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COMMON PLEAS
May 29 3 40 PM '99
LAWRENCE COUNTY
CLERK OF COURTS
LAWRENCE COUNTY

IN THE COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO
GENERAL DIVISION

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

Case No. 1997 OC 000166
JUDGE W. RICHARD WALTON

Plaintiff,

v.

DAVID JACKSON, *et al.*,

Defendants.

CONSENT ORDER AND FINAL
JUDGMENT ENTRY AS TO
DEFENDANTS FANCHER
INDUSTRIES, INC. AND BRIAN S.
FANCHER

WHEREAS, Plaintiff State of Ohio, on relation of Betty D. Montgomery, Attorney General of Ohio, at the written request of the Director of Ohio Environmental Protection ("Director"), filed a complaint commencing this action against, among others, Defendant Brian S. Fancher and Defendant Fancher Industries, Inc. (hereinafter collectively referred to as "Defendants") to enforce the provisions of Ohio's solid waste laws set forth in Ohio Revised Code ("R.C.") Chapter 3734 and the rules adopted pursuant to that chapter, R.C. Chapter 3767, and to pursue other legal and equitable relief;

NOW THEREFORE, without trial or admission of any issue of law or fact, and upon the 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 subject matter of this action pursuant to R.C. Chapter 3734 and rules promulgated thereunder. The Court has jurisdiction over the parties. Venue is proper in this Court. The complaint states a claim upon which relief can be granted.

***II. PERSONS BOUND**

2. The provisions of this Consent Order and Final Judgment Entry (hereinafter "Consent Order") shall apply to and be binding upon Defendants, their agents, officers, employees, assigns, successors in interest, and any person acting in concert, privity or participation with them who receives actual notice of this Consent Order whether by personal service or otherwise. Defendants shall provide a copy of this Consent Order to each contractor they employ to perform work itemized and/or required herein.

III. SATISFACTION OF LAWSUIT

3. Plaintiff alleges in the complaint that Defendants unlawfully permitted and/or allowed the open dumping of scrap tires on property, which Defendant Fancher Industries, Inc. has owned since February 27, 1996, located on State Route 7, Athalia, Rome Township, Lawrence County, Ohio (hereinafter referred to as the "Jackson tire dump"), in violation of the solid waste laws of the State of Ohio, and in a manner that constitutes a threat to public health and safety and the environment. Except as otherwise provided for by this Consent Order or by law, compliance with the terms of this Consent Order shall constitute full and complete satisfaction of any civil liability of Defendant Fancher Industries, Inc. and Defendant Brian S. Fancher for all claims alleged in the Complaint.

IV. RESERVATION OF RIGHTS

4. Nothing in this Consent Order, including the imposition of stipulated or civil penalties, shall limit the authority of the State of Ohio to:

- A. Seek any relief for claims or conditions not alleged in the complaint;
- B. Seek any relief for claims or conditions alleged in the complaint which occur after

the entry of this Consent Order;

- C. Enforce this Consent Order through a contempt action or otherwise for violations of this Consent Order;
- D. Bring any action against Defendants or against any other person, under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. § 9601, et seq., R.C. Chapter 3704, R.C. Chapter 3734, or R.C. Chapter 6111 to: (1) recover natural resource damages, or (2) order the performance of, or recover costs for any removal, remedial or corrective activities not conducted pursuant to the terms of this Consent Order, or both; and,
- E. Take any action authorized by law against any person, including Defendants, to eliminate or mitigate conditions at the Jackson tire dump, which conditions may present an imminent threat to the public health and safety and the environment.

V. COMPLIANCE WITH APPLICABLE LAWS

5. Nothing in this Consent Order shall affect Defendants' obligation to comply with all applicable federal, state or local laws, regulations, rules, or ordinances. Defendants shall obtain all federal, state, or local permits and licenses necessary to comply with this Consent Order.

VI. DEFINITIONS

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

- A. "Director" means the Director of the Ohio Environmental Protection Agency.
- B. "Jackson tire dump" or "Dump" means the scrap tire dump at the property owned by Fancher Industries, Inc. and located on State Route 7 in Athalia, Rome Township, Lawrence County, Ohio.
- C. "Ohio EPA" means the Ohio Environmental Protection Agency, and its agents.

- D. "R.C." means the Ohio Revised Code.
- E. "O.A.C." means the Ohio Administrative Code.

VII. INJUNCTION

7. Defendants agree to and are ordered and permanently enjoined to comply with R.C. Chapter 3734 and rules promulgated thereunder and all subsequent modifications and amendments thereto.

8. ~~Defendants agree to and are ordered and permanently enjoined to immediately~~ take all actions necessary to prevent other persons from dumping scrap tires at the Jackson tire dump.

9. Defendants agree to and are ordered and permanently enjoined to, in accordance with O.A.C. Rule 3745-27-60(B)(8), begin immediately the application of a pesticide or larvicide for the control of mosquitoes at the Jackson tire dump from April first to November first, or as needed, annually until all scrap tires, partially burned scrap tires, and/or burned scrap tire residue are removed from the Jackson tire dump in accordance with Section VIII of this Order.

VIII. COMPLIANCE SCHEDULE

10. By May 29, 1998, Defendants agree and are ordered and enjoined to move back onto the Jackson tire dump all scrap tires, partially burned scrap tires, and/or burned scrap tire residue that have migrated onto the parcels of land adjacent to the Jackson tire dump.

11. Beginning with July, 1998, Defendants agree and are ordered and enjoined to lawfully remove and transport to a licensed scrap tire facility or a licensed solid waste facility, whichever is applicable, at least seven (7) tons of the scrap tires, partially burned scrap tires, and/or burned scrap tire residue located at the Jackson tire dump each month until all scrap tires,

partially burned scrap tires, and/or burned scrap tire residue are removed from the Dump. The scrap tires, partially burned scrap tires, and burned scrap tire residue shall be removed from the Jackson tire dump one area at a time (See map attached as Exhibit 1) in the following order: Area 1, Area 2, Area 3, and Area 4.

12. Beginning August 7, 1998, and on or before the 7th day of each month thereafter, Defendants shall provide to the Ohio EPA a copy of all receipts received during the previous month from the licensed scrap tire facility or licensed solid waste facility that received the scrap tires, partially burned scrap tires, and/or scrap tire residue removed from the Dump in accordance with Paragraph 11 of this Order. Within seven (7) days of completing the removal of all scrap tires, partially burned scrap tires, and/or burned scrap tire residue from a particular area of the Jackson tire dump in accordance with Paragraph 11 of this Order, Defendants shall provide to the Ohio EPA written notice of completion for that area.

13. Within thirty (30) days of completing the removal of all scrap tires, partially burned scrap tires, and burned scrap tire residue from the Jackson tire dump in accordance with Paragraph 11 of this Order, but in any event no later than April 30, 1999, Defendants agree and are ordered and enjoined to submit to the Ohio EPA a characterization and remediation plan ("plan") that complies with O.A.C. Rule 3745-27-79(C)(2). If the Ohio EPA determines that a plan is not necessary, the Ohio EPA will notify Defendants in writing. If the Ohio EPA determines that the plan submitted by Defendants is deficient, the Ohio EPA shall notify Defendants or their agent in writing. Defendants agree and are ordered and enjoined to resubmit to the Ohio EPA - within fourteen (14) calendar days of receipt of any notice of deficiency from the Ohio EPA - a plan that addresses all of the deficiencies noted by the Ohio EPA. If the

resubmitted plan is either not complete or not approveable, or both, the Ohio EPA may approve the resubmitted plan with modifications or additional terms and conditions.

14. Defendants agree and are ordered and enjoined to implement the characterization and remediation plan approved by the Ohio EPA within seven (7) days of receiving notice of approval by the Ohio EPA, and to complete the plan in accordance with its terms and conditions.

15. Within seven (7) days of completion of each requirement set forth in Paragraphs 9, 10, and 14 of this Order, Defendants are ordered and enjoined to provide to the Ohio EPA the following documents:

- A. Notice in writing of the date or dates on which the requirement was completed, and
- B. With respect to Paragraph 9, a copy of the receipt(s) from the person that applied the pesticide or larvicide.

IX. SUBMITTAL OF DOCUMENTS

16. Defendants are enjoined and ordered to submit all documents, notices, and plans required under this Consent Order to the Ohio EPA at the following address:

Ohio Environmental Protection Agency
Southeast District Office
2195 Front Street
Logan, Ohio 43138
Attn: Clint Shuff, Division of Solid and Infectious Waste Management, or his successor.

X. RIGHT OF ENTRY

17. Defendants hereby agree to allow representatives of Ohio EPA to enter the Jackson tire dump to inspect, investigate, take samples and pictures, and examine or copy records in order to determine compliance with the terms of this Consent Order and R.C. Chapter 3734 and rules promulgated thereunder. Nothing in this Consent Order limits Ohio EPA's authority

under R.C. Chapter 3734 or any other statutory authority to determine compliance at the Jackson tire dump with this Consent Order, and R.C. Chapter 3734 and rules promulgated thereunder.

18. To the extent that any property to which access is required for the implementation of the requirements of this Consent Order is owned or controlled by persons other than Defendants, Defendants shall use their best efforts to secure from such persons access for Defendants and Ohio EPA, as necessary, to implement the requirements of this Consent Order. Copies of all access agreements obtained by Defendants shall be submitted to Ohio EPA within ten (10) days of receipt by Defendants. If any access required to effectuate this Consent Order is not obtained within thirty (30) days of the entry date of this Consent Order, or within thirty (30) days of the date that Ohio EPA notifies Defendants in writing that additional access beyond that previously secured is necessary, Defendants shall promptly notify Ohio EPA in writing of the steps Defendants have taken to obtain access. Ohio EPA may, as it deems appropriate, assist Defendants in obtaining access.

19. Paragraphs 17 and 18 of this Order shall not be construed to eliminate or restrict any State right to seek access to the Jackson tire dump which it may otherwise have under Federal or State law.

XI. STIPULATED PENALTIES

20. In the event that Defendants fail to meet any of the requirements set forth in Sections VII and VIII of this Order, Defendants 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, up to thirty (30) days - Twenty-five Dollars (\$25.00) per day for each requirement not met. For each day of each failure to meet a requirement, from thirty-one

(31) to sixty days (60) - Fifty Dollars (\$50.00) per day for each requirement not met. For each day of each failure to meet a requirement, from sixty-one (61) to ninety (90) days - One Hundred Dollars (\$100.00) per day for each requirements not met. For each day of each failure to meet a requirement, over ninety days (90) days - One Hundred Fifty Dollars (\$150.00) per day for each requirement not met.

21. Any payment required to be made under the provisions of Paragraph 20 of this Order shall be made by delivering a certified check in the amount owed, payable to the order of "Treasurer, State of Ohio", to Plaintiff State of Ohio at the following address:

Jena Suhadolnik, Administrative Assistant, or her successor
Office of the Attorney General of Ohio
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3428.

Defendants shall also state in writing the specific failure of the Consent Order requirement which was not complied with, and the date(s) of non-compliance. The payment of stipulated penalties by Defendants and the acceptance of such stipulated penalties by Plaintiff for specific failures or violations pursuant to this Section XI shall not be construed to limit Plaintiff's authority to seek additional relief or to otherwise seek judicial enforcement of this Consent Order.

XII. FUTURE DAMAGES

22. In the event that the State arranges for the cleanup of the Jackson tire dump in order to abate the nuisance Defendants have and are maintaining, whether funded by the State or by a third party as a credit project or supplemental environmental project, Defendants agree and it is ordered that the State shall be given a judgment lien against Defendants in the full amount of the costs of the cleanup plus interest of ten percent per year.

XIII. GENERAL PROVISIONS

23. This Consent Order shall be effective upon the date of entry by the Court.

24. 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 Defendants from the obligation created by this Consent Order.

XIV. AUTHORITY TO ENTER INTO THE CONSENT ORDER

25. The signatory for Defendant Fancher Industries, Inc. represents and warrants that he or she has been duly authorized to sign this document and so bind Defendant Fancher Industries, Inc. to all terms and conditions thereof.

XV. RETENTION OF JURISDICTION

26. This Court will retain jurisdiction of this action for the purpose of enforcing and administering Defendants' compliance with the terms and provisions of this Consent Order.

XVI. COSTS

27. Defendant is hereby ordered to pay all costs of this action.

**XVII. ENTRY OF CONSENT ORDER AND FINAL JUDGMENT ENTRY,
AND FINAL JUDGMENT BY CLERK**

28. Pursuant to Rule 58 of the Ohio Rules of Civil Procedure, upon signing of this Consent Order and Final Judgment Entry by the Court, the clerk is hereby directed to enter it upon the journal. Within three (3) 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.

IT IS SO ORDERED.

DATE

**JUDGE W. RICHARD WALTON
COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO**

APPROVED:

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



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Environmental Enforcement Section
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(614) 466-2766**

Attorneys for Plaintiff State of Ohio

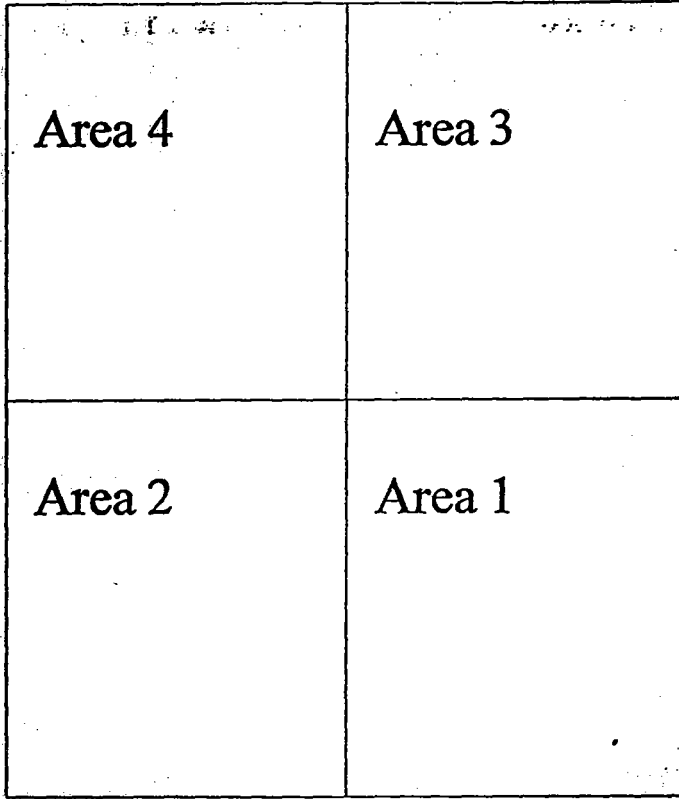


BRIAN S. FANCHER, Individually

**and as Authorized Representative of
Fancher Industries, Inc.
1857 Coles Boulevard
Portsmouth, Ohio 45662**

Defendants Pro Se

Exhibit 1



State Route 7, Athalia, Lawrence County, Ohio