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

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U.S. EPA. REGION IX
REGIONAL HEARING CLERK

In the matter of:) Docket No. **TCSA-09-2007-0008**
) **CONSENT AGREEMENT**
Tucson Small School) and
Project, Inc.) **FINAL ORDER PURSUANT TO**
Respondent.) **SECTIONS 22.13 AND 22.18**
)

I. CONSENT AGREEMENT

Complainant, the Director of the Communities and Ecosystems Division, United States Environmental Protection Agency, Region 9, ("EPA") and Respondent Tucson Small School Project, Inc. on behalf of City High 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 material 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 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 a management plan for each school under its administrative control or direction. 40 C.F.R. § 763.93(g)(2). 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 management plan for that school. 40 C.F.R. § 763.93(g)(3).

4. Sections 207(a)(1) and 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3), provides that any LEA that fails to conduct an inspection, or fails to develop a management plan, 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 of (1) not more than \$ 5,000 for each day during which a violation continues, for violations on or before January 30, 1997; (2) not more than \$ 5,500 for each day during which a violation

continues, for violations after January 30, 1997 but on or before March 15, 2004; and (3) not more than \$ 6,500 for each day during which a violation continues, for violations after March 15, 2004.

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. Respondent holds a charter for City High School, which is an Arizona Charter school. Arizona Charter schools are public, state-funded schools constituted within the state of Arizona pursuant to the Arizona Charter School Law of 1994. See Arizona Revised Statutes Education Code §15-181 to §15-189. Arizona Charter schools contract with the Arizona State Board of

Education, the Arizona State Board for Charter Schools, or a 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 the City High School in 2004. 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 48 East Pennington Street, Tucson, Arizona. Respondent is a "Local Educational Agency" ("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.

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 asbestos management plan. 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 asbestos management plan, 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.

10. On May 24, 2006, EPA investigators inspected City High School and the school was unable to present an AHERA asbestos management plan. In a letter dated July 17, 2006, Paula Bisson of the EPA Region 9 Toxics Office requested to see a copy of the Cesar Chavez Middle School/Aztlan Academy AHERA asbestos management plan within 30 days. As of February 28, 2007, Respondent had not responded to EPA's request and Respondent had not produced an AHERA asbestos management plan for City High School. As of May, 2006, Respondent had not conducted inspections nor had Respondent developed such an asbestos management plan for City High School.

11. Respondent violated Section 207(a)(1) of TSCA Title II, 15 U.S.C. § 2647(a)(1), by failing to 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 building referenced in Paragraph 8 above.

12. 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 building 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.E 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. Unless another deadline is specified in this Paragraph 14, within **fifteen (15) days** of the effective date of this CAFO, Respondent shall complete each of the following projects in compliance with TSCA, the AHERA Subpart E regulations, and all other applicable law:

A. Training for the Designated Person 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 asbestos-containing building material (“ACBM”) or assumed to contain asbestos-containing material (“ACM”). Training for the Designated Person shall be in accordance with the training requirements listed in 40 C.F.R. § 763.84(g)(2). Training for maintenance and custodial staff shall be a minimum of 2 hours and specific to the training requirements listed in 40 C.F.R. § 763.92(a)(1) and (2).

B. Inspection and development of a management plan for City High School. Sampling and laboratory analysis shall not rely on pre-AHERA reports. Suspected asbestos material may be considered “assumed” in lieu of sampling, pursuant to § 763.85(a)(4)(iv). Specifically, the management plan shall include:

- (1) a description by the inspector of the manner used to determine sampling locations;
- (2) a list by the inspector identifying whether homogenous areas are surfacing material, thermal system insulation or miscellaneous material;
- (3) blueprints, diagrams, or written descriptions of each school building that clearly identifies each location and approximate square or linear footage of homogenous areas where material was sampled for ACM, homogenous areas where friable suspected ACBM is assumed to be ACM, and where nonfriable suspected ACBM is assumed to be ACM;
- (4) the address and telephone number of a person designed under 40 C.F.R. § 763.84 to ensure that the duties of Respondent, as the LEA, are carried out, and the course name, and the dates and number of hours of training taken by that person to carry out the duties;
- (5) a statement that Respondent used (or will use) accredited persons to inspect for ACBM and design or carry out response actions with respect to ACBM;
- (6) a description of the steps taken by Respondent to inform workers and building occupants, or their legal guardians, about inspections, reinspections, response actions, and post-response action activities, including periodic reinspection and surveillance activities that are planned or in progress; and
- (7) a true and correct statement, signed by the person designated by Respondent under 40 C.F.R. § 763.84, which certifies that the general LEA responsibilities, as stipulated by 40 C.F.R. § 763.84, have been met or will be met.

C. Development and implementation of an operations and maintenance program 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.

D. within **thirty (30) days** of the effective date of this CAFO, clean-up and repair of items identified as suspected ACBM. Such clean-up and repair or removal shall be conducted in accordance with 40 C.F.R. § 763.90.

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. Maintenance of a complete copy of the new management plan 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.

G. 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.

H. Notification to workers and building occupants, or their legal guardians about inspections, reinspections, response actions, and post-response activities, including periodic reinspection and surveillance activities that are planned or in progress.

I. A commitment to perform a reinspection 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.

J. Within **30 days** of the effective date of this CAFO, Respondent shall implement the management plan(s). Implementation includes any required initial cleaning as specified by 40 C.F.R. § 763.91(c)(1).

K. Within **twenty (20) days** of completing each of the tasks set forth above in paragraphs 14.A-J (or within **twenty (20) days** of the effective date of this CAFO if the tasks were performed before the effective date of this CAFO), Respondent shall provide to EPA substantiating documentation of the completion of the projects and an accounting of the costs incurred by Respondent in completing each project (or any other costs incurred in complying with any requirement under Title II of TSCA, 15 U.S.C. §§ 2641-2656), including but not limited to a copy of the invoice with an attached copy of the cancelled check for each project and a copy of the contract(s) for services.

L. Within **twenty (20) days** of completing all of the tasks set forth above in paragraphs

14.A-J, Respondent shall certify that it is in compliance with TSCA and AHERA Subpart E regulations at City High School. **By signing this CAFO, Respondent certifies that it has complied with AHERA and the AHERA Subpart E regulations at all other facilities under its control which are subject to AHERA requirements.**

15. The submissions required to be made pursuant to Paragraph 14 of this CAFO shall be sent by certified mail, with return receipt requested, to:

Ron Tsuchiya
Toxics Office
Communities and Ecosystems Division (CED-4)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105

All notices, records and submissions required by this CAFO which purport to document compliance with the terms of this Agreement, shall contain a Certification Statement signed by a responsible official of Respondent. The Certification Statement should be as follows:

I certify under penalty of law that the information contained in or accompanying this document is true, accurate and complete. As to the identified portion[s] of this document for which I cannot personally verify [its/their] truth and accuracy, I certify that, based on my inquiry of the person or persons directly responsible for gathering the information, the information is true, accurate, and complete.

F. CIVIL ADMINISTRATIVE PENALTY

16. A. Respondent consents to the assessment of a penalty in the amount of **EIGHT THOUSAND EIGHT HUNDRED DOLLARS (\$ 8,800)**, 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. Complainant and Respondent agree to defer actual payment of the civil penalty described in this paragraph pending compliance by Respondent with the terms of Section I.E of this CAFO.

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B. The Respondent shall pay the full civil penalty amount in Paragraph 16.A, unless payment is waived in whole or in part pursuant to this Paragraph 16.B: 1. If the EPA approved costs of compliance with Section I.E are equal to, or exceed the civil penalty amount in Paragraph 16.A, the costs of compliance shall represent full payment of the penalty, and no further payment is necessary. 2. If the costs of compliance are less than the civil penalty amount in Paragraph 16.A, Respondent shall pay the amount equal to the civil penalty amount minus the EPA approved costs of compliance, in lieu of the civil penalty amount.

C. Respondent shall pay any civil penalty amount required by Paragraph 16.B. within ten (10) calendar days of the date Respondent provides the final accounting of costs incurred to EPA pursuant to Paragraph 14.K of this CAFO. Payment shall be made by cashier's or certified check, payable to the order of the "Treasurer of the United States of America." The check shall state on the reverse side, "For Deposit Into the Asbestos Trust Fund, 20 U.S.C. § 4022" and shall be accompanied by a cover letter identifying this CAFO, the docket number, and stating that payment is being made pursuant to Section E of this Agreement. Respondent shall mail the check and the letter by Certified Mail, Return Receipt Requested, to the following address:

U.S. Environmental Protection Agency
Headquarters Accounting Operations Branch
Attention: Asbestos Trust Fund
P.O. Box 360277M
Pittsburgh, PA 15251

When payment is mailed to the above address, Respondent shall send a copy of the check and transmittal letter to:

- a) Regional Hearing Clerk
Office of Regional Counsel (ORC-1)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105

- b) Ron Tsuchiya
Toxics Office
Communities and Ecosystems Division (CED-4)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105

17. 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.

18. 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), which 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.

19. 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.

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

21. Except as set forth in Paragraph 18 above, each party shall bear its own costs, fees, and disbursements in this action.

22. 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.

23. 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.

24. 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.

25. 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.

TUCSON SMALL SCHOOL PROJECT, INC.:

Date: 6-19-07 By: 
Name: Brett Goble
Title: Co-Director

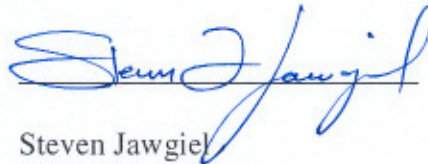
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: 7/16/07 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 and pay the full civil penalty amount as described in the Consent Agreement, unless waived by EPA in whole or in part pursuant to Paragraph 16, in accordance with the terms set forth in the Consent Agreement.

Date: 07/27/07



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-⁰⁹~~9~~-2007- 0008) against the Tucson Small School Project, Inc., 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:

Mr. Brett Goble
Co-Director
Tucson Small School Project, Inc.
48 East Pennington Street
Tucson, AZ 85701

Certified Mail No. 7005 3110 0002 8247 1179

Danielle Carr

Danielle Carr

Regional Hearing Clerk

United States Environmental Protection Agency, Region IX

Date

7-31-07