



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
Five Post Office Square, Suite 100
Boston, Massachusetts 02109-3912

BY E-MAIL

November 10, 2022

LeAnn Jensen
Regional Judicial Officer
U.S. Environmental Protection Agency-Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912
Jensen.Leann@epa.gov

Re: In the Matter of the Town of Southington, CT, Docket No. TSCA-01-2023-0004

Dear Ms. Jensen:

Attached is a Consent Agreement and Final Order (“CAFO”) that both initiates and resolves an administrative penalty action, pursuant to 40 C.F.R. § 22.13(b), against the Town of Southington, Connecticut. The CAFO has been signed by both parties and is being submitted to you for approval, in accordance with 40 C.F.R. § 22.18(b). The CAFO alleges that the continued presence of polychlorinated biphenyls (“PCBs”) in vapor barriers and mastics between the walls at two of the Town’s schools is unauthorized under the PCB regulations, which were promulgated pursuant to the Toxic Substances Control Act (“TSCA”).

TSCA Section 16(a)(2)(c), 15 U.S.C. § 2615(a)(2)(c), authorizes EPA to compromise, modify, or remit, with or without conditions, any civil penalty imposed under this subsection. For reasons specific to this case, EPA Region 1 determined that a \$0 penalty was appropriate and that such a penalty would be consistent with TSCA’s statutory penalty factors, found at TSCA Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). Accordingly, EPA Region 1 submitted a written request to the Office of Enforcement and Compliance Assurance (“OECA”) requesting approval to deviate from the relevant PCB penalty policies, which are the *Polychlorinated Biphenyl (PCB) Penalty Policy* (April 9, 1990) and *Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act: [Interim] PCB Penalty Policy*, 45 Fed. Reg. 59770 (Sept. 10, 1980).¹

The CAFO is a “settlement with conditions,” containing provisions that will help the Town manage the PCBs safely until they can be removed in 20 years. Appendix A contains more

¹ The latter penalty policy is rarely used ever since EPA issued the 1990 policy, but it has some helpful guidance for assessing penalties when the claims pertain to PCBs in building materials.

information about the background of this case and the application of the statutory penalty factors.

Once you sign the Final Order, I will file the fully executed CAFO with the Regional Hearing Clerk, thereby resolving this matter. The parties' consent to the use of digital signatures is included in the CAFO, as well as Respondent's consent to electronic service of the CAFO. Respondent signed the CAFO with a "wet" signature, so I will file a PDF of the executed CAFO and submit the original signature to Regional Hearing Clerk when I am next in the office. This settlement does not have any public notice requirements.

Sincerely,

Catherine Smith
Senior Enforcement Counsel, EPA Region 1
smith.catherine@epa.gov

Enclosure

cc: Meagan L. Moore, Counsel, BakerHostetler, at mmoore@bakerlaw.com

Appendix A

Background Information and Application of Statutory Penalty Factors *In the Matter of the Town of Southington, Docket No. TSCA 01-2023-0004*

Background

The Town of Southington has two middle schools constructed in the 1960's, the John F. Kennedy Middle School and the Joseph A. DePaulo Middle School ("the Schools"). As part of a renovation project, the Town discovered PCBs in caulk, glazing, mastic, vapor barriers, and building substrates at the Schools. The Town removed most of these materials in accordance with a PCB Approval issued by EPA Region 1 on April 17, 2013 ("the 2013 Approval"). However, pursuant to 40 C.F.R. § 761.62(c), the 2013 Approval allowed the Town to maintain in place PCB-containing vapor barriers and mastic located between the walls, under the theory that these materials were "wastes in storage for disposal." The Approval, which expires in 2023, requires regular air monitoring to ensure that the vapor barriers and mastic do not pose an unreasonable risk to human health or the environment.

Recent years of sampling results (five years at one school and four years at the other school) have shown no exceedances of the site-specific action levels set for the Schools, which was 300 nanograms per cubic meter. According to the Town, it would cost at least \$7.8 million to remove the materials.

Almost a decade has passed since EPA Region 1 issued the 2013 Approval. The Town asked EPA to renew the Approval upon its expiration. However, as the Town had no current plans to remove the vapor barriers and mastic between the walls, EPA decided that: (1) these materials could not be categorized as *wastes in temporary storage for disposal* and were better categorized as manufactured PCB *products* unauthorized for use under 40 C.F.R. § 761.20(a); (2) it was important to maintain the integrity of EPA's "waste in storage for disposal" regulations, which are meant to allow only short-term storage of such materials; (3) it was inappropriate to renew the 2013 Approval, as the relevant authorities in 40 C.F.R. Part 761 for approving risk-based storage and disposal are for wastes and not products; and (4) the Town should be on a compliance plan to remove the PCBs, with regular air monitoring in the meantime.

EPA's decided that a settlement with a \$0 penalty and a 20-year compliance schedule was appropriate because: (1) the Town had relied on EPA Region 1's issuance of the 2013 Approval to undertake a \$85 million renovation of the Schools to extend their life by two or three decades; (2) the violative materials are located between walls, where they pose little harm (as confirmed by years of air monitoring results); (3) according to the Town, it would cost at least \$7.8 million to remove the materials; and (4) the settlement contains conditions, including air monitoring, that should help keep people safe until the PCBs can be removed.

Several Headquarters and Regional Offices approved the draft settlement, including OECA, the Office of General Counsel, and Region 1's Land, Chemicals, and Redevelopment Division.

Application of Penalty Factors

Pursuant to TSCA Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B), when imposing a civil penalty, EPA must 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.

To help EPA apply the TSCA statutory factors consistently in cases involving PCB violations, EPA issued the *Polychlorinated Biphenyl (PCB) Penalty Policy* (April 1990) and an earlier policy entitled *Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act: [Interim] PCB Penalty Policy*, 45 Fed. Reg. 59770 (Sept. 10, 1980). Presiding officers apply the statutory factors when considering penalties but also consider any penalty policy issued by EPA to facilitate the application of the statutory penalty criteria. See 40 C.F.R. § 22.27(b); *In re CDT Landfill Corp.*, 11 E.A.D. 88, 117 (EAB 2003); *In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000).

However, presiding officers are not bound by EPA's penalty policies. See, e.g., 40 C.F.R. § 22.27(b); *CTD Landfill*, 11 E.A.D. at 117; and *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 610 (EAB 2002). Nor is EPA bound by them because they are not regulations, as many of EPA's penalty policies clarify. See, e.g., *Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act: [Interim] PCB Penalty Policy* at 59770 (1980); *Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy* at 1 (2007); and *Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68* at 3 (2012). Also, in this particular case, EPA does not have complete information to perform a standard penalty calculation under the PCB penalty policies, as it is difficult to quantify the amount of material behind the walls of the Schools.

In consultation with OECA, EPA Region 1 agreed to a \$0 penalty, applying the statutory factors as follows:

- TSCA has a strict liability scheme, so TSCA regulations apply whether or not the Town intended to violate them. Nonetheless, TSCA requires consideration of the “**degree of culpability**” as one of the statutory penalty factors. In this case, the Schools were constructed, and the PCB-containing vapor barriers were placed between the walls, before the PCB Regulations became effective, demonstrating a lack of culpability. When the PCBs were discovered, the Town sought and received EPA approval of its management plans for the vapor barriers and other materials.
- The vapor barriers pose little threat to human health or the environment, as they are located between the walls and are not emitting significant air emissions. Years of air

sampling results confirm this. These facts are relevant to the “**nature, circumstances, extent, and gravity of the violation.**”

- In 2013, Respondent received an approval from EPA Region 1 pursuant to 40 C.F.R. §§ 761.61 and 761.62 to store and remove certain PCB wastes from the Schools, which approval expires in 2023. The 2013 Approval contains interim PCB monitoring requirements. Respondent removed and managed PCB wastes pursuant to such approval and relied on the approval to keep the vapor barriers in place until they could reasonably be removed. These facts are relevant when considering the “**degree of culpability**” and “**such other factors as justice may require.**”
- This CAFO provides a path to compliance for the eventual removal of such PCBs. Nonetheless, the Town relied on EPA’s original designation of the vapor barrier as a waste in storage for disposal in making long-term renovation plans, which is a consideration under “**such other factors as justice may require.**”
- Until such time that the PCBs can feasibly be removed, the CAFO also requires best management practices to ensure the safety of the students, teachers, and employees working in the Schools. These are the same practices that the Town has been following since EPA Region 1 approved its monitoring plan in 2014. This control of harm goes to the **nature, circumstances, extent, and gravity of the violation.**
- According to the Town, the expected useable life of the renovated Schools is at least another twenty years. In 2012, the Town estimated that the cost to completely remove the PCB materials would be approximately \$7.8 million. Current proposals likely will be far more expensive.² The Town does not have the ability to raise the capital necessary to perform a removal in a short period of time, thus necessitating an extended time for removal. Also, according to the Town, fines and penalties will impair the Town’s ability to manage financial reserves, raise necessary capital, and may affect existing creditor obligations. Although not constituting an “inability to pay” finding, consideration of these facts are relevant to the “**ability to pay**” and “**effect on ability to continue to do business**” factors.
- \$0 penalty CAFOs are not unusual; EPA has in the past used \$0 penalty CAFOs to establish a history of violation for EPCRA “audit policy” cases, and sometimes EPA issues \$0 penalty cases for “inability to pay” cases.

² The BEN model estimates that, in 2029 (the last year for which BEN will project expenses), that \$7.8 million figure would be over \$9 million. However, the costs are delayed instead of avoided, and according to the model, result in a negative EBN.