

FILED
MAR 17 1994
 PHE G. CANTAK
 STARK COUNTY OHIO
 CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS
 STARK COUNTY, OHIO**

STATE OF OHIO, ex rel.	:	CASE NO:
LEE FISHER,	:	
ATTORNEY GENERAL OF OHIO,	:	JUDGE:
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SMITH & NEPHEW, INC.	:	
	:	
Defendant.	:	

CONSENT ORDER

The Complaint in the above-captioned matter having been filed herein, and Plaintiff State of Ohio, by its Attorney General Lee Fisher, and Defendant Smith & Nephew, Inc. ("SNI") having consented to the entry of this Order,

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

I. DEFINITIONS

1. As used in this Consent Order, the following terms are defined as follows:
 - a. "Ohio EPA" means the Ohio Environmental Protection Agency and its agents, including the Canton City Health Department, Division of Air Pollution Control.

- b. "Permit to Install" has the same meaning as set forth in Ohio Administrative Code ("OAC") Chapter 3745-31.
- c. "Permit to Operate" has the same meaning as set forth in OAC Chapter 3745-35.
- d. "Facility" means SNI's manufacturing plant located at 1875 Harsh Avenue, S.E., Massillon, Ohio, which is operated by Smith & Nephew Perry, a division of SNI.

II. JURISDICTION AND VENUE

2. The Court has jurisdiction over the parties and the subject matter of this case. The Complaint states claims upon which relief can be granted against SNI pursuant to Chapter 3704 of the Ohio Revised Code ("O.R.C."). Venue is proper in this Court.

III. PARTIES

3. The provisions of this Consent Order shall apply to and be binding upon the parties to this action, their agents, officers, directors, employees, assigns, successors, and, pursuant to Rule 65 (D) of the Ohio Rules of Civil Procedure, any person acting in concert or participation with any of them who receives actual notice of the Consent Order whether by personal service or otherwise.

IV. SATISFACTION OF LAWSUIT

4. Plaintiff alleges in its Complaint that Defendant SNI has committed violations of the requirements of O.R.C. Chapter 3704 and the regulations promulgated thereunder at its Facility. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability of SNI for all claims under such laws and regulations which have been alleged in the Complaint.

5. Nothing in this 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 date of entry of this Consent Order. Such relief may include, but is not limited to, any appropriate administrative, civil, and/or criminal enforcement action that seeks injunctive, monetary, and other relief against Defendant SNI.

6. Nothing in this Consent Order shall be construed to relieve the Defendant of its rights and obligations to comply with applicable federal, state, or local statutes, regulations, or ordinances.

V. PERMANENT INJUNCTION

7. SNI agrees to and is hereby enjoined and ordered to immediately and permanently comply with any applicable requirements of O.R.C. Chapter 3704 and the rules adopted thereunder at the Facility. Specifically, SNI agrees to refrain and is hereby permanently enjoined from "installing" or "modifying" any "air contaminant source", as those terms are defined in OAC Rule 3745-31-01(I), (J), and (D), respectively, at its Facility without first applying for and obtaining a Permit to Install from the Director of Ohio EPA in accordance with OAC Rule 3745-31-02(A). Additionally, except as authorized under O.R.C section 3704.03(F), SNI agrees to refrain and is hereby permanently enjoined from operating any "air contaminant source", as that term is defined in O.A.C. Rule 3745-35-01(B)(1), at its Facility without first applying for and obtaining a Permit to Operate from Ohio EPA in accordance with OAC rule 3745-35-02(A). Further, SNI agrees and is hereby permanently and

immediately enjoined and ordered to comply with all terms and conditions of all Permits to Install and Permits to Operate which are issued to it.

VI. PAYMENT PURSUANT TO ORC SECTION 3704.06

8. Pursuant to O.R.C. §3704.06, SNI shall pay to the State of Ohio the sum of one million, four hundred thousand dollars (\$1,400,000.00). The total payment is payable in three installments as follows:

- a. SNI shall pay \$466,667 to the Plaintiff by no later than thirty (30) days after entry of this Consent Order.
- b. SNI shall pay a second payment of \$466,667 to Plaintiff by no later than six (6) months after entry of this Consent Order.
- c. SNI shall pay a third payment of \$466,666 to Plaintiff by no later than twelve (12) months after entry of this Consent Order.

9. Such amount shall be paid by delivering certified checks totalling that amount, payable to the order of "Treasurer, State of Ohio", to the Administrative Assistant, Office of the Ohio Attorney General, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43266-0410.

VII. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

10. In order to compensate Plaintiff for the alleged damages to the air resources of the State of Ohio arising from the violations set forth in the Complaint, SNI agrees to and has funded or agrees to and is hereby enjoined to fund the following supplemental environmentally beneficial projects in the following manner:

- a. SNI has contributed twenty-thousand dollars (\$20,000.00) to the Stark County Regional Planning Commission for the costs of conducting an air quality redesignation study, in an effort to have Stark County

redesignated as an ozone attainment area under the Clean Air Act.

- b. SNI shall contribute \$295,625 to the Ohio Department of Natural Resources, Division of Forestry, Forestry Development Fund ("Fund") for the purpose of funding urban area tree-planting project(s) in Stark County, Ohio. Such contribution shall be in the form of certified checks made payable to the Ohio Department of Natural Resources, Division of Forestry, and such checks shall specify Fund No. 4B8. Such contribution shall be made according to the following schedule:
 - a. SNI shall make an initial contribution of \$98,542 to the Fund by no later than thirty (30) days after entry of this Consent Order.
 - b. SNI shall make a second contribution to the Fund in the amount of \$98,542 by no later than six (6) months after entry of this Consent Order.
 - c. SNI shall make a third contribution to the Fund in the amount of \$98,541 by no later than twelve (12) months after entry of this Consent Order.

VIII. STIPULATED PENALTIES

11. In the event that SNI fails to meet the deadlines set forth in paragraphs 8, 10, and 16, Defendant SNI is liable for and shall immediately pay stipulated penalties in accordance with the following schedules for each failure to meet a deadline:

- a. For each day of each failure to meet the deadline, up to thirty (30) days - One Thousand Dollars (\$1,000.00) per day.
- b. For each day of each failure to meet the deadline, from thirty-one (31) to sixty (60) days -- Three Thousand Dollars (\$3,000.00) per day.
- c. For each day of each failure to meet the deadline, over sixty (60) days -- Six Thousand Dollars (\$6,000.00) per day.

12. In the event SNI violates the permanent injunction set forth in

paragraph 7 herein relating to the installation, modification, and operation of air contaminant sources without the necessary permits, SNI shall be liable for and shall immediately pay stipulated penalties in accordance with the following schedule:

- a. For each air contaminant source installed or modified without first obtaining a Permit to Install, SNI shall pay a stipulated penalty of Five Thousand Dollars (\$5,000.00).
- b. For each air contaminant source operated in violation of O.R.C. Chapter 3704 and OAC Chapter 3745-35, SNI shall pay a stipulated penalty in accordance with the following schedule:
 1. For each day of operation without a permit, up to thirty (30) days – One Thousand Dollars (\$1,000.00) per day.
 2. For each day of operation without a permit, from thirty-one (31) to sixty (60) days – One Thousand Five-Hundred Dollars (\$1,500.00) per day.
 3. For each day of operation without a permit, over sixty (60) days – Two Thousand Dollars (\$2,000.00) per day.

Such penalty shall be paid by delivering a certified check in the appropriate amount, payable to the order of "Treasurer, State of Ohio", to the Administrative Assistant, Office of the Ohio Attorney General, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43266-0410. The payment of stipulated penalties by SNI and the acceptance of such stipulated penalties by the State for specific violations pursuant to this paragraph shall not be construed to limit the State's authority to seek additional relief pursuant to O.R.C. Chapter 3704 or to otherwise seek judicial enforcement of this Consent Order; provided, however, that if the State accepts the payment of a stipulated penalty for a violation, such stipulated penalty shall constitute the maximum civil penalty which can be

obtained by the State for such violation pursuant to O.R.C. Section 3704.06(C).

Notwithstanding any other language in this paragraph, in the event of a violation the State may choose to refuse SNI's tendered payment of a stipulated penalty for such violation and seek civil penalties for such violation in accordance with O.R.C. Section 3704.06(C).

13. The specific provisions of this Consent Order set forth in paragraph 12 requiring the payment of stipulated penalties may be terminated if SNI has continuously complied with this Order for a period of three years and all penalties and costs imposed by this Order have been paid. Such termination of stipulated penalties shall occur only through order of this Court, upon application by any party, and only after a demonstration that the conditions set forth in this paragraph have been met.

IX. POTENTIAL FORCE MAJEURE

14. In any proceeding to enforce any of the provisions of this Consent Order, including proceedings to enforce the stipulated penalty provisions set forth at paragraphs 11 and 12, SNI may raise at that time the question of whether 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, unusually severe weather conditions, strikes, acts of war or civil disturbances, or conflicting orders of any regulatory agencies or courts. 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 an enforcement action, if any, is commenced. Acceptance of this Consent Order without a force majeure clause does not constitute a waiver by SNI of any rights or defenses it may have under applicable law or equity.

X. RETENTION OF JURISDICTION

15. The Court will retain jurisdiction of this action for the purpose of enforcing this Order and resolving any disputes hereunder. The parties expressly reserve any rights they may have pursuant to Rule 60 (B) of the Ohio Rules of Civil Procedure.

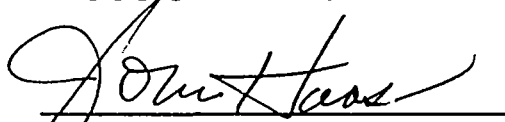
XI. ATTORNEY GENERAL'S ENFORCEMENT COSTS

16. Defendant SNI hereby agrees and is enjoined to pay to the Ohio Attorney General's Office a sum of Ten Thousand Dollars (\$10,000.00) to reimburse the Attorney General's expenses and time incurred in this matter. Such costs shall be paid by delivering a certified check in that amount, payable to the order of "Treasurer, State of Ohio", to the Administrative Assistant, Office of the Ohio Attorney General, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43266-0410. Such costs shall be paid no by later than thirty (30) days after entry of this Order.

XII. COSTS

17. SNI is hereby ordered to pay any court costs of this action.

IT IS SO ORDERED.



JUDGE, Stark County
Court of Common Pleas

3/11/94
DATE

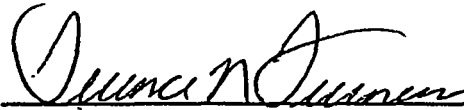
Approved:

LEE FISHER
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