8/18/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Joe Mortiboy,	)	**Docket No.RCRA-UST-1092-12-01-9006**
	)	
	)	
Respondent	)	

CLARIFICATION OF DEFAULT ORDER

On June 30, 1995, Complainant filed a motion for clarification of the order on default ("order") in this matter which was issued on April 27, 1995. The order required Respondent, Joe Mortiboy, to comply with the compliance provisions delineated by Complainant in its proposed default order, i.e., to submit within 30 days a plan to measure for the presence of a release where contamination was most likely to be present and within 60 days to begin a site assessment pursuant to 40 CFR § 280.72. Respondent was assessed the full amount of the proposed penalty, that is, $25,760. The "Penalty" section of the order stated, however, that collection of the penalty "will be held in abeyance and reduced by the cost of compliance with the required site assessment, if Respondent undertakes to complete the site assessment . . . and demonstrates through appropriate documentation that he is unable to pay the entire penalty." (Order on Default at 13.) Complainant, in its motion for clarification, points out that the "Order" section

of the default order does not explicitly state that Respondent must document his inability to pay in order to have the penalty offset by the cost of compliance and asserts that this may lead to different interpretations of the default order. Additionally, Complainant says that it interprets the order as calling for a reduction of the penalty by the verified cost of the site assessment and any required follow-up corrective action. If this interpretation is correct, Complainant says that the payment terms of the order should be changed from 60 days from the date of the order to 90 days in order to allow time for the site assessment and any follow-up corrective action, because the amount of the penalty will not be known until these activities are completed.

Because Respondent initially refused to accept service, service of the order on default was not accomplished until June 8, 1995.[1/] Respondent did not appeal the order, but by letter to the ALJ, dated June 22, 1995, alleged, among other things, that, despite the presence of "no trespassing" signs, the EPA inspector had trespassed on his property, that other EPA employees were biased against him and hostile, and that his neighbors, who desired to acquire his property, had called EPA into the case.[2/]

[1/] The EAB, being unaware that prompt service of the order had not been accomplished, returned the file to the Hearing Clerk by a memorandum, dated May 31, 1995, stating that "no appeal was filed and the Board elected not to review the case sua sponte."

[2/] Respondent has alleged that certain buildings on his property have been designated for possible listing as historic landmarks pursuant to the National Historic Preservation Act, 16 USCS § 470 et seq. His greatest concern appears to be that (continued...)

Additionally, Respondent acknowledged removing two underground gasoline storage tanks in July of 1992, alleged that he had inherited the property from his grandmother, that, although he was confident that there was no contamination of the property, he would welcome a site assessment, but he was unemployed, indigent and had no money.

In an undated letter, received August 15, 1995, Respondent acknowledged Complainant's motion for clarification of the default order.[3/] Respondent stated that he was attempting to secure a "pro bono" attorney, reiterated that he had no money and asserted that he would rather spend any money he obtained in the future on a site assessment [rather than paying a penalty].

DISCUSSION

The Rules of Practice (40 CFR Part 22) do not provide for motions for reconsideration of initial decisions and the general rule is that, upon issuance of an initial decision or of an order such as a dismissal or default which is treated as an initial decision, the ALJ's jurisdiction in the matter terminates. Asbestos

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[2/](...continued)
corrective action costs together with any penalty will be a lien on the property and that he will lose title thereto.

[3/] Because there is no indication that a copy of this letter was served on counsel for Complainant or the Regional Hearing Clerk, a copy of the letter is attached to this order.

Specialists, Inc., TSCA Appeal No. 92-3, 4 EAD 819, 831, at 824, note 15 (EAB, October 6, 1993). Exceptions to this rule are motions to reopen the record pursuant to Rule 22.28 or motions to set aside a default order pursuant to Rule 22.17(d). Other possible exceptions are errata notices correcting typographical or other minor errors and, to a limited extent, orders clarifying the decision.

In support of its argument that the ALJ has the authority to issue the clarification sought, Complainant cites In re Adcom Wire, d\b\a Adcom Wire Company, RCRA Appeal No. 92-2, Order On Motion For Clarification (EAB, May 24, 1994) and In re Dana Corporation-Victor Products Division and BRC Rubber Group, et al., Docket Nos. V-W-90-R-14 and R-15, Order Denying Request For Interlocutory Appeal (August 1, 1994). Adcom was a RCRA permit proceeding pursuant to 40 CFR Part 124--Procedures For Decisionmaking--wherein the EAB relied on its authority to issue remand orders (§ 124.19(f)(1)(iii)) to support the conclusion that it could entertain motions for clarification whenever the need for clarification arises. Although the order directing Respondent to perform a site assessment and, depending on the results of such assessment, corrective action, might be construed as implying to the contrary, the ALJ, unlike the EAB (Rule 22.30(c)), does not have remand authority under the Part 22 Rules applicable here. Adcom is, therefore, not controlling. In Dana, Judge Lotis issued an order clarifying the scope of a previous order granting complainant's motion for accelerated decision. Because this was an

interlocutory order, Dana is also distinguishable and not authority for the order sought by Complainant herein. Nevertheless, Rule 22.04(c)(2) provides that the Presiding Officer (ALJ) has authority to, inter alia, "issue all necessary orders".[4/] In view thereof, and because Complainant's understanding of the order is accurate, i.e., documentation of inability to pay is a condition precedent to reduction of the penalty and, if the condition is satisfied, the penalty will be reduced by the cost of complying with the order, including the cost of a site assessment and any necessary corrective action, an order to that effect will be issued.

If Respondent's representations are accepted, and there does not appear to be any reason to disbelieve him, he is indigent and lacks the ability to have a site assessment performed, let alone the ability to finance any necessary corrective action or to pay a penalty. Under these circumstances, there appear to be two possible avenues of relief, i.e., (1) a motion to set aside the default order pursuant to Rule 22.17(d) or (2) payment of the penalty in installments as authorized by the Claims Collection Act, 31 U.S.C. § 3711 (40 CFR § 13.18), neither of which will assure remediation of any releases or contamination at the site. It has been held that "good cause" within the meaning of Rule 22.17(d) for

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[4/] The cited Rule (40 CFR § 22.04(c)) provides in pertinent part: "(c) Presiding Officer. The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer shall have authority to: . . . (2) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders; . . . ."

setting aside a default order may be satisfied by showing a meritorious defense particularly if there is a strong probability that the result would have been different had a hearing been held. In re Midwest Bank & Trust Company, Inc., Rockland Mineral Processors, Inc., John E. Suerth, RCRA (3008) Appeal No. 90-4, 3 EAD 696 (CJO, October 23, 1991). Under such circumstances, a showing of a good cause for failing to respond to, for example, the ALJ'S order or to a motion for default is not essential. Here, it appears that any meritorious defense would relate to the amount of the penalty, in particular ability to pay, rather than the violation. See, however, In re Microft Systems International Holdings, S.A. and Alfred Waldner Company, Docket No. FIFRA-93-H-03 (Order Granting Motion To Set Aside Default Order, December 13, 1994) (even though it was recognized that FIFRA is a strict liability statute, facts demonstrating that respondents had good reason to believe representations made at time of pesticide registration were accurate constituted a meritorious defense relating to amount of penalty). In the absence of a properly supported motion, I do not have authority to set aside the default order and the cited decisions are not controlling.

Assuming the accuracy of Respondent's representations as to his indigence, it is difficult to envisage circumstances under which Respondent could undertake a site assessment, finance corrective action, if required, and comply with an installment schedule having any likelihood of liquidating a penalty of the magnitude involved here in the foreseeable future. These are

matters for Complainant to address, if, as is likely, Respondent fails to comply with the order as clarified herein.

ORDER

The "order on default", issued April 27, 1995, is affirmed insofar as it assesses Respondent a penalty of $25,760 and requires the submission of a "site assessment plan", performance of a site assessment pursuant to 40 CFR § 280.72, and, if the site assessment reveals that a release has occurred, submission of a corrective action plan and implementation of the plan pursuant to 40 CFR § 280.66. The penalty shall be paid as specified in the default order, except that it shall be paid within 90 days of the date of this order. If Respondent persists in his contention that he is unable to pay the penalty and submits appropriate documentation, such as copies of income tax returns or bank statements, to support such contention, the cost of the site assessment and any required corrective action, verified by copies of contracts, invoices, sales tickets, etc., will be deducted from the amount of the penalty.

Dated this 18th day of August 1995.

Spencer T. Nissen
Administrative Law Judge

Enclosure

CERTIFICATE OF SERVICE

This is to certify that the original of this **CLARIFICATION OF DEFAULT ORDER**, dated August 18, 1995, in re: Joe Mortiboy, Dkt. No. RCRA-UST-1092-12-01-9006, was mailed to the Regional Hearing Clerk, Reg. X, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: August 18, 1995

ADDRESSEES:

Mr. Joe Mortiboy
General Delivery
Moose Pass, AK 99631

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Deborah E. Hilsman, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Reg. X
1200 Sixth Avenue
Seattle, WA 98101

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Ms. Mary Shillcutt
Regional Hearing Clerk
U.S. EPA, Region X
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Seattle, WA 98101