

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

ENVIRONMENTAL RESOURCE

TSCA Docket No. VII-93-T-068A

SERVICES, INC.,

Respondent

Toxic Substances Control Act -- Initial Decision -- Where Complaint charged two violations of Act and bore two docket numbers, and Default order bearing only one docket number declared Respondent liable for violations as charged and imposed civil penalty, Respondent was declared by Initial Decision for other docket number to have violated Complaint as charged, but no additional civil penalty was imposed.

Appearances

For Complainant:

Gayle Hoopes
Office of Regional Council
Region VII
U.S. Environmental Protection Agency
726 Minnesota Avenue
Kansas City, KS 66101

For Respondent:

Robert Scudder, President
Environmental Resource Services, Inc.
10008 Sapp Brothers Drive
Omaha, NE 68138

Before

Thomas W. Hoya

Administrative Law Judge

INITIAL DECISION

A March 8, 1994 Complaint, issued by Complainant Director of the Air and Toxics Division, Region VII, U.S. Environmental Protection Agency, charged Respondent Environmental Resource Services, Inc. with two violations of Section 15(1)(D) of TSCA, 15 U. S. C. § 2614 (1) (D) , and proposed a \$20, 000 penalty. A May 31, 1996 Default Order, based on Respondent's failure to file a required Prehearing Exchange, found Respondent to have violated the Complaint as charged, and imposed an \$18,000 civil penalty. ¹

The Complaint initiating the instant case bore two docket numbers: the number of the instant case, and also TSCA-VII-93-T-064A. Some of the documents filed or issued in the processing of the Complaint, however, including the Default Order, bore only the second docket number. Consequently, the case bearing the docket number of the instant case was left without resolution. It was to remedy this situation that processing of the instant case was resumed after issuance of the Default Order for the other case.

Respondent, located in Lincoln, Nebraska, is a business incorporated under the laws of the State of Nebraska. Respondent's Answer to the Complaint generally denied the charges.

According to the Complaint, in December 1991 Respondent conducted air clearance monitoring in the Lawrence Public Schools, of Lawrence, Nebraska, and in the Silver Lake Public Schools, of Roseland, Nebraska. As recited In the Complaint, Respondent had been delegated and assigned by these school systems their duties under 40 C.F.R. § 763.90(i) regarding asbestos in schools.

The Complaint charged that such monitoring by Respondent in the main Public School building in Lawrence failed to comply fully with 40 C.F.R. § 763.90(i)(5), and in the Silver Lake High School in Roseland failed to comply fully with 40 C.F.R. § 763.90(i) (2) and 40 C.F.R. Part 763, Subpart E, Appendix A, Part II, ¶ B.17. Such failures to comply constituted, it was charged, violations of Section 15(1)(D) of TSCA, 15 U.S.C. § 2614(1)(D).

When processing of the instant case was resumed after issuance of the Default Order in the other case, Complainant filed a September 24, 1996 Motion to Consolidate the two cases. Complainant's Motion (¶ 4) explained that two different docket numbers were assigned to the cause of action arising out of "the same factual situation" apparently because a two-count Complaint, one for each of the two school systems, was issued. The Motion stated further (¶ 3) that "[a]ll Motions, status reports, Orders and any correspondence in reference to ... [the concluded case] was pertinent and relevant to ... [the instant case] includ[ing] the May 31, 1996 Default order."

Complainant's Motion to Consolidate requested (last paragraph) , among other points, that the instant case "be concluded by the May 31, 1996 Default Order." Further, Complainant stated in a November 29, 1996 letter that "the Agency maintains its position that this pending case has already been concluded by the Default Order issued" in the concluded case.²

A November 22, 1996 order in the instant case stated that the "ruling on the Agency's September 24, 1996 Motion to Consolidate may be issued in a form that concludes this case [and] [a]ny submission received... by December 22, 1996 will be considered in the ruling." Complainant submitted the November 29, 1996 letter quoted above; Respondent made no submissions.³

Discussion

A decision declaring Respondent to have violated the Complaint as charged but imposing no civil penalty should satisfy the needs of both parties. Complainant has stated that it considered the matter resolved by the Default Order making that same declaration and imposing an \$18,000 civil penalty. Thus Complainant has requested no additional penalty in the resolution of the instant case.

For Respondent, conclusion of the instant case with another declaration of its violation, but imposition of no additional penalty, will relieve it of a vulnerability it had of a further penalty imposition in this case. As to the declaration of Respondent's having violated the Act as charged, the record of this case, including Complainant's Prehearing Exchange,⁴ supports that conclusion.

ORDER⁵

Respondent is declared to have committed two violations of Section 15 (1)(D) of the Act, 15 U.S. C. § 2614(1)(D), as charged in the Complaint. For such violations, no civil penalty is imposed.

Thomas W. Hoya
Administrative Law Judge

Dated: December 31, 1996

¹ In re Environment Resource Services, Inc., TSCA-VII-93-T-064A, Default Order (May 31, 1996).

² Letter to the undersigned from Complainant (November 29, 1996).

³ A copy of the Order was sent certified mail return receipt requested to Respondent's address as listed in its Answer, the only document filed by Respondent. The mailing came back undelivered with the following message stamped on it: "Returned to Sender --Undeliverable as Addressed -- Forwarding Order Expired." Section 22.05(c) (4) (40 C.F.R. § 22.05(c) (4)) of the Agency's Consolidated Rules of Practice (40 C.F.R. Part 22), which govern this proceeding, provides as follows.

The initial document filed by any person shall contain his name, address and telephone number. Any changes... shall be communicated promptly.... A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules.

Another copy of the Order was sent certified mail return receipt requested to Monica Green Kruger, who had said that she represented Robert Scudder, president of Respondent, in his bankruptcy proceeding, but did not represent Respondent in the instant case. Summary of Telephone Conference (November 22, 1996). A signed receipt for this copy of the order was returned to this Office. Ms. Green stated, in an October 9, 1996 letter to Complainant, that Respondent "is no longer in business and has no assets."

⁴ Complainant's Motion to Consolidate stated (¶ 3) that "[a]ll Motions, status reports, Orders and any correspondence in reference to... [the concluded case] was pertinent and relevant to ... [the instant case] includ[ing] the May 31, 1996 Default Order."

⁵ Under Section 22.30 of the Consolidated Rules of Practice, 40 C.F.R. § 22.30, the parties may file with the Environmental Appeals Board a notice of appeal of this decision and an appellate brief within 20 days of service of this initial decision. This initial decision shall become the final order of the Environmental Appeals Board within 45 days after its service, unless an appeal

is taken by the parties or unless the Environmental Appeals Board elects, sua sponte, to review the initial decision pursuant to Section 22.30(b) of the Rules. After any appeal or sua sponte review, the order of the Environmental Appeals Board shall be the final order in this case.