



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

March 4, 2021

VIA EMAIL

Mr. Stephen J. Axtell
Partner
Thompson Hine LLP
Austin Landing I
10050 Innovation Drive, Suite 400
Dayton, Ohio 45342
steve.axtell@thompsonhine.com

Re: Consent Agreement and Final Order
Dayton Superior Corporation
Docket No: RCRA-05-2021-0015

Dear Mr. Axtell:

Attached please find a copy of the signed, fully executed Consent Agreement and Final Order (CAFO) in resolution of the above case. The original was filed with the Regional Hearing Clerk on March 4, 2021.

Dayton Superior Corporation must pay the civil penalty in the amount of \$100,000 in the manner prescribed in paragraphs 79 and 80 of the CAFO, and in the comment or description field of an electronic funds transfer, state the case title and the docket number RCRA-05-2021-0015. Dayton Superior Corporation's payment is due within thirty (30) calendar days of the effective date of the CAFO.

Thank you for your cooperation in resolving this matter.

If you have any questions or concerns regarding this matter, please contact Spiros Bourgikos, of my staff, at 312-886-6862.

Sincerely,

MICHAEL
CUNNINGHAM
M

Digitally signed by
MICHAEL CUNNINGHAM
Date: 2021.03.01
12:00:19 -06'00'

Michael Cunningham, Chief
RCRA Compliance Section 1

Attachment

cc: James Jennings, Illinois EPA (James.m.jennings@illinois.gov)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)	Docket No. RCRA-05-2021-0015
)	
Dayton Superior Corporation)	Proceeding to Commence and Conclude
)	an Action to Assess a Civil Penalty
Respondent)	Under Section 3008(a) of the Resource
)	Conservation and Recovery Act,
)	42 U.S.C. § 6928(a)
)	
)	
)	
)	

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a), and Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. Part 22.

2. The Complainant is the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency (EPA), Region 5.

3. EPA provided notice of commencement of this action to the State of Illinois pursuant to Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).

4. Respondent is Dayton Superior Corporation, a corporation which for the dates referenced in this Consent Agreement and Final Order (CAFO) was doing business in the State of Illinois.

5. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a CAFO per 40 C.F.R. § 22.13(b).

6. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

7. Respondent consents to the assessment of the civil penalty specified in this CAFO, and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

8. Jurisdiction for this action is conferred upon EPA by Sections 3006 and 3008 of RCRA, 42 U.S.C. §§ 6926 and 6928.

9. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

10. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

Statutory and Regulatory Background

11. EPA has promulgated regulations, codified at 40 C.F.R. Parts 260 through 279, governing generators and transporters of hazardous waste and facilities that treat, store, and dispose of hazardous waste, pursuant to Sections 3002, 3003, and 3004 of RCRA, 42 U.S.C. §§ 6922, 6923, and 6924.

12. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator of EPA may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program when the Administrator finds that the state program meets certain conditions. Any violation of regulations promulgated pursuant to Subtitle C (Sections 3001-3023 of RCRA, 42

U.S.C. §§ 6921-6939e) or any state provision authorized pursuant to Section 3006 of RCRA, constitutes a violation of RCRA, subject to the assessment of civil penalties and issuance of compliance orders as provided in Section 3008 of RCRA, 42 U.S.C. § 6928.

13. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Administrator of EPA granted the State of Illinois final authorization to administer a state hazardous waste program in lieu of the federal government's base RCRA program effective January 31, 1986. 51 Fed. Reg. 3778 (January 30, 1986).

14. Pursuant to Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) and the regulations at 35 IAC Part 703 [40 C.F.R. Part 270], the treatment, storage, or disposal of hazardous waste by any person who has not applied for or received a permit is prohibited. See 35 IAC § 703.121(a) [40 C.F.R. § 270.1(c)].

15. Pursuant to 35 IAC § 722.134 [40 C.F.R. § 262.34], however, and subject to certain exceptions, a generator of hazardous waste may accumulate hazardous waste on-site for 90 days or less without having a permit or interim status, provided that the generator complies with all applicable conditions set forth in 35 IAC § 722.134 [40 C.F.R. § 262.34] including, but not limited to, certain requirements for owners and operators in 35 IAC Part 725 [40 C.F.R. Part 265].

16. A generator who accumulates hazardous waste for more than 90 days is an operator of a storage facility and is subject to the requirements of IAC Title 35 Parts 724 and 725 [40 C.F.R. Parts 264 and 265] and the permit requirements of 35 IAC §§ 703.121, 703.180 and 705.121 [40 C.F.R. §§ 270.1, 270.10 and 124.3(a)], i.e. must either obtain a permit or achieve interim status, unless the generator has been granted an extension to the 90-day period. 35 IAC §§ 722.134(a) and (b) [40 C.F.R. § 262.34(a) and (b)].

17. Similarly, a generator of hazardous waste who accumulates hazardous waste on-site for 90 days or less without having a permit or interim status and who violates any of the applicable conditions of 35 IAC § 722.134 [40 C.F.R. § 262.34] (operator exemption conditions) becomes subject to the requirements of IAC Title 35 Parts 724 and 725 [40 C.F.R. Parts 264 and 265] and the permit requirements of 35 IAC §§ 703.121, 703.180, and 705.121 [40 C.F.R. §§ 270.1, 270.10 and 124.3(a)], i.e. must either obtain a permit or achieve interim status. 35 IAC §§ 722.134(a) and (b) [40 C.F.R. § 262.34(a) and (b)].

18. One operator exemption condition is that a container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste. 35 IAC §§ 722.134(a)(1)(A) and 725.273(a) [40 C.F.R. §§ 262.34(a)(1)(i) and 265.173(a)].

19. Another operator exemption condition is that the date upon which each period of accumulation begins must be clearly marked and visible for inspection on each container. 35 IAC § 722.134(a)(2) [40 C.F.R. § 262.34(a)(2)].

20. Another operator exemption condition is that while being accumulated on-site, each container must be labeled or marked clearly with the words "Hazardous Waste". 35 IAC § 722.134(a)(3). [40 C.F.R. § 262.34(a)(3)].

21. Another operator exemption condition is that facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water that could threaten human health or the environment. 35 IAC §§ 722.134(a)(4) and 725.131 [40 C.F.R. §§ 262.34(a)(4) and 265.31]

22. Under Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), EPA may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or

within a specified period of time, or both. The Administrator may assess a civil penalty of up to \$102,638 per day for each violation of Subtitle C of RCRA that occurred after November 2, 2015, pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and 40 C.F.R. Part 19.

General Allegations

23. At all times relevant to this CAFO, Respondent was a “person” as defined by 35 IAC § 720.110 [40 C.F.R. § 260.10] and Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

24. At all times relevant to this CAFO, an industrial facility existed at and about 2150B South Route 45-52, Kankakee, Illinois (Facility).

25. At all times relevant to this CAFO, the Facility included contiguous land and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste.

26. At all times relevant to this CAFO, the Facility was a "facility," as that term is defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

27. At all times relevant to this CAFO, Respondent either owned the Facility or part of the Facility, or was responsible for the overall operation of the Facility, or both.

28. At all times relevant to this CAFO, Respondent was an “owner” or “operator” of the Facility, as those terms are defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

29. At all times relevant to this CAFO, the State of Illinois had not issued a permit to Respondent to treat, store, or dispose of hazardous waste at the Facility.

30. At all times relevant to this CAFO, Respondent did not have interim status for the treatment, storage, or disposal of hazardous waste at the Facility.

31. At all times relevant to this CAFO, Respondent had not been granted an extension to accumulate hazardous waste for more than 90 days

32. On or about March 1, 2013; July 30, 2015, May 26, 2016 and September 28, 2016; Respondent submitted Hazardous Waste Notifications separately or as part of its IEPA Annual Report to IEPA for the Facility.

33. In its Hazardous Waste Notifications dated March 1, 2013; July 30, 2015, May 26, 2016 and September 28, 2016, Respondent identified itself as a hazardous waste generator.

34. At all times relevant to this CAFO, Respondent generated during each calendar month more than 1000 kg of hazardous waste at the Facility.

35. At all times relevant to this CAFO, Respondent used paint in dip tanks at the Facility to coat metal components such as rebar with paint to create coated metal products for concrete roads and bridges.

36. At all times relevant to this CAFO, the Facility's process to coat metal components with paint generated waste paint-related material (waste paint wastes).

37. At all times relevant to this CAFO, Respondent managed and disposed of the waste paint wastes as RCRA "hazardous waste", as that term is defined under 35 IAC § 721.103 [40 C.F.R. § 261.3].

38. At all times relevant to this CAFO, Respondent characterized the waste paint wastes as exhibiting one or more of the following characteristics of hazardous waste defined under 35 IAC §§ 721.131 and 721, Subpart C [40 C.F.R. §§ 261.31 and 261, Subpart C]: D001 ignitability, D007 chromium toxicity, D008 lead toxicity; D035 methyl ethyl ketone toxicity; and F003 and F005 spent non-halogenated solvents.

39. At all times relevant to this CAFO, Respondent was a "generator," as that term is defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

40. Respondent generated and managed hazardous waste at the Facility after November

19, 1980.

41. At least 91 days prior to July 12, 2016, Respondent moved a 1,500-gallon, open-topped dip tank (1,500-gallon open container) containing at a minimum paint from Respondent's coating process to an outside storage area at the Facility.

42. Upon or before Respondent moving the 1,500-gallon open container outside, and at all times relevant to this CAFO after that date, the 1,500-gallon open container was a portable device in which material was stored, transported, treated, disposed of, or otherwise handled.

43. Upon or before Respondent moving the 1,500-gallon open container outside, and at all times relevant to this CAFO after that date, the 1,500-gallon open container was a "container", as that term is defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

44. Upon or before Respondent moving the 1,500-gallon open container outside, and at all times relevant to this CAFO after that date, the material in the 1,500-gallon open container (paint waste) was either disposed of or was accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated.

45. Upon or before Respondent moving the 1,500-gallon open container outside, and at all times relevant to this Complaint after that date, the paint waste was "abandoned", as that term is defined under 35 IAC § 721.102(a)(2)(A)(i) [40 C.F.R. § 261.2(a)(2)(i)(A)].

46. Upon or before Respondent moving the 1,500-gallon open container outside, and at all times relevant to this CAFO after that date, the paint waste was "discarded", as that term is defined under 35 IAC § 721.102(a)(2) [40 C.F.R. § 261.2(a)(2)].

47. Upon or before Respondent moving the 1,500-gallon open container outside, and at all times relevant to this CAFO after that date, the paint waste was a "solid waste", as that term is defined under 35 IAC § 721.102 [40 C.F.R. § 261.2].

48. At all times relevant to this CAFO, the paint waste exhibited one or more of the following characteristics of hazardous waste defined under 35 IAC §§ 721.131 and 721, Subpart C [40 C.F.R. §§ 261.31 and 261, Subpart C]: D001 ignitability, D007 chromium toxicity, D008 lead toxicity; D035 methyl ethyl ketone toxicity; and F003 and F005 spent non-halogenated solvents.

49. At the latest upon Respondent moving the 1,500-gallon open container outside, and at all times relevant to this CAFO after that date, the paint waste was a “hazardous waste” as that term is defined under 35 IAC § 721.103 [40 C.F.R. § 261.3].

50. For a period including at least the 91 days prior to July 12, 2016, Respondent held the paint waste in the 1,500-gallon open container for a temporary period, at the end of which the paint waste was treated, disposed of, or stored elsewhere.

51. For a period including at least the 91 days prior to July 12, 2016, Respondent’s holding the waste paint in the 1,500-gallon open container constituted hazardous waste “storage,” as that term is defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

52. On or about July 12, 2016, EPA inspected the Facility (the inspection).

53. On or about January 3, 2017, Respondent communicated with U.S. EPA regarding Respondent’s management of Facility wastes.

54. On or about April 4, 2017, EPA issued a Notice of Violation to Respondent, alleging certain violations of RCRA discovered during the inspection.

55. On or about May 8, 2017, Respondent submitted to EPA a written response to the Notice of Violation.

56. On or about November 3, 2017, EPA issued a Notice of Intent to File a Civil Complaint to respondent.

57. On or about November 22, 2017, Respondent submitted to EPA a written response to the Notice of Intent to File a Civil Complaint.

58. On or about June 10, 2019, Respondent sold its Dayton Paving Division (which included the Facility), to Simplex Construction Products.

Count I
Storage of Hazardous Waste Without a Permit or Interim Status

59. Complainant incorporates paragraphs 1 through 58 of this Complaint by reference.

60. Respondent's storage of hazardous waste for over 90 days without a permit or interim status, described in paragraphs 41-51, above, violated Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and 35 IAC § 703.121(a) [40 C.F.R. § 270.1(c)].

61. At the time of the inspection, the 1,500-gallon open container was covered with a large board with holes.

62. At the time of the inspection, the 1,500-gallon open container was not "closed" within the meaning of 35 IAC § 725.273(a) [40 C.F.R. § 265.173(a)].

63. Respondent's conduct set forth in paragraphs 61-62, above, violated 35 IAC § 725.273(a) [40 C.F.R. § 265.173(a)].

64. At the time of the inspection, the date upon which each period of accumulation began was not clearly marked and visible for inspection on the 1,500-gallon open container.

65. Respondent's conduct set forth in paragraph 64, above, violated 35 IAC § 722.134(a)(2) [40 C.F.R. § 262.34(a)(2)].

66. At the time of the inspection, the 1,500-gallon open container was not labeled or marked clearly with the words "Hazardous Waste".

67. Respondent's conduct set forth in paragraph 66, above, violated 35 IAC § 722.134(a)(3) [40 C.F.R. § 262.34(a)(3)].

68. At the time of the inspection, material that Respondent ultimately determined was hazardous waste was on the ground outdoors surrounding a dipping tank at the Facility.

69. At the time of the inspection, paint containing volatile compounds was drying in multiple open containers in an area at the Facility.

70. At the time of the inspection, material designated "720A009 Greenbar" was on the floor in and around two areas at the Facility.

71. At all times relevant to this CAFO, the Material Safety Data Sheet for 720A009 Greenbar stated that, "Precautions should be taken to prevent the formation of dusts in concentration above flammable, explosive, or occupational exposure limits."

72. At the time of the inspection, Respondent was not maintaining and operating the Facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water that could threaten human health or the environment.

73. Respondent's conduct set forth in paragraphs 68-72, above, violated 35 IAC § 725.131 [40 C.F.R. § 265.31]

74. Pursuant to 35 IAC § 722.134 [40 C.F.R. § 262.34], each of Respondent's failures to meet an operator exemption condition, set forth in paragraphs 61-73, above, barred Respondent from accumulating or storing hazardous waste on-site for any length of time without a permit or interim status.

75. As a result of Respondent's failure to meet all of the applicable conditions for the generator exemption provided by 35 IAC § 722.134 [40 C.F.R. § 262.34], Respondent became an operator of a hazardous waste treatment, storage, and disposal facility (TSDF).

76. Respondent's storage of hazardous waste without a permit or interim status, while

failing to meet one or more operator exemption conditions, as described in paragraphs 61-73, above, violated Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and 35 IAC § 703.121(a) [40 C.F.R. § 270.1(c)].

77. Respondent's violations of RCRA set forth in this count subject Respondent to a civil penalty of up to \$102,638 per day, pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and 40 C.F.R. Part 19.

Civil Penalty

78. Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), Complainant determined that an appropriate civil penalty to settle this action is \$100,000.00. In determining the penalty amount, Complainant considered the seriousness of the violation and Respondent's efforts to comply with the applicable requirements. Complainant also considered EPA's *RCRA Civil Penalty Policy*, dated June 23, 2003.

79. Within 30 days after the effective date of this CAFO, Respondent must pay the civil penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

[for checks sent by regular U.S. Postal Service mail]

EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

[for checks sent by express mail]

U.S. Bank
Government Lockbox 979077
EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

80. A transmittal letter stating Respondent's name, the case title and the case docket number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk (E-19J)
USEPA, Region 5
77 West Jackson
Chicago, Illinois 60604

Spiros Bourgikos (ECR-17J)
Enforcement and Compliance Assurance Division
Land and Chemicals Enforcement and Compliance Assurance Branch
RCRA Compliance Section 1
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Kris Vezner (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

81. This civil penalty is not deductible for federal tax purposes.

82. If Respondent does not timely pay the civil penalty, EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States enforcement expenses for the collection action. The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

83. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date payment

was due at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a 6 percent per year penalty on any principal amount 90 days past due.

Effective Date and Satisfaction of CAFO

84. The Effective Date of this CAFO is the date that the signed Final Order is filed with the Regional Hearing Clerk.

85. This CAFO will be deemed satisfied upon EPA's receipt of the full civil penalty amount.

General Provisions

86. The parties consent to service of this CAFO by e-mail at the following valid e-mail addresses: vezner.kris@epa.gov (for Complainant), and steve.axtell@thompsonhine.com (for Respondent).

87. This CAFO does not affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law, other than the violations alleged in the CAFO.

88. Respondent agrees not to contest this CAFO or any EPA action or decision taken pursuant to this CAFO, prior to EPA's initiation of a judicial action to enforce this CAFO. Respondent shall bear the burden of proving that EPA's actions were arbitrary and capricious and not in accordance with law.

89. This CAFO does not affect Respondent's responsibility to comply with RCRA and other applicable federal, state, local laws or permits.

90. By issuing this CAFO, EPA assumes no liability for injuries or damages to persons or property resulting from any acts, errors, or omissions of Respondent. EPA will not be deemed a party to any contract, agreement or other arrangement Respondent or its officers, directors, employees, agents, successors, assigns, heirs, trustees, receivers, contractors, or consultants may enter in carrying out actions pursuant to this CAFO.

91. Notwithstanding any other provisions of this CAFO, EPA retains all of its authority to take, direct, or order any and all actions necessary to protect human health or the environment.

92. This CAFO is a “final order” for purposes of 40 C.F.R. § 22.31, EPA’s RCRA Civil Penalty Policy, and EPA’s Hazardous Waste Civil Enforcement Response Policy (December 2003).

93. The terms of this CAFO bind Respondent, its successors, and assigns.

94. Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

95. Each party agrees to bear its own costs and attorney’s fees in this action.

96. This CAFO constitutes the entire agreement between the parties.

In the Matter of: Dayton Superior Corporation, Respondent

United States Environmental Protection Agency, Complainant

**MICHAEL
HARRIS**

Digitally signed by
MICHAEL HARRIS
Date: 2021.03.01
16:13:05 -06'00'

Date

Michael D. Harris
Division Director
Enforcement and Compliance Assurance Division

Dayton Superior Corporation, Respondent

Date

2/23/21

Brian Maglosky
Vice-President, Supply Chain

In the Matter of:
Dayton Superior Corporation
Docket No. RCRA-05-2021-0015

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

ANN COYLE Digitally signed by ANN
COYLE
Date: 2021.03.04
08:59:07 -06'00'

Date

Ann L. Coyle
Regional Judicial Officer
United States Environmental Protection Agency
Region 5

Consent Agreement and Final Order
In the Matter of: Dayton Superior Corporation
Docket Number: RCRA-05-2021-0015

CERTIFICATE OF ELECTRONIC MAILING

I certify that I served a true correct a copy of the foregoing **Consent Agreement and Final Order**, docket number RCRA-05-2021-0015 , which was filed on March 4, 2021 , in the following manner to the following addressees:

Copy by E-mail
Attorney for Respondent: Steve Axtell
steve.axtell@thompsonhine.com

Copy by E-mail
Attorney for Complainant: Kris Vezner
vezner.kris@epa.gov

Copy by E-mail to
EPA enforcement staff contact: Spiros Bourgikos
bourgikos.spiros@epa.gov

Copy by E-mail to
Regional Judicial Officer Ann Coyle
coyle.ann@eps.gov

Dated: _____

LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5