UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	
Louisville Environmental	)	Docket No. RCRA-4-99-0017
Services, Inc.	)	
	)	
Respondent	)	
	)	

DEFAULT ORDER

This administrative proceeding for the assessment of a civil penalty was initiated by the Chief, Enforcement and Compliance Branch, Waste Management Division, United States Environmental Protection Agency, ("EPA"), Region 4 ("Complainant"), pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and the Consolidated Rules of Practice governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 64 Fed. Reg. 40138 (July 23, 1999). On September 21, 1999, Complainant filed a Complaint and Compliance Order ("Complaint") seeking compliance with all applicable requirements of Subtitle C of the Resource Compliance and Recover Act ("RCRA"), 42 U.S.C. §§ 6921 et. seq., 40 C.F.R. Parts 260 through 270, submission of a revised RCRA Facility Investigation ("RFI") Workplan, and a penalty of $83,160. No answer having been filed in this matter, Complainant filed a Motion for Default on March 1, 2000, requesting assessment of the civil penalty as well as the other relief sought in the Complainant.

Section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a), authorizes a finding of default "upon failure to timely answer a complaint". 40 C.F.R. § 22.15(a) requires an answer to the complaint within thirty (30) days after service. Default by respondent constitutes, for purpose of the pending proceeding, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. Section 22.17(c) of the Consolidated Rules, provides that when the Presiding Officer finds that default has occurred, a default order shall be issued against the defaulting party unless the record shows good cause why a default order should not be issued. The relief proposed in the complaint or the motion for default shall be ordered unless the record clearly demonstrates that the requested relief is inconsistent with the Act.

This order shall constitute the initial decision under these Consolidated Rules of Practice.

FINDINGS OF FACT:

1. Respondent is Louisville Environmental Services, Inc. ("LES"), a corporation incorporated under the laws of Kentucky and doing business in the Commonwealth of Kentucky.

2. Respondent was issued an initial hazardous waste treatment and storage permit by the Kentucky Department for Environmental Protection on January 25, 1996.

3. The hazardous waste treatment and storage permit issued by the Commonwealth of Kentucky constitutes the facility's RCRA permit.

4. On January 25, 1996, Respondent was issued the Hazardous and Solid Waste Amendments of 1984 (HSWA) portion of the RCRA permit pursuant to Sections 3004(u) and 3005(c) of RCRA, 42 U.S.C. §§6924(u) and 6925(c), which required Respondent to determine whether there had been releases of hazardous waste or hazardous constituents from any solid waste management units at Respondent's facility.

5. The hazardous waste treatment and storage permit issued by the Commonwealth of Kentucky combined with the HSWA portion of the permit issued by EPA constitutes the facility's RCRA permit (herein the "Permit"). Since issuance of the RCRA permit, the Commonwealth of Kentucky has withdrawn the operating permit form LES. However, and in spite of the withdrawal of the RCRA operating permit, the HSWA permit remains in effect.

6. The Permit details specific schedules for the implementation of corrective action.

7. Condition 1.D of the permit states that Respondent must comply with all conditions of the permit and any failure to comply with the permit constitutes a violation of RCRA and is grounds for an enforcement action.

8. Condition 11.E.1.a of the permit requires Respondent to submit an RFI Work Plan to the Regional Administrator. The RFI Work Plan must meet the requirements of permit condition 11.E.1.c.

9. On August 12, 1996, Respondent made a timely submittal of an RFI Work Plan to EPA.

10. Condition 11.E.1.c of the permit requires Respondent to prepare an RFI Workplan which is thorough and complete, which will determine the nature and extent of contamination and the potential pathways of contaminant releases to the air, soil, surface water, and groundwater.

11. Condition 11.E.1.d of the permit provides that the Regional Administrator must approve the RFI Work Plan. If the Regional Administrator finds the plan deficient, then the Regional Administrator must

notify Respondent of the technical deficiencies and specify a due date for submission of a revised RFI Work Plan.

12. On May 16, 1997, EPA made a determination that the August 12, 1996, RFI Work Plan was inadequate. EPA notified Respondent of the technical inadequacies. Respondent received the Notice of Technical Inadequacy on May 19, 1997. Respondent was directed to submit the revised RFI Work Plan on or before July 3, 1997.

13. Condition 11.J.1, which specifies Work Plan and Report Requirements, provides that the Respondent shall revise all submittals and schedules as specified by the Regional Administrator.

14. An extension was granted to Respondent to submit the RFI Work Plan on or before February 16, 1998. Another extension was later granted for submittal of the RFI Work Plan on August 16, 1998.

15. A Notice of Violation and Opportunity to Show Cause was issued on March 31, 1999, as EPA had not received a revised RFI Work Plan, nor a request for extension, at that time.

16. On September 21, 1999, Complainant issued a Complaint and Compliance Order, Docket No. RCRA-4-99-0017, against Respondent, seeking, among other things, a civil penalty of $83,160, .

17. In the Complaint, Complainant informed Respondent that an answer must be filed within thirty (30) days of receipt of the Complaint and that failure to file an answer may result in entry of a Default Order imposing the proposed penalties without further proceedings.

18. The Complaint also referred Respondent to the Consolidated Rules, 40 C.F.R. Part 22. Pursuant to paragraph 42 if the Complaint, and as set forth at 40 C.F.R. § 22.37(b), the Order included in the Complaint is equivalent to a Compliance Order under Section 30008 of RCRA, 42 U.S.C. § 6928, which automatically became a final order absent a request for a hearing pursuant to 40 C.F.R. § 22.15, within 30 days of service.

19. Service of the Complaint was completed as evidenced by the Federal Express COSMOS tracking form.

20. A review of the Administrative Record indicates that Respondent has failed to file an answer to the Complaint.

21. Respondent was served with Complainant's Motion for Default on March 1, 2000, by Certified Mail, Return Receipt Requested.

22. Respondent's receipt of the Motion for Default is evidenced by the receipt of service signed by Robert W. Huber, President of Respondent, Louisville Environmental Services, Inc. on March 4, 2000.

23. As of this date Respondent has not filed a response to Complainant's Motion for Default.

CONCLUSIONS OF LAW

1. Respondent is a "person" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and 40 C.F.R. § 260.10, and the equivalent state regulations.

2. Section 3005(a) of RCRA, 42 U.S.C. §6925(a), prohibits the treatment, storage or disposal of hazardous waste without a permit issued pursuant to RCRA.

3. On November 8, 1984, RCRA was amended by HSWA to include provisions requiring EPA to promulgate standards and issue permits to address releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit pursuant to Section 3005(a) of RCRA, 42 U.S.C. § 6925(a).

4. Section 3004(u) of RCRA, 42 U.S.C. § 6924(u) states, "Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in the unit...".

5. Section 3004(u) of RCRA, 42 U.S. C. § 6924(u), and 40 C.F.R. § 264.101 require that permits issued pursuant to Section 3005 of RCRA, 42 U.S.C. § 6925, contain schedules of compliance for corrective action.

6. Pursuant to 40 C.F.R. § 270.30(a), failure to comply with the conditions of a permit issued pursuant to RCRA constitutes a violation of RCRA and is grounds for an enforcement action.

7. Respondent's failure to submit a revised RFI Work Plan, as required by Conditions 11.E.1.d and 11.J.1 of the permit, constitutes a violation of the Permit, which pursuant to 40 C.F.R. § 270.30(a), 40 C.F.R. § 264.101, and Condition 1.D of the Permit, is a violation of RCRA.

8. The maximum penalty assessable for violations of the Complaint and Compliance Order is $27,500 for each day of noncompliance. Section 3008 of RCRA, 42 U.S.C. § 6928

9. 40 C.F.R. § 22.17(a) provides that "a party may be found in default (1) after motion, upon failure to file a timely answer to the complaint..."

10. 40 C.F.R. § 22.17(a) provides that for purposes of the pending action, default by a respondent constitutes "an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations".

11. Respondent is in default for purposes of the pending action for failing to file a timely answer. 12. For purposes of the pending action, all facts alleged in the Complaint are admitted and Respondent has waived its right to a hearing on such factual allegations.

This Default Order is being issued in accordance with section 22.17(c) of the consolidated Rules, 40 C.F.R. § 22.17(c), which provides that when a Presiding Officer determines that a default has occurred, a Default Order shall be issued against the defaulting party unless the record shows good cause why such an order should not be issued. The record does not show good cause why a default order should not be issued.

PENALTY DETERMINATION

Section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), provides that "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." Furthermore, Section 22.27(b) of the Consolidated Rules provides that the Presiding Officer shall consider any civil penalty guidelines issued under the Act, and explain in detail how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. However, once a determination is made that Respondent has defaulted, the penalty assessed shall not be greater than that proposed by complainant in the complaint... or the motion for default, whichever is less.

Based upon the above, pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C § 6928(a)(3), and the guidelines issued under RCRA, the "October, 1990 RCRA Civil Penalty Policy" ("Penalty Policy") the following criteria are to be considered in determining the amount of a penalty: 1) the seriousness of the violations; 2) any good faith efforts by the Respondent to comply with applicable requirements; 3) the potential for harm to human health or the environment: 4) the extent to which the conduct of Respondent has deviated from the regulatory requirements; 5) the presence of multiple violations; 6) the number of days over which the violations occurred; and
7) the economic benefit accruing to the Respondent, as well as such other matters as justice may require.

A review of the Administrative Record indicates that EPA prepared a penalty calculation worksheet and narrative summary explaining the $83,160 penalty proposed in the Complaint and Motion for Default. In reviewing those documents as well as the administrative record I considered the following factors:

1) Seriousness of the Violation: According to the RCRA Penalty Policy, the gravity-based component is a measure of the seriousness of a violation, and is determined by examining two factors: potential for harm and extent of deviation from a statutory or regulatory requirement. (*See* Penalty Policy, 21 ELR 35276) The harm to human health and/or the environment as well as to the RCRA program were considered to be "moderate". In reaching this conclusion, Complainant considered that

fifteen solid waste management units were listed for having confirmatory sampling to determine whether a release had occurred. While some of the confirmatory sampling indicated the presence of petroleum derived hydrocarbons, EPA had no specific knowledge of impact to receptors. Therefore the violation was considered to pose a moderate risk of exposure. The harm to the RCRA program was deemed moderate due to the fact that failure to submit an adequate RFI workplan significantly undermines the corrective action process.

The extent of deviation in this case, was considered "minor". Again, based upon the guidance provided in the Penalty Policy, a minor deviation is deemed to have occurred if "the violator deviates somewhat from the regulatory or statutory requirements but most (or all important aspects) of the requirement are met". LES met most of the requirements defined in the permit.

The penalty for a violation with a gravity component of "moderate" and a "minor" extent of deviation was determined to be in the mid-range between the $4,999 to $3,000. Therefore, EPA set this factor at $4,000, a mid-point within the range provided in the penalty guidance.

The above conclusions regarding the seriousness of the violation are not inconsistent with the Act.

Multiple Violations and Multiple Day Penalties: I concur fully with Complainant's views that each day LES failed to submit the revised RFI Workplan constituted one continuous violation and therefore does not justify application of multiple penalties. Assessment of multi-day penalties is discretionary for all days of all violations when the gravity-based designation has been "moderate-minor". Due to the fact that the potential for harm was at the low end of moderate, a lower end amount of $400 was used as a multiple times 179 days of continuing violation. This determination is not inconsistent with the Act and rules promulgated.

Adjustment Factors: It is noted in the RCRA Penalty Policy itself, that while the Policy serves as guidance to Agency personnel charged with responsibility for calculating appropriate penalty amounts for RCRA violations, it also serves under 40 C.F.R. § 22.27(b) as guidance to judicial officers presiding over administrative proceedings at which proper penalty amounts for violations redressable under RCRA Sections 3008(a) and (g) are at issue. "Such judicial officers thus have discretion to apply most of the upward or downward adjustment factors described in this policy in determining the penalty to be imposed on a violator. ..." 21 EAR 35276

In addition to the statutory adjustment factors to apply, such as good faith efforts to comply with applicable requirements, those set forth in the Policy which are appropriate for consideration by the presiding official, include degree of willfulness and/or negligence, history of noncompliance, and ability to pay. However, there has been no evidence introduced by Complainant into the record supporting an upward adjustment for any of these factors. Likewise, absent any evidence in the record

introduced by Respondent in this default proceeding, there is no basis upon which to adjust the assessed penalty downward for any of these factors.

Economic Benefit Accruing to Respondent: Although EPA found that the economic benefit of delaying the revision of the RFI Workplan amounted to $5,000, as a delayed cost only interest of the delayed cost was considered. Using the computer model developed by EPA to calculate economic benefit, the "BEN" model, it was determined that this benefit was diminimis. I find this conclusion not inconsistent with the statutory or regulatory criteria.

Inflation Factor: Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69360, $7,560 must be added to the total penalty.

For the reasons set forth above, I find the proposed penalty of $83,160. is not inconsistent with the record of the proceeding or with RCRA.

ORDER

Under the authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and the Consolidated Rules, 40 C.F.R. § 22.17, **Respondent is found to be in default**.

Respondent is hereby **ordered** to comply with all terms and conditions of the Complaint requiring compliance or corrective action, including **submittal of the RFI Workplan as referenced in paragraph 42 thereof, effective without further proceedings on the date this default order becomes final under 40 C.F.R. 22.27(c)**.

Respondent is further hereby **ordered** to pay a civil penalty of **Eighty Three Thousand and One Hundred and Sixty Dollars ($83,160)**. This penalty shall become due and payable, without further proceedings, **thirty (30) days** after this Default Order becomes final, pursuant to 40 C.F.R. § 22.17(c). Payment shall be made by forwarding a money order, cashier's or certified check, in the amount of $83,160 payable to Treasurer, United States of America to:

EPA Region 4
P.O. Lock Box 100142
Atlanta, Georgia 30384

Respondent shall note on the money order or check the title and docket number of this case. Respondent shall submit a copy of the check to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

This **Default Order constitutes** an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Default Order shall become final within forty-five (45) days after its service upon the parties and without further proceedings, unless (1) a party appeals the Initial Decision to the Environmental Appeals Board, (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects to review the Initial Decision on its own initiative. 40 C.F.R. § 22.27(c). The procedures for appealing an Initial Decision are listed in the Consolidated Rules at 40 C.F.R. § 22.30.

If the civil penalty is not paid within the prescribed time period, interest will be assessed pursuant to Section 11 of the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3717, based on the present value of funds owed to the United States Treasury at the time the Final Order is issued, and such rate will remain in effect until full payment is received. A six (6%) percent per annum late payment penalty will also be applied on any principal amount not paid within ninety (90) days of the due date.

Date: July 19, 2000

/S/
Susan B. Schub
Regional Judicial Officer