

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

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OFFICE OF REGIONAL COUNCILS

In The Matter of:

Ebersole Associates, Inc.,
and
L & N Zimmerman Excavating, Inc.,

Respondents

Docket No.: CAA-3-2007-0329

INITIAL DECISION AND ORDER OF DEFAULT

I. BACKGROUND

This administrative proceeding for the assessment of a civil penalty was initiated by the Director of the Waste and Chemicals Management Division for Region III of the United States Environmental Protection Agency ("EPA" or "Complainant"). On September 28, 2007, EPA issued an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") against Ebersole Associates, Inc. ("Ebersole") and L & N Zimmerman Excavating, Inc. ("L & N") (collectively "Respondents") pursuant to Sections 113(a)(3)(A) and (d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(a)(3)(A), (d), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules"). Section 22.34 of the Consolidated Rules applies to this proceeding. In the Complaint EPA alleges that Respondents violated 40 C.F.R. § 61.145(a) and 40 C.F.R. § 61.145(b)(1) of the National Emission Standard for Asbestos ("Asbestos NESHAP"), promulgated under Section 112 of the CAA, 42 U.S.C. § 7412.

Complainant's Motion for Default Order ("Motion for Default") seeks an order assessing a civil penalty in the amount of Sixteen Thousand Three Hundred Twelve Dollars and Seventeen Cents (\$16,312.17) against Ebersole. This amount reflects the total penalty assessed on both Respondents less the amount paid by L & N pursuant to a Consent Agreement with EPA. On September 30, 2008 an Order to Supplement Record ("Order to Supplement") was issued. The Order requested additional information from EPA concerning service of the Complaint and a further analysis of the statutory factors of the CAA in the penalty assessment. In response to the Order to Supplement, EPA filed a Supplementation of Record ("Supplementation") on October 29, 2008.

II. FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following findings of fact:

1. Respondent Ebersole is a Pennsylvania corporation which owns and, at all times relevant hereto, has owned the premises of the former JDM Outlet office supply store (at 1500 East Cumberland Street) and the premises of the former Eatwell Diner (at 1539 East Cumberland Street) in Lebanon, Pennsylvania. (Complaint 3.) Respondent L & N is a Pennsylvania corporation which, at all times relevant hereto, was a demolition contractor hired by Ebersole to demolish the former JDM Outlet office supply store and the former Eatwell Diner. (Id.)
2. On March 28, 2006, an EPA asbestos inspector observed ongoing demolition activities at the site of the Eatwell Diner at 1539 East Cumberland Street. (Id. 4.) The inspector spoke with an individual involved in the demolition and learned that the demolition was being conducted by L & N. (Id.) He spoke with a neighbor and learned that the apparent

- owner of the site was Ebersole, which was located just down the street at 1900 Cumberland Street. (Id.) The inspector took two samples of debris. (Id.) Subsequent laboratory analysis using the method specified in Polarized Light Microscopy, 40 C.F.R. Part 763 subpart E, app. E, § 1, found that the asbestos content in both samples was greater than 1 percent. (Id.)
3. The inspector proceeded to the Ebersole office and spoke with a representative there. (Id.) Upon returning to his office, the inspector made further contact with L & N and learned of an earlier demolition, also done by L & N for Ebersole, of the former JDM Outlet office supply store at 1500 East Cumberland Street. (Id.)
 4. No pre-demolition inspection was conducted prior to either demolition, and no notice of an intention to demolish was submitted prior to either demolition. (Id.) L & N submitted a notice of the ongoing demolition at the Eatwell Diner following contact with the inspector. (Id.)
 5. On September 28, 2007, EPA filed an administrative complaint pursuant to 40 C.F.R. § 22(1)(a)(2), alleging that Ebersole and L & N violated Section 112 of the Clean Air Act by (1) failing to inspect the premises of the former Eatwell Diner and JDM Outlet for asbestos before demolishing them and (2) failing to notify the Administrator of their intention to demolish these two sites. (Complaint.)
 6. EPA and the Department of Justice jointly determined that the twelve-month time limit of Section 113(d) of the CAA, 42. U.S.C. § 7413(d), does not apply. (Id. 3.)
 7. The Complaint informed Respondents that a failure to submit an answer within 30 days of service would constitute an admission of the facts alleged therein. (Id. 9.) EPA sent the Complaint on September 28, 2007 by certified mail, return receipt requested, to

Randall I. Ebersole, President of Ebersole Associates, at 1900 Cumberland Street in Lebanon, Pennsylvania. (Complaint, Certif. of Service.) The receipt was signed on October 1, 2007 and returned. (Supplementation, Attach. 2.) Ebersole did not file an answer within thirty (30) days of service, and to date has not filed an answer.

8. On June 25, 2008, EPA filed its Motion for Default. (Motion for Default.) EPA sent the Motion for Default by certified mail, return receipt requested, on the same date to Randall I. Ebersole at 1900 Cumberland Street in Lebanon, Pennsylvania. (Id., Certif. of Service.) The receipt was signed on June 28, 2008 and returned. (Supplementation, Attach. 3.) Ebersole did not file an answer to the Motion for Default within fifteen (15) days of service, and to date has not filed a response.

III. DECISION ON DEFAULT

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following findings of law:

1. The Complaint in this action was lawfully and properly served upon Ebersole in accordance with 40 C.F.R. §§ 22.5(b)(1) and 22.7(c).
2. Service of the Complaint satisfies the notice requirement of 40 C.F.R. § 22.34(b).
3. Ebersole was required to file an answer to the Complaint within the thirty (30) days of service of the Complaint. 40 C.F.R. § 22.15(a).
4. Ebersole's failure to file an answer to the Complaint or otherwise respond to the Complaint within thirty (30) days constitutes an admission of all facts alleged in the Complaint and a waiver of Ebersole's right to contest such factual allegations. 40 C.F.R. § 22.17(a).

5. EPA's Motion for Default was lawfully and properly served on Ebersole in accordance with 40 C.F.R. §§ 22.5(b)(2) and 22.7(c).
6. Ebersole was required to file a response to the Motion for Default within fifteen (15) days of service. 40 C.F.R. § 22.16(b).
7. Ebersole's failure to respond to the Motion for Default is a waiver of any objection to the granting of the Motion for Default. 40 C.F.R. § 22.16(b).

IV. DECISION ON LIABILITY

I make the following legal findings regarding the liability of Ebersole under CAA Section 113(d):

1. Section 112(d) of the CAA authorizes the Administrator to promulgate regulations establishing emissions standards and work practice standards for hazardous air pollutants. 42 U.S.C. § 7412(d).
2. Pursuant to this authority the Administrator promulgated the Asbestos NESHAP, 40 C.F.R. Part 61, subpart M, which includes the Standard for Demolition and Renovation, 40 C.F.R. § 61.145. See National Emission Standards for Hazardous Air Pollutants; Amendments to Asbestos Standard, 49 Fed. Reg. 13,658, 13,661 (Apr. 5, 1984).
3. Section 113(d) of the CAA authorizes the Administrator to assess penalties up to \$32,500 per day of violation against "any person . . . [who] has violated . . . any other requirement . . . of [the subchapter containing Section 112] . . . , including, but not limited to, a requirement . . . of any rule . . . promulgated, issued, or approved under [the CAA]" 42 U.S.C. § 7413(d).¹

¹ Amount increased from \$25,000 by Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R., Part 19.

4. The twelve-month time limit in Section 113(d) of the CAA, 42 U.S.C. § 7413(d), does not apply.
5. Ebersole is an incorporated entity operating out of Lebanon, Pennsylvania. It is therefore a "person" under the CAA. 42 U.S.C. § 7602(e).
6. The former Eatwell Diner and the former JDM Outlet, as commercial structures, are "facilities" under 40 C.F.R. § 61.141.
7. The activities taking place at the two facilities constituted "demolitions" under 40 C.F.R. § 61.141.
8. The samples from the former Eatwell Diner contained regulated asbestos-containing material (RACM) under 40 C.F.R. § 61.141.
9. Ebersole, as the owner of the two facilities being demolished, is an owner or operator of a demolition under 40 C.F.R. § 61.141. Therefore, the standards in 40 C.F.R. § 61.145 apply to the demolition activities at those two sites.
10. Ebersole was required to inspect the former Eatwell Diner and the former JDM Outlet for asbestos prior to the commencement of demolition activities. 40 C.F.R. § 61.145(a).
11. Ebersole violated 40 C.F.R. § 61.145(a) by failing to inspect the properties for asbestos.
12. Ebersole was required to notify the Administrator that it intended to demolish the two facilities. 40 C.F.R. § 61.145(a)(2), (b)(1).
13. Ebersole violated 40 C.F.R. § 61.145(b)(1) by failing to notify the Administrator that it intended to demolish the buildings.

V. DECISION ON PENALTY AMOUNT

In arriving at a penalty amount, the Presiding Officer is to consider the statutory factors set forth in Section 113(e) of the CAA. 42 U.S.C. § 7413(e). The statutory factors include, in addition to such other factors as justice may require:

the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

Id. EPA asserted in the Complaint that it had accounted for the statutory factors, because it had computed its penalty figure in accordance with EPA's General Penalty Policy, EPA, Clean Air Act Stationary Source Civil Penalty Policy (1991), and its Asbestos Demolition and Renovation Civil Penalty Policy (Asbestos Penalty Policy), EPA, Clean Air Act Stationary Source Civil Penalty Policy, app. III (rev. 1992).² EPA claimed that the Asbestos Penalty Policy "represent[ed] an analysis of the statutory penalty factors," but did not cite any authority for this assertion. An Order to Supplement was issued, which requested that EPA provide additional analysis of the statutory factors sufficient to allow a Presiding Officer to consider EPA's requested penalty amount. EPA responded with a Supplementation, again claiming, without further support, that its reliance on the Asbestos Penalty Policy represented a sufficient consideration of the statutory factors.

Although EPA's Supplementation did not further analyze the statutory factors, I nevertheless approve its requested penalty amounts because I find that an application of the Asbestos Penalty Policy reflects a consideration of the statutory factors. In re U.S. Army

² Both sources available at <http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/penpol.pdf>.

Training Ctr., No. CAA 04-2001-1502, 2003 EPA ALJ LEXIS 187, at *52 (Sept. 12, 2003) (finding that the Asbestos Penalty Policy reflects the factors in Section 113(e) of the CAA); In re House Analysis & Assocs., 4 E.A.D. 501, 508-09 (EAB 1993) (CAA Stationary Source Civil Penalty Policy reasonably implements statutory criteria under CAA).

In accordance with 40 C.F.R. § 22.17(c), which requires that the Presiding Officer order the relief proposed in a motion for default unless it is clearly inconsistent with the record of the proceeding or the CAA, I have followed EPA's analysis in determining the penalty:

Count I: Failure to Inspect

Gravity - \$5,000

EPA represents that this is a first violation. Therefore, the amount of asbestos at the sites is presumed to be between zero and ten units, since Complainant did not specify an amount. See Asbestos Penalty Policy at 17.

Economic Benefit - \$0

The economic benefit was not calculated by EPA. The Asbestos Penalty Policy obtains the economic benefit by multiplying the amount of asbestos by a dollar figure. Since Complainant did not specify an amount of asbestos, it is presumed to be zero for the purposes of this calculation. See Asbestos Penalty Policy at 17.

Count II: Failure to Provide Notice

Gravity - \$15,000

EPA represents that this is a first violation and no notice was given. See Asbestos Penalty Policy at 15.

Economic Benefit - \$0

The economic benefit was not calculated by EPA. The Asbestos Penalty Policy obtains the economic benefit by multiplying the amount of asbestos by a dollar figure. Since Complainant did not specify an amount of asbestos, it is presumed to be zero for the purposes of this calculation. See Asbestos Penalty Policy at 17.

Subtotal - \$20,000

Total - \$22,000

EPA presumed Respondent's net worth to be less than \$100,000. Therefore the penalty is increased by \$2,000. This increase is made only once for multiple violations by the same person. See Asbestos Penalty Policy at 6 and General Penalty Policy at 14-15, 22.

Inflation-Adjusted Penalty - \$28,369

For violations occurring after March 15, 2004 where the applicable penalty policy was issued prior to January 31, 1997, the penalty amount calculated (not including mitigation or adjustment factors) is multiplied by 1.2895. Memorandum from Thomas V. Skinner, Acting Assistant Administrator, EPA, to Regional Administrators 2-3 (Sept. 21, 2004).³

Pursuant to a consent agreement with EPA, L & N has paid \$12,056.83 of the \$28,369 penalty assessed on Respondents. EPA accordingly requests that Ebersole pay the outstanding balance of \$16,312.17.

The burden to demonstrate mitigating circumstances, including an inability to pay, rests with Respondent. General Penalty Policy at 21. With the record being devoid of any evidence to the contrary, I find Respondent capable of paying the assessed amount.

ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, Complainant's Motion for Default Order is hereby GRANTED and Respondent is hereby ORDERED as follows:

1. Respondent Ebersole Associates, Inc. is hereby assessed a civil penalty in the amount of Sixteen Thousand Three Hundred Twelve Dollars and Seventeen Cents (\$16,312.17) and ordered to pay the civil penalty as directed in this Order.

³ Available at <http://www.epa.gov/compliance/resources/policies/civil/penalty/penaltymod-memo.pdf>.

2. Respondent shall pay the civil penalty by certified or cashier's check payable to the "United States Treasury" within thirty (30) days after this Default Order has become final. See ¶ 6 below.

a. All payments made by certified or cashier's check and sent by regular mail shall be addressed and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

Contact: Natalie Pearson, 314-418-4087

b. All payments made by certified or cashier's check and sent by overnight delivery service shall be addressed and mailed to:

U.S. Environmental Protection Agency
U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson, 314-418-4087

c. All payments made by electronic wire transfer shall be directed to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727
Environmental Protection Agency"

(For Customer Service, dial 212-720-5000)

d. All payments made through the automated clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

PNC Bank
ABA No. 051036706
Transaction Code 22 - Checking
Environmental Protection Agency
Account 310006
CTX Format
808 17th Street, NW
Washington, DC 20074

Contact: Jesse White 301-887-6548

(For Customer Service, dial 800-762-4224)

- e. All payments made online can be made at:

WWW.PAY.GOV
Enter sfo 1.1 in the search field
Open form and complete required fields.

- f. Additional payment guidance is available at:

http://www.epa.gov/ocfo/finservices/make_a_payment_cin.htm

- g. At the same time that payment is made, Respondent shall mail copies of any corresponding check, or written notification confirming any electronic wire transfer to:

Lydia Guy
Regional Hearing Clerk
U.S. EPA Region III (Mail Code: 3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

and

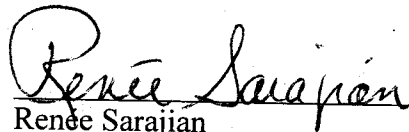
James M. Baker
Senior Assistant Regional Counsel
U.S. EPA Region III (Mail Code: 3RC10)
1650 Arch Street
Philadelphia, PA 19103-2029

A transmittal letter identifying the name and docket number should accompany both the remittance and/or a copy of the check or a copy of Respondent's electronic wire transfer.

3. In the event of failure by Respondent to make payment as directed above, this matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.
4. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debt owed to the United States and to assess a charge to cover the cost of processing and handling a delinquent claim.
5. Respondent is ordered to pay the civil penalty of Sixteen Thousand Three Hundred Twelve Dollars and Seventeen Cents (\$16,312.17) pursuant to 40 C.F.R. § 22.17(c), thirty (30) days after this Order becomes final under 40 C.F.R. § 22.27(c).
6. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order forty-five (45) days after it is served upon the Complainant and Respondent unless (1) a party appeals this Initial Decision to the EPA Environmental Appeals Board in accordance with 40 C.F.R. § 22.30, (2) a party moves to set aside the Default Order that constitutes this Initial Decision, or (3) the Environmental Appeals Board elects to review the Initial Decision on its own initiative.

IT IS SO ORDERED.

7/14/09
Date


Renee Sarajian
Regional Judicial Officer/Presiding Officer

CERTIFICATE OF SERVICE

This Initial Decision and Default Order was served on the date below, by the manner indicated, to the following people:

VIA HAND DELIVERY:

James M. Baker
Senior Assistant Regional Counsel (3RC20)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

VIA CERTIFIED MAIL/
RETURN RECEIPT REQUESTED:

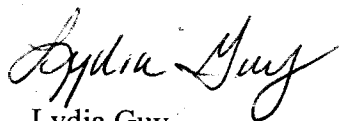
Randal I. Ebersole
President
Ebersole Associates, Inc.
1900 Cumberland Street
Lebanon, Pennsylvania 17042

VIA POUCH MAIL:

Eurika Durr
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

JUL 14 2009

Date



Lydia Guy
Regional Hearing Clerk
Region III, EPA