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FILED

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US EPA - REGION IX
HEARING CLERK

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

In the matter of:) Docket No. TSCA-09-2013-0003
) CONSENT AGREEMENT
U.S. Department of the Interior) and
(Bureau of Indian Education) FINAL ORDER PURSUANT TO
Sacramento Education Line Office) SECTIONS 22.13 AND 22.18
)
Respondent.)
_____)

I. CONSENT AGREEMENT

Complainant, the Director of the Communities and Ecosystems Division, United States Environmental Protection Agency, Region 9, ("EPA") and Respondent United States Department of Interior ("DOI") (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 material is present in a school building under the authority of a local educational agency (“**LEA**”). Section 203(g) of TSCA, 15 U.S.C. § 2643(g), required the Administrator of EPA to promulgate regulations to, among other things, require periodic reinspection of friable and non-friable asbestos. 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 763.85(b) of the Subpart E regulations states that at least once every 3 years after a management plan is in effect, each LEA shall conduct a reinspection of all friable and nonfriable known or assumed asbestos-containing building material, in each school building that they lease, own, or otherwise use as a school building. 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.

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 in the case of 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 Title II, with any portion remaining unspent to be deposited into the Asbestos Trust Fund established pursuant to Section 5 of the Asbestos Hazard Emergency Response Act of 1986, 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. Schools owned by, operated by, or otherwise the legal responsibility of the Bureau of Indian Education ("BIE") are subject to AHERA. 15 U.S.C. § 2642(7). Respondent is the LEA for the schools owned by, operated by, or otherwise the legal responsibility of the BIE Sacramento Line Office.

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 redelegate 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. At the times relevant to this enforcement action, acting through the Sacramento Line Office of the BIE, Respondent owned, operated, or otherwise had the legal responsibility for one or more of the buildings at Sherman Indian High School in Riverside, California and Pyramid Lake High School in Nixon, Nevada. Respondent owns, leases, or otherwise uses, at the minimum, one (1) "school building," as defined in Section 202(13) of TSCA Title II, 15 U.S.C. § 2642(13), and in 40 C.F.R. §§ 763.83, located at each of the schools listed in this paragraph. Respondent is the LEA, as defined in Section 202(7) of TSCA Title II, 15 U.S.C. § 2642(7), and in 40 C.F.R. §§ 763.83, for the schools listed in this paragraph.

9. Sections 203(i) and 205(d) of TSCA Title II, 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 203(g) of TSCA, 15 U.S.C. § 2643(g), and Section 763.85(b) of the Subpart E regulations require that Respondent, at least once every 3 years after an AMP is in effect, conduct a reinspection of all friable and nonfriable known or assumed asbestos-containing building material. Section 207(a)(3) of TSCA Title II, 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 Title II. If a signed statement of an architect or project engineer has been submitted to EPA pursuant to section 763.99(a)(7), 40 C.F.R. § 763.99(a)(7), then the LEA is not required to perform an inspection.

10. On May 12, 2009, an EPA investigator inspected Pyramid Lake High School, and officials at the school were unable to present an AHERA asbestos management plan. In a letter dated July 14, 2009, Adrienne Priselac of the EPA Region 9 Toxics Office requested to see a copy of the BIE Sacramento Education Line Office's AHERA asbestos management plans within 30 days.

A. Sherman Indian High School: Sherman Indian High School began operating before October 12, 1988. Respondent provided EPA an AMP prepared in 1989 for Sherman Indian High School. This 1989 AMP for Sherman Indian High School identified asbestos containing building material ("ACBM") present in 1989, but failed to document periodic re-inspections and failed to document the current amount and location of ACBM. On December 21, 2010, Respondent sent EPA an AHERA inspection for Sherman Indian High School dated December 17, 2010. This inspection identified over 130,000 square feet of asbestos containing material (excluding roof materials and materials enumerated in linear feet), and identified the following areas in need of

immediate abatement: 1 square foot of insulation debris in the northwest corner of the basement of Building 14 and 75 square feet of drywall/joint compound on walls and ceiling in the pump room of building 65. Respondent provided EPA in May, 2012, an AMP dated 2010 for Sherman Indian High School. At the time of EPA's 2009 inspection, Respondent had not conducted required surveillance and periodic re-inspections of the ACBM in Sherman Indian High School.

B. Pyramid Lake High School: All structures at Pyramid Lake High School were constructed after October 12, 1988. Respondent provide an AMP for Pyramid Lake High School dated December 23, 2010. This 2010 AMP for Pyramid Lake High School documents that Pyramid Lake High School contains no ACBM. At the time of EPA's 2009 inspection, Respondent had not conducted an inspection, nor had Respondent developed an asbestos management plan, for Pyramid Lake High School.

11. Violations:

A. Respondent violated Section 207(a)(1) of TSCA Title II, 15 U.S.C. § 2647(a)(1), by failing to conduct required surveillance and periodic re-inspections, pursuant to Section 203(g) of TSCA Title II, 15 U.S.C. § 2643(b), and regulations thereunder at 40 C.F.R. Part 763, Subpart E, for the school buildings at Sherman Indian High School.

B. Respondent violated Section 207(a)(1) of TSCA Title II, 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 Title II, 15 U.S.C. § 2643(b), and regulations thereunder at 40 C.F.R. Part 763, Subpart E, for the school buildings at Pyramid Lake High School.

C. Respondent violated Section 207(a)(3) of TSCA Title II, 15 U.S.C. § 2647(a)(3), by failing to develop an asbestos management plan, pursuant to Section 203(i) of TSCA Title II, 15 U.S.C. § 2643(i), and regulations thereunder at 40 C.F.R. Part 763, Subpart E, for the school buildings at Pyramid Lake High School.

D. RESPONDENT'S ADMISSIONS

12. 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

13. AHERA and the AHERA Subpart E regulations contain the full requirements, including the steps which must be taken to inspect each school building to determine whether that building contains **ACBM** or is assumed to contain asbestos-containing material ("**ACM**"), and what must be done to prepare a management plan. Compliance with AHERA and the AHERA Subpart E regulations includes:

(A) Identification and training for Designated Persons identified by the Respondent, as required by 40 C.F.R. § 763.84(g)(1), and all maintenance and custodial staff who may work in a building that contains ACBM or assumed to contain ACM.

(B) 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 management plan shall be available to representatives of EPA and the State, the public, including teachers, other school personnel, and their representatives,

and parents without cost or restriction.

(C) Notifications: (1) Written notification to parent, teacher and employee organizations of the availability of the management plan 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. (2) Notification to workers and building occupants, or their legal guardians about inspections, re-inspections, response actions, and post-response activities, including periodic re-inspection and surveillance activities that are planned or in progress.

(D) Implementation of the management plan. Whenever any friable ACBM is present or assumed to be present in a building that Respondent leases, owns or otherwise uses as a school building, implementation includes: development and implementation of an operations and maintenance program; any required initial cleaning as specified by 40 C.F.R. § 763.91(c)(1); clean-up and repair of items identified as suspected ACBM conducted in accordance with 40 C.F.R. § 763.90; and a commitment to perform a re-inspection of all friable and nonfriable known or assumed ACBM in each school building that Respondent leases, owns or otherwise uses as a school building, at least once every three years.

(E) Maintenance of the following records: (1) records of accreditation for the person(s) who inspect, assess, and develop management plans; (2) record of each person required to be trained under 40 C.F.R. § 763.92(a)(1) and (2), with the person's name and job title, the date that training was completed, the location of the training, and the number of hours completed in such training; (3) record of periodic surveillance performed, with the name of each person performing the surveillance, the date of the surveillance, and any changes in the conditions of the materials; (4) record of each person performing initial cleaning pursuant to 40 C.F.R. § 763.91(c), the date of such cleaning, the locations cleaned, and the methods used to

perform such cleaning; and (5) for each time that operations and maintenance activities are performed, a record of each person performing the activity, the start and completion dates of the activity, the location(s) where such activity occurs, a description of the activity, including preventative measures used, and if ACBM is removed, the name and location of storage or disposal site of the ACBM.

F. RESPONDENT'S CERTIFICATION

14. In executing this CAFO, Respondent certifies that it has complied with AHERA and the AHERA Subpart E regulations at Sherman Indian School and Pyramid Lake High School and these are the only facilities under the control of the Bureau of Indian Education Sacramento Line Office which are subject to AHERA requirements. The AHERA Management Plan for Sherman Indian School documents that the school contains over 136,000 square feet of asbestos containing building materials. The AHERA Management Plan for Pyramid Lake High School documents that the school contains no asbestos containing building materials. Respondent certifies that all accounting of the costs incurred by Respondent in complying with AHERA and the AHERA Subpart E regulations provided to EPA are true and accurate.

G. CIVIL ADMINISTRATIVE PENALTY

15. Respondent consents to the assessment of a penalty in the amount of **TEN THOUSAND ONE HUNDRED DOLLARS (\$10,100)**, 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. **As the Respondent's EPA-approved costs of compliance with AHERA and the Subpart E regulations exceeds the civil penalty amount, the costs of compliance already expended by Respondent shall represent full payment of penalty.**

16. 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, tribal or local laws or statutes.

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

18. Each party shall bear its own costs, fees, and disbursements in this action.


19. 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.

20. 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.


21. 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.

UNITED STATES DEPARTMENT OF INTERIOR:

Date: 1/23/13 By: 
BRIAN DRAPEAUX
Acting Director, Bureau of Indian Education
United States Department of Interior

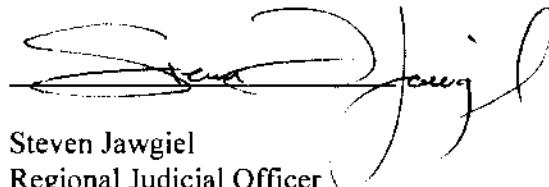
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: 2/7/13 By: 
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.

Date: 02/08/13



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

CERTIFICATE OF SERVICE

I certify that the original of the fully executed Consent Agreement and Final Order in the matter of Department of the Interior – Bureau of Indian Education Sacramento Line Office (**Docket #: TSCA-09-2013-0003**) was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, and that a true and correct copy of the same was sent to the following parties:

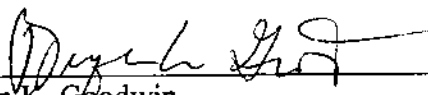
A copy was mailed via CERTIFIED MAIL to:

Mr. Brian Drapeaux
Acting Director – Bureau of Indian Education
1849 C Street, N.W.
Mail Stop 3609 MIB
Washington, DC 20240
Andover, MA 01810

CERTIFIED MAIL NUMBER: 7001 0320 0002 4540 4983

A copy was hand-delivered to the following U.S. EPA case attorney:

Margaret Alkon, Esq.
Office of Regional Counsel
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105



Bryan K. Goodwin
Regional Hearing Clerk
U.S. EPA, Region IX

2/8/13

Date



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

Certified Mail No. 7001 0320 0002 4540 4983
Return Receipt Requested

Re: TSCA-09-2013- 0003

Date: FEB 05 2013

Mr. Brian Drapeaux
Acting Director – Bureau of Indian Education
1849 C Street, N.W.
Mail Stop 3609 MIB
Washington, DC 20240

Dear Mr. Drapeaux:

Enclosed please find your copy of the fully executed Consent Agreement and Final Order which contains the terms of the settlement reached with Margaret Alkon of the EPA Region 9 Office of Regional Counsel. Your completion of all actions enumerated in the Consent Agreement and Final Order will close this case. If you have any questions, please contact Ron Tsuchiya at (415) 947-4168.

Sincerely,

A handwritten signature in black ink, appearing to read "Enrique Mazanilla".

Enrique Mazanilla, Director
Communities and Ecosystems Division

Enclosure