

DECISION AND ORDER

This matter arises under Sections 15 and 16 of the Toxic Substances Control Act ("TSCA," or "the Act"), 15 U.S.C. §§ 2615 and 2616. Section 2614(1) makes unlawful the failure or refusal to comply with ". . . any rule promulgated or order issued under section 2604 or 2605" [sections 5 and 6 of TSCA]. Section 16(a)(1) of the Act provides for the imposition of civil penalties for violations of section 15 "in an amount not to exceed \$25,000 for each such violation."¹

The complaint charged respondent, an "accredited asbestos contractor" as defined in Section 202(1) of TSCA [15 U.S.C. § 2642(1)] and 40 C.F.R. § 763.83, with three violations of the Act and regulations: (1) failure to identify properly all homogeneous areas of potential or suspected asbestos containing building material, in violation of 40 C.F.R. § 763.85 and Section 15(1) of TSCA [15 U.S.C. § 2614(1)], in connection with the inspection of Colorado West Christian School in Montrose, Colorado; (2) failure to sample properly or assume to be asbestos containing building material, in violation of Section 203(b) of TSCA [15 U.S.C. § 2643b of AHERA, "Inspection"] and 40 C.F.R. § 763.86, certain sheet vinyl floorings in the school's buildings; and (3) failure to establish a "management plan" in conformance with Title II of TSCA [15 U.S.C.

¹ Section 2614(2) makes it unlawful for any person to fail or refuse to establish or maintain records. The Act also provides that "[E]ach day . . . violation[s] continue shall, for purposes of this subsection, constitute a separate violation of section 2614 [section 15 of TSCA] of this title."

§ 2643(i) of AHERA, "Management Plans"] by failing to include proper identification, sampling, and assessment of certain areas in the school in violation of 40 C.F.R. § 763.93(e). The total civil penalty originally proposed by complainant, \$38,000, was thereafter reduced to \$9000.²

The parties agreed that the penalty was the only issue remaining to be determined,³ and filed cross motions for "accelerated decision" after settlement efforts failed.⁴ Complainant's motion was granted as to liability, and denied as to the amount of the penalty since it was clear that factual issues remained unresolved in connection with the penalty. Respondent's motion was denied. Subsequently the parties agreed that the penalty should be resolved on submissions, thereby obviating the necessity for a trial. The parties were given an opportunity to file additional material before decision on the penalty issue was rendered.⁵ Thereafter, respondent stated in an affidavit that ". . . due to economic constraints and the extent and nature of the liability in the industry," he had terminated his asbestos business

² Affidavit of Robert W. Harding, Chief, Toxics Section, Toxic Substances Branch, Air, Radiation, and Toxics Division, United States Environmental Protection Agency, Region VIII, (attached to complainant's response to respondent's motion for accelerated decision), at 4.

³ See Status Report by Complainant, March 31, 1993.

⁴ Complainant's motion was for accelerated decision as to the penalty, which, of course, encompasses the issue of liability.

⁵ Order Providing Opportunity to Submit Materials, November 3, 1993.

and does not "intend to re-enter this business in the future."⁶

With respect to penalties, the Act provides that

In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations 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.⁷

As noted above, complainant reconsidered the proposed penalty after the submission of materials purporting to show respondent's financial position, based upon those documents and the **Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act.**⁸ Complainant determined that ability of a respondent to pay should be based upon four percent of the average gross income for the current year and prior three years, which produced a figure of \$9590.40,⁹ and lowered its request to \$9000.¹⁰ The parties stipulated that the new proposed penalty was calculated from respondent's average gross income for the current year and three prior years, and that it " . . . is based upon respondent's ability to pay as allowed in the 'Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control

⁶ Affidavit of Mr. David W. Craig d/b/a Craig and Company, filed on November 10, 1993.

⁷ 15 U.S.C. § 2615(a)(2)(B) [TSCA § 16(a)(2)(B).]

⁸ Affidavit of Robert W. Harding, supra. See also 45 Federal Register 59770, September 10, 1980.

⁹ Affidavit of Robert W. Harding, at 5.

¹⁰ Complainant's Motion for Initial Decision on Penalty, at 1.

Act published in the Federal Register (Page 59770, Vol. 45, No. 177)'."¹¹ Since the date of complainant's calculations, respondent has submitted no additional documents which would show that its financial situation has changed, other than an affidavit to the effect that respondent has ceased doing business, from which it may be supposed that his income has been reduced as a result. However, respondent has not shown that it cannot afford to pay the \$9000 penalty that complainant now seeks. Accordingly, no basis exists for a reduction of the penalty based upon inability to pay.

Because the Act provides that "such other matters as justice may require" shall be taken into account in determining the amount of the penalty, it is proper to consider respondent's cooperation in the investigation, prosecution, and final resolution of this case. Such cooperation enabled complainant to bring this matter on for determination far more quickly, and without the trial to which respondent was entitled, than would be the case if respondent had not cooperated, and significant allowance for this factor must be made. It is therefore determined that the appropriate amount to be assessed in this matter is \$ 5000.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent's cooperation in the investigation and prosecution of this matter, including respondent's willingness to have the matter determined upon submissions, has resulted in a significantly more expeditious and less costly resolution of this

¹¹ Stipulations of Facts and Law, at 1.

matter than would otherwise have been the case.

2. Such cooperation must be taken into account to a greater extent than complainant has done heretofore, in the interests of justice, 15 U.S.C. § 2615 (a)(2)(B), and warrants a reduction of the penalty proposed by complainant.

3. The appropriate penalty to be assessed in this matter, given the facts shown here, is \$5000.00.

ORDER

It is ordered that respondent shall pay a civil penalty of \$5000.00 for the violations previously found, within sixty (60) days from the date of service of this order, by forwarding to the Regional Hearing Clerk a cashier's check or a certified check for the said amount payable to the United States of America. The check shall be mailed to:

U. S. Environmental Protection Agency
Regional Hearing Clerk, Region VIII
c/o Mellon Bank
Post Office Box 360859M
Pittsburgh, Pennsylvania 15251

Failure to pay the civil penalty assessed herein may result in the commencement of a civil action in federal district court to recover the amount due together with interest thereon at the rate of four percent (4%) per annum.



J. F. Greene
Administrative Law Judge

Washington, D. C.
January 31, 1994