

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

FILED

2011 MAY -2 PM 12:

REGIONAL OFFICE

In the matter of:) Docket No. TSCA-09-2011- 0004
)
Bailey Charter)
Elementary School,)
)
Respondent.)

CONSENT AGREEMENT

and

**FINAL ORDER PURSUANT TO
SECTIONS 22.13 AND 22.18**

I. CONSENT AGREEMENT

Complainant, the Director of the Communities and Ecosystems Division, United States Environmental Protection Agency, Region IX, ("EPA") and Bailey Charter Elementary School (hereafter "**Respondent**") seek to settle this case and consent to the entry of this Consent Agreement and Final Order ("CAFO").

A. APPLICABLE STATUTES AND REGULATIONS

1. This administrative proceeding is initiated pursuant to Section 207 of the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (hereinafter referred to as "TSCA" or the "Act"), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22.

2. This proceeding involves the Asbestos Hazard Emergency Response Act ("AHERA"), also known as Title II of TSCA, and the regulations promulgated thereunder. Section 203(b) of TSCA, 15 U.S.C. § 2643(b), required the Administrator of EPA to, among other things, promulgate regulations prescribing procedures for determining whether asbestos-containing building material ("ACBM") is present in a school building under the authority of a local educational agency ("LEA"). Section 203(i) of TSCA, 15 U.S.C. § 2643(i), required the

Administrator of EPA to, among other things, promulgate regulations requiring each LEA to develop and implement an asbestos management plan (“AMP”) for school buildings under its authority. These regulations are codified at 40 C.F.R. Part 763, Subpart E (the “**Subpart E regulations**”).

3. Section 763.85(a)(2) of the Subpart E regulations states that any building leased or acquired on or after October 12, 1988 that is to be used as a school building shall be inspected as described under paragraphs (a)(3) and (4) of Section 763.85 prior to use as a school building and that, in the event that emergency use of an uninspected building as a school building is necessary, such buildings shall be inspected within 30 days after commencement of such use. Section 763.93(g)(2) of the Subpart E regulations provides that each LEA shall maintain in its administrative office a complete, updated copy of an AMP for each school under its administrative control or direction. Section 763.93(g)(3) of the Subpart E regulations provides that each school shall maintain in its administrative office a complete, updated copy of the AMP for that school. 40 C.F.R. § 763.93(g)(3).

4. Sections 207(a)(1) and (3) of TSCA, 15 U.S.C. §§ 2647(a) (1) and (3), provide that any LEA that fails to conduct an inspection or fails to develop an AMP pursuant to regulations under Section 203(i) of TSCA, 15 U.S.C. § 2643(i), is liable for a civil penalty. Section 207(a) of TSCA, 15 U.S.C. § 2647(a), the Federal Civil Penalties Inflation Adjustment Act of 1990 (as amended by the Debt Collection Improvement Act of 1996), and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize a civil penalty, for each day that a violation continues, of (1) not more than \$5,000 for violations on or before January 30, 1997; (2) not more than \$5,500 for violations after January 30, 1997 but on or before March 15, 2004; (3) not more than \$6,500 for violations after March 15, 2004 through January 12, 2009; and (4) not more than \$7,500 for violations after January 12, 2009.

5. Section 207(a) of TSCA, 15 U.S.C. § 2647(a), further provides that any civil penalty shall be assessed and collected in the same manner and subject to the same provisions as civil penalties assessed and collected under Section 16 of TSCA, 15 U.S.C. § 2615. Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires EPA to take into account the nature, circumstances, extent, and gravity of the violation(s), and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. Section 207(a) states that any civil penalty collected shall be used by the LEA to comply with TSCA, with any portion remaining unspent to be deposited into the Asbestos Trust Fund established pursuant to Section 5 of AHERA and codified at 20 U.S.C. § 4022. In addition, Section 207(c) of TSCA, 15 U.S.C. § 2647(c), requires EPA to consider the significance of the violation, the culpability of the violator, including any history of previous TSCA violations, the ability of the violator to pay the penalty, and the ability of the violator to continue to provide educational services to the community.

B. AUTHORITY AND PARTIES

6. Respondent is a Nevada Charter school. Nevada Charter schools are public, state-funded schools constituted within the state of Nevada pursuant to the Nevada Charter School Law of 1997. See Nevada Revised Statutes (NRS) relating to charter schools, NRS 386.500 to 386.610. Nevada Charter Schools may not operate for profit. See NRS 386.553. The governing body of a Nevada Charter School is a public authority legally constituted within the State of Nevada for administrative control or direction of its school. See NRS 386.549. Nevada Charter schools contract with the State Board, a college or university within the Nevada System of Higher Education, or a school district to provide an education service.

7. The authority to take action under Section 207 of TSCA, 15 U.S.C. § 2647, is vested in the Administrator of EPA ("Administrator"). By EPA Delegation Order Number 12-2-A,

dated May 11, 1994, the Administrator delegated to the Regional Administrator of EPA Region IX the authority to commence administrative proceedings under TSCA and to sign consent agreements memorializing settlements in such proceedings. By EPA Regional Order Number R9 1260.06A dated May 19, 2005, the Regional Administrator of EPA Region IX re delegated this authority to the Director of the Communities and Ecosystems Division. The Director of the Communities and Ecosystems Division has the authority to commence and settle an enforcement action in this matter.

C. COMPLAINANT'S ALLEGATIONS

8. Respondent began operating **Bailey Charter Elementary School** in or around **2006**. Respondent owns, leases, or otherwise uses, at the minimum, one (1) "school building," as defined in Section 202(13) of TSCA, 15 U.S.C. § 2642(13), and in 40 C.F.R. § 763.83, located at **1090 Bresson Avenue, Reno, Nevada (the "Bresson Building")**. In July 2010, Respondent moved to a new location at **210 Gentry Way, Reno, Nevada (the "Gentry Building")**. Respondent is a LEA, as defined in Section 202(7) of TSCA, 15 U.S.C. § 2642(7), and in 40 C.F.R. § 763.83.

9. Sections 203(i) and 205(d) of TSCA, 15 U.S.C. §§ 2643(i) and 2645(d), require that Respondent, prior to using a building as a school after October 12, 1988, conduct an inspection and have developed a valid AMP. Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3), and 40 C.F.R. § 763.97(a), make it unlawful for Respondent to fail to conduct such inspections and develop such an AMP, and provide that each separate failure to comply with respect to a single school building constitutes a violation of Section 207(a)(3) of TSCA. If a signed statement of an architect has been submitted to EPA pursuant to Section 763.99(a)(7), then the LEA is not required to perform an inspection.

10. In April 2009, EPA inspectors inspected **Bailey Charter Elementary School**, and

Respondent was unable to present an AMP. Respondent did produce a limited asbestos NESHAP survey conducted in 2001 documenting the presence of asbestos-containing materials in the Bresson Building at that time. In a letter dated **November 16, 2009**, the EPA Region IX Toxics Office requested a copy of Respondent's AMP within 30 days. Respondent did not provide an AMP for the Bresson Building. At the time of EPA's April 2009 inspection, Respondent had not conducted an AHERA inspection, obtained an architect's statement, nor developed an AMP, for **Bailey Charter Elementary School operating at the Bresson Building**. Respondent began using the **Gentry Building** as a school building on or about July 19, 2010. Until October 2010, Respondent had not conducted an AHERA inspection, obtained an architect's statement, nor developed an AMP, for **Bailey Charter Elementary School at the Gentry Building**. The AMP dated October 22, 2010, documents that **Bailey Charter Elementary School**, located at the **Gentry Building**, does not contain ACBM.

11. Respondent violated Section 207(a)(1) of TSCA, 15 U.S.C. § 2647(a)(1), by failing to either submit to EPA a signed statement of an architect or conduct an inspection, pursuant to Section 203(b) of TSCA, 15 U.S.C. § 2643(b), and the Subpart E regulations, for each of the school buildings referenced in Paragraph 8 above.

12. Respondent violated Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3), by failing to develop an AMP, pursuant to Section 203(i) of TSCA, 15 U.S.C. § 2643(i), and the Subpart E regulations, for each of the school buildings referenced in Paragraph 8 above.

D. RESPONDENT'S ADMISSIONS

13. To avoid the disruption of orderly educational activities and the expense of protracted and costly litigation, Respondent, in accordance with 40 C.F.R. § 22.18(b)(2) and for the purpose of this proceeding, (i) admits that EPA has jurisdiction over the subject matter of this CAFO and over Respondent; (ii) neither admits nor denies the specific factual allegations contained in

Section I.C. of this CAFO; (iii) consents to any and all conditions specified in this CAFO; (iv) agrees to pay, and consents to the assessment of, the civil administrative penalty under Section I.G of this CAFO; (v) waives any right to contest the allegations contained in Section I.C. of this CAFO, including but not limited to its right under Section 16(a)(2)(A) of TSCA to request a hearing; and (vi) waives the right to appeal the proposed final order contained in this CAFO.

E. COMPLIANCE WITH AHERA

14. AHERA and the Subpart E regulations specify the steps which must be taken to evaluate whether a school building contains or is assumed to contain ACBM. When a LEA has properly determined that no buildings in a school contains ACBM, compliance by the LEA with AHERA and the Subpart E regulations include:

(A) Development and updating of AMP. The AMP shall include: (1) a list of the name and address of each school building (2) for each school building, a statement of inspection as specified by 40 C.F.R. § 763.93(e)(1) and the information that is required to be detailed in the inspection as specified by 40 C.F.R. § 763.93(e) unless, for each school building that qualifies, the LEA has a signed statement from an architect as specified by 40 C.F.R. § 763.99(a)(7) in lieu of inspection; (3) the name, address, and telephone number of a person designated under 40 C.F.R. § 763.84 to ensure that the duties of Respondent, as the LEA, are carried out (the "**Designated Person**"); (4) the course name, and the dates and number of hours of training taken by that person to carry out the duties; (5) a dated copy of each year's annual notification of the AMP's availability to workers and building occupants, or their legal guardians, (including parents, teachers and employees), along with a description of the steps taken to effect the notification; (6) a true and correct statement, signed by the Designated Person which certifies that the general LEA responsibilities, as stipulated by 40 C.F.R. § 763.84, have been met or will be met; (7) the name of each consultant that contributed to the AMP and the applicable statement

that each such consultant is accredited, as required by 40 C.F.R. § 763.93(e)(12). Pursuant to 40 C.F.R. § 763.93(f), if Respondent requires, the AMP may also include a statement signed by an accredited AMP developer that such a person has prepared or assisted in the preparation of the AMP or has reviewed such plan, and that such plan is in compliance with the Subpart E regulations.

(B) Identification and training for Designated Persons identified by the Respondent, as required by 40 C.F.R. § 763.84(g)(1). Training for the Designated Person shall be in accordance with the training requirements listed in 40 C.F.R. § 763.84(g)(2).

(C) Maintenance of a complete copy of the AMP for each school in Respondent's administrative office and in each school administrative office, as required by 40 C.F.R. §§ 763.93(g)(2) and (3). The AMP shall be available to representatives of EPA and the State, the public, including teachers, other school personnel, parents, and their representatives without cost or restriction.

(D) Notifications: Written notification to parent, teacher and employee organizations of the availability of the AMP and a description of the steps used to make such notification, as required by 40 C.F.R. § 763.93(g)(4), and subsequent notification to these organizations at least once each school year.

Additional requirements apply to LEA's with school buildings that contain, or are assumed to contain, ACBM.

F. RESPONDENT'S CERTIFICATION

15. In executing this CAFO, Respondent certifies that it has complied with AHERA and the Subpart E regulations at **Bailey Charter Elementary School**, and all other facilities under its control which are subject to AHERA requirements. The AMP for Bailey Charter Elementary School documents that the school contains no known or assumed ACBM. Respondent certifies

that all accounting of the costs incurred by Respondent in complying with AHERA and the Subpart E regulations provided to EPA are and will be true and accurate.

G. CIVIL ADMINISTRATIVE PENALTY

16. Respondent consents to the assessment of a penalty in the amount of **FOURTEEN THOUSAND SIX HUNDRED TEN DOLLARS (\$14,610)**, as specified in this Paragraph as final settlement and complete satisfaction of the civil claims against Respondent arising from the facts alleged in Section I.C. of the CAFO and under the Act, as alleged in Section I.C. of the CAFO. This penalty has been reduced from **\$16,900** to reflect the EPA approved costs of Respondent's compliance with AHERA and the Subpart E regulations.

17. Respondent shall pay the civil penalty amount required by Paragraph 16 within thirty (30) calendar days of the effective date of this CAFO. The civil penalty shall be paid by remitting a certified or cashier's check including the name and docket number of this case, for the amount, payable to "Treasurer, United States of America," that shall state on the reverse side, "For Deposit Into the Asbestos Trust Fund, 20 U.S.C. § 4022", (or be paid by one of the other methods listed below) and sent as follows:

Regular Mail:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
Attention: Asbestos Trust Fund
PO Box 979077
St. Louis, MO 63197-9000

Wire Transfers:

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:
Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency, Attn: Asbestos Trust Fund"

Overnight Mail:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
ATTN Box 979077
Attention: Asbestos Trust Fund
St. Louis, MO 63101

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
ABA = 051036706
Transaction Code 22 – checking
Environmental Protection Agency
Account 31006
CTX Format

On Line Payment:

This payment option can be accessed from the information below:

www.pay.gov

Enter "sfo1.1" in the search field

Open form and complete required fields

Comments regarding this payment: Attention: Asbestos Trust Fund

If clarification regarding a particular method of payment remittance is needed, contact the EPA Cincinnati Finance Center at 513-487-2091.

A copy of each check, or notification that the payment has been made by one of the other methods listed above, including proof of the date payment was made, shall be sent with a transmittal letter, indicating Respondent's name, the case title, and docket number, to both:

- a) Regional Hearing Clerk
Office of Regional Counsel (ORC-1)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

b) Ron Tsuchiya
Toxics Office
Communities and Ecosystems Division (CED-4)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

18. In the event that Respondent fails to pay the civil administrative penalty assessed above by its due date, Respondent shall pay to Complainant an additional stipulated penalty in the amount of **ONE HUNDRED DOLLARS (\$100)** for each day that payment is late. Upon Complainant's written demand, payment shall immediately become due and payable.

19. Respondent's failure to pay in full the civil administrative penalty by its due date also may lead to any or all of the following actions:

a. The debt being referred to a credit reporting agency, a collection agency, or to the Department of Justice for filing of a collection action in the appropriate United States District Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any such collection action, the validity, amount, and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.

b. The debt being collected by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government) includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds. 40 C.F.R. Part 13, Subparts C and H.

c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; (ii) suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds; (iii) convert the method of payment under a grant or contract from an advanced payment to a reimbursement method; or (iv) revoke a grantee's or contractor's letter-of-credit. 40 C.F.R. § 13.17.

20. Issuance of this CAFO does not constitute a waiver by EPA of its right to enforce the

terms of this CAFO or to seek other civil or criminal relief for violations, if any, of any provision of federal law not specifically settled by this Consent Agreement. Nothing in this CAFO shall relieve Respondent of its duty to comply with all applicable provisions of the Act, rules promulgated thereunder, and other Federal, state or local laws or statutes.

21. The provisions of this CAFO shall be binding on Respondent and on Respondent's officers, directors, employees, agents, servants, authorized representatives, successors, and assigns.

22. Except as set forth in Paragraph 19 above, each party shall bear its own costs, fees, and disbursements in this action.

23. For the purposes of state and federal income taxation, Respondent shall not claim a deduction for any civil penalty payment made pursuant to this CAFO.

24. This Consent Agreement constitutes the entire agreement between the Respondent and EPA. This Consent Agreement and Final Order is for the purpose of fully and finally settling the civil claims against Respondent arising from the facts alleged in Section I.C. of this CAFO. Full payment of the civil penalty and any applicable interest charges or late fees or penalties as set forth in this Consent Agreement and the Final Order shall constitute full settlement and satisfaction of civil penalty liability against Respondent for the violations alleged in Section I.C. of this CAFO.

25. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), the effective date of this CAFO shall be the date on which the accompanying Final Order, having been signed by the Regional Judicial Officer, is filed.

26. The undersigned representatives of each party to this Consent Agreement certify that each is duly authorized by the party whom he or she represents to enter into the terms and bind

that party to it.

BAILEY CHARTER ELEMENTARY SCHOOL:

Date: 2/8/11 By: Michelle Engebretson

Name: Michelle Engebretson

Title: Principal

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: 4/07/11 By: Kathie A. Tap

ENRIQUE MANZANILLA

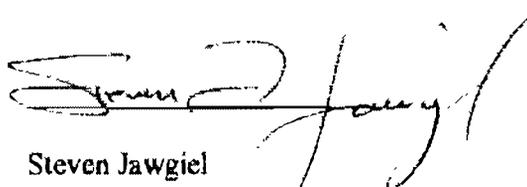
Director, Communities and Ecosystems Division

U.S. Environmental Protection Agency, Region IX

II. FINAL ORDER

IT IS HEREBY ORDERED that this Consent Agreement and Final Order be entered and that Respondent shall comply with the terms set forth in the Consent Agreement and pay the full civil penalty amount of **FOURTEEN THOUSAND SIX HUNDRED TEN DOLLARS (\$14,610)** in accordance with the terms set forth in the Consent Agreement.

Date: 04/28/11



Steven Jawgiel
Regional Judicial Officer
U.S. EPA, Region IX

CERTIFICATE OF SERVICE

I certify that the original and one copy of the fully executed Consent Agreement and Final Order Pursuant to 40 C.F.R §§ 22.13 and 22.18 (Docket No. TSCA-9-2011-) against the Bailey Charter Elementary School, was filed this day with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, California 94105, and that a true and correct copy of the same was sent to Respondent at the following address:

Ms. Michelle Engebretson
Principal
Bailey Charter Elementary School
210 Gentry Way
Reno, NV 89502

Certified Mail No. 7001 0320 0002 4540 3443


~~Steven Agency~~ Bryan K Gaudwin
Regional Hearing Clerk
United States Environmental Protection Agency, Region IX

Date: 8/2/11