UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
BCP Construction, Inc.,	)	Docket No. TSCA-09-92-0003
	)	
Respondent	)	

Toxic Substances Control Act -- Default Order -- Where Respondent failed to respond to order for prehearing exchange, Respondent was declared to be in default and to have committed the violations charged in the Complaint, and was subjected to the civil penalty proposed by Complainant, except that the proposed civil penalty was corrected for calculation errors.

Appearances

For Complainant:

Douglas G. White, Esq.
Assistant Regional Counsel
Office of Regional Counsel
Region IX
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

For Respondent:

Robert Perkey, President
BCP Construction, Inc.
2432 W. Peoria Avenue
Suite 1205
Phoenix, AZ 85029

Before

Thomas W. Hoya
Administrative Law Judge

DEFAULT ORDER

This Default Order is issued in a proceeding initiated under Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). Complainant is the Regional Administrator, Region IX, U.S. Environmental Protection Agency, and Respondent is BCP Construction, Inc., an Arizona corporation. Respondent is declared by this Default Order to have violated TSCA and regulations ("the Regulations") promulgated pursuant to TSCA, 40 C.F.R. Part 763.

Accordingly, an order is imposed on Respondent that assesses a civil penalty of $31,000. This issuance of a Default Order grants Complainant's Motion for Default Order filed August 12, 1992, and renewed February 1, 1995.

Procedural Background

The Complaint, issued January 13, 1992, contained four counts. Counts I and II alleged that in 1989 Respondent used two supervisors and one worker who were not properly accredited under the Regulations to perform asbestos abatement work at an elementary school in the Castro Valley Unified School District ("CVUSD"), located in California. Counts III and IV made the same allegation regarding one supervisor and three workers used by Respondent to perform asbestos abatement work at the Tempe Union High School District #213 ("TUHSD"), located in Arizona. Such use of each of these supervisors and workers was said to violate Section 15(1)(D) of TSCA, 15 U.S.C. § 2614(1)(D). The total civil penalty proposed in the Complaint for these alleged violations was $263,000.

Respondent filed a January 30, 1992 Answer to the Complaint that denied many of the allegations. Based on documentation provided by Respondent with and subsequent to its Answer, Complainant amended its Complaint by deleting several of its original allegations. The May 14, 1992 First Amended Complaint contained two counts: the first alleged that Respondent used two supervisors in the CVUSD who lacked proper accreditation; and the second alleged that Respondent used one worker in the TUHSD who lacked proper accreditation. The First Amended Complaint proposed a recalculated civil penalty of $83,000.

On February 28, 1992, the parties were ordered to make a prehearing exchange by May 15, 1992. Complainant filed its prehearing exchange timely, but Respondent made no submission. In addition, on May 20, 1994 Respondent was ordered to answer Complainant's First Amended Complaint, but failed to answer. Complainant moved August 12, 1992, renewed February 1, 1995 for a Default Order, based on Respondent's failure to file its prehearing exchange and to answer the Amended Complaint.

Respondent's Violations

Procedure for this case is governed by the Consolidated Rules of Practice ("Consolidated Rules") issued by the U.S. Environmental Protection Agency ("EPA") at 40 C.F.R. Part 22. Section 22.17(a) of the 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 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.

Complainant has moved for a default, in the manner prescribed by Section 22.17(a). As described above, Respondent has failed to comply with orders directing that it make a prehearing exchange and that it answer the Amended Complaint.

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 First Amended Complaint stated an enforceable claim for all of the violations alleged therein. Furthermore, its allegations are supported by Complainant's Prehearing Exchange and by admissions in Respondent's Answer to the original Complaint. 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 First Amended Complaint, as discussed in more detail below.

Both the original Complaint and the First Amended Complaint alleged that Respondent is an Arizona corporation doing business in the United States, and is a "person" pursuant to TSCA. Respondent's Answer to the original Complaint neither admitted nor denied this allegation. Section 22.15(d) of the Consolidated Rules, 40 C.F.R. § 22.15(d), provides that "failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the

allegation."

Count I of the First Amended Complaint charged Respondent with performing asbestos abatement work in 1989 at an elementary school in the CVUSD with two supervisors who lacked the accreditation required by 40 C.F.R. § 763.90(g), in violation of TSCA Section 15(1)(D), 15 U.S.C. § 2614(1)(D).[1] Complainant's Prehearing Exchange included documentation supporting its claim that Respondent used these two supervisors on this work and that they were without proper accreditation.

Respondent admitted this charge in its Answer. Respondent stated, however, that both supervisors had been scheduled to take a supervisors' course before the CVUSD asbestos abatement work, but the course had then been canceled, and that each had taken the next course that he could, one completing his course before the end of the CVUSD work, and the other completing his course about a month and a half after the work.[2]

Count II of the First Amended Complaint charged Respondent with performing asbestos abatement work in 1989 in the TUHSD with a worker who lacked the accreditation required by 40 C.F.R. § 763.90(g), in violation of TSCA Section 15(1)(D), 15 U.S.C. § 2614(1)(D).[3] In its Answer, Respondent denied this charge, maintaining that its worker had received "recertification" training.[4] Complainant, in its Prehearing Exchange, documented Respondent's use of this worker, and stated that, while the worker had received recertification training, Respondent had supplied no evidence that he had received initial training.

As stated above, moreover, Respondent 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."

Therefore Respondent is found to have violated TSCA as charged in the First Amended Complaint. This conclusion is fortified by Complainant's Prehearing Exchange, which documented Respondent's use of the supervisors and the worker at issue. Moreover, for Count I, Respondent's explanation regarding the canceled courses does not excuse, but only mitigates, the violation. For Count II, Respondent's defense of recertification lacked, as noted by Complainant, evidence to show any initial certification. Thus the

---

[1]First Amended Complaint ¶¶ 7-14.

[2]Answer at 1.

[3]First Amended Complaint ¶¶ 15-24.

[4]Answer at 2.

finding of Respondent's TSCA violations is consistent with the record of this case.

In sum, it is concluded that Respondent, as charged in the First Amended Complaint, violated Section 15(1)(D) of TSCA, 15 U.S.C. § 2614(1)(D), and Section 763.90(g) of the Regulations. This conclusion is based on Respondent's default, the First Amended Complaint, the Answer, and Complainant's prehearing exchange submission.

Civil Penalty

The remaining issue is the appropriate civil penalty. In the First Amended Complaint, the proposed amount was $83,000. As quoted above,[5] one section of the Consolidated Rules states 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." This section suggests an automatic acceptance of the First Amended Complaint's proposed $83,000 penalty.

The Consolidated Rules, however, also contain a section titled "Amount of civil penalty" that includes specific instructions for default situations.

> **§ 22.27 Initial Decision.**
>
> . . . .
>
> (b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

The sentence referring to the default situation implies a responsibility of the Presiding Officer to review the amount of the

---

[5] See supra the first paragraph in the text under the heading "Respondent's Violations."

civil penalty.[6] Accordingly, it will be reviewed.

Section 22.27 (b) of the Consolidated Rules (40 C.F.R. § 22.27(b)) requires that the assessment of any civil penalty be "in accordance with any criteria set forth in the Act." In addition, the Presiding Officer must consider any civil penalty guidelines issued under the relevant statute. To determine penalties in administrative civil actions brought pursuant to Section 16 of TSCA, EPA employs its Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act (AHERA), dated January 31, 1989 ("EPA's Response Policy").

EPA's Response Policy provides for the calculation of a civil penalty in two stages: (1) determination of a "gravity based penalty" ("GBP"), and (2) adjustments to the GBP. The GBP is calculated on a matrix, in which one axis is the circumstances level ranging from 1 to 6 (with 1 reflecting the highest probability that harm will result from a particular violation) and the other axis reflecting the extent of potential harm caused by the violation ("major," "significant," or "minor") based on the quantity of asbestos-containing building material in the violation.

It was on the basis of EPA's Response Policy that Complainant justified its proposed civil penalty of $83,000. As discussed below, however, Complainant misapplied EPA's Response Policy in several respects.

For Count I of the First Amended Complaint--failure of accreditation for contractor/supervisor activities at the CVUSD--Complainant calculated a penalty of $78,000. Pursuant to EPA's Policy, nonetheless, the penalty should be only $16,000.

Complainant correctly determined that the extent level for the activities conducted in the CVUSD at Building D was Significant, and at Building B was Minor.[7] It was in the determination of the Circumstance Level that an error appeared. Failure to have properly accredited supervisors for asbestos removal is a Level 2 rather than a Level 3 violation. (See Appendix B of EPA's Response Policy.) This error produced unduly low penalty readings from

---

[6]This responsibility to review the amount of the civil penalty is suggested also by Katzson Bros., Inc. v. U.S. E.P.A., 839 F.2d 1396 (10th Cir. 1988).

[7]The Building D violation involved 2,280 square feet of asbestos-containing building material, and 60 linear feet of thermal system insulation. The Building B violation involved 96 feet of thermal system insulation. First Amended Complaint ¶ 11. Given these quantities of regulated materials, Complainant correctly determined the extent level based on the options set forth in EPA's Response Policy (page 13).

EPA's Response Policy (see Table B on page 17) for both the Building D and the Building B violations. Complainant's calculation of the penalty for a Significant Extent, Level 3 violation at Building D produced $10,000, and for a Minor Extent, Level 3 violation at Building B produced $1,500. But the appropriate calculation is for a Significant Extent, Level 2 violation, producing $13,000, and for a Minor Extent, Level 2 violation, producing $3,000.

In addition, Complainant applied a $5,000 penalty cap. This cap is applicable only to actions against Local Education Agencies ("LEAs"), whereas this action is against "other persons," for whom the penalty limit is $25,000 per day.

Finally, Complainant categorized the violations as "per day" violations, rather than "one day" violations, as they are characterized by EPA's Response Policy (see Appendix B). Accordingly, Complainant multiplied the Building D violation by 15 days ($10,000 capped at $5,000 x 15 = $75,000), and the Building B violation by 2 days ($1,500 x 2 = $3,000) to obtain its total penalty for Count I of $78,000. But if the violations are treated as "one day" transgressions, the multiplication step is omitted, and the total penalty for Count I becomes $13,000 for Building D plus $3,000 for Building B, or $16,000.

For Count II of the First Amended Complaint--failure of one worker to be accredited at the TUHSD #213--Complainant calculated a penalty of $5,000. But applying EPA's Response Policy should yield $15,000. Again, Complainant correctly determined the extent level, which in this case was Major.[8] In addition, Complainant correctly determined the Circumstance Level (Level 3).

Under EPA's Response Policy, a Major Extent, Level 3 violations produces a $15,000 penalty (see pages 17-18, Table B). Complainant's lower proposed $5,000 amount may have stemmed from again applying the $5,000 cap for LEAs. As noted, the cap for "other persons" is $25,000, well above the $15,000 calculated for Respondent.

In EPA's Response Policy, Count II is categorized as a per worker, per day penalty (Appendix B, page 30). Complainant properly calculated the penalty as a one worker, one day violation. As Complainant stated in its Proposed Initial Decision and Default Order (page 12), the violation "occurred on only one day." In addition, there was only one worker involved. As a result, the penalty for Count II should be $15,000.

---

[8]Count II involved 3,300 square feet of asbestos-containing building material. First Amended Complaint ¶ 20. Given this quantity of regulated material, Complainant correctly determined the extent level to be Major. See EPA's Response Policy at 13.

As noted, pursuant to EPA's Response Policy, the first stage in determining a penalty is calculation of the GBP, as has been done above, and the second stage is an adjustment of the GBP. Such adjustment is made when warranted by a consideration of certain listed factors: the violator's culpability, compliance history, ability to pay and to stay in business, and such other matters as justice may require. Complainant found no reason to adjust the GBP for reason of any of these factors. Complainant's judgment on this point appears sound.

In conclusion, the above modifications of Complainant's penalty calculations under EPA's Response Policy reduce the total penalty from $83,000 to $31,000. This application of EPA's Response Policy provides one justification for the civil penalty imposed on Respondent.

EPA's Response Policy is EPA's effort to translate into more specific terms those general guidelines mandated by the statute for imposing civil penalties. Section 16 of TSCA, 15 U.S.C. § 2615, provides a $25,000 maximum penalty for each violation, and directs EPA in assessing penalties to consider the violation's "nature, circumstances, extent, and gravity," and the violator's "ability to pay, ... to continue to do business, prior ... violations, [and] ... culpability, and such other matters as justice may require."

Here, Respondent is found to have committed three separate violations, so the statutory maximum is $75,000.[9] That $31,000 is well under one-half of this maximum reflects reasonably the moderateness of the violations. Respondent clearly made an attempt to comply; for example, for Count I and the CVUSD asbestos abatement work, Respondent explained that both unaccredited supervisors had been scheduled to take the required course before beginning work and, when the course was canceled, each took the next available course. For Respondent's flawed attempts to comply, a civil penalty of $31,000 is a reasonable sanction.

In conclusion, the $31,000 penalty appears justified in terms of the statute. It should be enough both to encourage Respondent to take greater care in assuring proper employee accreditation, and enough also to deter other firms in this business from inattentiveness to the accreditation requirement.

---

[9]Each day a violation continues is considered a separate violation for purposes of the $25,000 maximum. As discussed supra, however, the violations here were one-day violations.

ORDER[10]

Respondent is found to be in default with respect to the First Amended Complaint and, as charged therein, is found to have violated TSCA by violating Section 15(1)(D), 15 U.S.C. § 2614(1)(D), and Section 763.90(g) of the Regulations. For this default and these violations, Respondent is assessed a civil penalty of $31,000.

Therefore, pursuant to 40 C.F.R. § 22.17, Respondent is hereby ordered to pay a civil penalty of thirty-one thousand dollars ($31,000). Payment shall become due according to 40 C.F.R. § 22.17(a), and shall be made by forwarding a cashier's or certified check, payable to the "Treasurer, United States of America," to:

EPA - Region 9
(Regional Hearing Clerk)
P.O. Box 360863M
Pittsburgh, PA 15251

Failure to pay the civil penalty imposed by this Default Order shall subject Respondent to the assessment of interest and penalty charges on the debt pursuant to 4 C.F.R. §§ 102.13(b),(e).

Thomas W. Hoya
Administrative Law Judge

Dated: October 31, 1995

---

[10]This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(b). Pursuant to Section 22.27(c) of the Consolidated Rules, 40 C.F.R. § 22.27(c), an Initial Decision "shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless: (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision." Under Section 22.30(a) of the Consolidated Rules, 40 C.F.R. § 22.30(a), the parties have twenty (20) days after service upon them of an Initial Decision to appeal it. The address for filing an appeal is as follows:

Environmental Appeals Board
U.S. EPA
Weststory Building (WSB)
607 14th Street, N.W., 5th Floor
Washington, DC 20005