

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In The Matter Of:

Terry L. Brenneman, and  
Tub Mill Farms, Inc.

Solid Waste Management Act

Elk Lick Township  
Somerset County  
Enf. ID No. 316 568 P

CONSENT ORDER AND AGREEMENT

This Consent Order and Agreement is entered into this 27<sup>th</sup> day of October,  
2014, by and between the Commonwealth of Pennsylvania, Department of Environmental  
Protection ("Department") and Terry L. Brenneman and Tub Mill Farms, Inc.

The Department has found and determined the following:

- A. The Department is the agency of the Commonwealth with the duty and authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 – 6018.1003 ("SWMA"), Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-7 ("Administrative Code"), and the rules and regulations promulgated thereunder.
- B. Terry L. Brenneman ("Terry Brenneman") is an individual residing in Somerset County who maintains a mailing address of 120 Post Office Street, Boynton, PA 15532, and/or P.O. Box 136, Boynton, PA 15532.
- C. Tub Mill Farms, Inc. ("Tub Mill") is a Delaware corporation that maintains a business address of 120 Post Office Street, Boynton, PA 15532, and/or P.O. Box 136, Boynton, PA 15532. Terry Brenneman is and has been the President, owner and operator of Tub Mill on

the dates set forth herein. Tub Mill is in the business of procuring, storing, processing, disposing, and selling used railroad ties and utility poles. Tub Mill operated a facility on a parcel of ground in Elk Lick Township, Somerset County, Tax Parcel ID No. S14-012-009-00 ("Tub Mill Site"), from approximately 2002 to 2011.

D. On or about June 10, 2009, April 22, 2010, May 24, 2011, and November 3, 2011, the Department conducted inspections at the Tub Mill Site. On or about said dates, Tub Mill and Terry Brenneman were causing and directing the sorting, sizing, removing of scrap metal from, and the stacking/piling of used railroad ties and utility poles; and storage of piles of short pieces, split pieces, rotted pieces, and shredded pieces of used utility poles and railroad ties. Used railroad ties and utility poles, piles of short pieces, split pieces, rotted, shredded and ground pieces of used railroad ties and utility poles remain on the Tub Mill Site and have been stored on the site for more than one year. Previously used utility poles and railroad ties and any scraps or cuttings therefrom are "residual waste" as that term is defined in Section 103 of the SWMA, 35 P.S. § 6018.103. The sorting, grading, stockpiling, sizing, removing of scrap metal from, and shredding of waste utility poles and railroad ties is "processing," and Tub Mill's and Terry Brenneman's operations constituted a residual waste "transfer facility" as those terms are defined in 25 Pa. Code § 287.1.

E. The Department has not issued an authorization for the acceptance, processing, storage or disposal of solid waste, or the operation of a transfer facility, on the Tub Mill Site.

F. On or about the dates set forth in Paragraph D, Terry Brenneman and Tub Mill transported and caused to be transported residual waste to the Tub Mill Site.

G. On or about the dates set forth in Paragraph D, Tub Mill and Terry Brenneman processed and disposed of solid waste and directed others to do so at the Tub Mill Site, a facility

that did not and does not possess a permit from the Department authorizing the processing and disposal of said waste, in violation of Sections 302, 303(a)(1), and 610(1), (4), (6) and (9) of the SWMA, 35 P.S. §§ 6018.302, 6018.303(a)(1), and 6018.610(1), (4), (6) and (9).

H. The conduct described in Paragraphs D, F, and G constitutes a public nuisance and unlawful conduct pursuant to Sections 303(a), 601 and 610(1), (4), (6), and (9) of the SWMA, 35 P.S. §§ 6018.303(a), 6018.601 and 6018.610(1), (4), (6), and (9).

I. As of the date of this Consent Order and Agreement, Terry Brenneman and Tub Mill (collectively, the "Brenneman Parties") do not have access to the Tub Mill Farms Site.

After full and complete negotiation of all matters set forth in this Consent Order and Agreement and upon mutual exchange of covenants contained herein, the parties desiring to avoid litigation and intending to be legally bound, it is hereby ORDERED by the Department and AGREED to the Brenneman Parties as follows:

1. Authority. This Consent Order and Agreement is an Order of the Department authorized and issued pursuant to Sections 104(7) and 602 of the SWMA, 35 P.S. §§ 6018.104(7) and 6018.602, and Section 1917-A of the Administrative Code, 71 P.S. § 510-17.

2. Findings.

a. The Brenneman Parties agree that the findings in Paragraph A through I are true and correct and, in any matter or proceeding involving the Brenneman Parties and the Department, the Brenneman Parties shall not challenge the accuracy or validity of these findings.

b. The parties do not authorize any other persons to use the findings in this Consent Order and Agreement in any matter or proceeding.

3. Corrective Action.

a. Cessation of Acceptance of Solid Waste. Upon the execution of this Consent Order and Agreement, the Brenneman Parties shall immediately cease accepting or transporting railroad ties, utility poles or any solid waste to the Tub Mill Site or any other unpermitted facility.

b. Tub Mill Site. Upon obtaining reasonable access to the Tub Mill Site as described in Paragraph 3.b.iv, below, Tub Mill and Terry Brenneman shall, jointly and severally, ensure that all of the following activities have been fully completed:

i. Remove all ties, poles and related material (the "Tub Mill Material," as defined below) from the Tub Mill Site, and investigate and if necessary remediate soil contamination from the site, as set forth below, within six (6) years of execution of this Consent Order and Agreement. The Tub Mill Material does not include existing railroad tracks, whether abandoned or in-use, installed in the ground for the purpose of carrying trains or rail-cars.

ii. Within six (6) months of the date of the Consent Order and Agreement, provide a detailed description of the number and estimated linear footage of all previously used railroad ties, previously used utility poles, and volume in cubic yards of all wood materials derived therefrom (including but not limited to ground, shredded or mulched treated wood and cut ends) (collectively, the "Tub Mill Material") to the Department for the Department's approval ("Site Manifest").

iii. The Brenneman Parties shall remove the Tub Mill Materials from the Tub Mill Site, and conduct related activities, as follows:

A. The Brenneman Parties will use their best efforts to sell as much of the Tub Mill Materials as is feasible. Within thirty (30) months from the date of the Consent Order and Agreement, they shall hold public auctions, with the first public auction occurring within twelve (12) months of the date of the Consent Order and Agreement;

B. Within five (5) years of the date of the Consent Order and Agreement, remove all Tub Mill Material from the Tub Mill Site;

C. The Brenneman Parties shall timely submit to the Department written quarterly reports within fourteen (14) days of the end of each calendar quarter (March 31, June 30, September 30 and December 31) during the term of this Consent Order and Agreement commencing with the quarter ending December 31, 2014 ("Quarterly Reports"); the Quarterly Reports shall describe all removal and remediation activities undertaken at the Tub Mill Site during that quarter, including a written summary and legible copies of all documentation regarding all sales, disposals, or other transfers of all Tub Mill Material during that calendar quarter, shall be signed by Terry Brenneman, and shall be deemed to be submitted by Terry Brenneman pursuant to 18 Pa. C.S. Section 4904 (Unsworn Falsification to Authorities);

D. In addition to the Quarterly Reports required under Paragraph 3 (iii)(C), above, the Brenneman Parties shall submit to the Department a written accounting of all compensation received or due from anyone from the sale or transfer of any Tub Mill Materials on a Department-approved form ("Monthly Accounting"). The Monthly Accounting shall include the date of transfer, the transferee's name, and a description of and the value of all compensation received or due. The Monthly Accounting shall be received by the Department on or before the tenth (10<sup>th</sup>) day of each calendar month, beginning with the first

month after complete execution of this Consent Order and Agreement, shall be signed by Terry Brenneman, and shall be deemed to be submitted by Terry Brenneman pursuant to 18 Pa. C.S. Section 4904 (Unsworn Falsification to Authorities);

E. All Tub Mill Material not sold shall be disposed of at a facility permitted to process, store, and/or dispose thereof, or sold and physically transferred to parties who put the materials to prompt lawful reuse.

iv. The Brenneman Parties shall, during the three (3) months following execution of this Consent Order and Agreement and thereafter if directed by the Department, use their best efforts to obtain reasonable access to the Tub Mill Site from the site owner for the purpose of conducting the activities set forth in Paragraph 3, and shall contemporaneously provide documentation to the Department of all such efforts. Such reasonable access shall include commercially reasonable provisions for liability protection, and assurances of non-interference with such activities by third-parties including the site owner; provided, however, that the Brenneman Parties shall allow and cooperate with the efforts of any third-party who has the Department's written consent to enter and perform removal or remedial activities on the Site.

c. Funding of material removal and remediation. The Brenneman Parties shall, within forty-five (45) days of execution of this Consent Order and Agreement, establish an escrow account ("Escrow Account"), with terms and conditions and with an institution or person approved by the Department in writing, and shall deposit the gross proceeds from all private or public sales (including but not limited to auctions) of the Tub Mill Material at or from the Tub Mill Site into the Escrow Account.

i. The Escrow Account funds shall be held exclusively for the purpose of funding the lawful removal and disposal of Tub Mill Material from the Tub Mill Site and/or the investigation and removal of any contaminated soil, as provided in sub-paragraphs "e" and "f" below, and payment of any stipulated civil penalties due hereunder.

ii. The failure of the sales proceeds to be satisfactory to accomplish removal, investigation and cleanup shall not be a defense or limitation to the Brennehan Parties' responsibility to accomplish the obligations in this Consent Order and Agreement.

iii. After the complete removal of the Tub Mill Material, and the confirmation of soil attainment as set forth in sub-paragraph "f" below, the payment to the Department of any stipulated penalties due hereunder, and all other required compliance requirements of this Consent Order and Agreement is confirmed in writing by the Department, any funds that remain in the Escrow Account shall be distributed to the Brennehan Parties.

iv. The Escrow Account shall specify that funds shall be disbursed solely upon the Department's written direction. The Department will approve disbursement of funds from the Escrow Account if the Brennehan Parties demonstrate to the Department's satisfaction (and all requests must be accompanied by third-party documentation, such as fuel receipts, mechanics' receipts, customer invoices, waste disposal facility invoices/receipts) that such expenditures were for the following authorized purposes:

A. Reasonable and customary expenses for a Department-approved auctioneer for auctions of the Tub Mill Materials from the Tub Mill Site;

B. Fuel costs and maintenance solely incurred for equipment used at the Tub Mill Site for purposes of compliance with this Consent Order and Agreement.

as well as transportation costs to move the Tub Mill Materials to a disposal facility or to a customer's location;

C. Costs for disposal of Tub Mill Materials at a site permitted to accept such material;

D. Soil testing and soil remediation costs necessary under the Department-approved Soil Sampling Plan and Soil Standard Attainment as set forth below; and

E. Costs for the employment of individuals (other than Terry Brenneman) solely for the purposes outlined in this agreement at reasonable rates and amounts.

d. The Brenneman Parties shall comply with and not cause or allow a breach of the requirements of any access agreement once such agreement is entered into.

e. Soil Sampling Plan. Within thirty (30) days of the completion of the removal of all Tub Mill Materials from the Tub Mill Site, the Brenneman Parties shall submit to the Department for approval a soil sampling plan prepared by a qualified third-party, for all areas previously used for storage and/or processing of the railroad ties, utility poles, ends and treated wood mulch or ground treated wood ("Soil Plan"). Within thirty (30) days of Department's approval of the Soil Plan, the Brenneman Parties shall implement the Soil Plan as approved or modified by the Department by having soil samples collected by a qualified third-party and submitted to a laboratory accredited by the Department, and submit analyses of sampling to the Department within seven (7) days of receipt of the results.

f. Soil Standard Attainment. Within thirty (30) days of receipt of the sampling results, the Brenneman Parties shall either demonstrate attainment at the Tub Mill Site of a statewide health standard suitable for the Tub Mill Site pursuant to the provisions of the Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§6026.101-6026.908 based on



the results of the sampling performed under Paragraph 3.e, or select and attain an acceptable alternate remediation standard based on additional remediation and/or deed restrictions tied to the future use of the land. The sampling and attainment set forth in Paragraphs 3.e and 3.f shall not exceed six (6) months in duration.

g. Withdrawal of pending appeal(s). Within five (5) business days of complete execution of this Consent Order and Agreement, the Brenneman Parties shall withdraw with prejudice the consolidated appeals docketed at the Environmental Hearing Board as follows:

*Terry Brenneman, L&K Industries, Inc., and Tub Mill Farms, Inc. v. DEP,*  
EHB Dkt. No. 2012-008-M (Consolidated with 2012-009-M); and,

4. Stipulated Civil Penalties:

a. In the event the Brenneman Parties, singularly or collectively, fail to comply in a timely manner with any requirement of Paragraph 3, the Brenneman Parties shall be in violation of this Consent Order and Agreement and, in addition to other applicable remedies, shall, jointly and severally, pay a civil penalty in the amount of \$250.00 per day for each violation.

b. Stipulated civil penalty payments shall be payable monthly on or before the fifteenth day of each succeeding month. All payments to the Department required in this Consent Order and Agreement shall be by money order, bank check, certified check, or other means approved by the Department, made payable to "Commonwealth of Pennsylvania, Solid Waste Abatement Fund" and sent to:

Michael G. Forbeck, Regional Manager, Waste Management  
Pennsylvania Department of Environmental Protection  
400 Waterfront Drive  
Pittsburgh, PA 15222-4745

c. Any payment under this paragraph shall neither waive the Brenneman Parties' duty to meet their obligations under this Consent Order and Agreement nor preclude the Department from commencing an action to compel the Brenneman Parties' compliance with the terms and conditions of this Consent Order and Agreement. The payment resolves only the Brenneman Parties' liability for civil penalties arising from the violations of this Consent Order and Agreement for which the payment is made.

d. Stipulated civil penalties shall be due automatically and without notice.

5. Additional Remedies.

a. In the event the Brenneman Parties, singularly or collectively, fail to comply with any provision of this Consent Order and Agreement, the Department may, in addition to the remedies prescribed herein, pursue any remedy available for a violation of an order of the Department, including an action to enforce this Consent Order and Agreement.

b. The remedies provided by this paragraph and Paragraph 4 (Stipulated Civil Penalties) are cumulative and the exercise of one does not preclude the exercise of any other. The failure of the Department to pursue any remedy shall not be deemed to be a waiver of that remedy. The payment of a stipulated civil penalty, however, shall preclude any further assessment of civil penalties for the violation for which the stipulated penalty is paid.

6. Reservation of Rights. The Department reserves the right to require additional measures to achieve compliance with applicable law. The Brenneman Parties reserve the right to challenge any action which the Department may take to require those measures.

7. Liability of the Brenneman Parties. The Brenneman Parties shall be jointly and severally liable for any violations of the Consent Order and Agreement, including those caused by, contributed to, or allowed by his, her, and/or its officers, agents, employees, or contractors.

8. Transfer of Site. The duties and obligations under this Consent Order and Agreement shall not be modified, diminished, terminated or otherwise altered by the transfer of any legal or equitable interest in the Tub Mill Site, or any part thereof.

9. Correspondence with Department. All correspondence with the Department concerning this Consent Order and Agreement shall be addressed to:

Michael G. Forbeck  
Program Manager, Waste Management  
400 Waterfront Drive, Pittsburgh, PA 15222-4745  
412-442-4000, Fax 412-442-4194

10. Correspondence with the Brenneman Parties. All correspondence with The Brenneman Parties concerning this Consent Order and Agreement shall be addressed to:

For Terry Brenneman and Tub Mill:  
Terry Brenneman  
120 Post Office Street  
Boynton, PA 15532

The Brenneman Parties shall notify the Department whenever there is a change in the contact person's name, title, or address. Service of any notice or any legal process for any purpose under this Consent Order and Agreement, including its enforcement, may be made by mailing a copy by first class mail to the above address.

11. Force Majeure.

a. In the event that the Brenneman Parties are prevented from complying in a timely manner with any time limit imposed in this Consent Order and Agreement solely because of a strike, fire, flood, act of God, or other circumstance beyond the Brenneman Parties' control and which the Brenneman Parties, by the exercise of all reasonable diligence, are unable to prevent, then the Brenneman Parties may petition the Department for an extension of time. An increase in the cost of performing the obligations set forth in this Consent Order and Agreement

shall not constitute circumstances beyond the Brenneman Parties' control. The Brenneman Parties' economic inability to comply with any of the obligations of this Consent Order and Agreement shall not be grounds for any extension of time.

b. The Brenneman Parties shall only be entitled to the benefits of this paragraph if they notify the Department within five (5) working days by telephone and within ten (10) working days in writing of the date they or any of them become aware or reasonably should have become aware of the event impeding performance. The written submission shall include all necessary documentation, as well as a notarized affidavit from an authorized individual specifying the reasons for the delay, the expected duration of the delay, and the efforts which have been made and are being made by the Brenneman Parties to mitigate the effects of the event and to minimize the length of the delay. The initial written submission may be supplemented within ten working days of its submission. The Brenneman Parties' failure to comply with the requirements of this paragraph specifically and in a timely fashion shall render this paragraph null and of no effect as to the particular incident involved.

e. The Department will decide whether to grant all or part of the extension requested on the basis of all documentation submitted by the Brenneman Parties and other information available to the Department. In any subsequent litigation, the Brenneman Parties shall have the burden of proving that the Department's refusal to grant the requested extension was an abuse of discretion based upon the information then available to it.

12. Severability. The paragraphs of this Consent Order and Agreement shall be severable and should any part hereof be declared invalid or unenforceable, the remainder shall continue in full force and effect between the parties.

13. Entire Agreement. This Consent Order and Agreement shall constitute the entire integrated agreement of the parties. No prior or contemporaneous communications or prior drafts shall be relevant or admissible for purposes of determining the meaning or extent of any provisions herein in any litigation or any other proceeding.

14. Attorney Fees. The parties shall bear their respective attorney fees, expenses and other costs in the prosecution or defense of this matter or any related matters, arising prior to execution of this Consent Order and Agreement.

15. Modifications. No changes, additions, modifications, or amendments of this Consent Order and Agreement shall be effective unless they are set out in writing and signed by the parties hereto.

16. Titles. A title used at the beginning of any paragraph of this Consent Order and Agreement may be used to aid in the construction of that paragraph, but shall not be treated as controlling.

17. Hazardous Sites Cleanup Act. The Brenneman Parties agree that failure to comply with the provisions of Paragraph 3 of this Consent Order and Agreement constitutes a failure to comply with an "enforcement action" as provided in Section 1301 of the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, 35 P.S. § 6020.1301.

18. Decisions Under Consent Order. Any decision which the Department makes under the provisions of this Consent Order and Agreement, including a notice that stipulated civil penalties are due, is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa. C.S. § 101. Any objection which the Brenneman Parties may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

19. Termination. The obligations in this Consent Order and Agreement shall terminate when the Department determines that all of the obligations have been complied with, and all funds due to the Department have been paid, or at such other time that the Department determines that termination of this Consent Order and Agreement would be in the best interests of the environment.

20. Orders. Upon complete execution and upon the Brenneman Parties' compliance with Paragraph 3.g hereof, this Consent Order and Agreement shall supersede the following:

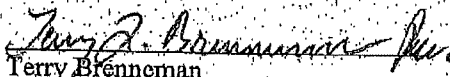
- a. To the extent not previously done, the Administrative Order dated December 15, 2011, directed to Terry Brenneman; and,
- b. The Administrative Order dated December 15, 2011, directed to Tub Mill regarding the Tub Mill Site.

21. Execution of Agreement. This Consent Order and Agreement may be signed in counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument. Facsimile signatures shall be valid and effective.

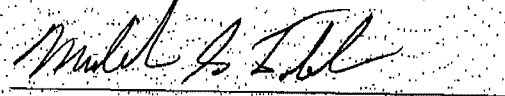
IN WITNESS WHEREOF, the parties hereto have caused this Consent Order and Agreement to be executed by their duly authorized representatives. The undersigned representatives of the Brenneman Parties certify under penalty of law, as provided by 18 Pa. C.S. § 4904, that they are authorized to execute this Consent Order and Agreement on behalf of the Brenneman Parties; that the Brenneman Parties consent to the entry of this Consent Order and Agreement as a final ORDER of the Department; and that the Brenneman Parties hereby knowingly waive the right to appeal this Consent Order and Agreement and to challenge its content or validity, which rights may be available under Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514; the Administrative Agency Law,

2 Pa. C.S. § 103(a) and Chapters 5A and 7A; or any other provisions of law. Signature by the Brenneeman Parties' attorney certifies only that the agreement has been signed after consulting with counsel.

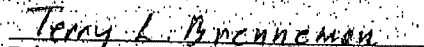
FOR TERRY BRENNEMAN:


  
Terry Brenneeman

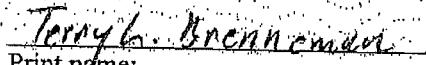
FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION:

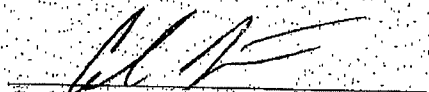
  
Michael G. Forbeck  
Regional Manager  
Waste Management

FOR TUB MILL FARMS, INC.:

  
Print name: Terry Brenneeman  
President

  
Richard T. Watling  
Assistant Counsel

  
Print name:  
Secretary or Treasurer

  
Carl Walker Metzger  
Attorney for Terry Brenneeman and  
Tub Mill Farms