

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF:)
)
LOUIS W. ALVES and) Docket No. TSCA-09-93-0009
ASSOCIATES, INC.) INITIAL DECISION
) AND DEFAULT ORDER
)
Respondent.)
)
_____)

By Motion for Default Order dated December 23, 1993, Complainant, the Director of the Air and Toxics Division of the United States Environmental Protection Agency, Region IX, ("Complainant") moved for a Default Order against Louis W. Alves and Associates, Inc. ("Respondent") assessing a civil penalty in the amount of \$56,000 and requiring Respondent to come into compliance with all applicable provisions of the implementing regulations of the Toxic Substances Control Act ("TSCA") for failure to file a timely Answer to a Complaint in accordance with 40 C.F.R. § 22.17(a)(1).

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, and based on the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Civil Penalty, I hereby order that Complainant's Motion for Default Order is GRANTED with respect to the assessment of a civil penalty and DENIED with respect to the issuance of a

compliance order.

I. FINDINGS OF FACT

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

1. On August 24, 1993, Complainant filed the Complaint in this action with the Regional Hearing Clerk and served the Complaint on Respondent.

2. Respondent received the Complaint on August 28, 1993. An Answer to the Complaint was due on or about September 17, 1993, within twenty (20) days after service of the Complaint. See 40 C.F.R. § 22.15(a).

3. On October 15, 1993, counsel for Complainant sent a letter by certified mail to Respondent informing Respondent that the Answer to the Complaint was overdue and that the Answer should be filed to avoid being found in default. As of the date of the filing of Complainant's Motion for Default Order, and as of the date of this Initial Decision, Respondent has not filed an Answer to the Complaint.

4. Based on the Preliminary Allegations of the Complaint, paragraphs 3 through 9:

a. Respondent, a California corporation, is a "person" pursuant to TSCA.

b. TSCA Section 16(a)(1), 15 U.S.C. § 2615(a)(1), authorizes the Administrator of EPA to assess a civil penalty of up to \$25,000 per day for each violation of TSCA Section 15, 15 U.S.C § 2614.

c. Pierce Joint Unified School District ("PJUSD") is a "Local Educational Agency" ("LEA"), as defined in TSCA Section 202(7), 15 U.S.C. § 2642(7), and 40 C.F.R. § 763.83.

d. PJUSD leases, owns, or otherwise uses, at least ten (10) school buildings which constitute the Pierce High School ("PHS"). The ten PHS buildings are identified in documents obtained from PJUSD, and referred to hereinafter, as "Unit A", "Unit B", "Unit C", "Unit D", "Unit E", "Bus Barn", "Track Storage Shed", "Baseball Field Snack Bar & Storage Shed", "Swimming Pool Pump House", and "School Water Well Pump House." These buildings are collectively referred to as "the PHS school buildings."

e. Each of the buildings referred to in Paragraph 4(d) above is a "school building," as defined in TSCA Section 202(13), 15 U.S.C. § 2642(13), and 40 C.F.R. § 763.83.

f. Respondent, an "accredited asbestos contractor," as defined in TSCA Section 202(1), was designated by and contracted with PJUSD to 1) inspect each of the PHS school buildings, conduct sampling and analysis, provide assessments of friable material, pursuant to 40 C.F.R. §§ 763.85, 763.86, 763.87 and 763.88; and 2) develop an asbestos management plan ("management plan") for each of the school buildings, pursuant to 40 C.F.R. § 763.93(e).

5. Based on Count I of the Complaint, paragraphs 10 through 13:

a. Accredited inspectors performing an inspection shall identify all homogeneous areas of friable suspected asbestos-containing building material ("ACBM") and all homogeneous areas of

nonfriable suspected ACBM pursuant to 40 C.F.R. § 763.85(a)(4)(iii).

b. Respondent, in inspecting for ACBM in each of the school buildings, failed to identify homogeneous areas of suspected ACBM, as required by 40 C.F.R. § 763.85(a)(4)(iii). This suspected ACBM consists of, in Unit B, approximately 195 square feet of vinyl tile in the coach's office in the boy's gym, approximately 49 square feet of vinyl tile in the ball room in the boy's gym, approximately 1,233 square feet of vinyl tile in the foyer of the boy's gym, approximately 21 square feet of 12" vinyl tile in the snack room in the boy's gym, approximately 10 square feet of floor tile mastic in the custodial room in the boy's gym, approximately 7,428 square feet of acoustical ceiling tiles in the main room in the boy's gym, and four fire doors (approximately 84 square feet) in the boy's gym; and, in Unit C, approximately 1,239 square feet of vinyl tile. These failures are a violation of the Rule.

c. Each of Respondent's failures to properly comply with the requirements of the Rule for each of the PHS school buildings, as set forth in Count I of the Complaint, constitutes a separate violation of TSCA Section 15(1)(D), 15 U.S.C. § 2614(1)(D).

6. Based on Count II of the Complaint, paragraphs 14 through 17:

a. Accredited inspectors designated by the LEA to collect bulk samples of suspect ACBM shall collect, in a randomly

distributed manner, at least three bulk samples from each homogeneous area of thermal system insulation that is not assumed to be asbestos-containing material ("ACM"), pursuant to 40 C.F.R. § 763.86(b)(1).

b. Respondent failed to take the required three samples before determining the material was not ACM. Respondent only collected one bulk sample for 16 linear feet of friable thermal system insulation in Unit A boiler room.

c. Respondent's failure to properly comply with the requirements of the Rule for the PHS school building, as set forth in Count II of the Complaint, constitutes a separate violation of TSCA Section 15(1)(D), 15 U.S.C. § 2614(1)(D).

7. Based on Count III of the Complaint, paragraphs 18 through 22:

a. Each management plan shall include, for each inspection and reinspection conducted under § 763.85, inter alia, a blueprint, diagram, or written description of each school building that identifies clearly each location and approximate square or linear footage of homogeneous areas where each bulk sample was collected, pursuant to 40 C.F.R. § 763.93(e)(3)(ii).

b. The management plan fails to include the location of any homogenous area where bulk samples were collected.

c. The management plan fails to provide the square or linear footage of the following sampled homogeneous areas in Unit A: 9" hall floor tile, 12" hall floor tile, 12" hall acoustic ceiling tile, 9" floor tile in room 11, 9" floor tile in room 10,

12" floor tile in nurses room entry, 9" floor tile in room 4, 9" floor tile in room 3, and pipe lagging in the boiler room; in Unit B: sprayed ceiling on entry of boy's gym, sprayed ceiling in locker room of the boy's gym, pipe elbows in the boiler room, tape in the janitor room attic, and mud in the janitor room attic; in Unit D: 12" acoustic tile in the chemistry room; in Unit E: sprayed on ceiling in the girl's gym storage room, sprayed on ceiling in the shower room, and unknown material sampled in the girl's gym shower room. The failures identified in paragraph b and c are a violation of the Rule.

d. Respondent's failure to properly comply with the requirements of the Rule for the PHS school buildings, as set forth in Count III of the Complaint, constitutes a separate violation of TSCA Section 15(1)(D), 15 U.S.C. § 2614(1)(D).

8. The Complaint in this proceeding did not contain any proposed order requiring the Respondent to come into compliance with TSCA.

9. On December 23, 1993 Complainant filed a Motion for Default Order. The Motion was served on the Respondent by certified mail on December 23, 1993. Respondent had twenty days from the date of service to reply. As of this date the Respondent has failed to reply to the Motion.

II. CONCLUSIONS OF LAW

____ Pursuant to 40 C.F.R. § 22.17(c), and based on the entire record, I make the following conclusions of law:

1. The Complaint in this action was served upon

Respondent in accordance with 40 C.F.R. §22.05(b)(1).

2. The Consolidated Rules of Practice Governing The Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules") require Respondent to file an Answer to the Complaint within twenty (20) days of the service of the Complaint. 40 C.F.R. § 22.15(a). Respondent has failed to file a timely Answer to the Complaint.

3. 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 action only, an admission of all facts alleged in the complaint" 40 C.F.R. § 22.17(a)(1).

4. Respondent's failure to file a timely Answer to the Complaint constitutes grounds for issuing an order finding the Complainant in default.

5. Respondent's default constitutes an admission of all facts alleged in the Complaint, as described in the Findings of Fact above.

6. Respondent violated Section 15(1)(D) of TSCA, 15 U.S.C. §2614(1)(D), as described in the Findings of Fact above.

7. Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), authorizes the assessment of a civil penalty of up to \$25,000 per day for each violation of TSCA by persons other than an LEA. The proposed civil penalty in the Complaint is for \$56,000.

_____8. When the Regional Administrator finds that a default has occurred, she shall issue a Default Order against the

defaulting party, and the default order shall constitute the Initial Decision. 40 C.F.R. §22.17(b). This authority of the Regional Administrator has been delegated to the Regional Judicial Officer pursuant to 40 C.F.R. §22.04(a)(3).

9. Respondent's failure to file a timely Answer to the Complaint is grounds for the entry of a Default Order against the Respondent assessing a civil penalty for the violations described above; no grounds have been shown in this default proceeding for issuing an order requiring the Respondent to come into compliance with TSCA.

I. DETERMINATION OF CIVIL PENALTY AMOUNT

Under the Consolidated Rules, the amount of the proposed civil penalty "shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.14(c). Administrative civil penalties must be assessed and collected pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, which provides that EPA shall take into account the nature, circumstance, extent and gravity of the violation, as well as ability to continue to do business, history of prior violations, degree of culpability and any other factors as justice may require.

The applicable civil penalty guideline is the Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act, dated January 31, 1989 ("ERP"), which provides guidance as to how to apply the above statutory factors which EPA shall take into account in assessing and collecting administrative

civil penalties. The policy is incorporated herein by reference.

The penalty for the violations alleged in the Complaint was calculated by following the guidelines set forth in the ERP as follows.¹ Under the ERP the base (unadjusted) penalty is calculated on a matrix, in which one axis is a circumstance level ranging from 1 (highest) to 6 (lowest) and the other axis is the extent of potential harm caused by the violation (major to minor).

The circumstance level reflects the probability that harm will result from a particular violation. ERP at 12. The circumstance level in the ERP for Count I, failure to properly inspect Units B and C, is a circumstance level 2. See Id. at Appendix B, B-6.

The extent level reflects the potential harm caused by a violation. Id. at 12. The extent level is determined by the quantity of asbestos-containing material at issue. This Count involves failure to inspect Units B and C. The failure to inspect Unit B constitutes a violation that involved more than 3,000 square feet of ACBM and is classified as a major extent. See Id. at 13. The failure to inspect Unit C constitutes a violation that involved more than 160 square feet and less than or equal to 3,000 square feet of ACBM and is classified as a significant extent level.

For Unit B the penalty matrix assigns a penalty of \$20,000 for a circumstance level 2 violation with a major extent. Id. at 17. For Unit C the penalty matrix assigns a penalty of \$13,000 for a

¹The penalty is calculated based on penalty tables for persons, such as Respondent, which are not local education agencies ("LEAs"), but which inspect LEAs for ACBM, analyze bulk samples or prepare management plans for the purpose of the LEA's AHERA requirements. See ERP at 2, 17.

circumstance level 2 violation with a significant extent.

Count II, failure to properly sample, is a circumstance level two violation. See Id. at Appendix B, B-6. The extent level is considered minor because the violation involved less than 160 square feet of ACBM. See Id. at 13. The penalty matrix assigns a penalty of \$3,000 for a circumstance level 2 violation with a minor extent level. Id. at 17.

Count III, failure to properly develop a management plan, is a circumstance level two violation. See Id. at Appendix B, B-6. The extent level is considered major when the quantity of asbestos cannot be readily determined. Id. at 13. In this case the quantity of asbestos cannot be readily determined because the management plan did not specify the location and footage of the material sampled, and accordingly, the extent level is classified as major. The penalty matrix assigns a penalty of \$20,000 for a circumstance level 2 violation with a major extent level. Id. at 17.

The base civil penalty, based on the above violations, is summarized as follows:

Count I, Failure to properly inspect Unit B:	\$20,000
Count I, Failure to properly inspect Unit C:	\$13,000
Count II, Failure to properly sample:	\$3,000
Count III, Failure to properly develop the management plan:	<u>\$20,000</u>
TOTAL BASE CIVIL PENALTY:	\$56,000

The base penalty can be adjusted for the following factors: culpability, history of such violations, ability to pay, ability to

continue in business and such other matters as justice may require. ERP at 19. In this case there is no basis for an adjustment to the base penalty for the following reasons.

No upward or downward adjustment has been made in the penalty amount for culpability. Respondent was an accredited asbestos contractor and is charged with knowing the requirements of the AHERA regulations. Respondent had complete control over the activities that it conducted at Pierce High School and was entirely capable of avoiding the violations.

No upward adjustment has been made for history of violations, since at the time the Complaint was filed the Respondent had no prior violations of TSCA.

Respondent has failed formally to request a reduction or to produce any data that support reducing the penalty on the basis of an inability to pay or inability to continue in business. In the absence of such information, it would be inappropriate to mitigate the penalty amount on this basis.

There are no other factors that would warrant a penalty adjustment in the interests of justice.

Accordingly, the appropriate civil penalty is fifty-six thousand dollars (**\$56,000**).

IV. DEFAULT ORDER

WHEREFORE, pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. §22.17, Complainant's Motion for Default Order is hereby GRANTED IN PART as follows. Respondent is hereby ORDERED to comply with all of the terms of this Default

Order:

A. Respondent is hereby assessed a civil penalty in the amount of fifty-six thousand dollars (**\$56,000**) and ordered to pay the civil penalty as directed in this Default Order.

1. Pursuant to 40 C.F.R. §22.27(c), this Default Order shall become final within forty-five (45) days after service upon the parties unless it is appealed to the EPA Environmental Appeals Board or the Environmental Appeals Board elects, sua sponte, to review it.

2. Respondent shall pay the civil penalty by certified or cashier's check payable to the Treasurer of the United States within sixty (60) days after a final order issued upon default. The check shall be sent by certified mail, return receipt requested, to:

**U.S. Environmental Protection Agency
Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251**

3. At the time payment is made to the above address, Respondent shall send a copy of the check by certified mail, return receipt requested, to the following address:

Regional Hearing Clerk (RC-1)
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

B. All correspondence to Complainant concerning compliance with the above requirements shall be sent to:

**Jo Ann Semones
Chief, Toxics Management Section (A-4-4)**

**Air & Toxics Division
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105**

IT IS SO ORDERED.

Date: February 15, 1994

/s/ _____
Steven W. Anderson
Region IX Judicial Officer