving shall implement the necessary repairs and corrections to the existing temporary and permanent SESC measures as identified in the inspection reports required by Paragraph 3.6 of this Consent Order as follows:
- Temporary SESC measures shall be implemented, maintained and repaired daily; and
 - Permanent measures in need of maintenance or repair shall be corrected within five (5) days following the construction site storm water inspector's detection of the problem.

If the scope of work or the season prevents the maintenance or repair of any temporary or permanent SESC measures, as required by this paragraph, Smith Paving shall request an extension in accordance with Section V of this Consent Order. If the DEQ denies the extension request, Smith Paving is subject to the pay stipulated penalties for each violation, per day of violation, in accordance with paragraph 9.3 of this Consent Order. If a permanent measure fails, Smith Paving shall install and implement temporary SESC measures immediately, on the same day that the failure is discovered, to prevent sediments from the failed permanent measure from being discharged into the waters of the state. Smith Paving shall maintain the temporary SESC measures until the failed permanent SESC measure is repaired or replaced.

- 3.8 On September 14, 2009, Smith Paving was issued an amended SESC permit by the Marquette SESC County Enforcing Agent (CEA) based on an amended SESC plan that was originally submitted to the Marquette SESC CEA on May 23, 2008, and amended by Smith Paving on February 24, 2009 and January 27, 2009. In accordance with the amended SESC permit No. 189-98, Smith Paving shall maintain the inactive area SESC measures to assure permanent stabilization by October 1, 2010. Prior to transitioning to start an earth change activity on another section, the completed section must have the final grade completed, with permanent stabilization measures installed. Temporary SESC measures shall remain until the completed section is permanently stabilized and temporary SESC measures shall be installed prior to reactivating the new section.
- 3.9 In the event that Smith Paving reopens a previously stabilized section, it shall amend its September 14, 2009 SESC plan and submit the amended plan to the Marquette CEA. Smith Paving shall, within 10 days of submitting the amendment to the Marquette CEA, submit a copy of the requested amendment to the DEQ for review and comment at the address in paragraph 3.10 of this Consent Order.
- 3.10 Smith Paving shall submit all reports, work plans, specifications, schedules, or any other writing required by this section to be sent to the WB, to the Upper Peninsula District Supervisor, WB, DEQ, 420 5th Street, Gwinn, Michigan 49841. The cover letter with each submittal shall identify the specific paragraph and requirement of this Consent Order that the submittal is intended to satisfy. Smith Paving shall submit all reports, work plans, specifications, schedules, or any other writing required by this section to be sent to the LWMD, to the Upper Peninsula District Supervisor, LWMD, DEQ.

IV. DEQ APPROVAL OF SUBMITTALS

- 4.1 For any work plan, proposal, or other document, excluding applications for permits or licenses, that are required by this Consent Order to be submitted to the DEQ by Smith Paving, the following process and terms of approval shall apply.
- 4.2 All work plans, proposals, and other documents required to be submitted by this Consent

Order shall include all of the information required by the applicable statute and/or rule, and all of the information required by the applicable paragraph(s) of this Consent Order.

- 4.3 In the event the DEQ disapproves a work plan, proposal, or other document, it will notify Smith Paving, in writing, specifying the reasons for such disapproval. Smith Paving shall submit, within 30 days of receipt of such disapproval, a revised work plan, proposal, or other document which adequately addresses the reasons for the DEQ's disapproval. If the revised work plan, proposal, or other document is still not acceptable to the DEQ, the DEQ will notify Smith Paving of this disapproval.
- 4.4 In the event the DEQ approves with specific modifications, a work plan, proposal, or other document, it will notify Smith Paving, in writing, specifying the modifications required to be made to such work plan, proposal, or other document prior to its implementation and the specific reasons for such modifications. The DEQ may require Smith Paving to submit, prior to implementation and within 30 days of receipt of such approval with specific modifications, a revised work plan, proposal, or other document which adequately addresses such modifications. If the revised work plan, proposal, or other document is still not acceptable to the DEQ, the DEQ will notify Smith Paving of this disapproval.
- 4.5 Upon DEQ approval, or approval with modifications, of a work plan, proposal, or other document, such work plan, proposal, or other document shall be incorporated by reference into this Consent Order and shall be enforceable in accordance with the provisions of this Consent Order.
- 4.6 Failure by Smith Paving to submit an approvable work plan, proposal, or other document, within the applicable time periods specified above, constitutes a violation of this Consent Order and shall subject Smith Paving to the enforcement provisions of this Consent Order, including the stipulated penalty provisions specified in paragraph 9.3.
- 4.7 Any delays caused by Smith Paving's failure to submit an approvable work plan, proposal, or other document when due shall in no way affect or alter Smith Paving's responsibility to comply with any other deadline(s) specified in this Consent Order.

- 4.8 No informal advice, guidance, suggestions, or comments by the DEQ regarding reports, work plans, plans, specifications, schedules or any other writing submitted by Smith Paving will be construed as relieving Smith Paving of its obligation to obtain written approval, if and when required by this Consent Order.

V. EXTENSIONS

- 5.1 Smith Paving and the DEQ agree that the DEQ may grant Smith Paving a reasonable extension of the specified deadlines set forth in this Consent Order. Any extension shall be preceded by a written request in duplicate to the DEQ, WB, Enforcement Unit Chief, Constitution Hall, 525 West Allegan Street, Lansing, Michigan 48909-7773, and the Upper Peninsula District Supervisor at the address in paragraph 3.7, no later than ten business days prior to the pertinent deadline, and shall include:
- a. Identification of the specific deadline(s) of this Consent Order that will not be met.
 - b. A detailed description of the circumstances that will prevent Smith Paving from meeting the deadline(s).
 - c. A description of the measures Smith Paving has taken and/or intends to take to meet the required deadline.
 - d. The length of the extension requested and the specific date on which the obligation will be met.

The district supervisor, in consultation with the Enforcement Unit Chief, shall respond in writing to such requests. No change or modification to this Consent Order shall be valid unless in writing from the DEQ, and if applicable, signed by both parties.

VI. REPORTING

- 6.1 Smith Paving shall verbally report any violation(s) of the terms and conditions of this Consent Order to the Upper Peninsula District Supervisor within 48 hours following detection of such violation(s) and shall follow such notification with a written report within

ten business days following detection of such violation(s). The written report shall include a detailed description of the violation(s), as well as a description of any actions proposed or taken to correct the violation(s). Smith Paving shall report any anticipated violation(s) of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible and, if applicable, in accordance with paragraph 10.3 of this Consent Order.

VII. RETENTION OF RECORDS

- 7.1 Upon request by an authorized representative of the DEQ, Smith Paving shall make available to the DEQ all records, plans, logs, and other documents required to be maintained under this Consent Order or pursuant to Part 31, Part 91, or its respective rules. All such documents shall be retained by Smith Paving for at least a period of three years from the date of generation of the record unless a longer period of record retention is required by Part 31, Part 91, or its respective rules.

VIII. RIGHT OF ENTRY

- 8.1 Smith Paving shall allow any authorized representative or contractor of the DEQ, upon presentation of proper credentials, to enter upon the premises of the facility at all reasonable times for the purpose of monitoring compliance with the provisions of this Consent Order. This paragraph in no way limits the authority of the DEQ to conduct tests and inspections pursuant to the NREPA and the rules promulgated thereunder, or any other applicable statutory provision.

IX. PENALTIES

- 9.1 Smith Paving agrees to pay to the State of Michigan \$7,449 **DOLLARS** as partial compensation for the cost of investigations and enforcement activities arising from the violations specified in Section II of this Consent Order. Payment shall be made in accordance with paragraph 9.6. The first payment shall be made not later than December 1, 2009 in the amount of \$1,241.50. Each subsequent payment of \$1,241.50, totaling 6

payments, shall be made on or before June 1st and December 1st of 2010, 2011 and 2012, with the last payment due on June 1, 2012.

- 9.2 Smith Paving agrees to pay a civil fine of \$28,065 **DOLLARS** for the violations specified in Section II of this Consent Order. Payment shall be made in accordance with paragraph 9.6. The first payment shall be made not later than December 1, 2009 in the amount of \$4,677.50. Each subsequent payment of \$4,677.50, totaling 6 payments, shall be made on or before June 1st and December 1st of 2010, 2011 and 2012, with the last payment due on June 1, 2012.
- 9.3 For each failure to comply with the provisions of Section III and IV of this Consent Order, Smith Paving shall pay stipulated penalties of \$100 per violation per day for 1 to 7 days of violation, \$250 per violation per day for 8 to 14 days of violation, and \$500 per violation per day for each day of violation thereafter. Failure to perform any of the following requirements shall be considered separate violations of this Consent Order and are subject to stipulated penalties under this paragraph:
- a. Failure to verbally report violations and submit written reports by the required dates in accordance with paragraph 6.1.
 - b. Failure to retain records on site in accordance with paragraph 7.1.
 - c. Failure to pay civil fines, costs, or stipulated or interest penalties by the required dates in accordance with this section.
- 9.4 Stipulated penalties accruing under paragraph 9.3 shall be paid within 30 days after written demand by the DEQ in accordance with paragraph 9.6.
- 9.5 To ensure timely payment of the above civil fine, costs, and stipulated penalties, Smith Paving shall pay an interest penalty to the General Fund of the State of Michigan each time it fails to make a complete or timely payment. This interest penalty shall be based on the rate set forth at MCL 600.6013(8), using the full increment of amount due as principal, and calculated from the due date for the payment until the delinquent payment is finally made in full.

- 9.6 Smith Paving agrees to pay all funds due pursuant to this agreement by check made payable to the State of Michigan and delivered to the DEQ, Revenue Control Unit, P.O. Box 30657, Lansing, Michigan 48909-8157. To ensure proper credit, all payments made pursuant to this Consent Order must include the **Payment Identification No. WTR3104**.
- 9.7 Smith Paving agrees not to contest the legality of the civil fine or costs paid pursuant to paragraphs 9.1, and 9.2, above. Smith Paving further agrees not to contest the legality of any stipulated penalties or interest penalties assessed pursuant to paragraphs 9.3 and 9.5 above, but reserves the right to dispute the factual basis upon which a demand by the DEQ for stipulated penalties or interest penalties is made

X. FORCE MAJEURE

- 10.1 Smith Paving shall perform the requirements of this Consent Order within the time limits established herein, unless performance is prevented or delayed by events that constitute a "Force Majeure." Any delay in the performance attributable to a "Force Majeure" shall not be deemed a violation of Smith Paving's obligations under this Consent Order in accordance with this section.
- 10.2 For the purpose of this Consent Order, "Force Majeure" means an occurrence or nonoccurrence arising from causes not foreseeable, beyond the control of, and without the fault of Smith Paving, such as: an Act of God, untimely review of permit applications or submissions by the DEQ or other applicable authority, and acts or omissions of third parties that could not have been avoided or overcome by Smith Paving's diligence and that delay the performance of an obligation under this Consent Order. "Force Majeure" does not include, among other things, unanticipated or increased costs, changed financial circumstances, or failure to obtain a permit or license as a result of Smith Paving's actions or omissions.
- 10.3 Smith Paving shall notify the DEQ, by telephone, within 48 hours of discovering any event that causes or may cause a delay in its compliance with any provision of this Consent Order. Verbal notice shall be followed by written notice within ten calendar days and shall

describe, in detail, the anticipated length of delay, the precise cause or causes of delay, the measures taken by Smith Paving to prevent or minimize the delay, and the timetable by which those measures shall be implemented. Smith Paving shall adopt all reasonable measures to avoid or minimize any such delay.

10.4 Failure of Smith Paving to comply with the notice requirements and time provisions under paragraph 10.3 shall render this Section X void and of no force and effect as to the particular incident involved. The DEQ may, at its sole discretion and in appropriate circumstances, waive in writing the notice requirements of paragraph 10.3, above.

10.5 If the parties agree that the delay or anticipated delay was beyond the control of Smith Paving, this may be so stipulated, and the parties to this Consent Order may agree upon an appropriate modification of this Consent Order. However, the DEQ is the final decision-maker on whether or not the matter at issue constitutes a force majeure. The parties to this Consent Order understand and agree that the final decision by the DEQ regarding a force majeure claim is not subject to judicial review. The burden of proving that any delay was beyond the reasonable control of Smith Paving, and that all the requirements of this Section X have been met by Smith Paving, rests with Smith Paving.

10.6 An extension of one compliance date based upon a particular incident does not necessarily mean that Smith Paving qualifies for an extension of a subsequent compliance date without providing proof regarding each incremental step or other requirement for which an extension is sought.

XI. GENERAL PROVISIONS

11.1 With respect to any violations not specifically addressed and resolved by this Consent Order, the DEQ reserves the right to pursue any other remedies to which it is entitled for any failure on the part of Smith Paving to comply with the requirements of the NREPA and its rules.

- 11.2 The DEQ and Smith Paving consent to enforcement of this Consent Order in the same manner and by the same procedures for all final orders entered pursuant to Part 31, MCL 324.3101 et seq.; and enforcement pursuant to Part 17, Michigan Environmental Protection Act, of the NREPA, MCL 324.1701 et seq.
- 11.3 This Consent Order in no way affects Smith Paving's responsibility to comply with any other applicable state, federal, or local laws or regulations.
- 11.4 The WB reserves its right to pursue appropriate action, including injunctive relief to enforce the provisions of this Consent Order, and at its discretion, may also seek stipulated fines or statutory fines for any violation of this Consent Order. However, the WB is precluded from seeking both a stipulated fine under this Consent Order and a statutory fine for the same violation.
- 11.5 Nothing in this Consent Order is or shall be considered to affect any liability Smith Paving may have for natural resource damages caused by Smith Paving's ownership and/or operation of the facility. The State of Michigan does not waive any rights to bring an appropriate action to recover such damages to the natural resources.
- 11.6 In the event Smith Paving sells or transfers the facility, it shall advise any purchaser or transferee of the existence of this Consent Order in connection with such sale or transfer. Within 30 calendar days, Smith Paving shall also notify the WB Upper Peninsula District Supervisor, in writing, of such sale or transfer, the identity and address of any purchaser or transferee, and confirm the fact that notice of this Consent Order has been given to the purchaser and/or transferee. The purchaser and/or transferee of this Consent Order must agree, in writing, to assume all of the obligations of this Consent Order. A copy of that agreement shall be forwarded to the WB Upper Peninsula District Supervisor within 30 days of assuming the obligations of this Consent Order.
- 11.7 The provisions of this Consent Order shall apply to and be binding upon the parties to this action, and their successors and assigns.

11.8 This Consent Order constitutes a civil settlement and satisfaction as to the resolution of the violations specifically addressed herein; however, it does not resolve any criminal action that may result from these same violations.

XII. TERMINATION

12.1 This Consent Order shall remain in full force and effect until terminated by a written Termination Notice (TN) issued by the DEQ. Prior to issuance of a written TN, Smith Paving shall submit a request consisting of a written certification that Smith Paving has fully complied with the requirements of this Consent Order and has made payment of any fines, including stipulated penalties, required in this Consent Order. Specifically, this certification shall include:

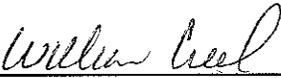
- a. The date of compliance with each provision of the compliance program in Section III, and the date any fines or penalties were paid.
- b. A statement that all required information has been reported to the district supervisor.
- c. Confirmation that all records required to be maintained pursuant to this Consent Order are being maintained at the facility.

The DEQ may also request additional relevant information. The DEQ shall not unreasonably withhold issuance of a TN.

Signatories

The undersigned CERTIFY they are fully authorized by the party they represent to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it.

DEPARTMENT OF ENVIRONMENTAL QUALITY



William Creal, Chief
Water Bureau

12-7-09
Date

SMITH PAVING, INC.



By: Andrew Smith
Title: President, Smith Paving, Inc.

11-20-09
Date

APPROVED AS TO FORM:



By: Alan Hoffman, Assistant Attorney General
For: S. Peter Manning, Chief
Environment, Natural Resources, and Agriculture Division
Michigan Department of Attorney General

12/3/09
Date