12/30/75

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
G.S. Service Corporation,	)	**Docket No. V-W-90-R-07**
	)	
Respondent	)	

Resource Conservation and Recovery Act -- Default Order -- Where Respondent failed to respond to order for prehearing exchange, Respondent was declared to be in default, and accordingly was subjected to the civil penalty and the compliance order proposed by Complainant.

Appearances

For Complainant:
Terrence Branigan, Esq.
Assistant Regional Counsel
Region V
U.S. Environmental Protection Agency
230 South Dearborn Street
Chicago, IL 60604

For Respondent:
(appearing pro se)
Mr. Donald R. Gardner
Registered Agent for
G.S. Service Corporation
6659 North 450 East
Montpelier, IN 47359

Before

Thomas W. Hoya
Administrative Law Judge

DEFAULT ORDER

This Default Order is issued in a proceeding initiated under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, against G.S. Service Corporation ("Respondent"), by the Director of the Waste Management Division, Region V, U.S. Environmental Protection Agency ("Complainant"). Respondent is declared by this Default Order to have violated Subtitle C of RCRA, Sections 3004 and 3005, 42 U.S.C. §§ 6924 and 6925, and federal regulations implementing the Hazardous and Solid Waste Amendments to RCRA. Respondent is further declared to have violated the Indiana Administrative Code, Ind. Rev. Stat. 1985, as amended ("Ind. Adm. Code"), and regulations adopted by the Indiana Environmental Management Board, 329 Ind. Adm. Code 3.[1]

Accordingly, an order is imposed on Respondent that assesses a civil penalty of $54,500 and that directs Respondent to achieve compliance with and report on its compliance with various statutory and regulatory requirements. This issuance of a Default Order grants Complainant's Motion for Default Order filed initially on October 30, 1991.

Procedural Background

The Complaint, issued January 12, 1990, was based on inspections of Respondent's facility conducted by the Indiana Department of Environmental Management on November 17, 1988 and December 8, 1988. The Complaint alleged several violations that, for purposes of a civil penalty, were organized essentially into three counts by a penalty justification submitted in Complainant's subsequent Prehearing Exchange.[2]

The first alleged violation was a failure to comply with land disposal restrictions (effective July 8, 1987) that prohibit land disposal of liquid hazardous wastes having a pH less than or equal to two, as required by RCRA § 3005(d)(2), 42 U.S.C. § 6925(d)(2), and 40 C.F.R. § 268.32(a)(1). For this violation, the Complaint

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[1] The State of Indiana was granted final authorization on January 31, 1986 to administer a hazardous waste program in lieu of the federal program. The U.S. Environmental Protection Agency ("EPA") may enforce the state program pursuant to RCRA §§ 3006(b), 3008(a), 42 U.S.C. §§ 6926(b), 6928(a). The Hazardous and Solid Waste Amendments of 1984 (HSWA) imposed stringent new requirements on the land disposal of hazardous waste. Indiana was not granted the authority, as of the date of the Complaint, to administer the provisions of HSWA, so federal regulations implementing the HSWA, found inter alia in 40 C.F.R. Part 268, are enforced by EPA in Indiana.

[2] Complainant's Prehearing Exchange, Exhibit 13.

proposed a penalty of $22,500.

The second alleged violation was a failure to maintain in Respondent's files all data used to determine, based on a knowledge of the waste, that the waste was subject to land disposal restrictions, as required by 40 C.F.R. § 268.7(a)(5). For this violation, the Complaint proposed a penalty of $9,500.

The third alleged violation was a failure to install liners, and a leachate collection system between them, in new hazardous waste surface impoundments, and operation of unpermitted impoundments after November 8, 1988, all in violation of RCRA §§ 3004(o)(1)(A), 3005(j), 42 U.S.C. §§ 6924(o)(1)(A), 6925(j), 40 C.F.R. § 264.221(c), and 329 Ind. Adm. Code 3-50-2(c). For this violation, the Complaint proposed a penalty of $22,500.

Along with these alleged violations for which the Complaint proposed civil penalties, the Complaint charged a violation of requirements concerning the standards for owners and operators of hazardous waste treatment, storage, and disposal facilities. The authority for these requirements was RCRA §§ 3004, 3005, 42 U.S.C. §§ 6924, 6925, and 320 Ind. Adm. Code 4-1 (now 329 Ind. Adm. Code 3). To remedy these violations, the Complaint proposed, under RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1), a compliance order that mandates Respondent to come into compliance with and report on its compliance with these requirements within certain time frames.

Respondent filed an Answer to the Complaint on February 15, 1990. In general, Respondent admitted that it had maintained waste surface impoundments without liners or a leachate collection system, but either denied or said it was without sufficient knowledge to form a belief regarding the other allegations.

Following Respondent's Answer, the parties engaged in settlement negotiations. When these negotiations proved unsuccessful, the parties were directed, by a March 20, 1990 Notice and Order, to make a Prehearing Exchange by June 1, 1990. This Notice and Order was served upon the parties by certified mail, and a signed receipt was returned from both services.

Complainant then moved, with Respondent's concurrence, for an indefinite extension of the Prehearing Exchange, to allow time for Complainant to coordinate this case with an enforcement action against Respondent by the State of Indiana. This Motion was granted on August 15, 1990.

Complainant reported on April 15, 1991 that settlement negotiations between the State of Indiana and Respondent had apparently broken down, and requested that the Prehearing Exchange be rescheduled. By an April 23, 1991 Order, served by regular mail, the parties were directed to make their Prehearing Exchange by June 15, 1991.

Respondent's counsel filed a Withdrawal of Appearance on May 3, 1991. Complainant filed its Prehearing Exchange on June 17, 1991, serving it on Respondent's registered agent, Donald R. Gardner. Mr. Gardner is the registered agent upon whom the Complaint was served, at the address of Respondent.[3] Respondent made no response to the April 23, 1991 Order for the Prehearing Exchange.

An August 29, 1991 Order directed Complainant to report on the status of the case and to include a proposed procedure for concluding it. In a September 27, 1991 Statement, Complainant reported that it had had no contact with Respondent since the May 3, 1991 Withdrawal of Appearance by Respondent's counsel, and asserted that it expected to file a motion for default. Complainant served this Statement on Respondent's registered agent by certified mail.

Complainant moved for default on October 30, 1991, serving Respondent's registered agent by certified mail. The certified mail receipt was not, however, returned. On December 6, 1991 Complainant then served its Motion for Default Order by certified mail again, serving Respondent's registered agent, as before, at the address of Respondent, and this time also at another address, Route 3, Box 3040, Seymour, Missouri. Signed certified mail receipts from both addresses were returned, and submitted for the record.

Respondent's Violations

Procedure for this case is governed by Consolidated Rules of Practice issued by the U.S. Environmental Protection Agency ("EPA") and published at 40 C.F.R. Part 22. Section 22.17(a) of these Consolidated Rules (40 C.F.R. § 22.17(a)), applying to motions for default, provides in pertinent part as follows.

§ 22.17 Default Order.

> (a) Default. A party may be found to be in default ... (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer .... Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have twenty (20) days from service to reply to the motion. Default 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

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[3] According to a report of the Indiana Department of Environmental Management, Mr. Gardner is Respondent's owner and president. Complainant's Prehearing Exchange, Exhibit 2.

> right to a hearing on such factual allegations. If 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.

(emphasis in original)

As described above, Complainant has moved for a default, in the manner required by Section 22.17(a); and Respondent, having filed nothing since the Withdrawal of Appearance, remains in default. As further described above, the Complaint and Answer were previously filed; and an Order was issued directing the Prehearing Exchange, with which only Complainant has complied.

That Respondent is no longer represented in this case by counsel does not excuse Respondent from its responsibility to comply with the Order for the Prehearing Exchange. For example, in Baker v. Ace Advertisers' Service, Inc., 134 F.R.D. 65, 72 (S.D.N.Y. 1991), the court stated,

> [E]ven pro se parties must adhere to the rules governing all civil proceedings; and while pro se litigants may deserve more lenient treatment than represented parties, they too must suffer the consequences of their actions, especially when they have been warned of the sanctions which could follow disobedience of a court order.

Respondent has been clearly warned of the consequences of its failing to respond. Both Complainant's September 27, 1991 Statement asserting Complainant's intention to move for a default, and also Complainant's subsequent Motion for a Default Order apprised Respondent that its continued silence risked default. Respondent made no response to either of these filings by Complainant, nor to the Order directing a Prehearing Exchange.

Accordingly, Respondent is declared in default. Such default, per Section 22.17(a), "constitutes ... an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations."

The Complaint stated an enforceable claim for all of the violations alleged therein. Moreover, its allegations are supported by Complainant's Prehearing Exchange and by admissions in Respondent's Answer. Therefore, in view of these factors, added to the force of Section 22.17(a), it is concluded that Respondent committed the violations charged in the Complaint, as discussed in more detail below.

The Complaint alleged, and Respondent admitted in its Answer, that Respondent is an Illinois corporation that owns and operates

a facility at 6659 North 450 East, Montpelier, Indiana 47359.[4] The Complaint also alleged, and the Answer admitted, that on December 8, 1988 Respondent submitted a form for notification of hazardous waste activity, pursuant to RCRA § 3010(a), 42 U.S.C. § 6930(a).[5]

The Complaint further charged, and the Answer admitted, that Respondent did not submit a Part A or Part B application for hazardous waste activity and did not have a permit or interim status to operate a hazardous waste treatment, storage, or disposal facility, under RCRA § 3005, 42 U.S.C. § 6925.[6] The Complaint charged additionally, and the Answer admitted, that Respondent had been cited by the Indiana Department of Environmental Management, based on a November 17, 1988 inspection by the Department, for operating a hazardous waste management facility without a final RCRA permit.[7]

During that November 17, 1988 inspection, as alleged in the Complaint and admitted in the Answer, inspectors observed outside Respondent's plant two unlined surface impoundments containing waste sludge resulting from Respondent's manufacturing process, in which powdered ferric sulfate is mixed with water for use in water purification.[8] The Complaint charged, and the Answer admitted, Respondent's failure to install liners or a leachate collection system in the surface impoundments.[9]

Respondent's Answer, however, stated that Respondent was without sufficient knowledge to form a belief as to two other allegations of the Complaint. One was the charge that Respondent's surface impoundments contained hazardous waste, and thus were in violation of RCRA § 3004(o)(1)(A) and 40 C.F.R. § 264.221(c).[10] The other was the charge that Respondent's placement of liquid hazardous wastes having a pH less than or equal to 2.0 constituted land disposal of a "California List" waste in violation of the Land Disposal Restrictions set forth in 40 C.F.R. § 268.32(a).[11] Under

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[4] Complaint ¶ 1; Answer ¶ 4.

[5] Complaint ¶ 6; Answer ¶ 5.

[6] Complaint ¶ 6; Answer ¶ 5.

[7] Complaint ¶ 7; Answer ¶ 3; Complainant's Prehearing Exchange, Exhibit 8.

[8] Complaint ¶ 11; Answer ¶ 3.

[9] Complaint ¶ 18; Answer ¶ 9.

[10] Complaint ¶ 18; Answer ¶ 9.

[11] Complaint ¶ 13; Answer ¶ 7.

Section 22.15(b) of the Consolidated Rules of Practice, 40 C.F.R. § 22.15(b), these statements in the Answer are considered to be denials.

Respondent's Answer expressly denied some allegations of the Complaint. The Answer denied the charge that Respondent had not had available for inspection, as required by 40 C.F.R. § 268.7(a)(5), the supporting documentation for the determination that its waste was subject to land disposal restrictions.[12] The Answer also denied the charge that the sludge in its surface impoundments had exhibited the hazardous waste characteristic of EP toxicity for lead and chromium.[13] The Answer set forth Respondent's belief that the Indiana Department of Environmental Management had used improper chemical analysis methods to measure this EP toxicity, and also to determine the pH of its waste.[14]

These denials, however, avail Respondent little, since it has been declared in default. As noted, under Section 22.17(a) of the Consolidated Rules (40 C.F.R. § 22.17(a)), such default "constitutes ... an admission of all facts alleged in the complaint."

In this case, moreover, Complainant has supported the allegations of the Complaint with its Prehearing Exchange. Here Complainant included Certificates of Analysis of samples from the surface impoundments taken during the December 8, 1988 inspection, and an exhibit indicating the methods used for determining pH, lead, and chromium, under EPA Publication SW-846 ("Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods").[15] The methodology appears to be appropriate according to 40 C.F.R. § 261.22(a)(1), § 260.11, and Table III of 40 C.F.R. Part 261 (July 1, 1988). The Prehearing Exchange contains also an inspection report that addresses the California List Wastes Analysis, and indicates an absence of the records required for a hazardous waste determination.[16]

Pursuant to 40 C.F.R. § 261.22(a)(1), a solid waste is a hazardous waste according to the characteristic of corrosivity if a representative sample "is aqueous and has a pH less than or equal to 2 ... as determined by a pH meter using either an EPA test

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[12] Complaint ¶ 15, Answer ¶ 8.

[13] Complaint ¶ 12; Answer ¶ 6.

[14] Answer ¶ 6.

[15] Complainant's Prehearing Exchange 5-9, and Exhibits 4-6.

[16] Complainant's Prehearing Exchange, Exhibit 1, RCRA Land Disposal Restrictions Inspection 6, 7, 16; see also Exhibits 7, 10.

method or an equivalent test method ... under the procedures set forth in §§ 260.20 and 260.21 ... Method 5.2 in [SW-846]." Therefore, the record shows that Respondent's surface impoundments contained hazardous waste that was subject to federal and state hazardous waste laws.

As stated above, it is concluded that Respondent violated RCRA §§ 3004, 3005, 42 U.S.C. §§ 6924, 6925, 40 C.F.R. §§ 264, and 329 Ind. Adm. Code 3, as alleged in the Complaint. This conclusion is based on Respondent's default, on Complainant's Complaint and Prehearing Exchange, and on the admissions in Respondent's Answer.

Civil Penalty

For the civil penalty, the section of the Consolidated Rules for default orders, quoted above,[17] provides 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." That section suggests an automatic acceptance of the $54,500 civil penalty proposed in the Complaint. Another section of the Consolidated Rules,[18] however, as well as a judicial case,[19] indicate a responsibility in the presiding officer even in default situations to review the amount of any civil penalty to be imposed. Accordingly, such a review will be conducted.

Section 22.27(b) of the Consolidated Rules (40 C.F.R. § 22.27(b)) requires that the assessment of any civil penalty accord with any statutory criteria and also consider civil penalty guidelines issued under the relevant statute. For RCRA, EPA issued a Final RCRA Civil Penalty Policy, dated May 8, 1984, which incorporates the statutory criteria. Thus, consistent with Section 22.27(b), Complainant's proposed civil penalty may be reviewed in terms of this Penalty Policy.

The Penalty Policy provides for a two-step calculation of the penalty. The first step derives a "gravity-based" penalty from a matrix in which one axis represents "the extent of deviation from a statutory or regulatory requirement," and the other axis the "potential for harm."[20] For each axis, there are three gradations:

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[17] See the first text paragraph supra under the heading Respondent's Violations.

[18] See Section 22.27(b) (40 C.F.R. § 22.27(b)), the last sentence.

[19] Katzon Bros., Inc. v. U.S. E.P.A., 839 F.2d 1396 (10th Cir. 1988).

[20] Final RCRA Civil Penalty Policy (May 8, 1984) at 3-5.

"major," "moderate," and "minor."[21] In the second step of calculating the penalty, the gravity based penalty obtained from the first step may be adjusted upwards or downwards to reflect any of five factors, such as "Good faith efforts to comply/lack of good faith."[22]

Complainant sought to justify its proposed $54,500 civil penalty on the basis of this Final RCRA Civil Penalty Policy.[23] This justification, as discussed briefly below, is adjudged to be reasonable. Accordingly, a civil penalty of $54,500 is assessed against Respondent.

As noted above,[24] Complainant's penalty justification organized the alleged violations into essentially three counts. The first was land disposal of liquid hazardous wastes having a pH less than or equal to 2.0 without complying with the applicable land disposal restrictions. Complainant rated both the potential for harm and the extent of deviation as major, for a gravity-based penalty of $22,500. No adjustment of the penalty was made. Circumstances noted by Complainant were that the waste had toxic metal concentrations (lead and chromium) exceeding EP toxicity levels, and that the acidity of the waste creates a high potential for migration of metal contaminants into the groundwater. Respondent's waste was not treated in any way, and disposal continued for at least 17 months following the effective date of the regulation.

The second alleged violation was a failure to maintain in Respondent's files all data used to determine, based on a knowledge of the waste, that the waste was subject to land disposal restrictions. Complainant rated the potential for harm as moderate and the extent of deviation as major, for a gravity-based penalty of $9,500. Again, no adjustment was made to that penalty amount. As circumstances, Complainant noted that federal and state agency representatives cannot be assured of the chemical, physical, or toxological properties of a RCRA unit's waste until waste samples can be collected and analyzed. Complainant added that the uncertainty of those properties until such analysis risks harm to human health and the environment.

The third alleged violation was a failure to install liners, and a leachate collection system between them, in new hazardous waste surface impoundments, and the operation of unpermitted

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[21] Id.

[22] Id. 4.

[23] Complainant's Prehearing Exchange, Exhibit 13.

[24] See text supra accompanied by note 2.

impoundments after November 8, 1988. Complainant rated both the potential for harm and the extent of deviation as major, for a proposed penalty of $22,500. As with the first two penalty amounts, no adjustment was made. A circumstance noted was the high potential for the liquid waste to contaminate surrounding soils and groundwater, resulting from Respondent's operation of these impoundments for about two years without installation of the required minimum technological requirements.

Compliance Order

The final issue is the compliance order requested in the Complaint and included in a proposed order submitted therewith. All of the provisions of the compliance order direct Respondent to comply with the various regulatory requirements applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities. These provisions are justified, and the proposed order is therefore adopted herein.

While it appears that Respondent may have ceased disposing of wastes in the surface impoundments,[25] a firm assurance of such cessation through the compliance order is warranted. Protection against further harm to human health and the environment requires an imposition of certain obligations. These include: an appropriate cleaning up of improperly disposed hazardous waste, i.e., a closure of the RCRA facility; obtaining adequate financial responsibility for, inter alia, closure of the facility; and monitoring groundwater for any potential migrations of hazardous waste. These obligations are more fully set forth in the compliance order.

Order

For the reasons set forth above, the proposed order submitted by Complainant is hereby approved and adopted by the undersigned, as follows.

DEFAULT ORDER

AND NOW, this the 30th day of December 1993, under the authority of the Resource Conservation and Recovery Act and 40 C.F.R. Part 22, Respondent is found to be in default with respect to the Complaint.

NOW THEREFORE, pursuant to 40 C.F.R. § 22.17, Respondent is

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[25] Complainant's Prehearing Exchange, Exhibit 9, RCRA Inspection Report, from post-Complaint Indiana Department of Environmental Management inspection on May 11, 1990.

hereby ordered to:

A. Immediately cease the addition of hazardous wastes to its surface impoundments.

B. Within forty-five (45) days of the effective date of this Order, submit a closure plan and, if necessary, a post-closure care plan, both of which comply with the requirements of 40 CFR Part 264 Subpart G (329 Ind. Adm. Code 3-46), and are consistent with 40 CFR 264.228 (closure and post-closure of surface impoundments, 329 Ind. Adm. Code 3-50-5), to the Indiana Department of Environmental Management and U.S. EPA for approval. Upon approval, Respondent shall implement the closure plan. Within sixty (60) days of completion of closure, Respondent shall submit a certification of closure to this Indiana Department and U.S. EPA, as required by 40 CFR 264.115 (329 Ind. Adm. Code 3-46-6). If Respondent chooses to close the units in place according to 40 CFR 264.228(a)(2) and (b) (329 Ind. Adm. Code 3-50-5(a)(2) and (b)), Respondent must submit an application for a post-closure permit which is based on 40 CFR 270.14(c) (329 Ind. Adm. Code 3-34-5(c)).

C. Within thirty (30) days of the effective date of this Order, submit a ground-water monitoring plan, consistent with the requirements contained in 40 CFR Part 264 Subpart F (329 Ind. Adm. Code 3-45), to the Indiana Department of Environmental Management and U.S. EPA for approval. Upon approval, Respondent shall implement the plan.

D. Within thirty (30) days of the effective date of this Order, comply with all applicable financial responsibility requirements contained in 40 CFR 264 Subpart H (329 Ind. Adm. Code 3-47).

E. Notify U.S. EPA in writing within seven (7) days upon achieving compliance with this Order or any part thereof. This notification shall be submitted to the U.S. EPA, Region V, Waste Management Division, 77 West Jackson Boulevard, Chicago, IL 60604-3590, Attention: Eileen Helmer, RCRA Enforcement Branch (5HR-12).

F. Within sixty (60) days after this Default Order becomes final, pay a civil penalty of fifty-four thousand five hundred dollars ($54,500). Such penalty shall become due and payable by Respondent without further proceedings sixty (60) days after this Default Order becomes final, as provided in 40 C.F.R. §22.17(a). Payment shall be made by cashier's or certified check payable to the Treasurer of the United States of America, and shall be mailed to U.S. EPA Region V, P.O. Box 70753, Chicago, IL 60673. At the same time payment is made, copies of the check shall be mailed to the Regional Hearing Clerk, Planning and Management Division (5MF-14), and the Solid Waste and Emergency Response Branch Secretary, Office of Regional Counsel (5CS-TUB-3), U.S. EPA, 77 West Jackson Boulevard, Chicago, IL 60604-3590.

The following notice concerns interest and late payment penalty charges that will accrue if the civil penalty set forth above is not paid within sixty days of Respondent's receipt of this Default Order:

> Pursuant to 31 U.S.C. Section 3713, an executive agency is entitled to assess interest and penalties on debts owed to the United States. Interest will begin to accrue on any such debt if it is not paid from the date on which the notice of debt and the interest requirements is first mailed to the debtor. (See 4 C.F.R. Section 102.13(b).) Interest will be assessed at the United States treasury tax and loan rate. (See 4 C.F.R. Section 102.13(c.) In addition, a penalty charge of six percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment of the civil penalty is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment of such penalty is due. (See 40 C.F.R. Section 102.13(e).)

Thus to avoid the assessment of interest on the civil penalty imposed by this Default Order, you must pay such civil penalty within 60 days of the date on which this Default Order becomes a Final Order. To avoid the assessment of penalty charges on the debt, you must pay the civil penalty within 90 days of the date on which this Default Order becomes a Final Order.

This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(b). This Default Order shall become final no later than forty-five (45) after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceedings, or (20 the Environmental Appeals Board elects sua sponte to review the Initial Decision. The procedures for appeal of an Initial Decision are set forth in 40 C.F.R. § 22.30, which provides that parties have twenty (20) days after service upon them of an Initial Decision to appeal it.

Thomas W. Hoya
Administrative Law Judge

Dated: December 22, 1993