



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

May 27, 2015

REPLY TO THE ATTENTION OF:
LC- 8J

CERTIFIED MAIL: No.7011 1150 0000 2643 8494
RETURN RECEIPT REQUESTED

Mr. Clyde J. Robinson
Office of the City Attorney
241 W South St.
Kalamazoo, Michigan 49007

Consent Agreement and Final Order In the Matter of City of Kalamazoo
Docket No. TSCA-05-2015-0008

Mr. Robinson:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order (CAFO) in resolution of the above case. This document was filed on May 27, 2015 with the Regional Hearing Clerk.

The civil penalty in the amount of \$7,200 is to be paid in the manner described in paragraphs 33 and 34. Please be certain that the docket number is written on both the transmittal letter and on the check.

Thank you for your cooperation in resolving this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Meghan Dunn".

Meghan Dunn
Pesticides and Toxics Compliance Section

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:

City of Kalamazoo
Kalamazoo, Michigan,

Respondent.



Docket No. TSCA-05-2015-0008

Proceeding to Assess a Civil
Penalty Under Section 16(a) of the
Toxic Substances Control Act,
15 U.S.C. § 2615(a)

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), and 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 Land and Chemicals Division, United States Environmental Protection Agency (EPA), Region 5.
3. Respondent is the City of Kalamazoo, a municipality located in Kalamazoo County, Michigan.
4. 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 consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).
5. 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.
6. 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

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

8. 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

9. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the Lead Act), 42 U.S.C. § 4852d, requires the Administrator of EPA to promulgate regulations for the disclosure of lead-based paint hazards in target housing that is offered for sale or lease.

10. On March 6, 1996, EPA promulgated regulations at 40 C.F.R. Part 745, Subpart F, Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property (Disclosure Rule) pursuant to 42 U.S.C. § 4852d.

11. 40 C.F.R. § 745.103 defines target housing as any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling.

12. 40 C.F.R. § 745.103 defines “agent” as any party who enters into a contract with a seller or a lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing.

13. 40 C.F.R. § 745.103 defines “seller” as any entity that transfers legal title to target housing, in whole or in part, in return for consideration, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.

14. 40 C.F.R. § 745.103 defines “purchaser” as any entity that enters into an agreement

to purchase an interest in target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes and nonprofit organizations.

15. 40 C.F.R. § 745.100 requires, among other things, that the seller or lessor of target housing complete the required disclosure activities before a purchaser or lessee is obligated under any contract to purchase or lease target housing.

16. 40 C.F.R. § 745.107(a)(1) requires, among other things, that before the purchaser or lessee is obligated under any contract to purchase or lease target housing, the seller or lessor shall provide the purchaser or lessee with an EPA-approved lead hazard information pamphlet. Such pamphlets include the EPA document entitled "Protect Your Family From Lead in Your Home" (EPA #747-K-94-001) or an equivalent pamphlet that has been approved for use in that State by EPA.

17. 40 C.F.R. § 745.113(a) requires that each contract to sell target housing include an attachment containing the following elements: a lead warning statement; a statement by the seller disclosing the presence of any known lead-based paint and/or lead-based paint hazards or lack of knowledge of such presence; a list of any records or reports available to the seller that have been provided to the purchaser regarding lead-based paints and/or lead-based paint hazards in target housing or a statement that no such records are available; a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. § 745.113(a)(2) and (3) and the Lead Hazard Information Pamphlet; a statement by the purchaser that he or she has received or waived the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a); and, the signatures and dates of signatures of the seller, agent, and purchaser certifying the accuracy of their statements.

18. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failure to comply with the Disclosure Rule violates Section 409 of TSCA, 15 U.S.C. § 2689, which may subject the violator to administrative civil penalties under Section 16(a) of TSCA, 15 U.S.C. § 2615(a), 42 U.S.C. § 4852d(b)(5), and 40 C.F.R. § 745.118(f).

19. The Administrator of EPA may assess a civil penalty of up to \$16,000 for each violation of Section 409 that occurred after January 12, 2009, pursuant to 42 U.S.C. § 4852d(b)(5), 15 U.S.C. § 2615(a), and 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

20. Between April 18, 2012 and February 18, 2013, Respondent owned single-family dwellings in Kalamazoo, Michigan at 1212 Brownell Court, 915 North Park Street, and 906 Reed Avenue (Respondent's properties).

21. Respondent's properties are "target housing" as defined in 40 C.F.R. § 745.103.

22. On the following dates, Respondent, either directly or through Respondent's authorized agent, entered into the following three written sales agreements (contracts) with individuals for the sale of target housing:

| Address | Date of Contract |
|-----------------------|-------------------------|
| 1212 Brownell Court | April 18, 2012 |
| 915 North Park Street | August 6, 2012 |
| 906 Reed Avenue | February 18, 2013 |

23. Respondent is a "seller," as defined in 40 C.F.R. § 745.103, because it transferred legal title of the target housing referred to in paragraph 21, above, in return for consideration.

24. The individuals who signed the contracts to purchase the target housing referred to in paragraph 21, above, became a "purchaser," as defined in 40 C.F.R. § 745.103, because they entered into an agreement to purchase an interest in target housing.

25. Respondent failed to include provide the purchaser with the pamphlet "Protect Your

Family from Lead in Your Home” (or equivalent) as required by the regulations at 40 C.F.R. § 745.107(a)(1) prior to the purchaser entering the contract to sell target housing at 1212 Brownell Court, 915 North Park Street, and 906 Reed Avenue, in violation of 40 C.F.R. § 745.107(a)(1), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

26. Respondent failed to include a lead warning statement, as an attachment to the contracts to sell the target housing at 1212 Brownell Court, 915 North Park Street, and 906 Reed Avenue, in violation of 40 C.F.R. § 745.113(a)(1), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

27. Respondent failed to include a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or a lack of knowledge of such presence, as an attachment to the contracts to sell target housing at 1212 Brownell Court, 915 North Park Street, and 906 Reed Avenue, in violation of 40 C.F.R. § 745.113(a)(2), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

28. Respondent failed to include a list of records or reports available to the seller pertaining to lead-based paint and/or lead-based paint hazards in the target housing that have been provided to the purchaser or a statement that no such records or reports are available, as an attachment to the contracts to sell target housing at 1212 Brownell Court, 915 North Park Street, and 906 Reed Avenue, in violation of 40 C.F.R. § 745.113(a)(3), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

29. Respondent failed to include a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. § 745.113(a)(2) and (3) and the Lead Hazard Information Pamphlet required under 15 U.S.C. § 2696, as an attachment to the contracts to sell target housing at 1212 Brownell Court, 915 North Park Street, and 906 Reed Avenue, in violation of

40 C.F.R. § 745.113(a)(4), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

30. Respondent failed to include a statement by the purchaser that he or she has either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a) or waived the opportunity, as an attachment to the contracts to sell target housing at 1212 Brownell Court, 915 North Park Street, and 906 Reed Avenue, in violation of 40 C.F.R. § 745.113(a)(5), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

31. Respondent failed to include the signatures of the seller, agents, and purchaser certifying to the accuracy of their statements to the best of their knowledge, along with the dates of signature, as an attachment to the contracts to sell target housing at 1212 Brownell Court, 915 North Park Street, and 906 Reed Avenue, in violation of 40 C.F.R. § 745.113(a)(7), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

Civil Penalty

32. Pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a), Complainant determined that an appropriate civil penalty to settle this action is \$7,200. In determining the penalty amount, Complainant considered the nature, circumstances, extent and gravity of the violations, and, with respect to Respondent, ability to pay, effect on ability to continue to do business, any history of such prior violations, the degree of culpability, and Respondent's agreement to perform a supplemental environmental project. Complainant also considered EPA's Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy, dated December 2007.

33. Within 30 days after the effective date of this CAFO, Respondent must pay a \$7,200 civil penalty for the TSCA violations by electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

In the comment or description field of the electronic funds transfer, state "City of Kalamazoo" and the docket number of this CAFO.

34. Respondent must send a notice of payment that states Respondent's name, complete address, and the case docket number to EPA at the following addresses when it pays the penalty:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Meghan Dunn (LC-8J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Mary McAuliffe (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

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

36. If Respondent does not pay timely the civil penalty or any stipulated penalties due under paragraph 49, below, EPA may refer this matter to the Attorney General who will recover such amount, plus interest, in the appropriate district court of the United States under Section 16(a) of TSCA, 15 U.S.C. § 2615(a). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

37. 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 the payment was due at a rate established pursuant to 31 U.S.C. § 3717. 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.

Supplemental Environmental Project

38. Respondent must complete a supplemental environmental project (SEP) as described in paragraph 39. The parties agree that this SEP is intended to secure environmental and public health protection and improvements. The SEP is designed to protect families by removing and replacing the lead water piping system to residential properties:

39. Respondent will conduct a SEP to replace an aged underground water line system that serves nine residential properties. The SEP will consist of replacing the aged water main pipe in the street and the lead service pipes to each residence. The lead service pipes will be replaced with copper pipes. The nine residential properties are located on Houston Place, a street on Census Tract 6 which is considered Low / Moderate Income (under U.S. Department of Housing and Urban Development guidelines). Replacing the lead service pipes as part of this SEP will reduce potential lead in the water to those residential homes. This SEP must be completed by no later than November 30, 2015.

40. Respondent must spend at least \$32,500 to conduct the SEP described in paragraph 39, above.

41. Respondent certifies as follows:

I certify that the City of Kalamazoo is not required to perform or develop the SEP by any law, regulation, order, or agreement or as injunctive relief as of

the date that I am signing this CAFO. I further certify that the City of Kalamazoo has not received, and is not negotiating to receive, credit for the SEP in any other enforcement action.

I certify that the City of Kalamazoo is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP. I further certify that, to the best of my knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date that I am signing this CAFO (unless the project was barred from funding as statutorily ineligible.) For purposes of this certification, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not expired.

42. Respondent must conduct the SEP according to all applicable federal and state requirements.

43. EPA may inspect the properties identified by Respondent as required by paragraph 39, above, at any time to monitor Respondent's compliance with this CAFO's SEP requirements.

44. Respondent must submit a SEP completion report to EPA by December 31, 2015.

This report must contain the following information:

- a. Detailed description of the SEP as completed;
- b. Description of any operating problems and the actions taken to correct the problems;
- c. Itemized costs of goods and services used to complete the SEP documented by copies of invoices, purchase orders or canceled checks that specifically identify and itemize the individual costs of the goods and services;
- d. Certification that Respondent has completed the SEP in compliance with this CAFO; and
- e. Description of the environmental and public health benefits resulting from the SEP (quantify the benefits and pollution reductions, if feasible).

45. Respondent must submit all notices and reports required by this CAFO by first class

mail to Meghan Dunn of the Pesticides and Toxics Compliance Section at the address provided in paragraph 34, above.

46. In each report that Respondent submits as provided by this CAFO, Respondent must certify that the report is true and complete by including the following signed statement:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

47. Following receipt of the SEP completion report described in paragraph 44, above, EPA must notify Respondent in writing that:

- a. Respondent has satisfactorily completed the SEP and the SEP report;
- b. There are deficiencies in the SEP as completed or in the SEP report and EPA will give Respondent 30 days to correct the deficiencies; or
- c. Respondent has not satisfactorily completed the SEP or the SEP report and EPA will seek stipulated penalties under paragraph 49, below.

48. If EPA exercises option b, above, Respondent may object in writing to the deficiency notice within 10 days of receiving the notice. The parties will have 30 days from EPA's receipt of Respondent's objection to reach an agreement. If the parties cannot reach an agreement, EPA will give Respondent a written decision on its objection. Respondent will comply with any requirements that EPA imposes in its decision. If Respondent does not complete the SEP as required by EPA's decision, Respondent will pay stipulated penalties to the United States under paragraph 49, below.

49. If Respondent violates any requirement of this CAFO relating to the SEP, Respondent must pay stipulated penalties to the United States as follows:

- a. Except as provided in subparagraph b, below, if Respondent did not complete the SEP satisfactorily according to the requirements of this CAFO including the

schedule in paragraph 39, Respondent must pay a penalty of \$35,000.

- b. If Respondent did not complete the SEP satisfactorily, but EPA determines that Respondent made good faith and timely efforts to complete the SEP and certifies, with supporting documents, that it spent at least 90 percent of the amount set forth in paragraph 40, Respondent will not be liable for any stipulated penalty under subparagraph a, above.
- c. If Respondent completed the SEP satisfactorily, but spent less than 90 percent of the amount set forth in paragraph 40, Respondent must pay a penalty of \$7,500.
- d. If Respondent did not submit timely the SEP completion report, Respondent must pay penalties in the following amounts for each day after the report was due until it submits the report:

| <u>Penalty per violation per day</u> | <u>Period of violation</u> |
|--------------------------------------|---|
| \$100 | 1 st through 14 th day |
| \$250 | 15 th through 30 th day |
| \$500 | 31 st day and beyond |

50. EPA's determinations of whether Respondent completed the SEP satisfactorily and whether Respondent made good faith and timely efforts to complete the SEP will bind Respondent.

51. Respondent must pay any stipulated penalties within 15 days of receiving EPA's written demand for the penalties. Respondent will use the method of payment specified in paragraph 33, above, and will pay interest, handling charges and penalties on overdue amounts as specified in paragraph 37, above.

52. For federal income tax purposes, Respondent will neither capitalize into inventory or basis, nor deduct any costs or expenditures incurred in performing the SEP.

53. Any public statement that Respondent makes referring to the SEP must include the following language, "The City of Kalamazoo undertook this project under the settlement of the United States Environmental Protection Agency's enforcement action against the City of Kalamazoo for violations of the Disclosure Rule."

54. If an event occurs which causes or may cause a delay in completing the SEP as required by this CAFO:

- a. Respondent must notify EPA in writing within 10 days after learning of an event that caused or may cause a delay in completing the SEP. The notice must describe the anticipated length of the delay, its cause(s), Respondent's past and proposed actions to prevent or minimize the delay and a schedule to carry out those actions. Respondent must take all reasonable actions to avoid or minimize any delay. If Respondent fails to notify EPA according to this paragraph, Respondent will not receive an extension of time to complete the SEP.
- b. If the parties agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, the parties will stipulate to an extension of time no longer than the period of delay.
- c. If EPA does not agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, EPA will notify Respondent in writing of its decision and any delays in completing the SEP will not be excused.
- d. Respondent has the burden of proving that circumstances beyond its control caused or may cause a delay in completing the SEP. Increased costs for completing the SEP will not be a basis for an extension of time under subparagraph b, above. Delay in achieving an interim step will not necessarily justify or excuse delay in achieving subsequent steps.

General Provisions

55. This CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in the CAFO.

56. This CAFO does not affect the rights of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

57. This CAFO does not affect Respondent's responsibility to comply with the Lead Act and the Disclosure Rule and other applicable federal, state, and local laws.

58. Respondent certifies that it is complying with the Lead Act and the Disclosure Rule.

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

60. 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.

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

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

City of Kalamazoo, Respondent

April 22, 2015
Date

Clyde J. Robinson
Clyde Robinson
City Attorney
City of Kalamazoo

United States Environmental Protection Agency, Complainant

5/21/2015
Date

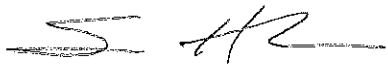
Margaret M. Guerriero
Margaret M. Guerriero
Director
Land and Chemicals Division

In the Matter of:
City of Kalamazoo
Docket No. TSCA-05-2015-0008

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.

26 May 2015
Date



Susan Hedman
Regional Administrator
United States Environmental Protection Agency
Region 5

In the matter of: City of Kalamazoo.
Docket Number: TSCA-05-2015-0008

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing *Consent Agreement and Final Order*, which was filed on May 27, 2015, in the following manner to the addressees:

Copy by Certified Mail
Return-receipt:

Mr. Clyde J. Robinson
Office of the City Attorney
241 W South St.
Kalamazoo, Michigan 49007

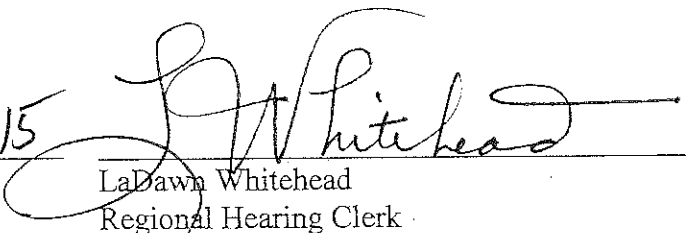
Copy by E-mail to
Attorney for Complainant:

Mary McAuliffe
McAuliffe.mary@epa.gov

Copy by E-mail to
Regional Judicial Officer:

Ann Coyle
coyle.ann@epa.gov

Dated: May 27, 2015


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

CERTIFIED MAIL RECEIPT NUMBER(S): 7011 1150 0000 2643 8494