

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 2007 DEC 19 AM 9: 51
REGION 5

IN THE MATTER OF:)
)
TCM Progressive, Inc.)
33900 West Nine Mile Road)
Farmington, MI 48335)
)
Respondent.)
_____)

Docket No. EPCRA-05-2006-0021

Initial Decision and Default Order

Background

This is an administrative action brought pursuant to section 325(c)(1) of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. § 11045(c)(1), and governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), codified at 40 C.F.R. Part 22. Complainant, the Chief of the Emergency Response Branch, Superfund Division, Region 5, United States Environmental Protection Agency (U.S. EPA), filed an Amended Complaint on June 29, 2007, to assess a civil penalty against Respondent TCM Progressive, Inc. The Complaint alleges that Respondent violated section 312(a) of EPCRA, 42 U.S.C. § 11022(a), by failing to prepare an emergency and hazardous chemical inventory form for calendar years 2002, 2003 and 2004 and submit it to the appropriate state and local entities.¹ Complainant proposes that the Administrator assess a civil penalty against Respondent of \$99,675 for these alleged violations.

Complainant has filed a Motion for Default Order requesting that the Presiding Officer find the Respondent liable for the violations alleged in the Complaint and to assess the proposed penalty. Section 22.17 of the Consolidated Rules provides in part:

¹ Section 312 (a) of EPCRA requires the inventory form to be submitted to the appropriate local emergency planning committee (LEPC), the state emergency response commission (SERC), and the fire department with jurisdiction over the facility.

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint. . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. . . .

(c) *Default Order.* When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is *clearly inconsistent* with the record of the proceeding or the Act. . . .

(emphasis added).

Pursuant to the Consolidated Rules and based upon the record in this matter and the following Findings of Fact, Conclusions of Law and Recommended Civil Penalty Assessment, Complainant's Motion for Default Order is GRANTED.

Statutory Background

EPCRA establishes a statutory framework for emergency planning to respond to chemical accidents and to provide local governments and the public with information about possible chemical hazards in their communities. At issue in this matter is section 312(a) of EPCRA, 42 U.S.C. § 11022(a), which requires the owner or operator of a facility which is required to prepare or have available a material safety data sheet (MSDS) for a hazardous chemical under the Occupational Safety and Health Act of 1970² (OSHA) to prepare and submit an emergency and hazardous chemical inventory form (inventory form) to each of the following: (A) the appropriate local emergency planning committee; (B) the state emergency response commission; and (C) the fire department with jurisdiction over the facility. The form must contain the information required by section 312(d) of EPCRA, 42 U.S.C. § 11022(d), and cover all hazardous chemicals present at the facility at any one time during the preceding year in

² 29 U.S.C. § 651 *et seq.*

amounts equal to or exceeding 10,000 pounds.³ The facility must submit the inventory form every year by March 1 for all chemicals that exceed the threshold planning quantity at any given time during that year. 40 C.F.R. § 370.25(a). Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), provides that any person who violates a requirement of section 312 shall be liable for a civil penalty in an amount not to exceed \$25,000 for each such violation.⁴

Findings of Fact and Conclusions of Law

Pursuant to sections 22.17(c) and 22.27(a) of the Consolidated Rules, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record in this case, I make the following findings of fact and conclusions of law:

1. Respondent TCM Progressive, Inc. was a corporation doing business in the State of Michigan.⁵
2. At all times relevant to the Amended Complaint, Respondent was an owner or operator of the facility located at 33900 West Nine Mile Road, Farmington, Michigan (the Facility).
3. At all times relevant to this Complaint, Respondent was an employer at the Facility, and was required by OSHA to prepare, or have available, an MSDS for propane.
4. The Facility is a "facility" as that term is defined under section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

³ The inventory form must also include information on all extremely hazardous chemicals present at the facility at any one time in amounts equal to or greater than 500 pounds or the threshold planning quantity designated by U.S. EPA at 40 C.F.R. Part 355, Appendices A and B. 40 C.F.R. § 370.20(b).

⁴ That amount has been increased to \$27,500 per day of violation that occurred from January 3, 1997, through March 14, 2004, and \$32,500 per day of violation occurring on or after March 15, 2004, by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 370, and implementing regulations at 40 C.F.R. Part 19.

⁵ It appears from the record that Respondent filed a certificate of dissolution with the Michigan Department of Consumer and Industrial Services on February 14, 2006. See Attachment G to Complainant's Memorandum in Support of Complainant's Motion for Default Order (filed Feb. 6, 2007). The Consolidated Rules make no mention of the capacity of a dissolved corporation to be named a respondent in an administrative action. The Federal Rules of Civil Procedure provide that "(t)he capacity of a corporation to sue or be sued shall be determined by the law under which it is organized." Fed. R. Civ. P. 17(b). It is generally held, however, that a defect in capacity does not deprive a court of subject matter jurisdiction and that such a defect can be waived, much like an affirmative defense. See Fed. R. Civ. P. 9(a); C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §§ 1295, 1559. In this Initial Decision, I conclude only that TCM was a corporation and thus was a "person" as defined by EPCRA. I make no conclusion as to its capacity to be sued under Michigan law.

5. Propane is a "hazardous chemical" as defined by section 311(e) of EPCRA, 42 U.S.C. § 11021(e).

6. Propane has a minimum threshold level of 10,000 pounds, as provided by 40 C.F.R § 370.20(b).

7. During at least one period of time in calendar year 2002, propane was present at the Facility in an amount equal to or greater than the minimum threshold level.

8. During at least one period of time in calendar year 2003, propane was present at the Facility in an amount equal to or greater than the minimum threshold level.

9. During at least one period of time in calendar year 2004, propane was present at the Facility in an amount equal to or greater than the minimum threshold level.

10. At all times relevant to the Amended Complaint, the Michigan State Emergency Response Commission was the state emergency response commission (SERC) for Michigan under section 301(a) of EPCRA, 42 U.S.C. § 11001(a).

11. At all times relevant to the Amended Complaint, the Oakland Local Emergency Planning Committee was the local emergency planning committee (LEPC) for Oakland County under section 301(c) of EPCRA, 42 U.S.C. § 11001(c).

12. At all times relevant to the Amended Complaint, the Farmington Fire Department was the fire department with jurisdiction over the Facility.

13. Respondent was required to submit to the SERC, LEPC and the fire department on or before March 1, 2003, a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2002.

14. Respondent was required to submit to the SERC, LEPC and the fire department on or before March 1, 2004, a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2003.

15. Respondent was required to submit to the SERC, LEPC and the fire department on or before March 1, 2005, a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2004.

16. As of January 31, 2006, Respondent had not submitted to the SERC, LEPC or fire department a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2002.

17. As of January 31, 2006, Respondent had not submitted to the SERC, LEPC or fire department a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2003.

18. As of January 31, 2006, Respondent had not submitted to the SERC a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2004.

19. As of January 31, 2006, Respondent had not submitted to the LEPC a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2004.

20. As of January 31, 2006, Respondent had not submitted to the Farmington Fire Department a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2004.

21. Complainant filed the original Complaint in this matter with the Regional Hearing Clerk on April 4, 2006.

22. On June 6, 2006, a copy of the original Complaint was personally served upon David Rice, a registered agent and officer of Respondent.⁶

23. Respondent did not file an answer to the original Complaint within 30 days of receipt and has not filed an answer as of this date.

24. Complainant filed a Motion for Default Order on February 6, 2007.

25. Respondent did not file a response to the motion within 15 days and has not filed a response as of this date.

26. On April 20, 2007, the Presiding Officer issued an Order to Show Cause and Order to Supplement the Record. Respondent did not respond to that Order.

27. On June 12, 2007, the Presiding Officer issued an Order to File Amended Complaint or, Alternatively, to Show Cause.

28. On June 29, 2007, Complainant filed an Amended Complaint in this action.

29. Service of the Amended Complaint was accomplished by mailing a copy by registered mail, return receipt requested to David Rice, registered agent and officer of Respondent, on June 29, 2007. A signed receipt has been filed with the Regional Hearing Clerk.

30. Respondent has not filed an Answer to the Amended Complaint.

⁶ See Attachments I and M to Complainant's Memorandum in Support of Complainant's Motion for Default Order (filed Feb. 6, 2007).

31. Respondent is a "person" as that term is defined under section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

32. Each day after March 1, 2003, that Respondent failed to submit to the SERC, LEPC, or fire department a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2002 is a violation of section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

33. Each day after March 1, 2004, that Respondent failed to submit to the SERC, LEPC, or fire department a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2003 is a violation of section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

34. Each day after March 1, 2005, that Respondent failed to submit to the SERC a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2004 is a violation of section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

35. Each day after March 1, 2005, that Respondent failed to submit to the LEPC a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2004 is a violation of section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

36. Each day after March 1, 2005, that Respondent failed to submit to the Farmington Fire Department a completed Emergency and Hazardous Chemical Inventory Form including propane for calendar year 2004 is a violation of section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

37. The failure to file a timely answer to the Amended Complaint is cause for issuance of a default order under 40 C.F.R. § 22.17(a)(1).

38. The Amended Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

39. Respondent was required by section 22.15(a) of the Consolidated Rules, 40 C.F.R. § 22.15(a), to file an answer to the Amended Complaint within thirty days from the date of service of the Complaint.

40. Respondent's failure to file an answer to the Amended Complaint constitutes an admission of all facts alleged in the Amended Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

41. Complainant's Motion for Default Order was lawfully and properly served on Respondent in accordance with 40 C.F.R. § 22.5(b)(2).

42. Respondent was required by section 22.16(b) of the Consolidated Rules, 40 C.F.R. § 22.16(b), to file any response to the motion within fifteen days of service.

43. Respondent's failure to respond to the motion is deemed to be a waiver of any objection to the granting of the motion pursuant to 40 C.F.R. § 22.16(b).
44. Respondent is in default in this proceeding and has waived its right to contest the factual allegations in the complaint. 40 C.F.R. § 22.17(a).
45. The record in this matter shows no good cause why a default order should not be issued. 40 C.F.R. § 22.17(c).
46. Respondent is liable for a civil penalty as set forth below.

Recommended Civil Penalty Assessment

The Consolidated Rules at section 22.27 provide in part:

(b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), authorizes U.S. EPA to assess a civil penalty of \$25,000 per day of violation for each EPCRA section 312 violation.⁷ Section 325(c) of EPCRA provides that each day a violation of section 312 continues shall, for purposes of that section, constitute a separate violation.

Complainant calculated the EPCRA penalty by evaluating the facts and circumstances of the case with specific reference to U.S. EPA's *Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act* (dated September 30, 1999) (Enforcement Response Policy). The Enforcement Response Policy provides that the statutory factors set forth in EPCRA section 325(b)(1)(C), though not applicable to cases such as this brought under section 325(c), shall be considered by the Administrator. Those factors are:

⁷ See n.4 above.

... the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

42 U.S.C. § 11045(b)(1)(C).

Complainant has submitted the Declaration of Ginger Jager, Region 5 Environmental Scientist, in support of its penalty calculation of \$99,675. In her Declaration, Ms. Jager explains the calculation of the penalty in accordance with the Enforcement Response Policy. She details the calculation of the base penalty as to each count of the Complaint, two "past year" violations of section 312 (Counts I and II) and three "current year" violations (Counts III, IV and V). For violations of the section 312 reporting requirements for the 2002 and 2003 calendar years, Complainant applied a flat penalty amount of \$1,500 for each year, consistent with the Enforcement Response Policy.⁸ Complainant then applied a 15 percent reduction based on the size of Respondent's business, which had less than 100 employees. Accordingly, Complainant calculated a penalty of \$1,275 for each of Counts I and II.

As to Counts III, IV and V, Complainant calculated a penalty of \$32,375 per count in accordance with the Enforcement Response Policy. These counts apply to Complainant's failure to submit an inventory form for the 2004 calendar year to the SERC, the LEPD and the fire department, respectively. Complainant utilized the Table II Civil Penalty Matrix (for violations occurring after March 15, 2004) included in the Enforcement Response Policy and determined that the violations were Level 1/Level C violations.⁹ Ms. Jager selected \$13,750 from the penalty matrix, which is towards the high range of the scale to reflect repeated attempts by local, state and federal officials to advise Respondent of the reporting requirements and Respondent's unresponsiveness to the information request dated December 1, 2004. In addition, Ms. Jager considered that there are about 11,096 persons residing within a one mile radius of the facility.¹⁰

⁸ Enforcement Response Policy at 20.

⁹ Respondent's three propane tanks had the capacity to hold 18,000, 15,000 gallons and 30,000 gallons, respectively. As alleged in the Complaint, propane has a threshold of 10,000 lbs. and during at least one time during calendar years 2002, 2003 and 2004, propane was present at the facility in an amount equal to or greater than the minimum threshold.

¹⁰ Declaration of Ginger Jager, filed May 17, 2007, at ¶¶ 26-27.

Under the Enforcement Response Policy, per day penalties for violations of section 312 are calculated by multiplying one percent of the base penalty (in this case \$137.50) by the number of days the violation continues.¹¹ This result was likewise reduced by 15 percent for the size of the business. The penalty amount for each count was added together for a total penalty of \$99,675.¹²

The Enforcement Response Policy further requires U.S. EPA to make adjustments to this penalty figure for a number of factors. Complainant made no adjustments for: (1) inability to pay, as Respondent did not submit documentation that substantiated an inability to pay as requested by Complainant; (2) prior violations, as none were found by Complainant; (3) degree of culpability, as it concluded that Respondent either had sufficient knowledge of the EPCRA requirement or had control over the violative condition. In addition, no adjustment was made for economic benefit as the cost of compliance in this case would have been minimal. As noted above, a 15% adjustment was made for size of business, and no reduction was made for cooperation or willingness to settle the matter. Finally, there was no voluntary disclosure on the part of Respondent.¹³

Complainant has, in this case, calculated the proposed penalty in accordance with the Enforcement Response Policy and I conclude that the penalty assessed is consistent with the record in the proceeding and with EPCRA.

DEFAULT ORDER

1. Respondent is assessed a civil penalty in the amount of \$99,675.
2. Respondent shall, within thirty calendar days after this Default Order has become final, forward a cashier's or certified check, in the amount of \$99,675, payable to the order of "Treasurer, United States of America," to

U.S. EPA Region 5
Attn.: Finance
P.O. Box 371531
Pittsburgh, PA 15251-7531

¹¹ In this case, the per day penalty was multiplied by 177 days. Although the record does not explain why this multiplier was chosen, the record is clear that the violation continued over 300 days until at least January 31, 2006. See Amended Complaint at ¶¶ 31, 34, 37.

¹² Declaration of Ginger Jager, at ¶ 28.

¹³ *Id.* at ¶¶ 29-34.

The check should note the case title of this matter, TCM Progressive, Inc., and the docket number of this Complaint.

3. In addition, Respondent shall mail a copy of the check to the following addresses:

Regional Hearing Clerk (E-13J)
U.S. EPA Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Ginger Jager
Chemical Emergency Preparedness and
Prevention Section (SC-6J)
U.S. EPA Region 5
77 West Jackson Boulevard
Chicago, IL 60604

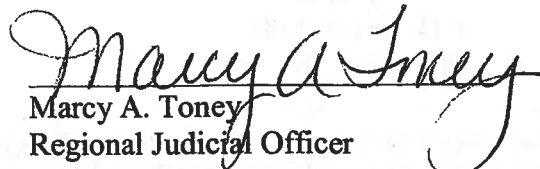
Maria Gonzalez
Office of Regional Counsel (C-14J)
U.S. EPA Region 5
77 West Jackson Boulevard
Chicago, IL 60604

A transmittal letter identifying the case name and docket number should accompany both the remittance and the copies of the check.

4. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless: (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceedings within thirty (30) days from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order; or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Dated: December 19, 2007


Marcy A. Toney
Regional Judicial Officer
Region 5

RECEIVED
 REGIONAL HEARING CLERK
 U.S. ENVIRONMENTAL PROTECTION AGENCY
 REGION 5

2007 DEC 19 AM 9: 51

In the Matter of TCM Progressive, Inc., Respondent
 Docket No. EPCRA-05-2006-0021

CERTIFICATE OF SERVICE

I certify that the foregoing Initial Decision and Default Order, dated December 19, 2007, was sent this day in the following manner:

Original hand delivered to:

Regional Hearing Clerk
 U.S. Environmental Protection Agency
 Region 5
 77 West Jackson Blvd.
 Chicago, IL 60604-3590

Copy hand delivered to
 Attorney for Complainant:

Maria Gonzalez
 U.S. Environmental Protection Agency
 Region 5
 Office of Regional Counsel
 77 West Jackson Blvd.
 Chicago, IL 60604-3590

Copy by U.S. Certified Mail
 Return Receipt Requested to:

Mr. David Rice
 1441 Horseshoe Circle
 Milford, MI 48381-3178

Mr. David Rice
 33900 West Nine Mile Road
 Farmington, MI 48335

Stuart Brickner
 28411 Northwestern Highway
 Suite 200
 Southfield, MI 48034

Dated: 12/19/07

By: 

Darlene Weatherspoon
 Administrative Assistant

