# IN THE MATTER OF HOUSE ANALYSIS & ASSOCIATES & FRED POWELL

CAA Appeal No. 93–1

***FINAL DECISION***

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Decided February 2, 1993

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Syllabus

House Analysis and Associates and Fred Powell (collectively referred to as "respondent") appeal the issuance of a default order finding respondent in violation of the Clean Air Act and assessing a civil penalty of $51,000. Respondent was found in violation of Sections 114 and 113 of the Clean Air Act for failure to respond adequately to an information request letter and compliance order, both requiring submission of certain information. The information related to asbestos-containing materials found in a storage unit utilized by respondent. The information was being sought to determine compliance with regulations applicable to asbestos under 40 C.F.R. Part 61, Subpart M.

A complaint was issued by Region III in this matter and an answer timely filed. However, when respondent did not comply with an order on prehearing exchange or respond to a motion for a default order, a default order was issued. On appeal, respondent asserts governmental misconduct in conducting the inspection and also denies receipt of any documents other than the complaint.

Held: The default order was properly issued and a penalty of $51,000 properly assessed.

***Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.***

***Opinion of the Board by Judge Reich:***

## I. *BACKGROUND*

House Analysis & Associates and Fred Powell, collectively referred to as the "respondent,"[1] appeal the issuance of an Order on

[1] Fred Powell is a contractor doing business as House Analysis & Associates. Judge Greene found Mr. Powell to be an asbestos contractor though Mr. Powell denies this. Whether or not Mr. Powell is an "asbestos contractor" is immaterial for purposes

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Default issued by Administrative Law Judge Greene on December 16, 1992. Judge Greene found that respondent violated certain requirements of the Clean Air Act, 42 U.S.C. §7401 *et seq.*, and assessed a civil penalty of $51,000 for these violations. Respondent's appeal to the Board is pursuant to 40 C.F.R. §22.30(a) and was timely filed.

This case arises from the alleged failure of respondent to provide certain information concerning asbestos-containing materials found in a rental storage facility utilized by respondent.[2] This material was found when an EPA inspector conducted an inspection of storage unit J264 of Public Storage Rental Spaces at 950 Jaymor Road in Southampton, Pennsylvania. The inspector observed approximately 60 bags and several open boxes of asbestos-containing duct and piping insulation.[3] Subsequent laboratory analysis confirmed the presence of chrysotile asbestos.[4] The storage unit in question was rented by respondent through Sue Powell, wife of Fred Powell.[5]

On April 6, 1992, pursuant to the authority of, *inter alia*, Section 114(a) of the Clean Air Act, 42 U.S.C. §7414(a), EPA Region III sent a letter to respondent in order to obtain certain information regarding the stored materials ("Section 114 letter"). The purpose of the request was to determine whether respondent was in violation of the National Emission Standards for Hazardous Air Pollutants ("NESHAP") for asbestos found at 40 C.F.R. Part 61, Subpart M. The letter required the information to be submitted within 14 calendar days of the date of receipt of the letter.[6]

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of this decision since the statutory provisions alleged to have been violated apply to any "person" and there is no question that Mr. Powell is a person for such purposes.

[2] This summary of the facts is based on a review of the administrative record and the findings made by Judge Greene in her order. While respondent disputes some of the factual allegations in the complaint, his default constitutes an admission of all the facts alleged in the complaint. 40 C.F.R. §22.17(a).

[3] Order on Default, at 2.

[4] *Id.*; Complainant's Prehearing Exchange Exhibit 7.

[5] Order on Default, at 5. Powell admits that the storage unit was leased by Sue Powell but denies that either he or his wife placed the asbestos-containing material there. Appeal at ¶¶ 6 and 7.

[6] Letter to Fred Powell from Thomas J. Maslany, Director, Air, Radiation & Toxics Division, Region III, dated April 6, 1992. The letter required the submission of the following information:

> (1) Describe in detail the origin(s) of the bagged and unbagged stored asbestos material, including, but not limited to, the name and address of each and every site from which this stored asbestos material was originally removed;
>
> (2) State exactly what work was undertaken by you or your com-

Mr. Powell responded to the Section 114 letter on April 16, 1992.[7] EPA considered this response to be inadequate and incomplete, a finding subsequently confirmed by Judge Greene.[8] In light of this inadequate response, Region III issued a compliance order to respondent on April 30, 1992, under the authority of Section 113(a)(3)(B) of the Clean Air Act, 42 U.S.C. § 7413(a)(3)(B), requiring submission of all of the information required to be submitted in the Section 114 letter.[9] This information was required to be submitted within 5 calendar days of receipt of the order. Respondent failed to submit the information required by this order.

Region III then issued a complaint to respondent on June 30, 1992, alleging violations of both Section 114(a) and Section 113(a)(3)

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pany at each and every location identified in Number 1 immediately above;

(3) Describe any asbestos-containing material of any kind that you and/or your company stripped or removed from any site or location identified in Number 1 immediately above, and estimate the volume of material stripped or removed from each such site or location;

(4) Describe in detail the manner in which the stored asbestos material was disposed of, including, but not limited to, the following information:

(a) location(s) at which the stored asbestos material was disposed;

(b) copies of waste shipment manifests or other records;

(c) evidence, including air monitoring results, that storage unit J264 was properly decontaminated in accordance with 40 C.F.R. Part 61, Subpart M;

(d) the names of any and all persons who participated in the disposal and/or cleanup of the stored asbestos material located in said storage unit.

(5) Provide the names, titles, addresses, and telephone numbers of all personnel or employees of you and/or your company who performed any type of work related to the stored asbestos material;

(6) List all previous violations assessed by any federal, state or local regulatory agency against House Analysis & Associates, associated with the handling of asbestos; and

(7) Provide any notice(s) of any demolition or renovation operation involving friable asbestos-containing material which you have ever submitted pursuant to 40 C.F.R. Part 61, Subpart M for every location identified in Number 1 immediately above.

This letter also required submission of certain information under Section 11(c) of the Toxic Substances Control Act, 15 U.S.C. § 2610(c), not of relevance here.

[7] The response is included as Exhibit 2 to Complainant's Prehearing Exchange.

[8] Order on Default, at 6.

[9] Complainant's Prehearing Exchange, Exhibit 3.

of the Clean Air Act for failure to comply with the two information demands.[10] For these violations, the Region proposed to assess a civil penalty of $51,000. This penalty was derived in accordance with Section 113 of the Clean Air Act and, more particularly, EPA's "Clean Air Act Stationary Source Civil Penalty Policy" of October 25, 1991 ("Penalty Policy").

Respondent submitted his answer to the complaint, dated July 30, 1992, on or about August 4, 1992. Respondent denied the substantive allegations of the complaint, alleging instead governmental misconduct relative to the EPA inspection. (Mr. Powell believes that the asbestos-containing material was "planted" by government agents. Answer to Section 114 Letter, at 1.) The matter was then scheduled for hearing pursuant to 40 C.F.R. Part 22.

As part of the prehearing proceedings, Judge Greene duly issued an Order for Pretrial Exchange dated August 25, 1992. This order required the parties to submit a list of proposed witnesses and a copy of each document to be offered in evidence, by September 25, 1992. The order further required that:

> Evidence regarding the appropriateness of the penalty proposed by complainant shall be exchanged if there is a dispute regarding the penalty. In any case, complainant shall be prepared to support its penalty request. If respondent intends to assert that it cannot afford to pay a penalty in the amount proposed in the complaint, respondent shall exchange evidence to support its position.

Complainant complied with this order, filing its prehearing exchange on September 22, 1992. Respondent did not comply and did not explain his failure to do so.[11]

Complainant then moved for an accelerated decision or, in the alternative, an order on default, citing respondent's failure to comply with the Order for Pretrial Exchange. This motion was dated September 30, 1992. The certificate of service shows that the motion was

[10] Judge Greene subsequently confirmed that failure to comply with the order was a separate violation from failure to comply with the Section 114 request. Order on Default, at 8.

[11] Order on Default, at 8.

served on respondent by certified mail on that date.[12] Respondent did not file any reply to this motion. On December 16, 1992, having determined that respondent's failure to comply with the pretrial order constitutes a default,[13] Judge Greene issued the Order on Default which has been appealed to the Board.

## II. *DISCUSSION*

Before reaching the merits of the appeal, we note that Region III has urged denial of the appeal on procedural grounds, as follows:

> Powell's "Appeal and Explanation to Dismiss Order on Default and Entire Case Matter at Bar" is defective in that it fails to set forth alternative findings of fact, alternative conclusions of law, relevant references to the record or the Order on Default, and a statement of the issues presented for review, as required by the Consolidated Rules of Practice, 40 C.F.R. § 22.30(a). Therefore, Powell's Appeal should be denied based on these procedural defects and the Order on Default upheld in its entirety.

Reply Brief of Complainant-Appellee, at 3–4 n.1. The fact that respondent Powell, who apparently is not a lawyer, chooses to represent himself and House Analysis & Associates does not excuse respondent from the responsibility of complying with the applicable rules of procedure.[14] However, while it is true that this appeal does not conform in all respects to 40 C.F.R. § 22.30(a), we believe it is appropriate to deal with it on its merits. Respondent has communicated his objections to the default order and the relief requested with sufficient clarity to enable us to consider the substance of his appeal.[15]

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[12] Pursuant to 40 C.F.R. § 22.17(a), any motion for a default order shall be served on all parties and the alleged defaulting party shall have 20 days from service of the motion to reply.

[13] Order on Default, at 8. A default also constitutes a waiver of a hearing on the factual allegations. 40 C.F.R. § 22.17(a).

[14] *See In re Turner Copter Services, Inc.*, FIFRA Appeal No. 85–4, at 3 (CJO, Nov. 5, 1985).

[15] *See American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 539 (1970) (Agency may relax procedural rules when justice so requires). *See also In re Waste Technologies Industries*, RCRA Appeal Nos. 92–7 *et alia*, at 4 n.3 (EAB July 24, 1992).

A. *Validity of Order on Default*

Pursuant to 40 C.F.R. § 22.17(a), 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 * * *." When a Presiding Officer finds that a default has occurred, he or she shall issue a default order which shall constitute the initial decision. 40 C.F.R. § 22.17(b).[16]

There is no dispute that an order for Prehearing Exchange was issued in this case, that it required the exchange of certain information by September 25, 1992, and that respondent failed to provide the information required. This, on its face, would appear to confirm the validity of the issuance of the default order. However, respondent makes one assertion in his appeal which needs to be addressed. He states that "[t]he only material that we ever received in matter at bar was the original complaint. No other material or mailings were ever received by Mr. Fred Powell."[17]

Respondent thus denies receiving either the Order on Prehearing Exchange or Complainant's Motion for Accelerated Decision or Motion for Default. The Region, in its response to the appeal, discusses at some length the various communications with respondent.[18]

The Order on Prehearing Exchange was served by mail on Fred Powell on August 26, 1992. The order was apparently served by first class rather than certified mail, and thus there is no record of its receipt.[19] However, as the Region notes, the order was served

[16] 40 C.F.R. § 22.17(d) also provides that a Presiding Officer may set aside a default order "for good cause shown." Respondent did not move for setting aside the default order pursuant to that provision.

[17] Appeal at ¶ 3.

[18] Reply Brief of Complainant-Appellee, at 5–9.

[19] It appears that the Order on Prehearing Exchange should have been sent by certified mail. 40 C.F.R. § 22.06 provides in part that "[c]opies of such rulings, *orders,* decisions, or other documents shall be served personally, *or by certified mail, return receipt requested,* upon all parties by the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, or *the Presiding Officer,* as appropriate." (Emphasis added.) However, we believe any objection respondent may have had in this respect has been waived. As will be discussed subsequently, we conclude that respondent received Complainant's Motion for Accelerated Decision or Motion for Default. According to 40 C.F.R. § 22.16(b), if no response is filed to a motion within the designated period, "the parties may be deemed to have waived any objection to the granting of the motion." No response was filed. If respondent had an objection to the issuance of a default order based on the failure to receive proper service of the Order on Prehearing Exchange, it was incumbent upon him to raise it at that time. Having failed to do so, any objection on this basis is deemed waived.

on the same business address successfully used to deliver the Section 114 letter, the compliance order, the complaint, and the Order on Default.[20] In addition, the order was referenced in Complainant's Prehearing Exchange, which was sent to respondent by certified mail and signed for by Suzanne Powell.[21] It is reasonable to assume that respondent would have inquired about the referenced order with either Region III or Judge Greene after receiving Complainant's Prehearing Exchange or, at the latest, after receiving the Order on Default.

As to the Motion for Accelerated Decision or Motion for Default, it was served by Region III by certified mail, to respondent's business address.[22] Despite two notices of attempted delivery, it was returned to EPA marked "unclaimed."[23] Thereupon, EPA both faxed the motion to Powell at the fax number used by Powell in serving his answer on EPA,[24] and hand-delivered it to his home, serving it upon one Mary Burns at that address.[25]

The provision governing service of documents other than the complaint, rulings, orders, and decisions, 40 C.F.R. § 22.05, states that such documents may be served personally or by certified or first class mail. In accordance with 40 C.F.R. § 22.07(c), for documents served by mail, "[s]ervice of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing." Thus, service was legally completed here when the motion was properly mailed, despite respondent's obvious attempts to forestall its actual receipt.[26] In addition, while not essential to our ruling, we are confident that respondent did actually receive the motion, through the fax and personal delivery.

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[20] This is the same address used in the present appeal as well.

[21] Certificate of Service and receipt, Attachment 8 to Reply Brief of Complainant-Appellee.

[22] Certificate of Service, Attachment 9 to Reply Brief of Complainant-Appellee.

[23] Attachment 10 to Reply Brief of Complainant-Appellee.

[24] Attachment 11 to Reply Brief of Complainant-Appellee.

[25] The record does not explain what relationship Ms. Burns has to the respondent, although she took the document and entered the Powells' house. Attachment 12 to Reply Brief of Complainant-Appellee.

[26] The Region argues that this result is compelled by the Federal Rules of Civil Procedure. Reply Brief of Complainant-Appellee, at 11. However, the Federal Rules of Civil Procedure are not binding upon administrative agencies. *In re Detroit Plastic Molding*, TSCA Appeal No. 87–7, at 7 (CJO, March 1, 1990). We reach the same result solely in reliance upon the provisions of 40 C.F.R. Part 22 cited.

In light of the foregoing, we find that respondent did indeed default by failing to respond to the Order on Prehearing Exchange, and that the issuance of a default order was proper.

B. *The Penalty Assessed*

As previously noted, Judge Greene assessed a penalty of $51,000 in accordance with the Clean Air Act Stationary Source Civil Penalty Policy dated October 25, 1991. The operative provision of the rules relating to the assessment of a civil penalty is 40 C.F.R. § 22.27(b), which reads as follows:

> (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.

In this instance, the Presiding Officer assessed a penalty identical to the amount assessed in the complaint.

The explanation of how the penalty amount was derived is detailed in the Order on Default,[27] and respondent has not objected to any of the specifics of the calculation contained therein. (Of course, because respondent asserts that it has not committed any violations, it implicitly objects to the imposition of any penalty.) We believe the penalty policy reasonably implements the statutory criteria for

[27] Even in default situations, a Presiding Officer has an obligation to articulate the reasoning supporting his or her penalty assessment. *In re Dworkin Electroplaters*, Docket No. RCRA-III-187, at 5–6 (ALJ, Dec. 31, 1992).

assessment of a penalty under the Clean Air Act[28] and thus will follow it here as well.[29]

The calculation[30] of the penalty in the Order on Default was as follows:

*Count I:*

1. *Actual or possible harm:*
   a. Level of Violation (This amount is zero because no violation of an emission standard was alleged.) ..... $0.00
   b. Toxicity of Pollutant (This amount is zero because no violation of an emission standard was alleged.) ..... $0.00
   c. Sensitivity of Environment (This amount is zero because no violation of an emission standard was alleged.) ..... $0.00
   d. Length of Time of Violation: (Measured from at least April 28, 1992). ..... $8,000.00
2. *Importance to the regulatory scheme:*
   Incomplete Response to Section 114 Demand to Provide Information ..... $15,000.00
3. *Size of the violator:* [30] (Based on an assumption that Respondent's net worth is between $100,001–$1,000,000). ..... $5,000.00

*Count II:*

1. *Actual or Possible Harm:*
   a. Level of Violation (This amount is zero because no violation of an emission standard was alleged.) ..... $0.00
   b. Toxicity of Pollutant (This amount is zero because no violation of an emission standard was alleged.) ..... $0.00

[28] Section 113(e) of the Clean Air Act, 42 U.S.C. § 7413(e), specifies penalty assessment criteria for administrative and judicial penalties.

[29] As stated by the Agency's Chief Judicial Officer in discussing the Agency's TSCA penalty policy, the policy "facilitate[s] the application of the statutory penalty factors to individual cases in a systematic fashion, and thus provides a sound framework for the exercise of an appellate tribunal's discretion." *In re ALM Corporation*, TSCA Appeal No. 90–4, at 7 (CJO, Oct. 11, 1991). That statement is equally true for the Clean Air Act penalty policy.

[30] This factor is considered only for Count 1 because the Penalty Policy provides that, when calculating a penalty for multiple violations, this factor "should be figured only once for all violations." Penalty Policy, at 22.

| | |
|---|---|
| c. Sensitivity of Environment (This amount is zero because no violation of an emission standard was alleged.) | $0.00 |
| d. Length of Time of Violation: (Measured from at least May 6, 1992). | $8,000.00 |
| 2. *Importance to the regulatory scheme:* Violation of Compliance Order | $15,000.00 |
| *TOTAL PROPOSED PENALTY:* | $51,000.00 |

Order on Default at 10–11. Count I relates to the Section 114 violation and Count II to the violation of the Section 113 order. The Order on Default further indicated that:

> EPA considered several other factors set forth in Section 113(e) of the Act, 42 U.S.C. § 7413(e), in determining the appropriate penalty for violations of the Act. In this case, respondent had no history of violation. No adjustment for culpability was appropriate. No cleanup costs were incurred by the United States in response to respondent's violations. EPA has not argued that respondent gained substantial economic benefit as a result of its noncompliance. Thus the gravity component for Counts I and II of the Complaint remained unadjusted.

Order on Default at 11.

We believe this calculation is correct. In this regard, we make the following observations as to two of the factors used in the determination.

As to the importance to the regulatory scheme, the policy establishes a penalty of $15,000 for failure to respond to a Section 114 letter or a compliance order, and a range of $5,000–$15,000 for an incomplete response.[31] Given that the response to the Section 114 letter was totally lacking in substantive detail, we believe the imposition of the maximum figure within this range is appropriate.[32] (Of

[31] Penalty Policy, at 12–13.

[32] The Penalty Policy provides:

> Penalty ranges are provided for incomplete notices, reports, and recordkeeping to allow the Regions some discretion depending on the seriousness of the omissions and how critical they are to the regulatory program. If the source omits information in notices, reports or records which document the source's compliance status,

course, since respondent failed to provide any response to the administrative order, a $15,000 penalty is appropriate for this violation as well.)

With regard to the length of time for violation, we find the Penalty Policy somewhat confusing. It assesses dollar figures based on the length of violation, based on a table reading in part:

| *Months* | *Dollars* |
|---|---|
| 0–1 | $5,000 |
| 2–3 | $8,000 |

Penalty Policy at 12. This table is not clear as to what figure applies if the violation exceeds one month but is less than two. The fairest reading, and the one supported by the Region's calculations in the complaint, is to assume that the lower figure applies to any violation less than 2 months. So interpreted, the Policy was correctly applied in this matter.[33]

Finally, we note that the respondent has never raised as a consideration any alleged inability to pay the penalty amount. The penalty policy appropriately puts the burden of demonstrating inability to pay upon the defendant. If the violator fails to provide sufficient information, this factor should be disregarded.[34] The Order on Prehearing Exchange, with which respondent did not comply, specifically directed respondent to provide any evidence supporting a position that it cannot afford to pay the penalty if it wanted to assert such a position. As previously discussed, there was no response to this order. We therefore conclude, as did Judge Greene, that no adjustment on this basis is warranted.

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this omission should be treated as a failure to meet the requirement and assessed $15,000.

*Id.* at 14.

[33] There is some confusion in the administrative record on the date of receipt of the Section 114 letter. The Region represents that its receipt is evidenced by Attachment 1 to its Reply Brief but that receipt is dated May 1, 1992. This would not appear to be correct in that respondent's response to the letter was dated April 16, so he must have received it by no later than that date.

Using April 16 as the date of receipt, a response would have been due April 30, and two months of violation would have occurred by the date of the complaint, thus supporting the $8,000 penalty assessed based on this factor. (The Order on Default assesses the violation based on two months of noncompliance, measuring it from April 28, but it is not clear why that particular date was used.)

[34] Penalty Policy, at 21.

For these reasons, we conclude that imposition of a penalty of $51,000 is appropriate and supported by the Penalty Policy.

## III. *CONCLUSION*

For the reasons discussed in this decision, and pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), respondent, House Analysis & Associates and Fred Powell, is assessed a civil penalty of $51,000. Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days of the date of service of this decision.

EPA Region III
Regional Hearing Clerk
P.O. Box 360515M
Pittsburgh, PA 15251

So ordered.