UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

MOUNTAIN STATES ASBESTOS REMOVAL, INC.
AND
HOUSING AUTHORITY OF THE CITY OF NEWARK,

RESPONDENTS

DOCKET NO. CAA-II-94-0106

DEFAULT ORDER AND INITIAL DECISION AND ORDER DISMISSING COMPLAINT

This case arises under Section 113 (d) of the Clean Air Act (hereinafter referred to as the "CAA"), 42 U.S.C. § 7413(d). The United States Environmental Protection Agency (the "Complainant" or the "EPA") , by motion dated February 29, 1996, moves for the issuance of a default order against Respondent Mountain States Asbestos Removal, Inc. , ("Respondent Mountain States") , and the assessment of a civil penalty in the amount of $37,200 against Respondent Mountain States. The motion will be granted. The Complaint against Respondent Housing Authority of the City of Newark ("Respondent Housing Authority") will be dismissed with prejudice.

Procedural History and Findings of Fact

The Director of the Air and Waste Management Division of the EPA for Region II commenced this proceeding by filing and serving an administrative Complaint and Notice of Opportunity for Hearing dated March 29, 1994, against the above cited Respondents, Respondent Mountain States and Respondent Housing Authority.[1/] The Complaint alleges that Respondents Housing Authority and Mountain States are the owner or operator of a renovation activity at the Christopher Columbus Homes located at 112 8th Avenue in Newark, New Jersey ("the facility"). Respondent Mountain States is incorporated in the State of Arizona and maintains a branch office under the name of Eastern States Environmental Services in the State of New Jersey. Respondent Housing Authority is a division of the City of Newark, New Jersey.

The Complaint charges the Respondents with two violations of the CAA's emission standards for hazardous air pollutants and the implementing regulation's emission standards for asbestos ("National Emission Standard for Asbestos", known as the "Asbestos NESHAP") . These violations arise under Section 112 of the CAA, 42 U.S.C. § 7412, and the regulations promulgated thereunder at 40 C.F.R. Part 61, Subpart M. Pursuant to the provisions at Section 113(d) of the CAA, the Complaint seeks the assessment of an administrative civil penalty in the amount of $95,200, against the Respondents for the alleged violations.

The alleged violations stem from two inspections conducted by EPA agents on November 2, 1993, and November 16, 1993, at the facility owned by Respondent Housing Authority and being renovated by Respondent Mountain States. More specifically, the Complaint alleges the following violations: On November 2, 1993, an EPA inspector conducted an Asbestos NESHAP inspection at the facility and during that inspection the inspector found dry and friable suspect regulated asbestos containing material ("RACM") "spread around on the ground in the vicinity of a dumpster designated for regular demolition debris." Complaint at ¶ 20. Samples of the debris on the ground were collected and on analysis were found to contain RACM as defined by 40 C.F.R. § 61.141. Count I of the Complaint further alleges that the Respondents violated 40 C.F.R. § 61.145(c)(6) by failing to ensure that all RACM debris stripped or removed from the facility remained wet until collected and contained for disposal.

Count II of the Complaint alleges that on "Tuesday, November 16," an inspector returned to the facility in answer to a complaint that plastic bags containing suspect RACM had been buried on the grounds of the facility.[2/] The inspector found five plastic bags containing suspect RACM buried in a fill area between buildings #7 and #8 of the facility. The inspector found two additional plastic bags containing suspect RACM, including one bag found in a sewer manhole opening at the facility, that were labeled with a "USDOT" label identifying them as containing asbestos. These bags also were labeled with the name Columbus Homes, Newark, New Jersey, as the waste generator. Samples of the suspect RACM from the plastic bags were collected and analysis of these samples showed that it was RACM. Count II of the Complaint further alleges that the Respondents violated 40 C.F.R. § 61.150(b) by failing to ensure that RACM was deposited either at a waste disposal site operated in accordance with 40 C.F.R. § 61.154 or an EPA approved conversion site.

The Complaint sets forth the basis for the Complainant's civil administrative penalty calculations against both Respondents. The Complainant proposes a

penalty in the amount of $95,200. The Complaint states that a copy of the EPA's Rules of Practice was enclosed with the transmittal of the Complaint.

On May 5, 1994, the Respondents filed a joint Answer to the Complaint and Request for Hearing. In general, the Respondents denied the allegations contained in the Complaint and requested dismissal or, alternatively, reduction in the amount of the civil penalty. The Answer was filed for the Respondents by attorney Louis A. Evans of Brown & Wood in New York, New York, who identified himself as attorney for the Respondents.

On June 1, 1994, Administrative Law Judge Head, who had been designated to preside in this proceeding by order dated May 13, 1994, issued an Order Setting Prehearing Procedures. [3/] In this order, Judge Head directed the EPA to file a status report regarding the status of settlement negotiations by July 6, 1994, and directed the parties to file their prehearing exchanges by August 12, 1994.

The Complainant filed a late Status Report on July 27, 1994. In this Status Report, counsel for the Complainant reported that the "Respondent" [Mountain States] had alleged that a "third party" was responsible for burying the RACM around the site, as alleged in the Complaint, in an attempt to discredit the Respondent.[4/] By motion dated August 10, 1994, the EPA, with concurrence by the "Respondent", requested a temporary stay of the proceedings in order to grant the EPA's Associate Counsel for Criminal Enforcement for Region II sufficient time to conduct a criminal investigation concerning Respondent Mountain States' allegation of third party wrongdoing.[5/]Judge Head orally granted the motion for a stay of the proceedings on August 16,1994. [6/]

By Status Report and Request For Reinstatement dated April 25, 1995, and Status Report dated October 12, 1995, the Complainant requested that the stay be vacated and that the proceedings be reinstated because the investigation by the EPA's Criminal Investigation Division resulted in a finding of insufficient proof for prosecution of third party wrongdoing in this matter as alleged by Respondent Mountain States. According to counsel for the Complainant, "Respondent's" counsel was unable to communicate with Respondent Mountain States at its offices in Scottsdale, Arizona, or in New Jersey but Respondent's counsel had recently discovered that Respondent Mountain States was still in business at another location and was attempting to verify if Mountain States was still his client. Complainant's October 12, 1995, Status Report. Counsel for the Complainant further stated: "The other Respondent, Housing Authority, although owner of the facilities involved, was determined early in negotiations

to be much less culpable than Mt. States, indeed, it was instrumental in discovering the alleged violations." Id.

On October 23, 1995, Judge Head entered an Order Resetting Prehearing Procedures. In this order, Judge Head ordered the parties to file their prehearing exchanges by November 27, 1995. [7/]

The Complainant's prehearing exchange dated November 24, 1995,was filed.

The file before me contains no prehearing exchange filed by either Respondent.

The Complainant filed a Notice of Motion For Default Order dated February 29, 1996, along with supporting documentation marked as Exhibits, a proposed Initial Decision and Default Order, and a declaration by counsel for the Complainant. [8/] The Notice of Motion For Default Order and the attachments move for the entry of a default order against Respondent Mountain States and for the assessment of a civil penalty against Respondent Mountain States in the amount of $37,200. This motion is sought on the bases that Respondent Mountain States failed to respond to a settlement offer by the Complainant, failed to comply with the Administrative Law Judge's Order Resetting Prehearing Procedures, failed to submit the prehearing exchange pursuant to that order, and continued to fail to communicate through "Respondent's" counsel to the Complainant or the Administrative Law Judge.

The declaration of Complainant's counsel, John F. Dolinar, dated February 29, 1996, which accompanied the motion for default, is a recitation of the events in this proceeding according to counsel. EPA attorney Dolinar stated that on May 11, 1994, he hosted a settlement conference attended by representatives from the EPA, Respondent Housing Authority, Respondent Mountain States, and Eastern Mountain States.

In support of this statement, the Complainant submitted a photocopy of a sign-in list of those individuals who attended the May 11, 1994, settlement conference. Exhibit 3 of Complainant's exhibits in support of the February 29, 1996, motion for default. According to EPA attorney Dolinar, Respondent Mountain States' counsel no longer considers Mountain States to be a client and counsel has confirmed that Respondent Mountain States is "unreachable." In addition, the Complainant has been unable to contact Respondent Mountain States telephonically.

In the proposed Initial Decision and Default Order, which was included with the Complainant's motion for a default order in accordance with Section 22.17(a) of the Rules of Practice, the Complainant states in a proposed finding of fact that "[t]he other respondent, Housing Authority of the City of Newark (Housing Authority), is too minimally culpable to proceed against." Proposed Initial Decision and Default Order at finding of fact 2. The proposed order by the Complainant would grant the Complainant's February 29, 1996, motion for the entry of a default order against Respondent Mountain States and assess a civil penalty in the amount of $37,200 against Respondent Mountain States.

The file before me contains no response to the Complainant's motion for a default order by either Respondent.

On April 11, 1996, Judge Head issued an Order To Show Cause ordering the "Respondent" to show cause for its failure to file the prehearing exchange as ordered in the October 23, 1995, Order Resetting Prehearing Procedures and why a default order should not be entered because of this failure. [9/] The deadline for compliance with the Order to Show Cause was June 3, 1996.

The file before me contains no response to the Order To Show Cause by either Respondent.

On January 10, 1997, the undersigned was redesignated as the Administrative Law Judge to preside in this proceeding.

Discussion

The issue before me is whether a default order should be entered against Respondent Mountain States with the assessment of a civil penalty in the amount of $37,200 pursuant to the Complainant's motion for the entry of a default order. At the outset, I note that the file before me is replete with ministerial mistakes. These mistakes, however, are not dispositive as to the issue before me.

This proceeding arises under the authority of Section 113(d) of the CAA. The federal regulations governing such proceedings are found at the Rules of Practice, 40 C.F.R. §§ 22.01 et seq. Section 22.17(a) of the Rules of Practice concerning default orders provides, in pertinent part, that "[a] party may be found in default ... after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer." [10/]

In summary, the file before me reflects that the proceedings in this matter were initiated by the filing of a Complaint against the above cited Respondents on April 4, 1994. After several delays, the Respondents were served with Judge Head's Order Resetting the Prehearing Procedures dated October 23, 1995, which ordered the submission of their prehearing exchanges by November 27,1995. No prehearing exchange was filed by either Respondent but the Complainant did file its prehearing exchange. The Respondents then did not respond to the Complainant's February 29, 1996, Notice of Motion for Default Order and proposed Initial Decision and Default Order filed against Respondent Mountain States in accordance with Section 22.17(a) of the Rules of Practice.[11/] Finally, the Respondents failed to respond to Judge Head's April 11, 1996, Order To Show Cause, which directs the Respondents to show cause why a default order should not be issued against them for failure to comply with the prehearing order.

As a preliminary matter, I address the question of whether there was proper filing and service of the Complaint in this matter. Sections 22.05 (a) and (b) of the Rules of Practice provide, in pertinent part, that the original of the complaint shall be filed with the Regional Hearing Clerk, that a certificate of service shall accompany the complaint, and that service of a copy of the signed original of the complaint, together with a copy of the Rules of Practice, may be made personally or by certified mail, return receipt requested, on the respondent (or his representative). Section 2 2. 05 (b) (1) (v) further provides that proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed return receipt, and that such proof of service shall be filed with the complaint immediately upon completion of service. As noted above, the certificate of service for the Complaint served on Respondent Mountain States was not timely forwarded to the Administrative Law Judge by the Regional Hearing Clerk but the file now reflects that the filing and service of the Complaint was properly accomplished with respect to Respondent Mountain States, as well as with Respondent Housing Authority.[12/] See Sections 22.05(a) and (b) of the Rules of Practice.

Next, I address the question of whether there was proper service of the orders and motions upon which the default order is based. Here, both Respondents are represented in this proceeding by the same attorney, Louis A. Evans of Brown & Wood in New York City. When attorney Evans filed the joint Answer to the Complaint on May 5, 1994, he identified himself as counsel for both Respondents. Since the filing of the Answer, counsel for the Respondents has made no filing with the Administrative Law Judge. [13/]

The file contains some information from Complainant's counsel indicating that attorney Evans has lost contact with Respondent Mountain States. In particular, counsel for the Complainant in a Status Report dated October 12, 1995, and in a declaration dated February 29, 1996, stated that counsel for the Respondents was unable to communicate with Respondent Mountain States at either its corporate headquarters in Scottsdale, Arizona, or at its subsidiary in New Jersey, and that counsel was attempting to determine if Respondent Mountain States was still his client. In his February 29, 1996, declaration counsel for the Complainant stated that Respondents' counsel no longer considered Mountain States to be his client.

However, the file before me is devoid of any communication from Respondents' counsel regarding the matter of representation. No motion to withdraw as attorney of record has been filed or approved. Section 22.10 of the Rules of Practice provides that a person who appears as counsel must conform to the standards of conduct and ethics required of practitioners before the courts of the United States. Rule 5 (b) of the Federal Rules of Civil Procedure requires that service of papers and pleadings be made upon the attorney unless otherwise ordered by the court. [14/] See generally Harris Truck Lines, Inc., v. Cherry Meat Packers, Inc., 303 F. 2d 609, 611 (7th Cir.) , rev'd on other grounds, 371 U.S. 215 (1962), on remand (7th Cir.), 313 F.2d 864, cert. denied, 375 U.S. 821 (1963); Fortner v. Balkom, 380 F.2d 816 (5th Cir. 1967).

I therefore find no basis for finding anyone other than attorney Evans as the proper person on whom service was to be executed after his entry of appearance as attorney for the Respondents on May 5, 1994, when he filed the joint Answer. The file reflects that subsequent to the filing of the Answer, all orders issued by the Administrative Law Judge and all motions and status reports filed by the Complainant were served on Respondents' attorney of record, attorney Evans. Therefore I find that the orders and motions upon which the default order is based, along with the Complaint, have been properly served on the Respondents.

In addition, I note that a party who fails to furnish any changes in his name, address, or telephone number shall be deemed to have waived his right to notice and service. See Section 22.05(c)(4) of the Rules of Practice. No such reported changes are in the file before me. Also, in this regard, I note that a respondent cannot avoid the entry of an order against him by an Administrative Law Judge simply by making his whereabouts unknown after jurisdiction over him has been acquired in the proceeding before the Administrative Law Judge.

Based on the foregoing, I find that the Respondents failed to comply with the Administrative Law Judge's October 23, 1995, prehearing exchange order, which was properly served on each of the Respondents. Such noncompliance, in itself, subjects the Respondents to a default order by direct application of Section 22.17(a) of the Rules of Practice. As cited above, Section 22.17(a) provides, in pertinent part, that "[a] party may be found in default... after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer." Although this regulatory language regarding the entry of a default order is discretionary in nature, the application of the regulation should be applied as a general rule in order to effectuate its intent, particularly when based on a motion for default. In other words, when the facts support a finding that there has been a failure to comply with a prehearing or hearing order without good cause, a default order generally should follow. Such position is consistent with the regulation's later mandatory provision that[d]efault by the complainant shall result in the dismissal of the complaint with prejudice." Section 22.17(a) of the Rules of Practice (emphasis added) . In the instant case, I find the Respondents are in default for their failure to comply with the Administrative Law Judge's October 23, 1995, prehearing order.

Further, Respondent Mountain States failed to respond to the Complainant's motion for default against Respondent Mountain States. If no timely reply to a motion is filed, the parties may be deemed to have waived any objection to the granting of such motion. Section 22.16(b) of the Rules of Practice. Both Respondents failed to respond to the Order To Show Cause. Such failure to respond only adds weight to support the entry of the default order. In this regard, I note that there is no regulatory requirement that an Administrative Law Judge issue an order to show cause prior to entering a default order but that Section 22.17(d) of the Rules of Practice does allow a default order to be set aside for good cause. See Section 22.17 of the Rules of Practice; see also In re Detroit Plastic Molding Company, TSCA Appeal No. 87-7 (CJO, Mar. 1, 1990).

The Complainant's motion for a default order specifies Respondent Mountain States' failure to comply with the Administrative Law Judge's prehearing exchange order as a ground for the entry of the order. This is a valid basis for seeking a default order under the Rules of Practice. Section 22.17(a) of the Rules of Practice. In addition, the Complainant maintains that a default order should be entered on the bases of Respondent Mountain States' alleged failure to respond to its settlement offer and "continued failure to communicate through Respondent's counsel to Complainant or the Court." Complainant's Notice of Motion For Default Order dated February 29, 1996;

proposed Initial Decision and Default Order at findings of fact 9 and 13. I reject these later cited reasons as valid bases upon which a default order may be entered under the applicable regulations.

The regulations at Section 22.17(a) of the Rules of Practice further provide with regard to a default order that "[d]efault by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations..." and that "[i]f the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default." This regulatory provision, couched in mandatory language, requires that I accept as true all facts alleged in the complaint upon the respondent's default.

The undersigned points out that for a finding of default on the basis of a failure to comply with a prehearing order, there is no regulatory requirement that the complainant present sufficient evidence to the Administrative Law Judge to establish a prima facie case to support the allegations of the complaint against the respondent as there is for a finding of default on the basis of a failure to appear at a hearing. See Section 22.17 (a) of the Rules of Practice; In re Rybond, Inc., RCRA Appeal No. 95-3, at 13-14 n. 17 (EAB, Nov. 8, 1996) ; see also In re Matter of Detroit Plastic Molding Company, supra; In re Turner Copter Services, Inc., FIFRA Appeal No. 85-4 (CJO, Nov. 5, 1985). In this regard, I note that Section 22.17(a) specifies only that "[n]o finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the Presiding Officer to establish a prima facie case against the respondent" (emphasis added) and that this additional requirement is not specified for a finding of default on the basis of a failure to comply with a prehearing order. This does not mean, however, that the complainant must not meet its burden of proof by alleging in the complaint a cause of action and sufficient facts to establish the violations. Also, the use of the term "evidence" presumes that a hearing has been held where evidence was admitted into the record. When there is a default for failure to comply with a prehearing order, a hearing has not been held and "evidence" has not been admitted into the record.

Thus, in the case before me where the default is based on a failure to comply with a prehearing order, I must accept as true all facts alleged in the Complaint. Rule 22.17(a) of the Rules of Practice. I find that those facts

alleged in the instant Complaint establish, by a preponderance of the evidence, the violations charged in the Complaint.

Further, I find that the reduced civil penalty in the amount of $37,200 as sought on motion for default for the violations charged in the Complaint is authorized and consistent with the statute providing for the administrative assessment of civil penalties for violations of the CAA and its implementing regulations. Section 113(d) of the CAA; 40 C.F.R. §§ 22.17(a), 22.27(b). Respondent Mountain States, by its default, has waived its right to contest the penalty, which shall become due and payable without further proceedings. [15/] Moreover, I find that the facts in the instant case justify the imposition of the reduced civil penalty in the amount of $37,200 now sought against Respondent Mountain States for the violations charged in the Complaint. The amount of the penalty was calculated in accord with Section 113 (e) of the CAA and the EPA's Clean Air Act Stationary Source Civil Penalty Policy, Appendix III, Asbestos Demolition and Renovation Civil Penalty Policy (revised May 5, 1992).

As discussed and determined above, the Complainant's motion for the entry of a default order against Respondent Mountain States is clearly warranted and supported by the file. I find that the essential elements for a default order against Respondent Mountain States have been met. I point out that the file before me also supports the entry of a default order against Respondent Housing Authority. However, the Complainant, citing Respondent Housing Authority's lack of culpability in the alleged violations, moves only for the entry of a default order against Respondent Mountain States with the amount of the proposed penalty correspondingly reduced to $37,200. Complainant's proposed Initial Decision And Default Order, at finding of fact 2 (wherein the Complainant states, "The other respondent, Housing Authority of the City of Newark (Housing Authority), is too minimally culpable to proceed against") ; see Complainant's Notice Of Motion For Default Order dated February 29, 1996; Complainant's Status Report dated October 12, 1995 (wherein counsel for the Complainant states "The other Respondent, Housing Authority, although owner of the facilities involved, was determined early in negotiations to be much less culpable than Mt. States, indeed, it was instrumental in discovering the alleged violations") . However, the EPA has not filed a motion for the dismissal of the Complaint against Respondent Housing Authority or amended its Complaint to delete Respondent Mountain States as a party.

The undersigned is unaware of any statutory or regulatory provision which prohibits the EPA from not pursuing its complaint against a particular party or

from deleting a party at any stage in the proceedings. While I believe that the more appropriate course of action in this proceeding would have been to move for dismissal against Respondent Housing Authority, I can not substitute my judgment for that of the EPA. Perhaps, the action of the EPA in this matter is akin to "prosecutorial discretion". Regardless, in view of the fact that the EPA has clearly expressed its position to not proceed against Respondent Housing Authority because of lack of culpability, I am ordering the dismissal of the Complaint with prejudice against Respondent Housing Authority.

ORDER

1 . The Complainant's motion for the entry of a default order against Respondent Mountain States is granted.

2 . A civil penalty of $37,200 is assessed against Respondent Mountain States.

3. Payment of the full amount of the penalty shall be made within sixty (60) days of service of this Order by submitting a certified or cashier's check payable to the Treasurer, United States of America, and mailed to:

U.S. Environmental Protection Agency

Region II

Regional Hearing Clerk

P.O. Box 360188

Pittsburgh, PA 15251-6188

4 . A transmittal letter identifying the subject case and EPA docket number, as well as the Respondent's name and address, must accompany the check.

5. If Respondent Mountain States fails to pay the penalty within the prescribed statutory time period, after entry of the final order, then interest on the civil penalty may be assessed pursuant to 31 U.S.C. § 3717 and 4 C.F.R. § 102.13.

6. The Complaint against Respondent Housing Authority is dismissed with prejudice.

7 . Pursuant to 40 C.F.R. §§ 22.17(b) and 22.27(c), respectively, this Default Order constitutes an Initial Decision that shall become the Final Order of the Agency unless an appeal is taken pursuant to 40 C.F.R. § 22.30 or the Environmental Appeals Board elects, sua sponte, to review this decision.

Barbara A. Gunning

Administrative Law Judge

Dated: 5/1/97

Washington, DC

[1/] The original of, rather than a copy of, the certificate of service for the Complaint filed on Respondent Housing Authority was incorrectly forwarded by the Regional Hearing Clerk to the Administrative Law Judge. See Sections 22.05(a) and (b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 22 C.F.R. §§ 22.05(a) and (b) ("Rules of Practice"). Also, the copy of the Complaint and accompanying certificate of service initially forwarded to the Administrative Law Judge did not include a copy of the certificate of service for Respondent Mountain States. However, when the EPA filed its Notice Of Motion For Default Order against Respondent Mountain States, it submitted photocopies of a certificate of service for the Complaint which shows service by certified mail, return receipt requested, on Scott Patterson, President of Respondent Mountain States on April 1, 1994, and a signed certified mail receipt, which indicates the receipt of the Complaint by Respondent Mountain States on April 7, 1994. Upon later telephonic contact, the Regional Hearing Clerk forwarded a photocopy of the Complainant's certificate of service for the Complaint for Respondent Mountain States which had been filed on April 1, 1994.

[2/] The Complaint does not state the year of this inspection but later references to this inspection in the Complaint reflect that it occurred shortly after the first inspection on November 2, 1993.

[3/] Judge Head's June 1, 1994, Order and later orders mistakenly refer to the Respondents in this matter in the singular.

[4/] In the Status Report dated July 25, 1994, and in later motions and status reports filed by the Complainant, counsel for the Complainant did not specify to which Respondent he was referring, but the Complaint identified Respondent

Mountain States as the party who allegedly buried the RACM at the site of the facility inspected and otherwise Respondent Mountain States is the appropriate Respondent in the context cited.

[5/] See id.

[6/] The file reflects that when Judge Head orally granted the motion for a stay, he orally ordered the Complainant to advise the Respondent of the stay and to forward a letter of confirmation to the Administrative Law Judge. No letter of confirmation is in the file before me.

[7/] This order was served on Respondents' counsel by certified mail, return receipt requested, on October 23,

1995. See Section 22.06 of the Rules of Practice.

[8/] The certificate of service attached to the February 29, 1996, Notice of Motion for Default Order states that the motion dated February 15, 1996, was served on Respondents' counsel by first class mail on February 15, 1996. Also, the motion is entitled "Notice Of Motion For Default Order" and is written in the future tense. The Complainant states that on February 29, 1996, it "will move the Administrative Law Judge... on February 29, 1996.... for a Default Order." Subsequently, this motion was repeatedly identified as a motion for default and was treated as a motion for default by Judge Head. I consider this motion to be a motion for default within the meaning of Section 22.17(a) of the Rules of Procedure as the motion clearly notifies the Respondents that the Complainant moves for a default order.

[9/] This order and all previous orders in this matter, as well as the Complainant's motions and status reports, were served on the Respondents through their attorney of record, Louis A. Evans, Esquire, of Brown & Wood. This order was sent by certified mail, return receipt requested.

[10/] The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. Section 22.03(a) of the Rules of Practice.

[11/] Sections 22.17 (a) and (c) of the Rules of Practice state, respectively, that "[a]ny motion for a default order shall include a proposed default order..." and that "[a] default order shall include findings of fact showing the grounds

for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed..."

[12/] A photocopy of the executed return receipt for the certified mail for the Complaint served on Respondent Mountain States is in the record before me even though it was not included with the Complaint forwarded to the Administrative Law Judge by the Regional Hearing Clerk.

[13/] In the Complainant's August 10, 1994, Motion For Stay In Proceedings, counsel for the Complainant stated that counsel for the Respondents joined in the motion.

[14/] The Federal Rules of Civil Procedure are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, , 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, at 13 n. 10 (EAB, Feb. 24, 1993).

[15/] Section 22.17(a) of the Rules of Practice states, in pertinent part, that "the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default." Section 22.27(b), regarding penalties in initial decisions, states that the

Administrative Law Judge "shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted." Compare Katzson Bros., Inc. v. E.P.A., 839 F.2d 1396 (10th Cir. 1988).