

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
FRED J. KRONAUGE) **Docket No. 5-CAA-95-017**
)
Respondent)

ORDER FINDING RESPONDENT IN DEFAULT AND ASSESSING PENALTY

By order issued by the undersigned on September 30, 1996, a procedural schedule for the filing of prehearing exchanges was established. Respondent was directed to file on December 10, 1996 either: (a) its prehearing exchange or (b) a statement that it elects to conduct cross-examination of EPA witnesses and to forgo the presentation of answering evidence. Respondent has done neither. By order issued March 4, 1997, Respondent was directed to show cause on or before March 27, 1997 why a default order should not be issued against it for "failure to comply with a prehearing or hearing order of the Presiding Officer . . .," as provided in 40 C.F.R. § 22.17. Complainant was permitted to file a response to Respondent's pleading on or before April 10, 1997. No response to the March 4, 1997 show cause order was received.

Section 22.17(a), 40 C.F.R. § 22.17(a), permits a default order to be issued against a party " . . . after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer" As noted above, Respondent failed to comply with the undersigned's September 30, 1996 order. Nor did Respondent file an answer to the March 4, 1997 show cause order. (1)

Accordingly, Respondent is hereby found to be in default. Pursuant to § 22.17 (a), all facts alleged in the complaint are deemed admitted and Respondent is deemed to have waived his right to a hearing. The findings of fact and conclusions of law are set forth below.

DISCUSSION

Respondent Fred J. Kronauge is a "person" as defined at Section 302(e) of the Clean Air Act, 42 U.S.C. § 7602(e). On or before August 10, 1993, a demolition was conducted at a commercial facility located at 124 Cedar Avenue, formerly 125 Sunrise, Dayton, Ohio (124 Cedar facility). The 124 Cedar facility is and was a "facility," as defined at 40 C.F.R. § 61.141.

The 124 Cedar facility demolition involved the wrecking and taking out of load-supporting structures, and the subsequent removal of the materials from the 124 Cedar facility, as defined at 40 C.F.R. § 61.141. The 124 Cedar facility demolition was subject, inter alia, to the asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP) standards for demolition and renovation operation. 40 C.F.R. § 61.145.

Respondent Fred J. Kronauge, 600 West Third Street, Dayton, Ohio, was the owner of the 124 Cedar facility. Respondent was an "owner of a demolition activity," as defined at 40 C.F.R. § 61.141, with respect to the 124 Cedar facility demotion.

On August 10, 1993, representatives of the State of Ohio Regional Air Pollution Control Agency (RAPCA) inspected the demolition site where the 124 Cedar facility demolition was conducted to determine compliance with the asbestos NESHAP. Section 112(i)(3)(A) of the Act, 42 U.S.C. § 7412(i)(3)(A), prohibits any person from operating a source in violation of an emission standard, including the asbestos NESHAP. Violations of the asbestos NESHAP are violations of Section 112(i)(3)(A) of the Act, and subjects the violator to the imposition of civil penalties under Section 113(d) of the Act, 42 U.S.C. § 7413(d).

Respondent was required by 40 C.F.R. § 61.145(b) to submit a notice of intent to demolish or renovate to the Administrator EPA pertaining to the 124 Cedar facility demolition. Pursuant to 40 C.F.R. § 61.04(b)(kk)(vi), Respondent was also required to submit a notice to the RAPCA, pertaining to the 124 Cedar facility. To date, neither the EPA nor RAPCA has received a notification of the 124 Cedar facility demolition because Respondent never submitted such a notification to either of the above-named Agencies. Therefore, Respondent Fred J. Kronauge's failure to provide the EPA and RAPCA with a notification of demolition is a violation of 40 C.F.R. § 61.145(b)(1) and therefore of Section 112(i)(3)(A) of the Act, and Section 114(a) of the Act, 42 U.S.C. § 7412(a).

Pursuant to Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), the Administrator of the EPA may assess a civil penalty of up to \$25,000 per day of violation, up to a total of \$200,000, for, inter alia, violations of Section 112 of the Act,

42 U.S.C. § 7412. Section 113(e)(1) of the Act, 42 U.S.C. § 7413(e)(1), authorizes the assessment of a civil penalty based upon consideration of the seriousness and duration of the violation alleged, the size of the business, the economic impact of the penalty on the business, the Respondent's full compliance history and good faith efforts to comply, payment by Respondent of penalties previously assessed for the same alleged violations, the economic benefit of noncompliance, and other factors as justice may require.

Pursuant to Section 113(d)(1) of the Act, 42 U.S.C.

§ 7413(d)(1), the Administrator of EPA and the Attorney General have determined that an administrative penalty action against Respondent is appropriate, although the first alleged date of violation occurred more than 12 months prior to the initiation of this action.

After considering these factors, it is determined that Respondent be assessed a civil penalty of \$17,000. This proposed penalty was calculated in accordance with the "Clean Air Act Stationary Source Civil Penalty Policy" (October 25, 1991) and the "Asbestos Demolition and Renovation Civil Penalty Policy" (May 11, 1992) (Penalty Policies). This calculation is explained in more detail below.

Under the Penalty Policies, the seriousness of the alleged violations is considered. Asbestos is a hazardous air pollutant that is known to cause death and serious irreversible illness. The notification requirement of the Asbestos NESHAP are essential to U.S. EPA and its delegated agents in that it provides them with the opportunity to ensure that renovation and demolition projects are performed in a manner consistent with the Asbestos NESHAP. The penalty policy generates an appropriately high factor associated with notification violations.

The Asbestos Penalty Policy recommends a penalty of \$15,000 for a first-time violation of the Asbestos NESHAP notification requirement. Asbestos Penalty Policy at 15. This is appropriate and is adopted. Then, Complainant recommends a \$2,000 increase for a sole proprietorship with under \$100,000 of net current

assets. Since this is the lowest possible size of business to assign to Respondent, it is adopted. General CAA Penalty Policy at 14.

The CAA also requires the penalty calculation to consider "the economic impact of the penalty on the business." 42 U.S.C. § 7413(e). Pursuant to the General CAA Penalty Policy, at page 20, "The Agency will generally not request penalties that are clearly beyond the means of the violator." The penalty guidance continues, "At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might contribute to a company going out of business."

There is no assertion by Respondent in its Answer to the Complaint or elsewhere, or by Complainant, that the proposed penalty of \$17,000 will have an adverse effect on its business or that the proposed penalty is clearly beyond the means of Respondent to pay. Thus, no adjustment to the \$17,000 is appropriate to reflect the economic impact of the penalty on the business.

Similarly, there is no assertion or evidence by either party that an adjustment to the \$17,000 to reflect other statutory factors such as (1) an increase in the penalty to capture the economic benefit of noncompliance, (2) any adjustment based upon the violator's compliance history and good faith efforts to comply, or (3) payment by the violator of penalties previously assessed for the same violation. Accordingly, no adjustment for these factors shall be made.

Within 60 days after a final order is issued in this docket, Respondent shall pay the assessed penalty of \$17,000 by certified or cashier's check payable to "Treasurer, the United States of America," and shall deliver it, with a transmittal letter identifying the name of the case and docket number of this Complaint to:

United States Environmental Protection Agency

Region 5

Regional Hearing Clerk

The First National Bank of Chicago

P.O. Box 70753

Chicago, Illinois 60673

Respondent also should include on the check the name of the case and the docket number. Respondent simultaneously shall send copies

of the check and the transmittal letter to:

John Shepler

Air Enforcement and Compliance Assurance Branch (AE-17J)

Air and Radiation Division

U.S. EPA, Region 5

77 West Jackson Boulevard

Chicago, Illinois 60604-3590

Louise Gross, Esquire

Assistant Regional Counsel

Office of Regional Counsel (CA-29A)

U.S. EPA, Region 5

77 West Jackson Boulevard

Chicago, Illinois 60604-3590

Since this order, as a default order, constitutes an initial decision, 40 C.F.R. § 22.17(b), the effectiveness and appeal provisions of 40 C.F.R. § 22.27 and 40 C.F.R. § 22.30, respectively, are applicable.

Charles E. Bullock

Administrative Law Judge

Dated: August 26, 1997

Washington, D.C.

IN THE MATTER OF FRED J. KRONAUGE, Respondent

Docket No. 5-CAA-95-017

CERTIFICATE OF SERVICE

I certify that the foregoing Order, dated August , 1997, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Ms. Sonja Brooks Regional Hearing Clerk

U.S. Environmental Protection

Agency, Region 5

77 West Jackson Boulevard

Chicago, IL 60604

Copy by Regular Mail to:

Counsel for Complainant: Louise Gross, Esquire

Assistant Regional Counsel

U.S. Environmental Protection Agency, Region 5 (CA-29A)

77 West Jackson Boulevard

Chicago, IL 60604

Copy by Certified Mail, Return

Receipt Requested and by

Regular Mail to:

Counsel for Respondent: Michael J. Long, Esquire

1401 West Dorothy Lane

Kettering, OH 45409

Respondent: Mr. Fred Kronauge

c/o American Engine & Welding

600 West Third Street

Dayton, OH 45407

Marion Walzel

Legal Assistant

Dated: August , 1997

1. A copy of the September 30, 1996 order and a copy of the March 4, 1997 show cause order were served upon Respondent's counsel, Michael D. Long, Esquire, at 1401 West Dorothy Drive, Kettering, Ohio 45409.