

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO, ex rel. : CASE NO. CV97 11 2184
BETTY D. MONTGOMERY :
ATTORNEY GENERAL OF OHIO :
 :
Plaintiff, : JUDGE
 : FILED BUTLER CO.
vs. : COMMON PLEAS COURT
 :
JOHN M. HORN LUMBER CO. : DEC 01 1997
 : CINDY CARPENTER
Defendant. : CLERK OF COURTS

CONSENT ORDER AND FINAL JUDGMENT ENTRY

Plaintiff, State of Ohio, ex rel. Betty D. Montgomery, Attorney General of Ohio, having filed the Complaint in this action against Defendant to enforce Ohio's hazardous waste laws found in Chapter 3734 of the Revised Code (hereinafter "R.C.") and rules adopted thereunder; and Plaintiff and Defendant having consented to the entry of this Order;

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

I. DEFINITIONS

As used in this Consent Order:

"Approved Closure Plan" means a closure plan which has been approved by the Director of the Ohio EPA ("Director"). The approved closure plan may be a closure plan approved by the Director as submitted by Defendant, or a closure plan approved by the Director after being submitted by Defendant and modified by the Director.

"Closure Plan" means a plan which meets the requirements of Ohio Administrative Code (hereinafter "O.A.C.") Rules 3745-66-11 through 3745-66-20.

“Consent Order” or “Order” means this Consent Order and Final Judgment Entry and all appendices hereto. In the event of conflict between this Order and any appendix, the Order shall control.

“Contractor” means the individual(s) or company or companies retained by or on behalf of Defendants to undertake and complete the work required by this Consent Order.

“Defendant” means the John M. Horn Lumber Company, a corporation organized under the laws of the State of Ohio and currently in good standing.

“Director” means Ohio’s Director of Environmental Protection.

“Facility” refers to the location where the treatment, storage, disposal, or other placement of hazardous waste, as alleged in the complaint, was conducted and which facility is located at 1200 Dayton Street, Hamilton, Butler County, Ohio.

“Ohio EPA” means the Ohio Environmental Protection Agency.

“O.A.C.” means the Ohio Administrative Code.

“Plaintiff” means the State of Ohio by and through the Attorney General of Ohio.

“Post-Closure Plan” means a plan which meets the requirements of O.A.C. Sections 3745-66-17 through 3745-66-20.

“R.C.” means the Ohio Revised Code.

II. JURISDICTION AND VENUE

The Court has jurisdiction over the subject matter of this action, pursuant to R.C. Chapter 3734. and the rules adopted thereunder. This Court has jurisdiction over the parties. Venue is proper in this Court. The Complaint states a claim upon which relief can be granted.

III. PERSONS BOUND

The penalties provisions of this Consent Order shall apply to and be binding upon the Defendant to this action. The injunctive provisions of this Consent Order shall apply to and will be binding upon the Defendant, its agents, officers, employees, servants, assigns, successors in interest and any other person who is acting or who has acted in concert, privity or participation with them who receives actual notice of this Consent Order whether by personal service or otherwise. Defendant is ordered and enjoined to provide a copy of this Consent Order to each Contractor it employs to perform work itemized herein.

IV. SATISFACTION OF LAWSUIT

1. Except as otherwise provided in this Consent Order, compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability of Defendant to Plaintiff for all claims alleged in the Complaint. Plaintiff and Defendant are entering into this Consent Order in order to resolve disputed claims alleged in the Complaint. By entering into this Consent Order, Defendant does not admit any fact, violation of law or regulation or other liability alleged or implied in the Complaint or herein.

2. 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 relief for claims or conditions not alleged in the Complaint;
- (b) Seek 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 Defendant or against any other person under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. §9601, et. seq. and/or R.C. 3734.20 through 3734.27 to: (1) recover natural resource damages, and/or (2) to order the performance of, and/or recover costs for any removal, remedial or corrective activities not conducted pursuant to the terms of this Consent Order. However, nothing in this subparagraph shall be construed to allow the State of Ohio to pursue a claim against Defendant for money damages under CERCLA to the extent such claim has been satisfied by the State through this action;

(e) Take any action authorized by law against any person, including Defendant, to eliminate or mitigate conditions at the Facility which may present an imminent threat to the public health or welfare, or the environment.

3. Defendant reserves its rights to raise any defense it may have in the event Plaintiff alleges that Defendant is not in compliance with the terms of this Consent Order or in the event Plaintiff brings any other action or claim against Defendant, whether specifically reserved herein or otherwise. Nothing contained in this Consent Order shall be deemed to create any rights in or any obligations or liabilities to persons or entities not a party hereto. Nothing in this Consent Order shall be construed as an acknowledgment by the State that any defenses exist, whether in an action to enforce the terms of this Consent Order or in any other action or claim brought by the State against Defendant.

V. INJUNCTION

1. Defendant is ordered and enjoined to comply with all applicable provisions of the Ohio hazardous waste laws and rules as set forth in R.C. Chapter 3734 and O.A.C. Chapters

3745-50 through 3745-69.

Closure

2. Within thirty (30) days after entry of this Consent Order, Defendant is ordered and enjoined to submit to the Ohio EPA, at the addresses set forth in Article VI, a closure plan in accordance with O.A.C. 3745-66-10 through 3745-66-20 for the Facility.

3. Following review of the closure plan, if the Ohio EPA determines that the closure plan is deficient and gives Defendant written notice of the deficiencies in the closure plan, the Defendant is ordered and enjoined to submit to Ohio EPA a revised closure plan within thirty (30) days of receipt of the notice of deficiencies.

4. Following review of the revised closure plan, if the Ohio EPA determines that the revised closure plan is deficient, Ohio EPA may modify the revised closure plan and approve the revised closure plan as modified by Ohio EPA.

5. Promptly, but in no event later than ten days after receipt of notice of approval by the Ohio EPA of Defendant's closure plan, either as originally submitted, as revised, or as revised and modified, Defendant is ordered and enjoined to implement the approved closure plan in the manner and pursuant to time frames set forth in the approved closure plan and O.A.C. Rule 3745-66-13.

6. Within sixty days of completion of closure, the Defendant is ordered and enjoined to submit certification of closure to Ohio EPA, pursuant to O.A.C. Rule 3745-66-15.

Closure Cost Estimate Financial Assurance and Responsibility

7. Within thirty (30) days of entry of this Consent Order, Defendant is ordered and enjoined to submit to Ohio EPA detailed closure costs estimates which are calculated pursuant to

O.A.C. Rules 3745-66-42 and 3745-66-44, as applicable.

8. Within thirty (30) days of entry of this Consent Order, Defendant is ordered and enjoined to submit to Ohio EPA documentation of financial assurance for closure pursuant to O.A.C. Rules 3745-66-43 and 3745-66-45, as applicable.

9. Within thirty (30) days of entry of this Consent Order, Defendant is ordered and enjoined to submit to Ohio EPA documentation demonstrating financial responsibility pursuant to O.A.C. Rule 3745-66-47.

Groundwater Monitoring

10. Defendant is enjoined and ordered to maintain the four ground water monitoring wells presently at the facility until closure is complete. The wells shall be maintained in such a manner that Ohio EPA may, at any time during the closure period, obtain ground water level measurements and/or samples from the wells. If during closure activities any well is affected such that representative samples may not be obtained, notification shall be made within 24 hours to DHWM-SWDO.

11. Following completion of closure activities and prior to closure certification, Defendant is enjoined and ordered to properly seal the wells according to the guidance provided in the Ohio EPA's Technical Guidance Manual for Hydrogeologic Investigations and Ground Water Monitoring. Notification of intent to abandon any or all of the wells shall be reported to DHWM-SWDO at least 1 week prior to implementation.

Deed Restriction

12. Defendant is enjoined and ordered to execute, deliver, record and file within 10 days of entry of this Consent Order in the appropriate index in the Butler County Recorder's

Office a deed for the property upon which the Facility is located. The deed shall include all of the recitals, restrictions, conditions and requirements attached hereto as Attachment A, which attachment, recitals, restrictions, conditions and requirements are incorporated into this Consent Order as if rewritten herein.

VI. SUBMITTAL OF DOCUMENTS

Any documents required to be submitted to Ohio EPA pursuant to this Consent Order shall be submitted to the following addresses, or to such addresses as Ohio EPA may hereafter designate in writing:

Ohio Environmental Protection Agency
1800 Watermark Drive
Columbus, Ohio 43266-0149
Attn: Manager, Compliance Assurance Section

Division of Hazardous Waste Management Ohio EPA
Southwest District Office
401 East 5th Street
Dayton, Ohio 45402
Attn: Keith Champion, or his successor
Division of Hazardous Waste Management

VII. CIVIL PENALTY

Defendant is ordered and enjoined to pay to the State of Ohio a civil penalty in the amount of One Hundred Thousand Dollars (\$100,000.00). This amount shall be paid by delivering to Plaintiff, c/o Jena Suhadolnik or her successor, Administrative Assistant, at the Office of the Attorney General of Ohio, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, a certified check in that amount, payable to the order of "Treasurer, State of Ohio" within thirty (30) days from the date of entry of this Consent Order. This civil penalty shall be deposited into the hazardous waste clean-up fund created by

VIII. STIPULATED PENALTIES

1. If Defendant fails to meet any of the requirements of paragraphs number 1-3 and/or 5-12 of Article V of this Consent Order, then Defendant is immediately and automatically liable for and is ordered and enjoined to pay to Plaintiff a stipulated penalty as follows:

- (a) For each day of each failure to meet a requirement, up to thirty (30) days a requirement is due to be met - Two Hundred Fifty Dollars (\$250.00).
- (b) For each day of each failure to meet a requirement, from thirty-one (31) to sixty (60) days after a requirement is due to be met - Five Hundred Dollars (\$500.00).
- (c) For each day of each failure to meet a requirement, over sixty (60) days after a requirement is due to be met - One Thousand Dollars (\$1,000.00).

2. In addition, if Defendant fails to meet any of the requirements imposed upon it in Article VII or Article X, Defendant is immediately and automatically liable for and is ordered and enjoined to pay to Plaintiff a stipulated penalty as follows:

- (a) For each day of each violation of each requirement of Article VII or Article X of this Consent Order, Five Thousand Dollars (\$5,000.00).

3. Defendant is ordered and enjoined to pay any required stipulated penalty by delivering to Plaintiff, c/o Jena Suhadonik or her successor, Administrative Assistant, at the Office of the Attorney General of Ohio, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, a certified check in the amount of the stipulated penalty, payable to the order of "Treasurer, State of Ohio" within 30 days from the date of failure to meet the requirement. This penalty shall be deposited into the hazardous waste clean-up fund created by R.C. Section 3734.28. However, in the event Defendant appeals to the Environmental Review Appeals Commission the Director's action approving the hazardous

waste closure plan submitted by Defendant pursuant to this Consent Order, stipulated penalties shall continue to accrue during the pendency of the appeal provided, however, that Defendant shall not be liable for any stipulated penalties accrued as a result of Defendant's failure to meet the requirements of Article V, paragraph 5, to the extent that any requirement of the appealed closure plan which triggered the accrual of stipulated penalties is either vacated or modified by the ERAC, the Court of Appeals for Franklin County or other court having subject matter jurisdiction pursuant to R.C. Chapter 3745 that is final and either not appealed or not appealable.

4. The payment of stipulated penalties by Defendant and the acceptance of such stipulated penalties by Plaintiff pursuant to this Article shall not be construed to limit Plaintiff's authority to seek additional relief pursuant to R.C. Chapter 3734, including civil penalties under R.C. 3734.13, or to otherwise seek judicial enforcement of this Consent Order, for the same violation for which a stipulated penalty was paid or for other violations. Moreover, nothing contained in this Consent Order shall prevent the State from bringing an action in contempt for a violation of this Consent Order, even where Defendant is not liable for stipulated penalties under this Consent Order.

IX. COMPLIANCE WITH APPLICABLE LAWS, PERMITS AND APPROVALS

All activities undertaken by Defendant pursuant to this Consent Order shall be undertaken in accordance with the requirements of all applicable federal and state and local laws, rules and regulations, and permits. For work both on and off the Facility, Defendant is ordered and enjoined to 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 is

ordered and enjoined to promptly, but no later than ten days after its discovery thereof, notify the Ohio EPA of the potential conflict. Defendant is ordered and enjoined to 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 or state or local law or rule.

X. PLAINTIFF'S ENFORCEMENT COSTS

For Plaintiff's enforcement costs in investigating and prosecuting this case, Defendant is ordered and enjoined to reimburse the Attorney General's Office in the amount of Two Thousand Dollars (\$2,000.00). This reimbursement shall be paid by delivering a certified check for that amount payable to the order of "Treasurer, State of Ohio" within seven (7) days of entry of this Order in the manner provided for in Article VIII.

XI. POTENTIAL FORCE MAJEURE

1. If any event occurs which causes or may cause a delay of any requirement of this Consent Order, Defendant shall notify the Ohio EPA, Southwest District Office, 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 will be implemented. Defendant will adopt all reasonable measures to avoid or minimize any such delay.

2. In 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

beyond its control such as, by way of example and not limitation, acts 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 the Plaintiff 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 an action to enforce the terms and conditions of this Consent Order, if any, is commenced by the Plaintiff. At that time, the burden of proving that any delay was or will be caused by circumstances beyond the control of Defendant shall rest with 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 Paragraph 1 shall render this Paragraph 2 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 compliance date based on a particular incident does not mean that Defendant qualifies for an extension of a subsequent compliance date or dates. Defendant must make an individual showing of proof regarding each incremental step or other requirement for which an extension is sought.

XII. RETENTION OF JURISDICTION

This Court will retain jurisdiction of this action for the purpose of enforcing Defendant's compliance with this Consent Order.

XIII. TERMINATION

No sooner than twelve months after Defendant certifies closure in accordance with the

provisions of O.A.C. Rule 3745-66-12 and the provisions of this Consent Order, Defendant may move the Court, pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure, to terminate this Consent Order if Defendant can demonstrate that it has been in continuous compliance with the obligations of this Consent Order, including but not limited to the payment of all penalties and the performance of all injunctive relief. The Plaintiff takes no position at this time as to such motion and reserves any rights it may have to oppose the motion.

XIV. COSTS

Defendant is hereby ordered to pay the court costs of the action.

XV. ENTRY OF CONSENT ORDER AND JUDGMENT BY CLERK

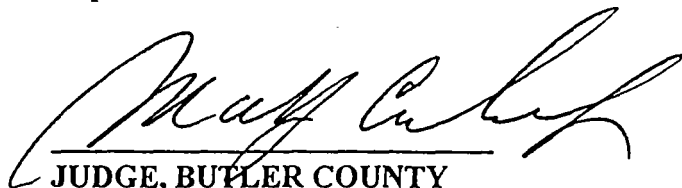
Upon signing of this Consent Order by the Court, the clerk is directed to enter it upon the journal. Within three days of entering the judgment upon the journal, the clerk is directed to serve upon all parties notice of the judgment and its date of entry upon the journal in the manner prescribed by Rule 5(B) of the Ohio Rules of Civil Procedure and note the service in the appearance docket.

XVI. AUTHORITY TO ENTER INTO THE CONSENT ORDER

Each signatory for a corporation represents and warrants that he/she has been duly authorized to sign this document and so bind the corporation to all terms and conditions thereof, and that he/she submits with this Consent Order an authenticated and certified resolution from the corporation establishing that he/she is so empowered.

IT IS SO ORDERED

December 1, 1997
DATE

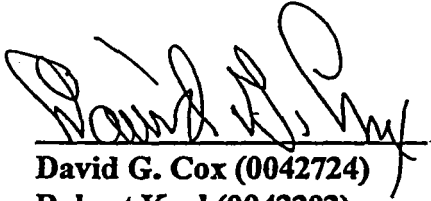


JUDGE, BUTLER COUNTY
COURT OF COMMON PLEAS

APPROVED:

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

By:



David G. Cox (0042724)

Robert Karl (0042292)

Assistant Attorneys General

Environmental Enforcement Section

30 East Broad Street, 25th Floor

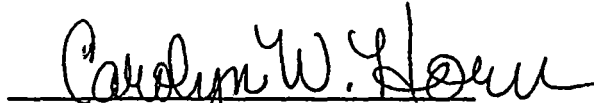
Columbus, Ohio 43215-3428

(614) 466-2766

Attorneys for Plaintiff

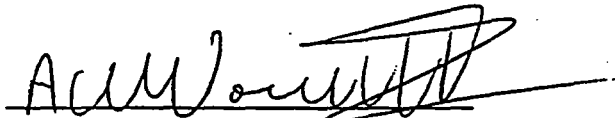
State of Ohio

By:



Authorized Representative of Defendant

John M. Horn Lumber Co.



A. Christian Worrell III (0030121)

Graydon, Head & Ritchey

1900 Fifth Third Center

511 Walnut Street

Cincinnati, Ohio 45202

Attorneys for John M. Horn Lumber Co.

DEED RESTRICTIONS

Pursuant to the Consent Order entered on _____, 199__, by the Butler County Court of Common Pleas in Case No. _____, State of Ohio ex rel. Montgomery, Plaintiff, v. Horn Lumber Company, Defendant, the Grantor, Horn Lumber Company, hereby provides public notice about, and imposes restrictions on, the following described real estate which shall hereinafter be referred to as the "Area," more particularly described as follows:

[metes and bounds definition of the Area]

The Grantor hereby imposes the following restrictions on the Area:

1.) The Area shall not be used for residential activities, but may be used for industrial activities. The term "residential activities" shall include, but not be limited to, the following:

- (a) Single and multi-family dwelling and rental units;
- (b) Day care centers and preschools;
- (c) Hotels and motels;
- (d) Educational (except as a part of industrial activities within the Area) and religious facilities;
- (e) Restaurants and other food and beverage services (except as a part of industrial activities within the Area);
- (f) Entertainment and recreational facilities (except as a part of industrial activities within the Area);
- (g) Hospitals and other extended care medical facilities; and
- (h) Transient or other residential facilities.

The term "industrial activities" shall include manufacturing, processing operations and office and warehouse use, including but not limited to production, storage and sales of durable goods and other non-food chain products and parking/driveway use.

2.) All of the above restrictions on the Area shall run with the land, inure to the benefit of the Director of Ohio EPA, and be binding upon the Grantor, its heirs,

successors, assigns, transferees, or any other owner of the Area. All of the above restrictions shall continue in perpetuity, subject to termination or modification as described below. In addition, it is the express, absolute and irrevocable intent of the Grantor that the legal and equitable interests associated with these deed restrictions remain separate and not be merged, and that the equitable interests be for the benefit of the Director of Ohio EPA. By this instrument, Grantor shall be estopped from ever denying the creation of these restrictions, and forever waives any right to challenge these restrictions.

3.) Any person may request written approval for a use of the Area which is not specifically permitted by the restriction set forth above in paragraph 1 by submitting a written petition, via certified mail, to the Director of Ohio EPA for termination or modification of this restriction. Any such request which constitutes a change in the specific prohibition may only be granted in the sole discretion of the Director of the Ohio EPA and based on the standards described below. In such event, the petition for modification or termination shall state the specific provision(s) sought to be modified or terminated and shall further include evidence demonstrating:

- (a) The Area meets Ohio's risk-based closure performance standard in effect at the time of such petition for a residential (or equivalent) land-use scenario; or
- (b) The Area has been sample tested and compared with background samples taken from land surrounding the Area which has been unaffected by past treatment, storage, or disposal of hazardous waste, and such data shows that current conditions present at the Area are not statistically greater than background conditions; or
- (c) The Area does not pose an unacceptable risk to human health or the environment.

4.) The petition for termination or modification will be considered by the Director of Ohio EPA only when it presents new and relevant information not previously considered prior to the imposition of this restriction by the Agency. The Director of Ohio EPA will issue a final determination based upon the criteria set forth in paragraph 3 above.

5.) For violation or breach of the foregoing use restriction, the Director of Ohio EPA shall have the right to proceed at law or in equity to compel compliance with the terms hereof or to obtain injunctive relief in order to prevent violation or breach of the foregoing use restriction. Failure to timely enforce the foregoing covenant and use restriction by any party shall not bar subsequent enforcement by such party and shall in no manner be deemed a waiver.

Fnd. Iron Pin

Lot 28776

16159

16160

16161

16162

16163

16164

16165

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16167

16168

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16172

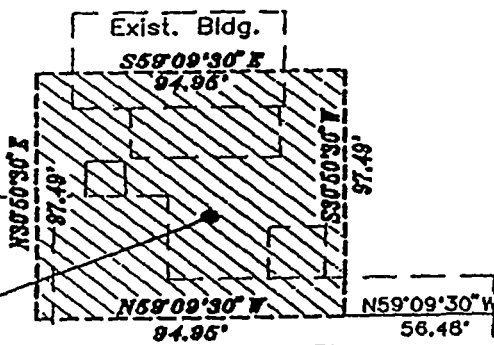
16173

BOND AVENUE

40' R/W

Lot 12825
The John Horn Lumber Co.
Blk. 1004, Pg. 620

Lot 12980
The John Horn Lumber Co.
Blk. 1004, Pg. 620



Limit Of Industrial
Use Deed Restriction
0.213 Ac.



Fnd. X-Notch

50' R/W

DAYTON STREET

JOB 95-187
SCALE 1" = 60'
DATE 11/12/97
T.K.T., P.S.

engineers planners surveyors



File name: J:/95/95187/M95187

LIMIT OF INDUSTRIAL USE
DEED RESTRICTION
LOT #12980, THIRD WARD,
CITY OF HAMILTON,
BUTLER COUNTY, OHIO