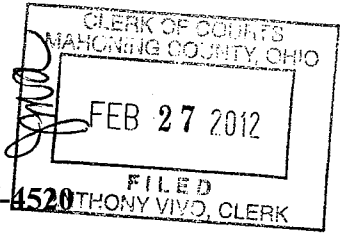


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IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO



STATE OF OHIO, ex. rel. DEWINE
ATTORNEY GENERAL OF OHIO

CASE NO. 10-CV-4520

Plaintiff,

JUDGE SWEENEY

v.

MAGISTRATE SARISKY

ENVIRONMENTAL AFFAIRS
MANAGEMENT, INC.

MAGISTRATE'S DECISION

Defendant.

FINDINGS OF FACT

1. Environmental Affairs Management, Inc. ("EAM") is an Ohio corporation with its principal place of business at 455 Dan Street, Akron, Summit County, Ohio. Tara Gioffi testimony; Exhibit 6.

2. EAM was contracted to renovate the football stadium locker rooms and office at the Austintown Fitch High School Stadium, located at 4560 Falcon Drive, Austintown Township, Mahoning County, Ohio. Id.

3. Mahoning-Trumbull Air Pollution Control Agency ("M-TAPCA") contracts with the Ohio Environmental Protection Agency ("Ohio EPA") as the local air pollution control agency for Mahoning and Trumbull counties. Gioffi testimony; Thomas Kalman testimony.

4. The purpose of Ohio's air pollution control laws is to achieve and maintain the national ambient air quality standards and to protect public health from hazardous air pollutants. Kalman testimony.

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5. Asbestos is a hazardous air pollutant. Cioffi testimony; Kalman testimony. Asbestos is a naturally occurring mineral fiber that is used at as an insulation and fire-proofing material. Kalman testimony. Asbestos is hazardous to human health as it can be inhaled or ingested and result in conditions such as asbestosis and mesothelioma, a type of lung cancer. Cioffi testimony; Kalman testimony. There is no known safe level of exposure to asbestos. Id.

Facts Pertaining to 2005 Director's Final Findings and Orders

6. Between 2003 and 2005, EAM conducted renovation and demolition activities at five separate locations. See Exhibit 1. Representatives from Ohio EPA's Northeast District Office and Mahoning-Trumbull Air Pollution Control Agency ("M-TAPCA") observed violations at each location. Id. The specific locations and dates were:

- i. Summit County Juvenile Court and Detention Center, Akron, Ohio (first incident on September 26, 2003);
- ii. Summit County Juvenile Court and Detention Center, Akron, Ohio (second incident on March 23, 2004);
- iii. City of Lorain Police Department, Lorain, Ohio (August 26, 2004);
- iv. St. Patrick's Elementary School, Kent, Ohio (August 24, 2005); and
- v. Saint Joseph Health Center, Warren, Ohio (September 30, 2005).

Id.

7. On October 8, 2003, March 26, 2004, September 15, 2004, September 7, 2005, and October 5, 2005, respectively, Ohio EPA and its local air pollution control agencies issued Notice of Violation letters to EAM regarding its failure to comply with Ohio's asbestos handling regulations at the above-listed locations. Exhibit 1, ¶¶ 22, 36, 49, 61, and 67. The violations ranged from failure to properly notify Ohio EPA, to work

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practice violations for handling of asbestos-containing materials, to improper disposal of asbestos-containing materials. Id.

8. On December 22, 2005, John Braswell, President of EAM, signed consensual Director's Final Findings and Orders ("2005 Orders"), issued pursuant to R.C. 3704.03 and 3745.01, on behalf of EAM to resolve the violations noted in the Notice of Violation letters. Id. at 15. The 2005 Orders required the payment of a Ten Thousand Dollar (\$10,000.00) civil penalty through ten monthly installments. Id. at 12.

9. On December 29, 2005, the Director signed the consensual 2005 Orders and had them entered upon the Ohio EPA Director's journal. Id. at 15.

10. Defendant has failed to make six of the ten payments of the civil penalty per the schedule outlined in the 2005 Orders. Kalman testimony. As of the date of the penalty hearing, EAM was 2023 days late in making payment. Id.

Facts Pertaining to Violations at Austintown Fitch High School

11. On May 22, 2007, M-TAPCA received an Ohio EPA Notification of Demolition and Renovation for the removal of 400 linear feet of regulated asbestos containing material ("RACM") from the Austintown Fitch High School stadium locker rooms and offices. Cioffi testimony, Exhibit 6. The notification specified that asbestos removal would occur on June 4, 2007 and that "all material to be removed under negative air containments or glove-bag techniques, utilizing wet methods." Id. at 2.

12. On May 29, 2007, M-TAPCA received a revised notification form that revised the dates to indicate that removal would occur between June 4, 2007 and June 11, 2007, and that "400 fittings" would be removed instead of 400 linear feet of RACM. Cioffi testimony, Exhibit 7.

13. On June 7, 2007, M-TAPCA employee Larry Himes received a phone call from Ohio Department of Health Asbestos Division employee, Josh Koch, concerning the EAM project at Austintown Fitch High School. Cioffi testimony. Mr. Koch stated that ODH inspector, Alan Richards, had inspected the site, found several problems related to the removal, and that ODH was considering issuing a public health emergency regarding the project. Cioffi testimony.

14. On June 7, 2007, Larry Himes conducted an inspection of the Austintown Fitch High School worksite. Cioffi testimony. Mr. Himes noted his observations on an Ohio EPA Asbestos Demolition and Renovation Field Data and Inspection Checklist per proper M-TAPCA procedures. Cioffi testimony, Exhibit 10. Mr. Himes also took four photographs and six samples of suspect RACM. Cioffi testimony, Exhibit 10, 11. Mr. Himes observed three asbestos disposal bags in the south locker room of the facility. Exhibit 10, 11. Two of the bags contained glove bags in which dry RACM was found. Id.

15. Mr. Himes observed dry, uncontainerized RACM at several locations at the facility, including offices, restrooms and locker rooms. Id. Mr. Himes observed that although EAM had access to water, EAM failed to wet the RACM at the worksite. Cioffi testimony, Exhibit 10, p. 2. Mr. Himes observed a lack of duct tape on the glove bags that indicated that the bags were not properly installed such that the fittings were removed while sealed inside the glove bags. Id.

16. During the inspection, Mr. Himes also took samples from six separate locations at the worksite. Cioffi testimony, Exhibit 12. On June 12, 2007¹, CC Technologies Gelles Laboratories confirmed the presence of chrysotile asbestos. Cioffi testimony, Exhibit 13. Specifically, the test results revealed the presence of asbestos in amounts of 12%, 10%,

12%, 12%, 10%, and 12%, respectively. Id. Each sample exceeded the 1% threshold for establishing a “positive” result for the presence of regulated asbestos. Cioffi testimony.

17. Also on June 12, 2007, M-TAPCA issued a certified warning letter EAM, notifying it of the observed violations and communicating the asbestos test results. Cioffi testimony, Exhibit 14. EAM’s President, John Braswell, received the certified letter and signed for it. Id. EAM never responded to the letter. Cioffi testimony.

18. In response to another call from Ohio Department of Health Asbestos Division, on June 14, 2007, Mr. Himes returned to the work site and again observed dry, uncontainerized RACM in the previously-noted locations. Cioffi testimony. As with the first inspection, Mr. Himes recorded his observations on an Ohio EPA Asbestos Demolition and Renovation Field Data and Inspection Checklist, took photographs of the suspect RACM, and took three samples for testing. Cioffi testimony, Exhibits 16, 18, and 19. CC Technologies Gelles Laboratories confirmed the presence of chrysotile asbestos for two of the samples. Cioffi testimony, Exhibit 20.

19. Unable to resolve the violations with EAM, in August 2007, M-TAPCA forwarded an “enforcement action request” to Ohio EPA’s Central Office. Cioffi testimony; Kalman testimony.

20. Because of EAM’s failure to comply with the 2005 Orders and continuing violations of Ohio’s asbestos rules, Ohio EPA’s central office referred the matter to the Ohio Attorney General's Office. Kalman testimony. Specifically, on November 13, 2009, Ohio EPA Director Chris Korleski wrote to Ohio Attorney General Richard Cordray and requested that the Ohio Attorney General's Office initiate all necessary legal action against EAM to resolve the violations, pursuant to R.C. 3704.06. Kalman testimony, Exhibit 2.

¹ The test results were received by Ohio EPA on June 12, 2007 by fax, and on June 18, 2007 by mail.

21. On October 6, 2010, Assistant Attorney General Gary Pasheilich attempted to contact EAM President John Braswell by certified mail to invite EAM to resolve the matter outside of litigation. Kalman testimony, Exhibit 3. The certified letter was returned and marked "refused." Id.

CONCLUSIONS OF LAW

22. Ohio Adm.Code 3745-15-01(U) defines "owner or operator" to mean "any person who owns, leases, controls, operates or supervises a facility, an emission source, or air pollution control equipment."

23. Ohio Adm.Code 3745-15-01(Q) defines a "facility" as "any building, structure, installation, operation, or combination thereof which contains one or more stationary source(s) of air contaminants." Further, Ohio Adm.Code 3745-20-01(B)(18) defines a "facility," as it relates to the asbestos rules and in relevant part, as "any institutional, commercial, public, industrial or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units)."

24. Ohio Adm.Code 3745-15-01(X) defines a "source" as "any building, structure, facility, operation, installation, other physical facility, or real or personal property that emits or may emit any air pollutant."

25. Ohio Adm.Code 3745-15-01(C) defines "air pollutant" or "air contaminant" as particulate matter, dust, fumes, gas, mist, smoke, vapor or odorous substances, or any combination thereof.

26. As a public high school and therefore a public structure, the property at 4560 Falcon Drive, Austintown Township, Mahoning County, Ohio, where EAM conducted asbestos-abatement contracting activities, is a "facility," as defined in Ohio Adm.Code 3745-15-01(Q), and Ohio Adm.Code 3745-20-01(B)(18). As the facility contained RACM as confirmed by laboratory testing, the facility is also a "source," as defined in Ohio Adm.Code 3745-15-01(X), of "air contaminants," as defined in Ohio Adm.Code 3745-15-01(C).

27. EAM is the "owner or operator," as defined in Ohio Adm.Code 3745-15-01(U) and 3745-20-01(B)(39), of a renovation operation as confirmed through EAM's Notice of Demolition and Renovation forms filed with M-TAPCA. Cioffi testimony, Exhibits 6, 7.

28. Ohio Adm.Code 3745-20-01(B)(44) defines "renovation," in relevant part, as the altering a facility or one or more facility components in any way, including the stripping or removal of regulated asbestos-containing material from a facility component.

29. By stripping components of insulation that was later confirmed to be RACM, as well as the complete removal of "fittings" containing RACM at the facility, EAM's actions constituted a "renovation," as defined by Ohio Adm.Code 3745-20-01(B)(44). EAM's submittal of its notifications also admits as much.

30. Ohio Adm. Code 3745-20-04(A)(3) provides that owners and operators of demolition or renovation operations shall adequately wet RACM when it is being stripped from facility components, unless, inter alia, the owner or operator uses one of three alternative emission controls. One of the alternative emission controls is the use of a glove-bag system designed and operated to contain the particulate asbestos material produced by the stripping of the asbestos materials.

31. Ohio Adm.Code 3745-20-04(A)(6) requires that all regulated asbestos-containing material ("RACM") must be kept adequately wet until collected and contained or treated in preparation for disposal in accordance with Ohio Adm.Code 3745-20-05.

32. Ohio Adm.Code 3745-20-05(B) prohibits owners and operators of demolition and renovation operations from discharging visible emissions to the outside air, and specifies that owners and operators must use one of the emissions control methods specified in Ohio Adm.Code 3745-20-05(B)(1) through (4).

33. On June 7, 2007 and June 14, 2007, MTAPCA inspector Larry Himes observed that EAM failed to adequately wet RACM stripped from facility components, and failed to properly utilize a glove-bag system to contain friable RACM during and after renovation activities in violation of Ohio Adm. Code 3745-20-04(A)(3), Ohio Adm.Code 3745-20-04(A)(6), and Ohio Adm.Code 3745-20-05(B).

REQUEST FOR CIVIL PENALTY AND INJUNCTIVE RELIEF

34. Once Ohio EPA's Division of Air Pollution Control receives an enforcement action request from a district or local air agency, Ohio EPA attempts, in most cases, to informally resolve the matter prior to initiating litigation. Kalman testimony. However, in some cases including where repeat violators are referred, Ohio EPA may directly refer the matter to the Ohio Attorney General's Office. Id.

35. R.C. 3704.06(B) provides that the attorney general, upon request of the Director of Ohio EPA, shall bring an action for an injunction, a civil penalty, or any other appropriate proceedings in any court of competent jurisdiction against any person violating or threatening to violate section 3704.05 or 3704.16 of the Revised Code. Further, R.C. 3704.06(C) provides that a person who violates section 3704.05 or 3704.16 of the Revised

Code shall pay a civil penalty of not more than twenty-five thousand dollars for each day of each violation.

36. Because of the mandatory language of R.C. 3704.06(C), a trial court has no discretion regarding whether to impose a civil penalty. See R.C. 3704.06(C); see also *State v Tri-State Group, Inc* (2004), 2004 Ohio 4441, 103; 2004 Ohio App. Lexis 4036. Nevertheless, the language of the statute gives the Court broad discretion to determine the amount of that penalty. A trial court's decision regarding the amount of the civil penalty should only be reversed if it is unreasonable, arbitrary, or unconscionable. *State ex rel. Brown v Dayton Malleable* (1982), 1 Ohio St.3d 151, 157, 1 Ohio B. Rep. 185; cf. *State ex rel. Rogers v Lorne J. Elbert, et al* (9th Dist.), 2008 Ohio 6746, 2008 Ohio App. Lexis 5657 **31-34 (where imposition of civil penalty of less than one percent of possible penalty was reversible error).

37. Ohio case law establishes: (1) strict liability for noncompliance with Ohio's environmental laws; (2) that protection against and deterring harm to the regulatory scheme is a vital public policy element in enforcing Ohio's environmental laws and imposing substantial civil penalties; (3) companies treating environmental noncompliance as a "cost of doing business" should be penalized to the point where it "hurts" them sufficiently so as to attain the goal of a "deterrent effect" for future violations. *Id.* In determining appropriate civil penalties for environmental cases, Ohio Courts have outlined several factors to be considered. In the leading case, *Dayton Malleable*, the Appellate Court applied a four-prong assessment in determining the civil penalty for a case involving air pollution and hazardous waste violations:

- (1) the harm or threat of harm posed to the environment by the person violating the statute;
- (2) the level of recalcitrance, defiance, or indifference demonstrated by the violator of the law (defendant's good or bad faith);
- (3) the economic benefit gained by the violation; and
- (4) the extraordinary costs incurred in enforcement.

See *State v Dayton Malleable* (2nd Dist.), 1981 Ohio App. Lexis 12103, *8, aff'd 1 Ohio St. 3d 151; See also *State v Tri-State Group* at 104.²

38. When imposing a civil penalty for air violations, the proper starting point is the statutory maximum, and any downward adjustments are to be made only based upon evidence introduced at trial. *United States v Midwest Suspension and Brake*, 824 F. Supp. 713 (E.D. Mich. 1993), aff'd 49 F.3d 1197 (6th Cir. 1995).

39. Further, the assessment of civil penalties is not dependent on any showing of intent:

It is well settled that violations of general police power regulations passed for the safety, health or well being of the community must be penalized whether or not there was any intent to commit the act. *United States v Balint*, 58 U.S. 250, 252, 42 S.Ct. 301, 302. Water pollution abatement statutes are such general police regulations. *United States v White Fuel Corp.*, 498 F.2d 619. Sections 6111.04 and 6111.07(A) prohibits all violations, not just "intentional or negligent" violations.

State ex rel. Brown v Dayton Malleable, Inc. (1979), 13 ERC 2189, 2192 (copy attached), aff'd (2nd Dist.) 1981 Ohio App. Lexis 12103, aff'd 1 Ohio St. 3d 151.

40. In determining the civil penalty, the Court should give effect to "the major purpose of a civil penalty: deterrence." *United States v T & S Brass and Bronze Works Inc.*, 681 F. Supp. 314, 322 (D.S.C. 1988), aff'd in relevant part, 865 F.2d 1261 (4th Cir. 1988). Civil penalties are imposed "first, to discourage the offender himself from repeating his transgressions; and second, to deter others from doing likewise." *Id.* Courts have routinely recognized that civil penalties in environmental enforcement cases should be large enough to hurt the offender and to substantial enough to deter anyone in the future from showing as

² The *Dayton Malleable* court looked to U.S. EPA's Civil Penalty Policy for NPDES violations to derive the relevant factors. *Dayton Malleable* at *8. Although the *Dayton Malleable* case involved water pollution violations, the methodology is consistently applied for all environmental violations regardless of media.

little concern as the Defendants did for the need to comply with the law. See *State ex rel. Brown v Dayton Malleable, Inc*, supra.

41. To serve a deterrent function, the probability that a significant penalty will be imposed must be high enough so that noncompliance results in substantial monetary risk for the polluter. Deterrence is effective only if the penalty is “large enough to hurt the offender.” *State ex rel. Celebrezze v Thermal-Tron* (8th Dist.), 71 Ohio App. 3d 11, 14, 1992 Ohio App. Lexis 150, citing *State ex rel. Brown v Howard* (10th Dist.), 3 Ohio App. 3d 189, 1981 Ohio App. Lexis 10045.

42. To assist with negotiating a pre-litigation settlement with violators, Ohio EPA uses the U.S. EPA Civil Penalty Policy for Stationary Sources (“Policy”) to determine an appropriate civil penalty. Kalman testimony, Exhibit 22. The factors considered under the Policy include the environmental harm or threat of harm, the amount of economic benefit received by a violator, the length of violation, the seriousness of the violations, any extraordinary enforcement costs to the regulatory agency, and any mitigating or augmenting circumstances. Kalman testimony.

43. Ohio EPA considered each of these factors and found that EAM’s activities produces a high risk of harm since dry, friable RACM was detected in high traffic areas at a public high school and that a high likelihood of exposure existed. *Id.* Ohio EPA also determined that EAM enjoyed an economic benefit since EAM failed to observe proper work practices thereby saving time and money. *Id.* Ohio EPA determined that EAM violated the terms of the 2005 Orders by 2023 days by failing to make payment. *Id.* Further, the work practice violation alleged in Count 2 continued for at least 11 days. *Id.* Exhibit 7, 10, 16. Mr. Himes observed the violations alleged in Counts 3 and 4 on June 14,

2007. Thus, 2036 days of violation represents a conservative estimate of the duration of Defendant's violations. Kalman testimony.

44. Appendix III to the Policy provides a framework for assessing civil penalties for asbestos demolition and renovation projects. Kalman testimony, Exhibit 22 at Appendix III.

45. Ohio EPA developed a penalty calculation worksheet for the EAM violations, using the Appendix III of the Policy. Kalman testimony, Exhibit 5. Under the formula, Ohio EPA calculated a "preliminary deterrent amount" of \$79,156. Id.

46. Per the Policy, Ohio EPA then augmented the preliminary amount by a factor of 50%, or \$36,250, to reflect the high degree of willfulness or negligence on the part of EAM. Id. Augmentation of the preliminary deterrence amount is appropriate in this matter due to the high level of recalcitrance, defiance and indifference on the part of EAM. Id. A primary consideration is the fact that EAM is a repeat violator, having previously violated Ohio's asbestos rules at five separate sites within two years of the events at issue in the present matter. Id. Additional considerations include EAM's failure to comply with the consensual 2005 Orders issued to resolve the previous violations, failure to respond to M-TAPCA's certified warning letter, and refusal to accept service of the certified letter from the Ohio Attorney General's Office regarding the matter. Id. Further, EAM's recalcitrance hinders Ohio EPA's attempts to address the high degree of noncompliance in Mahoning County, and address public health concerns. Kalman testimony.

47. The total proposed civil penalty amounted to \$115,406, or \$115,000 as rounded down. Kalman testimony, Exhibit. 5. Ohio EPA believes that this amount reflects an appropriate deterrent amount. Id.

CONCLUSION

The Court finds and enters a judgment by default and order and permanently enjoin Defendant as follows:

A. Preliminarily and permanently enjoin Defendant to comply with R.C. Chapter 3704 and rules adopted thereunder; specifically, order Defendant, pursuant to R.C. 3704.06(B) to comply with all rules related to the properly handling of asbestos-containing materials as specified in Ohio Adm.Code Chapter 20;

B. Retain jurisdiction of this suit for the purpose of making any order or decree which it may deem necessary at any time to carry out its judgment; and

C. Grant such other relief as may be just.

D. Order Defendant, pursuant to R.C. 3704.06, to pay civil penalties for the violations set forth in the amount of \$25,000 per day for each day of each violation, or alternatively, adopt Ohio EPA's civil penalty recommendation of \$115,000;

E. Order Defendant to pay all costs and fees for this action, including attorneys' fees assessed by the Office of the Ohio Attorney General.

FEB 27 2012

DATE



MAGISTRATE

NOTICE TO ATTORNEYS AND PARTIES

Pursuant to Civil Rule 53(D) (3), the parties shall have fourteen (14) days from the date of the filing of this Decision to file written Objections with the Clerk of Court's Office. The Objections shall be specific and state with particularity all grounds of objection. Any objection to a factual finding shall supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. Any such Objections must be served upon all parties to this action, and a copy must be provided to the Common Pleas Court. A party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law in that Decision unless the party has timely and specifically objected to that finding or conclusion as required by Civil Rule 53(E)(3).

done
THE CLERK SHALL SERVE NOTICE
OF THIS ORDER UPON ALL PARTIES
WITHIN THREE (3) DAYS PER CIV.R.5

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ATTORNEY GENERAL OFFICE
ENVIRONMENTAL ENFORCEMENT