

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO

P.F

STATE OF OHIO, ex rel. : Case No. 89-3841
ANTHONY J. CELEBREZZE, JR. :
ATTORNEY GENERAL OF OHIO : Judge Brown

Plaintiff,

-vs-

DAYTON PAINT & COATINGS,
INC. et al.,

Defendants.

CONSENT ORDER BETWEEN THE
STATE OF OHIO AND DAYTON
PAINT & COATINGS, INC.,
TIMOTHY A. BLASE AND
STANLEY D. HARDYAL

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The Plaintiff, State of Ohio, ex rel. Anthony J. Celebrezze, Jr., Attorney General of Ohio ("State" or "Plaintiff"), having filed the Complaint in this action against Defendants, Dayton Paint & Coatings, Inc., Timothy A. Blase, Stanley D. Hardy, and K. A. Pendleton Co., Inc., at the request of the Director of the Ohio Environmental Protection Agency ("OEPA" or "Ohio EPA"), to enforce the State of Ohio's hazardous waste laws and the rules promulgated thereunder concerning the Defendants' alleged waste handling practices at the Dayton Paint & Coatings, Inc. facility located at 213 North Beckel Street, Dayton, Ohio 45403 (hereinafter the "facility"), with the case against Defendant K. A. Pendleton Co., Inc. still proceeding along a normal litigation course, and Plaintiff and Defendants Dayton Paint & Coatings, Inc., Timothy A. Blase and Stanley D. Hardy having consented to entry of this Order;

THEREFORE, without trial or admission of any issue of law or of fact, upon the consent of the Plaintiff and Defendants, Dayton Paint & Coatings, Inc., Timothy A. Blase and Stanley D. Hardy hereto, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. PERSONS BOUND

The provisions of this Consent Order shall apply to and be binding upon Plaintiff State of Ohio; Defendant Dayton Paint & Coatings, Inc. ("Dayton Paint"), its agents, officers, employees, assigns, successors, and predecessors in interest; Timothy A. Blase ("Blase"); and, where specifically stated, Stanley D. Hardyal ("Hardyal"). Said provisions shall in no way apply to and be binding upon Defendant K. A. Pendleton Co., Inc. Defendant Dayton Paint shall provide a copy of this Consent Order to each consultant or contractor it employs to perform the work referenced herein. Defendant Dayton Paint shall also provide a copy of this Consent Order to all current and future employees of Dayton Paint & Coatings, Inc. and to any independent contractor employed to handle, treat and/or dispose of wastes generated by Dayton Paint & Coatings, Inc. until such time as Defendant Dayton Paint certifies to the Ohio EPA, pursuant to Ohio Administrative Code ("O.A.C.") Rule 3745-66-15, that all areas of the Dayton Paint facility where hazardous wastes have allegedly been treated, stored and/or disposed of have been closed in accordance with the specifications contained in a closure plan (and any amendments thereto) approved in advance by the Ohio EPA.

II. SATISFACTION OF LAWSUIT

Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil and/or administrative liability by Defendants Dayton Paint, Blase and Hardyal for all claims against said Defendants alleged in the Complaint. After

reasonable inquiry by counsel, the State of Ohio believes that it has alleged in the Complaint all violations, facts, and/or conditions at the facility of which it is currently aware.

Nothing in this Consent Order shall be construed so as to limit the authority of the State of Ohio to seek relief for claims or conditions not alleged in the Complaint, including violations or conditions which occur after the filing of the Complaint.

Similarly, nothing in this Consent Order shall be construed so as to limit the authority of the State of Ohio to undertake any action against any person, including Defendants Dayton Paint, Blase and Hardyal, to eliminate or mitigate conditions at the facility arising after the date hereof which may present a threat to the public health, welfare or the environment, except that the State of Ohio agrees not to seek additional civil penalties from Defendants Dayton Paint, Blase, or Hardyal arising out of the violations, facts and/or conditions alleged in the Complaint, other than those specifically set forth in this Consent Order. In addition, the State of Ohio hereby specifically reserves the right to proceed against any other party including, but not limited to, the K. A. Pendleton Co., Inc., for the violations alleged in the Complaint, any removal, remedial or corrective action, monitoring or testing that must be conducted at the Dayton Paint & Coatings, Inc. 213 North Beckel Street, Dayton, Ohio facility, or any costs incurred by the Ohio EPA under Ohio Revised Code ("O.R.C.") Sections\3734.20 through 3734.27 in connection with the instant enforcement action.

III. COVENANT NOT TO SUE

In consideration of the fulfillment of the obligations imposed upon Defendants Dayton Paint, Blase, and Hardyal by this Consent Order, including payment of the civil penalties as set forth in Section VII and satisfactory completion of all obligations, the State of Ohio hereby covenants not to sue or bring any judicial or administrative action against Defendants Dayton Paint, Blase and Hardyal arising out of the violations, facts, and/or conditions alleged in the Complaint, which Complaint is believed to allege, after reasonable inquiry by counsel, all violations, facts, and/or conditions at the facility of which the State of Ohio is currently aware. Nothing in this Covenant Not To Sue shall be construed so as to limit the authority of the State of Ohio to bring a subsequent judicial or administrative action as provided for in Section II of this Consent Order.

IV. JURISDICTION AND VENUE

The Court has both personal and subject matter jurisdiction over Defendants Dayton Paint, Blase and Hardyal. The Complaint states a claim upon which relief can be granted against Defendants Dayton Paint, Blase and Hardyal under Chapter 3734 of the Ohio Revised Code and the rules promulgated thereunder. Venue is proper in this Court.

V. CLOSURE PLAN

Defendants Dayton Paint and Blase are ordered to submit, within ninety (90) days after the entry by this Court of this Consent Order, an approvable closure plan, for areas of the

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Dayton Paint facility where alleged hazardous wastes were allegedly stored, disposed of and/or treated, which meets the applicable requirements of O.A.C. Rules 3745-66-10 through 3745-66-20. The closure plan shall be submitted to the Director of the Ohio EPA and the Ohio EPA's Southwest District Office and shall initially comply only with the applicable requirements of O.A.C. Rules 3745-66-11 through 3745-66-14. As specified in these Sections, the closure plan shall provide for the investigation and remediation of any waste contamination caused by the alleged treatment, storage, and/or disposal of hazardous waste at all locations at the Dayton Paint facility where alleged hazardous wastes were stored, disposed of, and/or treated, but said plan shall not initially provide for or require groundwater monitoring or post-closure care at the facility. If the Director of the Ohio EPA disapproves part or all of the closure plan, the above-referenced Defendants shall resubmit an approvable closure plan to the Ohio EPA, pursuant to O.A.C. Rule\3745-66-12, within thirty (30) days of Ohio EPA's notification of disapproval of the plan and the reasons for such disapproval. Said Defendants are enjoined and ordered to fully implement the closure plan, as approved by the Ohio EPA, in accordance with O.A.C. Rules 3745-66-11 through 3745-66-14. If, upon implementing the approved closure plan, Defendants Dayton Paint and Blase are able to achieve the closure performance standards established pursuant to O.A.C. Rule 3745-66-11 and the approved closure plan, Defendant Dayton Paint shall certify completion of closure in accordance with the

requirements of O.A.C. Rule 3745-66-15. If after said Defendants have implemented the approved closure plan Defendants encounter an unexpected event which requires a modification of said closure plan, as discussed in O.A.C. Rule 3745-66-12, or determine that the requirements of O.A.C. Rule 3745-66-11 and the approved closure plan cannot be achieved, the Defendants shall submit, within thirty (30) days thereafter, to the Director and to the Ohio EPA's Southwest District Office an amended closure plan which shall address the necessity to close as a landfill in accordance with O.A.C. Rules 3745-66-16 through 3745-66-20 and O.A.C. Rule 3745-68-10. If the Director of the Ohio EPA disapproves part or all of the amended closure plan, Defendants Dayton Paint and Blase shall resubmit an approvable amended closure plan within thirty (30) days of Ohio EPA's notification of disapproval of the amended plan and the reasons for such disapproval. Said Defendants are enjoined and ordered to fully implement any amended closure plan approved by the Ohio EPA. If upon implementation of the approved, amended closure plan Defendants Dayton Paint and Blase are able to achieve the closure performance standards established pursuant to O.A.C. Rule 3745-66-11 and the approved amended closure plan, Defendant Dayton Paint shall certify the completion of closure in accordance with the requirements of O.A.C. Rule 3745-66-15.

VI. PERMANENT INJUNCTION

Defendants Dayton Paint and Blase are hereby permanently enjoined and ordered to comply with all applicable provisions contained in Chapter 3734 of the Ohio Revised Code and the rules

promulgated thereunder including, but not limited to, the generator requirements contained in O.A.C. Chapter 3745-52, with respect to all future waste handling activities at the Dayton Paint facility. Defendant Hardyal is hereby permanently enjoined and ordered to comply with Chapter 3734 of the Ohio Revised Code and the rules promulgated thereunder. Defendants Dayton Paint and Blase are also permanently enjoined and ordered to refrain from engaging in any storage, treatment or disposal of hazardous waste for which a hazardous waste facility installation and operation permit is necessary without first obtaining such a permit from the hazardous waste facility board. Provided further that Defendants Dayton Paint and Blase shall not be required to comply with any requirements of O.A.C. Chapters 3745-54 through 3745-69, except for those requirements set forth in Section V of this Consent Order pertaining to closure of the facility and Section VI of this Consent Order as set forth below, and except to the extent that said Defendants hereafter engage in the storage in excess of ninety (90) days, treatment or disposal of hazardous waste at the facility or to the extent that the requirements of Chapters 3745-54 through 3745-69 are incorporated within the requirements of O.A.C. Chapter 3745-52 and are applicable to said Defendants in light of their particular generator status. Furthermore, until such time as Defendant Dayton Paint certifies to the Ohio EPA, pursuant to O.A.C. Rule 3745-66-15, that the Dayton Paint facility has been closed in accordance with the specifications in the approved closure plan and any approved amendments

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thereto, Defendants Dayton Paint and Blase are hereby enjoined and ordered to perform the following tasks:

1. Defendants Dayton Paint and Blase shall submit to the Ohio EPA, within thirty (30) days after the entry by this Court of this Consent Order, annual reports for the Dayton Paint facility which meet the requirements of O.A.C. Rules 3745-52-41 and 3745-65-75 for the 1987, 1988 and 1989 calendar years.
2. Defendants Dayton Paint and Blase shall submit to the Ohio EPA, within thirty (30) days after the entry by this Court of this Consent Order, material safety data sheets for all of the products purchased and used by Dayton Paint & Coatings, Inc. in the normal course of its business during the 1989 calendar year and the 1990 calendar year through July of that year. Said Defendants must also submit to the Ohio EPA, upon receipt, material safety data sheets for all such products purchased during the one (1) year period after the entry by this Court of this Consent Order.
3. Defendants Dayton Paint and Blase shall submit to the Ohio EPA, within ninety (90) days after the entry of this Consent Order, a detailed written estimate of the cost of closing the Dayton Paint facility pursuant to Chapter 3734 of the Ohio Revised Code and the rules promulgated thereunder, as required by O.A.C. Rule 3745-66-42.

VII. CIVIL PENALTY

It is hereby ordered that Defendants Dayton Paint and Blase shall pay in the aggregate a civil penalty totaling twenty-seven thousand five hundred dollars (\$27,500.00), while Defendant Hardyal shall pay a civil penalty totaling two thousand five hundred dollars (\$2,500.00). These civil penalties shall be paid by certified check made payable to "Treasurer, State of Ohio," which check shall be delivered by mail, or otherwise, to

Edward S. Dimitry, at his office at the Ohio Attorney General's Office, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43266-0410. The penalty to be paid by Defendants Dayton Paint and Blase shall be paid over two (2) years in semi-annual payments with the first payment being due thirty (30) days after the entry by this Court of this Consent Order, while the penalty to be paid by Defendant Hardyal shall be paid in its entirety thirty (30) days after the entry by this Court of this Consent Order. These penalties shall be paid into the hazardous waste clean-up fund created by O.R.C. Section 3734.28.

VIII. STIPULATED PENALTIES

In the event that Defendants Dayton Paint and Blase violate any of the requirements of Sections V, VI and/or VII of this Consent Order, said Defendants shall immediately and automatically be liable for and shall pay stipulated penalties according to the following schedule. For each day of violation or failure to meet a requirement, up to sixty (60) days, the Defendants shall pay a total of five hundred dollars (\$500.00) per day for each day of each violation or failure to meet a requirement. For each day of violation or failure to meet a requirement, from sixty-one (61) days to ninety (90) days, the Defendants shall pay a total of one thousand dollars (\$1,000.00) per day for each day of each violation or failure to meet a requirement. For each day of violation or failure to meet a requirement, from ninety-one (91) days to one hundred and twenty (120) days, the Defendants shall pay a total of one thousand

five hundred dollars (\$1,500.00) per day for each day of each violation or failure to meet a requirement. For each day of violation or failure to meet a requirement over one hundred and twenty (120) days, the Defendants shall pay a total of two thousand five hundred dollars (\$2,500.00) per day for each day of each violation or failure to meet a requirement. Any payment required to be made pursuant to Section VIII of this Consent Order shall be paid by certified check made payable to "Treasurer, State of Ohio," which check shall be delivered by mail, or otherwise, to Edward S. Dimitry, at his office at the Ohio Attorney General's Office, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43266-0410 within forty-five (45) days of the violation or failure to meet the requirement of this Consent Order. This penalty shall be paid into the hazardous waste clean-up fund created by O.R.C. Section 3734.28.

IX. POTENTIAL FORCE MAJEURE

If any event occurs which causes or may cause a delay of any requirement of Sections V and/or VI of this Consent Order, Defendant Dayton Paint, or Defendant Blase, shall notify the Ohio EPA, Division of Solid and Hazardous Waste Management, Attn: Michael A. Savage, 1800 Watermark Drive, Columbus, Ohio 43266-0149, 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 Dayton Paint, or Defendant Blase, to prevent or minimize the delay and the timetable by which

measures will be implemented. The ten (10) days shall start to run when any of Defendant Dayton Paint's officers, agents, employees, assigns, contractors, consultants, or any person acting in concert or privity with any of the above-referenced entities, either become aware of the event or should have become aware of the event through the exercise of job duties, contractual responsibilities or otherwise. Defendant Dayton Paint, or Defendant Blase, will adopt all reasonable measures to avoid or minimize any such delay.

Upon receipt of the notice referenced in the preceding paragraph, Plaintiff may agree to waive or defer one or more milestone deadlines herein or the enforcement thereof. Plaintiff, within sixty (60) days thereafter, will inform Defendant Dayton Paint, or Defendant Blase, of its decision in writing. Plaintiff is not bound by oral representations of Ohio EPA personnel concerning the validity of Defendant Dayton Paint's, or Defendant Blase's, reason for delay. A decision by Plaintiff to waive or defer any milestone deadline of this Consent Order shall not be a bar to any enforcement action for Defendant Dayton Paint's, or Defendant Blase's, failure to meet the date of the milestone as deferred. Such deferred milestone date shall be considered enforceable in place of the date specified in the milestone and shall be subject to the same stipulated penalty provisions as the original milestone date. A decision by Plaintiff to defer enforcement of any milestone deadline or stipulated penalties set forth in this Consent Order shall not constitute a waiver of enforcement action with regard

to the terms of this Consent Order, unless the Plaintiff expressly so agrees.

In any action by the State of Ohio to enforce any of the provisions of this Consent Order, Defendants Dayton Paint and Blase may raise that they are entitled to a defense that their conduct was caused by reasons entirely beyond their control such as, by way of example and not limitation, acts of God, strikes, acts of war, civil disturbances and orders or actions of any court or regulatory agency. While the State of Ohio does not agree that such a defense exists, it is, however, hereby agreed upon by Defendants Dayton Paint and Blase and the State of Ohio 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 of this Consent Order is commenced by Plaintiff. At that time, the burden of proving that any delay was or will be caused by circumstances beyond the control of Defendants Dayton Paint and Blase shall rest with said Defendants. Unanticipated or increased costs associated with the implementation of any action required by this Consent Order shall not constitute circumstances entirely beyond the control of Defendants Dayton Paint and Blase or serve as a basis for an extension of time under this Consent Order. Failure by Defendant Dayton Paint or Defendant Blase to comply with the notice requirements of this Section shall render this Section void and of no force and effect as to the particular incident involved. Acceptance of this Consent Order with this Potential

Force Majeure clause does not constitute a waiver by Defendants Dayton Paint and Blase of any rights or defenses they may have under applicable law.

X. RETENTION OF JURISDICTION

The Court will retain jurisdiction of this action for the purpose of overseeing that Defendants Dayton Paint, Blase and Hardyal carry out the terms and conditions of this Consent Order and comply with O.R.C. Chapter 3734 and the rules adopted thereunder.

XI. INSPECTIONS

Pursuant to O.R.C. Section 3734.07, Defendants Dayton Paint and Blase are ordered to allow employees, representatives, and agents of the Ohio EPA, upon proper identification, to enter upon the Dayton Paint facility at reasonable times, 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 O.R.C. Chapter 3734 and the rules promulgated thereunder. Ohio EPA agrees to provide Defendants Dayton Paint or Blase with copies or duplicates of all records and documents taken from the facility during any investigation, in addition to providing Defendants Dayton Paint or Blase with an opportunity to take split samples in the event Ohio EPA takes samples at the facility. Nothing in this Consent Order shall limit the rights of the Ohio EPA or U.S. EPA to conduct regular and routine inspections pursuant to statute or regulation at the Dayton Paint facility.

XII. NOTICE

Any submission to the Ohio EPA as required by this Consent Order, unless otherwise indicated, shall be delivered to:

- 1. Ohio EPA
Southwest District Office
40 South Main Street
Dayton, Ohio 45402
Attn: Donald S. Marshall
- 2. Ohio EPA
Division of Solid and Hazardous Waste Management
P.O. Box 1049
1800 WaterMark Drive
Columbus, Ohio 43266-0149
Attn: Michael A. Savage
- 3. Edward S. Dimitry
Shane A. Farolino
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street - 25th Floor
Columbus, Ohio 43266-0410
- 4. Paul W. Casper, Jr.
Stephen N. Haughey
Beth Schneider Naylor
FROST & JACOBS
2500 Central Trust Center
201 East Fifth Street
Cincinnati, OH 45202
(513) 651-6800
- 5. A contractor to be identified by Defendants.

Any submission to be made by the Ohio EPA as required by this Consent Order, unless otherwise indicated, shall be delivered to:

- 1. Edward S. Dimitry
Shane A. Farolino
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street - 25th Floor
Columbus, Ohio 43266-0410
- 2. Timothy A. Blase
Dayton Paint & Coatings, Inc.
213 North Beckel Street
Dayton, Ohio 45403

3. Paul W. Casper, Jr.
Stephen N. Haughey
Beth Schneider Naylor
FROST & JACOBS
2500 Central Trust Center
201 East Fifth Street
Cincinnati, OH 45202
(513) 651-6800

4. A contractor to be identified by Defendants.

XIII. COURT COSTS

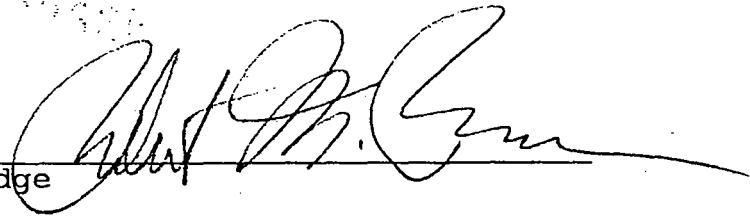
Defendants Dayton Paint and Blase shall pay the court costs of this action.

XIV. TERMINATION CLAUSE


The stipulated penalty provisions of Section VIII shall terminate on a date not earlier than twelve (12) months from the date of certification of closure as required by Section V of this Consent Order, provided that the facility is able to demonstrate to the satisfaction of the State that it has been in total compliance with all terms of this Consent Order during the aforementioned twelve (12) month period. Should the facility not demonstrate that it has been in total compliance with the Consent Order for this twelve (12) month period, it must demonstrate to the State that it is in total compliance with all terms of this Consent Order and all civil penalties and stipulated penalties are paid in full for some other consecutive twelve (12) month period after closure has been certified, as required by Section V of this Consent Order, in order to terminate the stipulated penalty provisions of this Consent Order. Once Defendants feel that total compliance with all terms of this Consent Order has been maintained for a twelve

(12) month period after closure has been certified, Defendants may notify the Ohio EPA of their alleged total compliance over such twelve (12) month period and request that the Ohio EPA evaluate and respond within sixty (60) days of said notice to Defendants' assertion of total compliance. If within sixty (60) days of said notice the Ohio EPA fails to respond to or disagrees with Defendants' assertion of total compliance, Defendants may move the Court, pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure, to terminate the stipulated penalty provisions of Section VIII of this Consent Order, provided the Court finds that Defendants have maintained total compliance with all terms of this Consent Order for a twelve (12) month period after closure has been certified. The Plaintiff takes no position as to such motion and reserves any rights it may have to oppose the motion including the basis that twelve (12) months is, in actuality, not an appropriate time period.


No earlier than two (2) years from the date of the Court's approval of this Consent Order, Defendants may move the Court, pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure, to terminate the permanent injunction provisions of Section VI of this Consent Order if the Defendants can demonstrate that they have been in total compliance with the obligations of this Consent Order for such a two (2) year period. The Plaintiff takes no position as to such motion and reserves any rights it may have to oppose the motion including the basis that two (2) years is, in actuality, not an appropriate time period.



Judge


ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO


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Attorneys for Plaintiff
State of Ohio


TIMOTHY A. BLASE
Individually and on behalf
of Dayton Paint & Coatings,
Inc., as its President


STANLEY D. HARDYAL


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