

IN THE
COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

| | | |
|--------------------------------|---|-------------------------|
| STATE OF OHIO, <i>ex rel.</i> | : | CASE NO. 213486 |
| LEE FISHER | : | |
| ATTORNEY GENERAL OF OHIO, | : | JUDGE JAMES F. KILCOYNE |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| INDEPENDENCE EXCAVATING, INC., | : | <u>CONSENT ORDER</u> |
| <i>et al.</i> , | : | |
| | : | |
| Defendants. | : | |

The Complaint in the above-captioned matter having been filed herein, and Plaintiff State of Ohio by its Attorney General Lee Fisher and Defendants Independence Excavating, Inc., Victor DiGeronimo, Sr., and Victor Digeronimo, Jr. (hereinafter "Defendants") having consented to the entry of this Order,

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

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 Defendants under Chapter 3704. of the Ohio Revised Code ("RC"), and venue is proper in this Court.

II. PARTIES

The provisions of this Consent Order shall apply and be binding upon the parties to this action, their agents, officers, employees, assigns, stockholders, directors, successors in interest and any person acting in concert or privity with any of them.

III. SATISFACTION OF LAWSUIT

A. Plaintiff alleges in its Complaint that Defendants owned and/or operated a concrete aggregate processing plant located at 4905 Warner Road, Garfield Heights, Cuyahoga County, Ohio (hereinafter the "Warner Road facility") in such a manner as to result in violations of their permits to install ("PTIs"), Nos. 13-1369 and 13-1752, the January 6, 1987 Final F&Os issued by the Director of Environmental Protection, and the air pollution control laws of the State of Ohio, *i.e.*, RC Chapter 3704. and the rules adopted thereunder.

B. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Defendants for all claims under such laws alleged in the Complaint, and for any violation of RC Chapter 3704. and the rules adopted thereunder occurring prior to the filing of this Consent Order.

C. 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 Consent Order, regardless of when said violations occurred.

IV. RIGHT OF ENTRY

A. Defendants acknowledge that Plaintiff State of Ohio, its agents and employees, including agents, employees and representatives of the Cleveland Division of Environment, Bureau of Air Pollution Control ("CDEBAPC") are authorized by law to enter into and onto Defendants' Warner Road facility to inspect the facility's operation and/or records, and/or to observe Defendants conduct at said facility, and agree to, and are ordered to, refrain from any conduct that would interfere with such inspections.

B. Nothing in this Consent Order shall be construed to limit Plaintiff's statutory authority under RC Chapter 3704. and/or the rules adopted thereunder to conduct inspections and/or surveys and/or to review records.

V. EFFECT UPON OTHER ACTIONS

Nothing in this Consent Order shall be construed to relieve Defendants of the obligation to comply with applicable federal, state and/or local statutes, regulations or ordinances, or shall constitute a waiver or release of any right, remedy, defense and/or claim against Defendants with regard to any person not a party to this Consent Order.

VI. PERMANENT INJUNCTIVE RELIEF

A. With respect to the Warner Road facility, Defendants are hereby permanently enjoined and ordered to comply with the requirements of RC Chapter 3704. and the rules adopted thereunder, which includes, *inter alia*:

1. Limiting all visual emissions from all air pollution sources at the Warner

Road facility to the 5% opacity limit required as part of the best available technology ("BAT") requirement for new sources set forth in Rule 3745-31-05 of the Ohio Administrative Code ("OAC");

2. Applying for and obtaining from the Director of Environmental Protection a permit to operate ("PTO") the air pollution sources at the Warner Road facility, pursuant to OAC Chapter 3745-35 where Defendants desire to resume any and all operations at said facility; and
3. Utilizing BAT, as defined by OAC Rule 3745-31-05, so as to prevent any future nuisances at the Warner Road facility where Defendants apply for and obtain a PTO from the Director of Environmental Protection to resume any and all operations at said facility.

B. With respect to the Warner Road facility, Defendants are enjoined and ordered to comply with their currently effective PTIs, Nos. 13-1369 and 13-1752, and any modifications or renewals thereof, until Defendants receive a PTO(s) for the air pollution sources at said facility.

VII. ADDITIONAL INJUNCTIVE RELIEF

A. Defendants are enjoined and ordered to immediately, *i.e.*, upon the Court's entry of this Consent Order, to undertake the following activities:

Upper Level

1. Source No. F002 (Product Storage Piles)

- a. Cease the processing of aggregate on the upper level until Defendants obtain a PTO from the Director of Environmental Protection for Source No. F002 (Product Storage Piles).

- b. Cease the addition of any new aggregate on the upper level until Defendants obtain a PTO from the Director of Environmental Protection for Source No. F002 (Product Storage Piles).
 - c. Begin and thereafter continue using the upper level for the storage of materials only until Defendants obtain a new PTI and PTO from the Director of Environmental Protection for Source No. F002 (Product Storage Piles).
 - d. Begin and thereafter continue storing all fine materials, *i.e.*, 310, 304 or other fine aggregate, to the west of the fenced-in scale house.
 - e. Begin and thereafter continue storing only clay and other "large" materials, *i.e.* materials identified by Defendants as Nos. 1 and 2, to the south and southeast of the fenced-in scale house. Said piles are not to exceed twelve (12) feet in height.
 - f. Begin and thereafter continue wetting the product storage piles when materials-handling of the fine aggregate, discussed in Article VII, Subparagraph A 1 d is occurring.
2. Source No. F001 (Paved and Unpaved Roads and Parking Lots)
- a. Begin and thereafter continue watering all unpaved roads and parking lots on the upper level when either materials-handling and/or facility traffic and weather conditions dictate that watering is necessary.
 - b. Begin and thereafter continue sweeping all paved roads and parking lots to maintain a clean condition on the upper level when either materials-handling and/or facility traffic and weather conditions dictate that sweeping is necessary.
 - c. Begin and thereafter maintain records of when the unpaved roads and parking lots on the upper level are watered,

and the reasons for the lack of watering during those times when aggregate is being handled.

- d. Watering and sweeping are not required when neither materials-handling nor vehicle traffic is occurring at the facility.

Lower Level

3. Source No. F003 (Primary Jaw Crusher)

- a. Cease accepting new concrete on the lower level until Defendants obtain a PTO from the Director of Environmental Protection for Source No. F003 (Primary Jaw Crusher).
- b. Begin and thereafter continue using a mixture consisting of a chemical dust suppressant and water at the base of the jaw crusher during its operation.
- c. Begin and thereafter continue using water at the feed hopper of the jaw crusher during its operation.
- d. Begin and thereafter maintain records regarding the use of the chemical dust suppressant, described in Article VII, Subparagraph A 3 b, during the operation of the jaw crusher.

4. Source No. F001 (Paved and Unpaved Roads and Parking Lots)

- a. Begin and thereafter continue watering all unpaved roads and parking lots on the lower level when either concrete processing and/or facility traffic and weather conditions dictate that watering is necessary.
- b. Begin and thereafter continue sweeping all paved roads and parking lots to maintain a clean condition on the lower level when either concrete processing and/or facility traffic and weather conditions dictate that sweeping is necessary.
- c. Begin and thereafter maintain records of when the unpaved roads and parking

lots on the lower level are watered, when the areas are not watered, and the reasons for the lack of watering during those times when concrete is being processed.

- d. Watering and sweeping are not required when neither materials-handling nor vehicle traffic is occurring at the facility.

B. Defendants are enjoined and ordered to submit to the Ohio Environmental Protection Agency ("Ohio EPA") and the CDEBAPC a revised operations plan detailing the operations of the Warner Road facility within sixty (60) days of the Court's entry of this Consent Order. Said plan to include, *inter alia*, the items discussed in Article VII, Subparagraphs A1 through A4.

C. Defendants are enjoined and ordered to install and thereafter maintain signs on the perimeter and at the gates of the Warner Road facility indicating that the facility is no longer open to the public until Defendants obtain a PTO from the Director of Environmental for any and all air pollution sources at said facility.

D. Defendants are enjoined and ordered to install and thereafter maintain adequate fencing and gates at the Warner Road facility, and to take appropriate security measures around the perimeter of said facility to prevent the unauthorized entrance of any person and/or persons.

E. Defendants are enjoined and ordered to confine all operations at the Warner Road facility to daylight hours only. Thus, defining a "work day" for said facility.

F. Defendants are enjoined and ordered to maintain a traffic speed of 5 M.P.H. at the Warner Road facility for all vehicles.

G. Within fourteen (14) days of the Court's entry of this Consent Order, Defendants are enjoined and ordered to submit to the Ohio EPA and the CDEBAPC the form to be used for documenting the watering/non-watering of all unpaved roads and parking lots at the Warner Road facility. Within five (5) days of receiving joint approval from both the Ohio EPA and the CDEBAPC, Defendants are enjoined and ordered to begin using the approved form at said facility.

H. Within fourteen (14) days of the Court's entry of this Consent Order, Defendants are enjoined and ordered to submit to the Ohio EPA and the CDEBAPC the log form to be used for documenting the use of the chemical dust suppressant during the operation of the primary jaw crusher, i.e., Source No. F003, at the Warner Road facility. Within five (5) days of receiving approval from both the Ohio EPA and the CDEBAPC, Defendants are enjoined and ordered to begin using the approved form at said facility.

I. Within six (6) months of the Court's entry of this Consent Order, the Ohio EPA and the CDEBAPC will conduct an inspection or inspections to evaluate whether a chemical dust suppressant will be needed to maintain the 5% opacity requirement set forth in PTI No. 13-1369, issued March 16, 1986, for all unpaved roads and parking lots, i.e., Source No. F001, at the Warner Road facility. Where the Ohio EPA and

the CDEBAPC determine that a chemical dust suppressant is warranted, Defendants are enjoined and ordered to begin using said chemical dust suppressant on the identified source at the Warner Road facility within twenty-four (24) hours of receipt of the notification of the determination from the Ohio EPA and/or the CDEBAPC.

J. Defendants are enjoined and ordered to lock the gate(s) leading to the upper and lower levels to prevent any and all "unauthorized entry" at the Warner Road facility after the "work day."

K. Defendants are enjoined and ordered to contact the Ohio EPA and the CDEBAPC at least thirty (30) days in advance of the desired resumption of the operation of the primary jaw crusher, *i.e.*, Source No. F003, at the Warner Road facility for the purpose of setting a mutually agreeable inspection date to determine Defendants' compliance with their currently effective PTI, No. 13-1369, issued March 16, 1986, or any new PTI or PTO issued by the Director of Environmental Protection for said source.

VIII. REPORTING REQUIREMENT

Unless otherwise stated in this Consent Order, Defendants are ordered to submit a statement as to whether they have performed the tasks set forth in Article VII and any supporting documentation to the City of Cleveland, Division of Air Environment, Bureau of Pollution Control located at 1925 St. Clair Avenue, Cleveland, Ohio 44114; with an additional copy to the Ohio EPA's Central Office, Division of Air Pollution

Control, Enforcement Section located at 1800 WaterMark Drive, Columbus, Ohio 43266-0149 within seven (7) days of the completion of said tasks.

IX. EFFECT OF CONSENT ORDER

This Consent Order does not constitute authorization or approval of the construction of any physical structure or facilities, or the modification of any existing sources of air pollution. Approval for any such construction or modification shall be by permit issued by the Ohio EPA or other such permits as may be required by applicable federal, state and/or local laws, rules and/or regulations.

X. POTENTIAL FORCE MAJEURE CLAUSE

In any action to enforce any of the provisions of this Consent Order, Defendants may raise at that time the question of whether they are entitled to a defense that their conduct was caused by reasons beyond their control such as, by way of example and not limitation, act of God, unusually severe weather conditions, strikes, acts of war or civil disturbances, or orders of any regulatory agency. While Plaintiff does not agree that such a defense exists, it is, however, hereby agreed upon by the parties 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 that a dispute arises and/or an enforcement action, if any, is commenced. Acceptance of this Consent Order without a force majeure clause does not constitute a waiver by Defendants of any rights or defenses they may have under applicable State law.

XI. CIVIL PENALTY

Defendants are ordered to pay to the State of Ohio a civil penalty of seventy one thousand, five hundred dollars (\$71,500.00). This penalty shall be paid by delivering to the attorney for Plaintiff, and/or his successor, six (6) certified checks, payable to the order of "Treasurer, State of Ohio" in accordance with the following payment schedule:

| <u>Date Payment Due</u> | <u>Amount</u> |
|--|---------------------|
| 1. The first payment shall be made within fifteen (15) days of the Court's entry of this Consent Order | \$ 23,500.00 ✓ |
| 2. The second payment shall be made by December 1, 1992. | 9,600.00 ✓ |
| 3. The third payment shall be made by June 2, 1993. | 9,600.00 |
| 4. The fourth payment shall be made by December 1, 1993. | 9,600.00 |
| 5. The fifth payment shall be made by June 1, 1994. | 9,600.00 |
| 6. The sixth payment shall be made by December 1, 1994. | <u>9,600.00</u> |
| TOTAL | <u>\$ 71,500.00</u> |

(Please be advised that where Defendants wish to pay the balance of the civil penalty owed prior to the December 1, 1994 deadline, they may do so without incurring any additional penalty.)

XII. STIPULATED PENALTIES

A. In the event that Defendants fail to meet any of the provisions of this Consent Order set forth in Articles VI, VII and VIII, Defendants shall be liable for and shall pay a stipulated penalty according to the following payment schedule:

1. For each day of each failure to meet a provision, up to thirty (30) days--five hundred dollars (\$500.00) per day per violation.
2. For each day of each failure to meet a provision, from thirty-one (31) to sixty (60) days--one thousand dollars (\$1,000.00) per day per violation.
3. For each day of each failure to meet a provision, from sixty-one (61) to ninety (90) days--two thousand dollars (\$2,000.00) per day per violation.
4. For each day of each failure to meet a provision, over ninety days (90) days--three thousand dollars (\$3,000.00) per day per violation.

B. Any payment required to be made under the provisions of Paragraph A of this Article shall be made by delivering to Plaintiff's attorney a certified check, or checks, for the appropriate amount(s), within ten (10) days from the date of the failure to meet the requirement of this Consent Order, made payable to "*Treasurer, State of Ohio*".

C. In the event, the Ohio EPA and/or the CDEBAPC receives a nuisance complaint regarding operations at the Warner Road facility, the Ohio EPA or the CDEBAPC will inform Defendants of the receipt of said complaint as soon as availability of staff and priority of workload constraints permit. The Ohio EPA or the CDEBAPC may perform a site inspection of the facility as part of investigating the nuisance complaint. Either the Ohio EPA or the CDEBAPC will inform Defendants, in writing, of the results of the complaint investigation and site inspection.

XIII. TERMINATION OF STIPULATED PENALTIES

A. The provisions of this Consent Order set forth in Article XII, Paragraphs A and B requiring the payment of stipulated penalties shall be terminated upon a demonstration by Defendants that: 1. they have complied with all the terms and conditions of this Consent Order, and 2. they have paid the civil penalty required by this Consent Order.

B. Defendants may not seek termination of the stipulated penalty section of this Consent Order for at least thirty-six (36) months, *i.e.*, three (3) calendar years, from the Court's entry of this Consent Order.

C. Termination of the stipulated penalty section of this Consent Order shall only be by order of the Court upon application by any party, and a demonstration that the conditions outlined in Article XII, Paragraphs A and B have been met.

XIV. RESERVATION OF RIGHTS

No earlier than thirty-six (36) months, *i.e.*, three (3) calendar years, from the Court's entry of this Consent Order, Defendants may move the Court, pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure ("Civ. R."), to terminate the permanent injunction provisions of Articles VI and VII where Defendants can demonstrate that they have been in compliance with the terms and provisions of this Consent Order for a consecutive thirty-six (36) month period and that the criteria of Civ. R. 60(B) have been met. Plaintiff takes no position as to such a motion and reserves any and all rights it may have to oppose Defendants' motion.

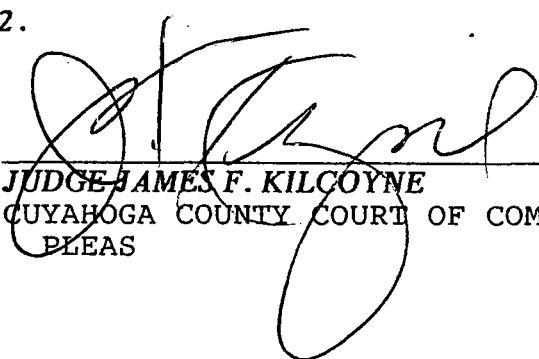
XV. RETENTION OF JURISDICTION

The Court will retain jurisdiction of this action for the purpose of enforcing the terms and provisions of this Consent Order.

XVI. COSTS

Defendants are hereby ordered to pay the costs of this action.

ENTERED THIS 27 DAY OF AUGUST, 1992.



JUDGE JAMES F. KILCOYNE
CUYAHOGA COUNTY COURT OF COMMON
PLEAS

Approved:

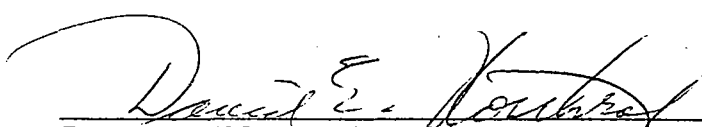
STATE OF OHIO, *ex rel.*
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Independence Excavating, Inc.

Via DiGeronimo

Victor DiGeronimo, Sr.
(In his individual capacity)

Via DiGeronimo

Victor DiGeronimo, Jr.
(In his individual capacity)

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GERALD E. FUERST, CLERK
DEP

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