



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)	
)	Docket No. CAA-5-2002-0017
C.D. Roberts Company)	
Newark, Ohio)	
)	
Respondent.)	
_____)	

DEFAULT ORDER AND INITIAL DECISION

By Motion for Default, the Complainant, the Acting Director of the Air and Radiation Division, United States Environmental Protection Agency (EPA), Region 5, Chicago, Illinois, has moved for a Default Order finding the Respondent, C.D. Roberts Company(C.D. Roberts), liable for violations of the Hazardous Air Pollutants (NESHAP) for Asbestos, 40 C.F.R. Part 61, Subpart M. The Complainant requests assessment of the full amount of the civil penalty proposed in the Administrative Complaint, Thirty-Seven Thousand One Hundred Dollars (\$37,100).

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (Consolidated Rules), 40 C.F.R. Part 22, 2000 ed., and based upon the record in this matter and the following Findings of Violation, Conclusions of Law and Determination of Penalty, the Complainant’s Motion for Default is hereby GRANTED. The Respondent, C.D. Roberts Company, is hereby found in default and a civil penalty in the amount of \$37,100 is assessed against it.

BACKGROUND

This civil administrative action arises under Section 113(d) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7413(d). The proceeding is governed by the Consolidated Rules. Section 112(b)(1)(A)(1970) of the Act, 42 U.S.C. § 7412(b)(1)(A), directed the Administrator of EPA to publish a list of “hazardous air pollutants.” Section 112(b)(1)(B) of the Act, 42 U.S.C. § 7412(b)(1)(B) (1970), required the Administrator to publish an “emission standard” for each designated hazardous air pollutant. These emission standards constitute the National Emissions Standards for Hazardous Air Pollutants known as NESHAPS. Section 112(i)(3)(A) of the Act, 42 U.S.C. § 7412(i)(3)(A), provides, in relevant part, that “[a]fter the effective date of any emission standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation.” Thus, a violation of the asbestos NESHAP constitutes a violation of Section 112 of the Act, 42 U.S.C. § 7412.

The Consolidated Rules requires a respondent to file a written answer within 30 days of service of the complaint. 40 C.F.R. § 22.15.

Pursuant to 40 C.F.R. § 22.17(a):

A party may be found to be in default: after motion upon failure to file a timely answer to the complaint.... Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent’s right to contest such factual allegations.

FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17 and the entire record in this matter, I make the following findings of fact:

1. The Complainant is, by delegation, the Acting Director of the Air and Radiation Division, U.S. EPA, Region 5, Chicago, Illinois.
2. The Respondent, C.D. Roberts Company, is a company doing business in the State of Ohio.
3. At all times relevant to the Complaint, C.D. Roberts acted as an operator on a demolition activity on property located at 6659 East Main Street, Reynoldsburg, Ohio (the Property or Facility).
4. On September 26, 2002, pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), the Complainant filed an administrative complaint against the Respondent, alleging violation of Section 112 of the Act, 42 U.S.C. § 7412, and seeking an administrative penalty of Thirty-Seven Thousand One Hundred Dollars (\$37,100).
5. The Complaint was properly served on October 2, 2002, as evidenced by a fully executed U.S. Postal Service Return Receipt.
6. As of the date of this Default Order and Initial Decision, the Respondent has failed to respond or file an Answer to the Complaint.
7. The Respondent was served with a Motion for Default.
8. As of the date of this Default Order and Initial Decision, the Respondent has failed to respond to the Motion for Default.

Count I

9. 40 C.F.R. § 61.145(a) requires that the owner or operator of a demolition or renovation thoroughly inspect the affected facility or part of the facility where the demolition or renovation will occur for the presence of asbestos.
10. The inspection report relied upon by the Respondent stated, "Often materials are

located in confined or inaccessible locations with little or no visible manifestation of their presence.... Accordingly, our survey may serve as a first reference but cannot be looked upon as a comprehensive listing of each material present that contains asbestos.”

11. This is not the thorough investigation required by 40 C.F.R. § 61.145(a).

Count II

12. 40 C.F.R. § 61.145(b)(4)(ii) requires an operator of a demolition activity to provide the Administrator with a written Notice that includes the name, address, and telephone number of both the facility owner and operator and the asbestos removal contractor owner or operator.

13. The written Notice submitted by C.D. Roberts failed to provide all the required information.

Count III

14. 40 C.F.R. § 61.145(b)(4)(iv) requires an operator of a demolition activity to provide the Administrator with a written Notice than includes a description of the facility including the size (square feet and number of floors), age, and present and prior use of the facility.

15. The written Notice submitted by C.D. Roberts failed to include an adequate description, including the ages of the facilities.

Count IV

16. 40 C.F.R. § 61.145(b)(4)(v) requires an operator of a demolition activity to provide the Administrator with a written Notice that includes the procedure, including the analytical methods, employed to detect the presence of regulated asbestos containing material (RACM) and Category I and Category II nonfriable asbestos containing materials (ACM).

17. C.D. Roberts failed to provide written Notice that included the procedure, including the analytical methods, employed to detect the presence of RACM and Category I and Category II

nonfriable ACM on the property.

Count V

18. 40 C.F.R. § 61.145(b)(4)(vi) requires the operator of a demolition activity to provide the Administrator with a written Notice that includes an estimate of the amount of RACM to be removed from the facility in terms of surface area in square feet. The Notice must also include an estimate of the approximate amount of Category I and Category II nonfriable ACM in the affected facility that will not be removed before the demolition.

19. C.D. Roberts failed to provide written Notice that included an estimate of the amount of RACM to be removed from the facility and an estimate of the approximate amount of Category I and Category II nonfriable ACM not to be removed before the demolition.

Count VI

20. 40 C.F.R. § 61.145(b)(4)(viii) requires that the operator of a demolition activity provide the Administrator with a written Notice that includes the scheduled starting and completion dates for the removal of ACM.

21. C.D. Roberts failed to provide written Notice that included the scheduled starting and completion dates for the removal of ACM.

Count VII

22. 40 C.F.R. § 61.145(b)(4)(x) requires that the operator of a demolition activity provide the Administrator with a written Notice containing a complete description of demolition methods, techniques, and affected facility components.

23. C.D. Roberts failed to provide written Notice that contained a complete description of demolition methods, techniques, and affected facility components.

Count VIII

24. 40 C.F.R. § 61.145(b)(4)(xi) requires that the operator of a demolition activity provide the Administrator with a written Notice that includes work practices and engineering controls to be used to comply with the subpart, including asbestos removal and waste-handling emission control procedures.

25. C.D. Roberts failed to provide written Notice that included work practices and engineering controls to be used to comply with the requirements of this subpart.

Count IX

26. 40 C.F.R. § 61.145(b)(4)(xiii) requires that the operator of a demolition activity provide the Administrator with a written Notice containing certification that at least one person trained as required by paragraph (c)(8) of this section will supervise the stripping and removal described in the notification.

27. C.D. Roberts failed to provide written Notice that included the required certification.

Count X

28. 40 C.F.R. §61.145(b)(2) requires the operator of a demolition activity to update the written Notice to the Administrator, as necessary.

29. C.D. Roberts was required to update its written Notice to include the additional operators in the demolition activity, MMC and C.D. Roberts, whose names did not appear on the original Notice and to repair the deficiencies set forth in Counts I through Counts IX.

30. C.D. Roberts failed to provide an updated written Notice.

Count XI

31. 40 C.F.R. § 61.145(c)(1) requires that the operator of a demolition activity is responsible for removing all RACM before demolition.

32. EPA guidance documents state that heavy machinery razing operations cause sufficient

force to turn Category II nonfriable ACM into RACM.

33. EPA guidance documents state that use of track excavators constitutes heavy machinery razing operations.

34. The operators of the demolition activity used a track excavator to demolish structures on the property.

35. Nobody removed the Category II nonfriable asbestos prior to or after the demolition on the property.

36. The use of a track excavator for demolition would cause sufficient force to change Category II nonfriable asbestos into RACM.

37. As an operator on a demolition activity, C.D. Roberts is responsible for removal of all RACM prior to demolition.

Count XII

38. 40 C.F.R. § 61.150(b)(1) requires operators of a demolition activity to dispose of all asbestos-containing waste materials as soon as is practical by the waste generator at a waste disposal site operated in accordance with 40 C.F.R. § 61.154.

39. Waste from the demolition activity at the property was deposited at Scotts Wrecking Inc., 5336 Ebright Road, Canal Winchester, Ohio.

40. Scotts Wrecking Inc. does not meet the standards of 40 C.F.R. § 61.154.

CONCLUSIONS OF LAW

1. Jurisdiction for this action was conferred upon EPA by Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d).

2. The Consolidated Rules provide that an order of default may be issued “after motion, upon failure to file a timely answer to the complaint.... Default by respondent constitutes, for

purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a).

3. C.D. Roberts' failure to answer the Complaint in this proceeding constitutes grounds for issuing the present order finding the Respondent in default.

4. C.D. Roberts' default constitutes an admission of all facts alleged in the Complaint.

5. The property is a "facility" as that term is defined by 40 C.F.R. § 61.141.

6. Respondent, C.D. Roberts, is a "person" as that term is defined by Section 302(e) of the Act, 42 U.S.C. § 7602(e), and an "operator of a demolition or renovation activity" as that term is defined by 40 C.F.R. § 61.141.

7. Materials at the facility contained "asbestos-containing material" (RACM) and Category II non-friable asbestos which became RACM through the use of heavy machinery razing operations as that term is defined at 40 C.F.R. § 61.141.

8. Respondent's failure to perform a thorough site investigation is a violation of 40 C.F.R. § 61.145(a).

9. Respondent's failure to provide written Notice that included the names of the owner of the facility and asbestos removal contractors and operators is a violation of 40 C.F.R. § 145 (b)(4)(ii).

10. Respondent's failure to provide written Notice that included an adequate description, including the ages of the facility is a violation of 40 C.F.R. § 61.145(b)(4)(iv).

11. Respondent's failure to provide written Notice that included the procedure, including analytical methods employed to detect the presence of RACM and Category I and Category II nonfriable ACM is a violation of 40 C.F.R. § 61.145(b)(4)(v).

12. Respondent's failure to provide written Notice that included an estimate of the amount

of RACM to be removed from the facility and an estimate of the approximate amount of Category I and Category II nonfriable ACM not to be removed before demolition is a violation of 40 C.F.R. § 61.145(b)(4)(vi).

13. Respondent's failure to provide written Notice that included a schedule for asbestos removal is a violation of 40 C.F.R. § 61.145(b)(4)(viii).

14. Respondent's failure to provide written Notice that included demolition techniques to be used and a description of the affected facility components is a violation of 40 C.F.R. § 61.145(b)(4)(x).

15. Respondent's failure to provide written Notice that included work practices and engineering controls to be used to comply with 40 C.F.R. § 61.145 is a violation of 40 C.F.R. § 61.145(b)(4)(xi).

16. Respondent's failure to provide written Notice including certification that a trained person will supervise the removal of asbestos is a violation of 40 C.F.R. § 61.145(b)(4)(xiii).

17. Respondent's failure to update the required written Notice to cure the deficiencies in the original Notice is a violation of 40 C.F.R. § 61.145(b)(2).

18. Respondent's failure to remove all RACM before demolition is a violation of 40 C.F.R. § 61.145(c)(1).

19. Respondent's failure to dispose of asbestos-containing waste at a waste disposal site in accordance with 40 C.F.R. § 61.154 is a violation of 40 C.F.R. § 61.150(b)(1).

20. When the Presiding Officer finds that a default has occurred, he shall issue a Default Order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the Initial Decision. 40 C.F.R. § 22.17(c). The

present Default Order, which resolves all outstanding issues and claims in this proceeding, constitutes the Initial Decision in this matter.

21. As described in the “Determination of Penalty” section below, I find the Complainant’s requested civil penalty of \$37,100 is properly based upon the statutory requirements of the Clean Air Act and the cited EPA penalty policies.

DETERMINATION OF PENALTY

Under the Consolidated Rules, the Presiding Officer shall determine the amount of civil penalty:

based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act.... If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by the complainant in the complaint, prehearing exchange, or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

Under Section 113(e) of the CAA, 42 U.S.C. § 7413(e), the statutory penalty factors include: (1) the size of the violator’s business; (2) the economic impact of the penalty on the business; (3) the violator’s full compliance history and good faith efforts to comply; (4) the duration of the violation; (5) payments by the violator of penalties previously assessed for the same violation; (6) the economic benefit of noncompliance; and (7) the seriousness of the violation.

Section 113(d) of the CAA, 42 U.S.C. § 7413(d), as amended by the Debt Collection and Improvement Act of 1996, 31 U.S.C. § 3701, authorizes a civil penalty of up to \$27,500 per day of violation.

In the Complaint, EPA proposed a penalty of \$37,100 against C.D. Roberts. Complainant’s explanation of its calculation of the proposed penalty, as set out in pages 17-18 of the Complaint,

the Penalty Calculation Breakdown and Affidavit of Will Brooke are incorporated by reference.

EPA states that the penalty was determined with reference to the “Clean Air Act Stationary Source Civil Penalty Policy, Appendix III - Asbestos Penalty Policy” dated October 25, 1991 and “Clarifications to the Clean Air Act Stationary Source Civil Penalty Policy, dated January 17, 1992 (Penalty Policy). Appendix III provides a table that specifies specific penalty amounts for deficiencies in late, incomplete or inaccurate notices.

Pursuant to the Penalty Policy and Appendix III, violations of 40 C.F.R. § 61.145(b)(2), 40 C.F.R. § 61.145(b)(4)(ii), 40 C.F.R. § 61.145(b)(4)(iv), 40 C.F.R. § 61.145(b)(4)(v), 40 C.F.R. § 61.145(b)(4)(viii), 40 C.F.R. § 61.145(b)(4)(x), 40 C.F.R. § 61.145(b)(4)(xi) and 40 C.F.R. § 61.145(b)(4)(xiii) were each assessed a penalty of \$200.

Pursuant to the Penalty Policy and Appendix III, violation of 40 C.F.R. § 61.145(b)(4)(vi), failure to include the amount of asbestos to be removed in the Notice was assessed a penalty of \$500.

Respondent committed two Work Practice violations in its failure to conduct a thorough inspection prior to demolition and failure to remove asbestos. Respondent had failed to perform a thorough search prior to demolition to detect asbestos in a different location. *In the Matter of C.D. Roberts Company*, Docket No. CAA-5-2002-0017. As the latest violation is a repeat violation, EPA asserts that it warrants a more substantial penalty. In accordance with Appendix III, which sets \$15,000 as the appropriate penalty for a second violation of this Work Practice (when the violation involves less than 10 units), EPA proposed a \$15,000 penalty for violation of 40 C.F.R. § 61.145(a).

Respondent also failed to remove 600 square feet of RACM. From the file involving the earlier case, EPA knew this was also a second Work Practice violation which also warrants a more

substantial penalty. In accordance with Appendix III, \$15,000 was assessed for violation off 40 C.F.R. § 61.145 (c)(1).

The economic benefit of failure to remove 600 square feet of RACM prior to demolition was calculated at \$5 per square foot, for a total benefit of \$3,000. This was based upon an August 11, 1993 report “Asbestos Abatement Cost Estimates” submitted to U.S. EPA by Vigyan Incorporated. The \$4.50 figure contained in the report was updated to \$5.00 due to the age of the report.

Despite two letters sent to the Respondent asking for ability to pay claims, no financial information was supplied to EPA. EPA made a conservative estimate on the net worth of C.D. Roberts and determined that it is a very small operation, with a net worth of less than \$100,000. Using this assumption, EPA assessed the smallest possible adjustment for Size of Violator - \$2,000.

Reviewing EPA’s penalty calculation, I find the proposed civil penalty of \$37,100 is appropriate and is based upon the statutory requirements found at Section 113(e) of the Clean Air Act, 42 U.S.C. § 7413(e), and the Penalty Policy.

DEFAULT ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. §22.17, Complainant’s Motion for Default is hereby GRANTED. The Respondent is hereby ORDERED as follows:

A. The Respondent is assessed a civil penalty in the amount of Thirty-Seven Thousand One Hundred Dollars (\$37,100).

B. Payment shall be made by certified or cashier’s check payable to “Treasurer of the United States of America” within thirty (30) days after the effective date of the final order. 40

C.F.R. § 22.31(c). Such payment shall be remitted directly to :

U.S. Environmental Protection Agency
Region 5
P.O. Box 70753
Chicago, Illinois 60673

C. A copy of the payment shall be mailed to the Regional Hearing Clerk (Mail Code R-19J) and Counsel for the Complainant (Mail Code C-14J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590. A transmittal letter identifying the name and docket number should accompany both the remittance and the copies of the check.

D. In the event of failure by the Respondent to make payment as directed above, this matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.

E. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

F. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.27. This Order shall become effective forty-five (45) days after the initial decision is served upon the parties unless (1) a party appeals the initial decision to the EPA Environmental Appeals Board¹, (2)

¹ Under 40 C.F.R. 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within thirty days after this Initial Decision is served upon the parties.

a party moves to set aside the default order that constitutes this initial decision, or (3) the Environmental Appeals Board elects to review the initial decision on its own initiative.

IT IS SO ORDERED.

Dated: 9/14/2004

/s/ _____

Bharat Mathur
Acting Regional Administrator