UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Weed Heights Development Co.,	)	Application for Attorneys' Fees
	)	and Expenses Under the Equal
Docket No. TSCA-09-84-0010	)	Access to Justice Act.
	)	

Equal Access To Justice Act. Failure to provide net worth documentation required by 40 C.F.R. 17.12 pursuant to Order provides justification for entry of a Default Order resulting in dismissal of application for attorneys' fees.

Appearances:

Patrick V. Fagan, Esquire
Mike Soumbeniotis, Esquire
Allison, Brunetti, MacKenzie, Hartman,
Soumbeniotis & Russell, Ltd.
P. O. Box 646
Carson City, NV 89702

Counsel For Respondent

David M. Jones, Esquire
Office of Regional Counsel
U. S. EPA, Region IX
211 Fremont Street
San Francisco, CA 94105

Counsel For Complainant

DEFAULT ORDER*

This proceeding arises from an application by Weed Heights Development Company (Weed Heights or Applicant) for attorneys' fees and expenses pursuant to the Equal Access to Justice Act (EAJA), (5 U.S.C. 504) and the Environmental Protection Agency's (EPA) implementing regulations, 40 C.F.R. Part 17.

The application results from a Complaint issued by EPA on January 30, 1984, charging Weed Heights with violations of the Toxic Substances Control Act (15 U.S.C. 2601, et seq.) involving inspection/use conditions, inadequate marking, improper storage and inadequate recordkeeping of PCB transformers. Weed Heights answered, denying liablity in that the six transformers referenced in the investigative report were never owned by Weed Heights. Exhibits attached to the Answer provided evidence that the said transformers had been sold or transferred by Anaconda Minerals Company, the former owner of the Weed Heights property and the transformers, prior to Weed Heights' acquisition of the property in December 1982.

Thereafter, on June 6, 1984, Complainant EPA filed Motion For Leave To File First Amended Complaint. The motion was granted and, in effect, added two additional Respondents, Mesaba Service and Supply Co., and Martin Electric Co. Again, in its Answer, Weed Heights asserted the same defense of nonownership.

Subsequently, Weed Heights filed Motion To Dismiss And/or For Accelerated Decision citing lack of ownership or interest in the transformers and referencing documentary proof thereof.

* This Default Order shall constitute the Initial Decision in this Proceeding. 40 C.F.R. 22.17(b)

Complainant's Response to said Motion To Dismiss was dated June 22, 1984. Rule 22.16(b) of the Consolidated Rules of Practice require that a party's response to any written motion must be filed within ten (10) days after service of motion. Failure of Complainant to comply with this Rule formed one of the bases upon which the Motion To Dismiss was granted.

Sec. 22.20 of the Rules of Practice provides that:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

Respondent Weed Heights provided documentary proof that it does not own or have any interest in the transformers which are the subject of this Complaint.

Complainant's response to said motions states that the inspection report filed by the EPA field investigators records no disclaimer of title to the transformers or responsibility for same by Mr. Darrell W. Johnson on behalf of his employer or principal, Weed Heights Development Company. And that this, among other things, leads to the assumption that title was still in Weed Heights. The documentary evidence submitted by Respondents nullifies this assumption.

Complainant states that the purpose of the First Amended Complaint was to determine "just who is the owner of this personalty and where does the responsibility for compliance with TSCA repose." The Order Granting the Motion to Dismiss states that the forum for that determination is by means of a more thorough investigation and not in a formal hearing.

And further, the fact that the transformers were located on the premises of Weed Heights does not place liability upon Weed Heights, especially in view of the arrangements made between Mesaba Service and Supply Co. and Martin Electric Company, the subsequent owners of the transformers, to remove them from that location. Complainant did not appeal the Order Granting Motion To Dismiss.

Complainant filed a Motion To Dismiss the application for attorneys' fees stating in part, as follows:

"Section 17.12, Net Worth Exhibit, provides in pertinent part as follows:

> (a) Each applicant. . .must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated. . . The exhibit may be in any form that provides full disclosure of assets and liabilities of the applicant and any affiliates and is sufficient to determine whether the applicant qualifies under the standards of 5 U.S.C. 504(b)(1)(B)(i). . . ."

The application submitted by Weed Heights Development Company contains references to the affidavits of Don H. and Joy Tibbals which are apparently intended to satisfy the provisions of Section 17.12(a) cited above. The affidavits attached to the application make reference only to the net worth of Weed Heights Development Company at the time the proceedings were initiated and there is no "detailed exhibit" which will meet the requirements of the regulation cited above.

The Court agreed and in Order dated March 5, 1985, advised Respondent:

> The information provided in the application and affidavits is not sufficient to determine the qualification of Weed Heights for an award. In order to give consideration to this

application, the provisions of 40 CFR 17.12 must be fulfilled. This information shall be filed with the Regional Hearing Clerk no later than March 27, 1985.

No response having been received from Respondent to this Order an Order To Show Cause Why Default Order Should Not Be Issued was filed May 2, 1985, requiring the parties to file responses thereto no later than May 21, 1985. Respondent did not submit a response.

It is therefore ordered that the application for attorneys' fees and expenses under the Equal Access To Justice Act filed by Respondent in this proceeding is dismissed with prejudice for failure to submit the net worth documentation required by 40 C.F.R. 17.12 pursuant to Order.

It is so ordered.

Edward B. Finch
Chief Administrative Law Judge

Dated: June 3, 1985
Washington, D. C.

CERTIFICATION

I hereby certify that the original of this Default Order was hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and three copies were sent by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region IX, for dissemination pursuant to 40 C. F. R. 22.27(a).

Leanne B. Boisvert
Legal Staff Assistant

Dated: June 3, 1985