

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO



STATE OF OHIO, ex rel., : Case No. 87-1184
ANTHONY J. CELEBREZZE, JR. :
ATTORNEY GENERAL OF OHIO, : JUDGE SMART
 :
Plaintiff, :
 :
v. : CONSENT ORDER
 :
SME CEMENT, INC., :
d/b/a UNITED STATES CEMENT :
CO., et al., :
Defendants. :

WHEREAS, the Complaint in the above-entitled action has been filed herein, and the Plaintiff State of Ohio by its Attorney General, Anthony J. Celebrezze, Jr., and Defendants Michael P. Carlow (hereinafter "Individual Defendant") and SME Cement, Inc., d/b/a United States Cement Company (hereinafter "Joint Defendants"), have consented to the entry of this Decree; and

WHEREAS, SME Cement, Inc. ("SME") and United States Cement Company ("U.S. Cement") are separate corporate entities; and

WHEREAS, SME Cement is the owner of the facility located at 8282 Middlebranch Road, Middlebranch, Ohio ("facility") and has been the owner of said facility during the time when the violations described in the complaint are alleged to have occurred; and

WHEREAS, at the time the violations described in the complaint are alleged have occurred, U.S. Cement neither owned nor operated the facility; and

WHEREAS, U.S. Cement now leases the facility for the production of cement products; and

WHEREAS, U.S. Cement agrees to be bound by the injunctive provisions and stipulated penalties provisions of this Consent Order and to guarantee that should SME fail to make payment of civil penalties as specified in paragraphs 5.a., 5.b., and 5.c., U.S. Cement will satisfy the delinquent payment provision with appropriate interest as specified in paragraph 5 of this Order; and

WHEREAS, the Individual Defendant, no longer an officer of either SME or U.S. Cement, agrees to be bound by the injunctive provision of the Consent Order against future violations;

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

JURISDICTION

1. The Court has jurisdiction over the parties and the subject matter of this case. The Complaint states a claim upon which relief can be granted against the Individual and Joint Defendants under Chapter 3704. of the Ohio Revised Code, and venue is proper in this Court.

PARTIES

2. This action is dismissed as to all Defendants except those signing the Consent Order. The provisions of this Consent Order shall apply and be binding upon the remaining parties to this action, their agents, officers, employees, assigns and successors in interest, in the manner set forth below.

SATISFACTION OF LAWSUIT

3. Plaintiff alleges in its complaint that the Individual and Joint Defendants have operated various air contaminant sources and fugitive dust sources at the facility located at 8282 Middlebranch Road, Middlebranch, Ohio ("facility") without applying for and obtaining permits to operate ("PTO") from Ohio EPA; failed to take reasonably available control measures to prevent fugitive dust from becoming airborne; failed to immediately report the breakdown of air pollution control equipment which caused the emission of air contaminants; exceeded particulate emission standards; and failed to provide a written statement to Ohio EPA of malfunctions of air pollution control equipment which continued for more than 72 hours. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by the Individual and Joint Defendants to the State of Ohio for all claims under State Air Pollution laws known to Plaintiff at the time of Entry of this Consent Order for the facility. Plaintiff alleges that all such claims known to the State of Ohio at this time have been alleged

in this Complaint. This Consent Order does not constitute any admission of culpability or of violation of law or regulations by Defendants.

4. Nothing in this Decree shall be construed to limit the authority of the State of Ohio to seek relief for claims or conditions at the facility causing the violation of any of the State's pollution laws and regulations not alleged in Plaintiff's Complaint or addressed by this Order, or occurring after the date of Entry of this Order.

CIVIL PENALTY AND ENFORCEMENT COSTS

5. The Joint Defendants shall pay or cause to be paid the sum of Fifty Thousand Dollars (\$50,000.00) in the following manner:

- a. The Joint Defendants shall pay Ten Thousand Dollars (\$10,000.00) by delivery of a certified check (or by other means acceptable to the Ohio Attorney General's Office) to the Canton Air Pollution Control Agency within 14 days of the entry of this Consent Order for extraordinary enforcement costs incurred as a result of the violations of law alleged in Plaintiff's Complaint.
- b. The Joint Defendants shall pay Eight Thousand Dollars (\$8,000.00) plus an amount in interest at the rate of 10% per annum charged upon the unpaid balance by delivery of a

certified check in the amount of Ten Thousand Dollars (\$10,000.00) (or by other means acceptable to the Ohio Attorney General's Office), made payable to the order of "Treasurer of the State of Ohio," no later than (NLT) 180 days after the due date.

c. The Joint Defendants shall make four (4) subsequent time payments by certified check (or by other means acceptable to the Ohio Attorney General's Office) to the Plaintiff State of Ohio of Eight Thousand Dollars (\$8,000.00) plus an amount in interest at the rate of 10% per annum charged upon the unpaid balance. Payments shall be made in a manner consistent with paragraph 5 of this Order and according to the following payment schedule:

1. NLT 360 days after entry (\$9,600.00)
2. NLT 540 days after entry (\$9,200.00)
3. NLT 720 days after entry (\$8,800.00)
4. NLT 900 days after entry (\$8,400.00)

The foregoing schedule shall not be construed as limiting the right of Joint Defendants to make payments sooner or in greater amounts with proportional savings in interest. If the Joint Defendants fail to make a payment(s) as scheduled in this Order, interest shall accrue at the rate of 10% specified in this Order, until such time as the payment(s) is made. All payments under

paragraph 5.b. and 5.c. are to be made to Plaintiff's counsel at the Environmental Section of the Ohio Attorney General's Office, 30 East Broad Street, 17th Floor, Columbus, Ohio 43266-0410.

6. If SME fails to submit a payment or payments according to the above schedule, U.S. Cement shall, within 14 days of written demand by counsel for Plaintiff, make such payment or payments with appropriate interest.

GENERAL PROVISIONS

7. The Individual and Joint Defendants shall comply with the requirements of Chapter 3704., Revised Code, and the rules and regulations adopted thereunder.

8. By this Consent Order, Plaintiff does not waive any rights or remedies available for any violations of this Consent Order or any past, present or future violations of State pollution laws or regulations at the facility unknown to Plaintiff on the date of entry of this Consent Order.

9. The Court will retain jurisdiction of this action for the purpose of making any order or decree which it may deem appropriate to carry out the Consent Order. However, the Joint Defendants are not hereby estopped from petitioning the Court for termination of the stipulated penalty portion of this Order after 3 years from the date of entry of this Order, or one year after the last payment under paragraph 5.c. is actually made, whichever is later.

10. If any condition contained in a future permit or variance issued to the facility by the Ohio Environmental Protection Agency invalidates or otherwise limits any provision of this

Consent Order, Plaintiff agrees not to seek enforcement of any such provision in this Order that is so invalidated.

11. The Joint Defendants shall pay the costs of this action.

STIPULATED PENALTIES

12. Should Joint Defendants fail to immediately report the malfunction or breakdown of any air contaminant source or air pollution control equipment at the facility which causes the emission of air contaminants in violation of any applicable law, the Joint Defendants shall incur, upon demand by Ohio EPA, a stipulated penalty of Two Hundred Fifty Dollars (\$250.00) per day for each failure to immediately report, until such failure or malfunction is reported to Ohio EPA. For purposes of this Order "immediately" shall be construed to mean within 24 hours of any such malfunction or breakdown, and a "day" shall be construed to mean each 24-hour time period or portion thereof. By this provision, Plaintiff does not waive any right to bring any additional enforcement action and seek additional remedies, monetary or injunctive, for any violation(s) of State law resulting from, created by or consisting of any such malfunction or breakdown.

13. Should Joint Defendants fail to provide a written statement to Ohio EPA within 2 weeks of any malfunction or breakdown of an air contaminant source or air pollution control equipment at the facility which causes the emission of air contaminants in violation of any applicable law and which continues

for more than 72 hours, the Joint Defendants shall incur, upon demand by Ohio EPA, a stipulated penalty of Five Hundred Dollars (\$500.00) per day until said written statement is provided to Ohio EPA. By this provision, Plaintiff does not waive any right to bring any additional enforcement action and seek additional remedies, monetary or injunctive, for any violation(s) of State law resulting from, created by, or consisting of any such malfunction or breakdown.


14. Should Joint Defendants operate any air contaminant source at the facility without first applying for and obtaining a PTO issued as a final action by the Director of the Ohio EPA in accordance with the provisions of O.A.C. Chapter 3745-47 and/or O.R.C. Chapter 119, the Joint Defendants shall incur, upon demand by Ohio EPA, a stipulated penalty of Seven Hundred Fifty Dollars (\$750.00) per day for each day of operation until a PTO is issued in accordance with the above-stated procedures. By this provision, Plaintiff does not waive any right to bring any additional enforcement action and seek additional remedies, monetary or injunctive, for any violations of State law resulting from, created by, or consisting of operation of any air contaminant source at the facility without applying for and obtaining a PTO.

POTENTIAL FORCE MAJEURE

In any action to enforce any of the provisions of this Consent Order, Defendants may raise at that time the question of whether they are entitled to a defense that their conduct was caused by reasons beyond their control such as by way of example

and not limitation, act of God or public enemy, accidental fire or explosion, usually severe weather conditions, strikes, acts of war, insurrection or riot, or orders of any regulatory agency. 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.

JUDGE, COURT OF COMMON PLEAS



Michael P. Carlow

Dated: 3/29/89

SME CEMENT, INC.

By: Lawrence J. Opsy - President
Lawrence J. Opsy, President

Dated: 3/30/89

Attest: 

Michael C. Miller
Secretary

UNITED STATES CEMENT COMPANY

By: Lawrence J. Ousky - President
Lawrence J. Ousky, President

Dated: 3/30/89

Attest: Michael C. Miller
Michael C. Miller
Vice President & Secretary

APPROVED:

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO

By: Brad L. Tammaro
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Dated: April 24, 1989

SQUIRE, SANDERS & DEMPSEY

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Dated: APR 10 1989