12/31/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Dworkin Electroplaters, Inc.,	)	**Docket No. RCRA-III-187**
	)	
Respondent	)	

Resource Conservation and Recovery 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 accordingly was subjected to the compliance order and the civil penalty proposed by Complainant, except that the proposed civil penalty was corrected for an arithmetic error.

Appearances

For Complainant:
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Assistant Regional Counsel
Region III
U.S. Environmental Protection Agency
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Philadelphia, PA 19107

For Respondent:
Kenneth S. Cooper
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1207 Chestnut Street
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Before

Thomas W. Hoya
Administrative Law Judge

DEFAULT ORDER

This Default Order is issued in a proceeding initiated under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, against Dworkin Electroplaters, Inc. ("Respondent"), by the Associate Director, Hazardous Waste Management Division, Office of RCRA Programs, Region III, U.S. Environmental Protection Agency ("Complainant"). Respondent is declared by this Default Order to have violated various provisions of RCRA, of regulations promulgated pursuant to RCRA, 40 C.F.R. Parts 260-270, and of the Pennsylvania Solid and Hazardous Waste Management Regulations, PA Code §§ 75.260-450.

Accordingly, an order is imposed on Respondent that assesses a civil penalty of $55,400 and directs Respondent to achieve compliance with and report on its compliance with various statutory and regulatory requirements. This issuance of a Default Order grants Complainant's June 4, 1991 motion for such an order.

The complaint, issued June 29, 1990, contained five counts. These counts were: storing hazardous waste in containers while lacking either a permit or interim status under RCRA that would authorize such storage; failure to develop a satisfactory contingency plan; failure to perform hazardous waste determinations on solid waste streams generated on site; failure to keep all hazardous waste containers closed; and storing hazardous waste in corroded containers.

Respondent filed an answer, dated August 3, 1990, denying the alleged violations and requesting a hearing. After the parties failed to negotiate a settlement, they were directed to make a prehearing exchange which, following several extensions, was due December 24, 1990.[1] Complainant filed its prehearing exchange timely, but Respondent has filed nothing since answering the complaint.

It is Respondent's default in making its prehearing exchange that serves as the basis for this Default Order. Complainant moved June 4, 1991 for a default order, including with its filing a proposed default order, and supplying for the record a certified mail receipt signed by Respondent.

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[1] The prehearing exchange was originally mandated by the Notice and Order of August 31, 1990, served upon the parties by certified mail; a signed receipt was returned by both. As noted in the text, the due date for the prehearing exchange was subsequently extended several times, the last extension being to December 24, 1990.

Respondent's Violations

Procedure in this case is governed by the Agency's Consolidated Rules of Practice, 40 C.F.R. Part 22. Section 22.17(a) of these 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.

(emphasis in original)

As described above, Complainant has moved for a default, in the manner required by Section 22.17(a); and Respondent, having filed nothing since its answer, remains in default. As further described above, the complaint and answer were previously filed; and an order was issued directing the prehearing exchange, with which only Complainant has complied.

Consequently, Respondent is declared in default. Such default "constitutes ... an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations."

In this case, the complaint charged five violations, as summarized above.[2] The complaint stated an enforceable claim for each of these five. Moreover, the allegations of the complaint are supported both by admissions in the answer and by Complainant's prehearing exchange. Accordingly, in view of these factors, added to the force of Section 22.17(a), it is concluded that Respondent committed the five violations charged in the complaint, as discussed in more detail below.

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[2] See the text paragraph preceding the text paragraph accompanying note 1 supra.

The complaint alleged that Respondent, a Pennsylvania corporation doing business in Pennsylvania, owns and operates a facility at 2527 North Bodine Street, Philadelphia, Pennsylvania that is an electroplating shop for electroplating brass, copper, and zinc.[3] Respondent's answer admitted these allegations.[4] The complaint alleged also, and Respondent's answer admitted, that Respondent's facility generates hazardous wastes under RCRA,[5] and that Respondent lacks a permit or interim status under Section 3005 of RCRA, 42 U.S.C. § 6925, or PA Code § 75.270 (40 C.F.R. Part 270).[6]

The Commonwealth of Pennsylvania was granted final authorization on January 30, 1986, pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), to administer a State hazardous waste management program in lieu of the Federal hazardous waste program. Thus the provisions of the Pennsylvania hazardous waste management program have become requirements of RCRA Subtitle C, 42 U.S.C. §§ 6921-6931, for regulation and enforcement in Pennsylvania. Under Section 3008(a)(2) of RCRA, 42 U.S.C. 6928(a)(2), such a State program may be enforced by the Agency for alleged violations in that State, provided notice is given to the State prior to issuance of the complaint. The complaint asserted that such notice was given.[7]

Count I of the complaint charged Respondent with storing hazardous waste at its facility without either a permit or interim status, in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and 25 PA Code 75.270(a) (40 C.F.R. 270.1(b)). Count II charged Respondent with failing to prepare a complete and adequate Preparedness, Prevention and Contingency Plan for its facility, as required by 25 PA Code § 75.265(i)(1) (40 C.F.R. § 265.50 - .56).

Count III charged Respondent with failing to determine, as required by 25 PA Code § 75.262(b)(1) (40 C.F.R. § 262.11), whether solid waste generated at its facility was hazardous waste. Count

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[3] Complaint, Compliance Order and Notice of Opportunity for Hearing (June 29, 1990) ¶¶ II.1-2.

[4] Answer to Complaint (August 3, 1990) ¶¶ 1-2.

[5] Complaint, Compliance Order and Notice of Opportunity for Hearing (June 29, 1990) ¶ II.8; Answer to Complaint (August 3, 1990) ¶ 8.

[6] Complaint, Compliance Order and Notice of Opportunity for Hearing (June 29, 1990) § II.17; Answer to Complaint (August 3, 1990) ¶ 17.

[7] Complaint, Compliance Order and Notice of Opportunity for Hearing (June 29, 1990) at 2.

IV charged Respondent with storing hazardous waste at its facility, in violation of 25 PA Code § 75.265(q)(3) (40 C.F.R. § 265.173(a)), in containers that were open, although no wastes were being added to or removed from such containers. Count V charged Respondent with storing hazardous waste at its facility in corroded containers, in violation of 25 PA Code § 75.265(q)(1) (40 C.F.R. § 265.171).

As stated above, it is concluded that Respondent committed the violations alleged in each of the five counts of the complaint. This conclusion is based principally on Respondent's default, and is supported by admissions in Respondent's answer and by the contents of Complainant's complaint and prehearing exchange.

Civil Penalty

The next issue is the appropriate civil penalty. The provision for defaults in the Agency's Consolidated Rules, quoted above,[8] 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." That statement suggests an automatic acceptance of "the penalty proposed in the complaint."

On the other hand, the Agency's Consolidated Rules contain also a section titled "Amount of civil penalty" that includes a specific reference to default situations.

> § 22.27 Initial Decision
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> * * *
>
> (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 decease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

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[8] See the first text paragraph supra under the heading Respondent's Violations.

(emphasis in original)

The last sentence in this section, referring to the default situation, suggests a responsibility in the Presiding Officer to review the amount of the civil penalty.[9] Accordingly, it will be reviewed.

Section 22.27(b) of the Consolidated Rules (40 C.F.R. § 22.27(b), as quoted above, requires that the recommended civil penalty "be assessed ... in accordance with any criteria set forth in the Act." Here Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), provides that such assessment "shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."

Section 22.27(b) of the Consolidated Rules (40 C.F.R. § 22.27(b)) requires consideration in such assessment also of "any civil penalty guidelines issued under the Act." For RCRA, the Agency has issued the Final RCRA Civil Penalty Policy, dated May 8, 1984. This Penalty Policy incorporates the two RCRA statutory factors in an approach that takes into account other factors as well.

The Penalty Policy provides generally for calculation of a civil penalty in two steps. The first step is deriving a so-called "gravity-based penalty" from a matrix on which the two axes represent respectively the "extent of deviation from a statutory or regulatory requirement" and the "potential for harm."[10] Each axis has three gradations: "Major," "Moderate," and "Minor."[11] At each point in the matrix where a gradation from one axis intersects a gradation from the other axis, a range of penalty amounts is provided, from which a gravity-based penalty is selected to fit the facts of the particular violation. For example, where both gradations are major, the gravity-based penalty may be anywhere from $20,000 to $25,000; where both are minor, from $100 to $499.[12]

In the second step, the gravity-based penalty derived from

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[9] 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). In that case, the Court remanded a default case to the Agency for further review of the amount of the penalty imposed, because the administrative proceeding that was appealed to the Court lacked any significant statement of reasoning in support of that penalty.

[10] Final RCRA Civil Penalty Policy (May 8, 1984) at 3-5.

[11] Id.

[12] Id. 4.

this matrix may then be adjusted upwards or downwards, when appropriate, for any of five factors. These five are: "Good faith efforts to comply/lack of good faith; Degrees of willfulness and/or negligence; History of noncompliance; Ability to pay; or Other Unique Factors."[13]

It was on the basis of this Final RCRA Civil Penalty Policy that Complainant justified its proposed civil penalty of $55,700.[14] This justification has been reviewed, as discussed briefly below, and adjudged to be reasonable, with the exception of one minor arithmetic error, noted below. Correction for that error reduces the civil penalty to $55,400. Accordingly, a civil penalty of $55,400 is assessed against Respondent.

For count I of the complaint--storage of hazardous waste without the required permit or interim status--Complainant rated the potential for harm as moderate, and the extent of deviation as major, for a gravity-based penalty of $9,000. Complainant then adjusted that figure upwards by $10 per day for 420 days of violation, or $4,200, producing a total penalty of $13,200 for count I. Circumstances noted by Complainant in these count I calculations included the long period of the illegal storage, but that only a small number of drums were involved.

For count II of the complaint--an inadequate Preparedness, Prevention, and Contingency Plan--Complainant rated both the potential for harm and the extent of deviation as moderate, for a gravity-based penalty of $7,000. As an adjustment, Complainant increased that figure by $1,000 for willfulness and/or negligence, producing a total penalty of $8,000 for count II. A circumstance noted by Complainant in these count II calculations was that Respondent still had not responded to an official notice of deficiencies in its plan, and thus still lacked a satisfactory plan for any on-site emergency that might arise.

It is in the second or adjustment step of these count II calculations that the arithmetic error appears. After "Degree of willfulness and/or negligence," Complainant entered, under "Percentage Change," "10%," and then, under "Dollar Amount," "$1000."[15] The gravity-based penalty to which the 10% was apparently applied, however, was, as noted above, $7,000. Thus the adjustment upwards should be $700, not $1,000. What perhaps caused the error was that a gravity-based penalty of $10,000 was entered

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[13] Id. 4.

[14] Complainant's Prehearing Exchange (December 24, 1990), Exhibit 9.

[15] Id. 22. The asterisked note after "Percentage Change" has been deleted.

and crossed out, and $7,000 was entered next to it. The 10% may thus have mistakenly been applied to the $10,000, which would explain the $1,000.[16] At any rate, it is $7,000 to which the 10% should presumably be applied, which gives an adjustment increase of $700, for a total civil penalty for count II of $7,000 plus $700, or $7,700.

For count III--nonperformance of hazardous waste determinations--Complainant rated both the potential for harm and extent of deviation as major, for a gravity-based penalty of $22,500. Complainant made no adjustment to this figure, producing a total civil penalty for count III of $22,500. A circumstance noted by Complainant in this count III calculation was that improper or absent waste determinations leave subsequent handlers of the waste uninformed, thereby risking their mishandling of hazardous waste.

For count IV--storing hazardous waste in open containers--Complainant rated both the potential for harm and extent of deviation as moderate, for a gravity-based penalty of $6,000. Complainant again made no adjustments, leaving the civil penalty for count IV at $6,000. Circumstances noted by Complainant were that this violation risks spillage of and accidental exposure to hazardous wastes, but that the risk here is limited by only a small number of drums being involved.

For count V--storing hazardous waste in corroded containers--Complainant rated both the potential for harm and the extent of deviation as moderate, for a gravity-based penalty of $6,000, and again made no adjustments. Circumstances noted by Complainant were that risk arises especially when the hazardous waste is transferred out of the corroded containers, but the risk is limited again by the involvement of only a small number of containers.

Compliance Order

The final issue is the compliance order requested in the complaint and the provisions of which were included by Complainant in its proposed order. Most of these provisions--viz., paragraphs (a), (b), (c), (d), and (g) in the proposed order quoted below--essentially would require Respondent to correct the violations charged in the complaint. Hence these paragraphs are justified.

Paragraph (e) of the proposed order would require Respondent to report to the Agency and to Pennsylvania its compliance with the first four of the above cited paragraphs. This reporting

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[16] It seems unlikely that the "10%" rather than the "$1000" was entered mistakenly, because to obtain $1,000 from $7,000 would require applying to the $7,000 a percentage figure that is not an even number.

requirement, as a means of monitoring Respondent's compliance with these paragraphs of the proposed order, is also justified.

One paragraph in the proposed order--paragraph (f)--does not have a direct counterpart in the complaint. Paragraph (f) would require Respondent to submit for Pennsylvania's approval and then implement a closure plan for any areas in its facility used for the treatment, storage, or disposal of hazardous waste since November 18, 1980. Since the record establishes that Respondent's facility is a hazardous waste storage facility, this requirement also is warranted.

Order

For the reasons set forth above, the proposed order submitted by Complainant is hereby approved and adopted by the undersigned, with the following changes. In the first paragraph, the date has been inserted. In paragraph (i), the amount of the civil penalty has been changed to $55,400. In the last paragraph, the references to "the Administrator" have been replaced with references to "the Environmental Appeals Board," a reference to an enclosed copy of the Consolidated Rules has been deleted because a copy was enclosed with the complaint, and at the very end a phrase has been added advising that the appeal period for an Initial Decision is 20 days. With these changes, the proposed order is as follows.

DEFAULT ORDER

AND NOW, this 31st day of December 1992, under the authority of the Resources Conservation and Recovery Act and 40 C.F.R. Part 22, Respondent is found to be in default with respect to the Complaint.

NOW THEREFORE, pursuant to 40 C.F.R. § 22.17, Respondent is hereby ordered to:

(a) Immediately after this Default Order becomes final, cease the practice of storing hazardous waste except in accordance with a permit or interim status or in accordance with 25 PA Code § (40 C.F.R. § 262.34);

(b) Within fifteen (15) days after this Default Order becomes final, conduct hazardous waste determinations on all solid waste streams in accordance with 25 PA Code 262.11 (40 C.F.R. § 262.11);

(c) Immediately after this Default Order becomes final place secure lids on all containers of hazardous waste stored at the Facility pending completion of closure of the Facility and keep such containers closed except as necessary to add hazardous waste or remove hazardous waste from such containers, in accordance with 25 PA Code

265.173 (40 C.F.R. § 265.173(a));

(d) Immediately after this Default Order becomes final transfer the contents of all hazardous waste containers which are leaking or not in good condition in accordance with 25 PA Code § 265.171 (40 C.F.R. § 265.171) or otherwise manage the waste in accordance with 25 PA Code § 265 (40 C.F.R. Part 265);

(e) Within thirty (30) days after this Default Order becomes final submit a report to EPA and to Pennsylvania Department of Environmental Resources ("PADER") certifying that compliance has been achieved with respect to paragraphs (a), (b), (c) and (d) of this Default Order;

(f) Within forty-five (45) days after this Default Order becomes final, submit to EPA and PADER, for approval by PADER, a complete closure plan, including a schedule for closure, for the areas used for the storage of the four (4) containers of hazardous waste referred to in Paragraphs 10(a) and (b) and the three (3) drums of hazardous waste referred to in paragraph 16 of the Complaint and for every other area or unit at the Facility which has been used for the treatment, storage or disposal of hazardous waste since November 18, 1980, including any area used for the storage of containers of hazardous waste which did not qualify for the exemption in 25 PA Code § 75.262(g) (40 C.F.R. 262.34). Such closure plan shall satisfy the requirements of 25 PA Code § 75.265(o) (40 C.F.R. § 265.110 - 265.116) and the applicable closure requirements of 25 PA Code § 75.265(q)-(y). Upon receipt of PADER's approval of such plan, implement such plan in accordance with the requirements and schedule set forth therein.

(g) Within forty-five days after this Default Order becomes final, submit to EPA and PADER, for approval by PADER, a complete Preparedness, Prevention, and Contingency Plan as required by 25 PA Code § 265.51 (40 C.F.R. §265.50 -.56). Upon receipt of PADER's approval of such plan, implement such plan in accordance with the terms and schedules set forth therein.

(h) Within forty-five (45) days after this Default Order becomes final, submit a report to EPA and to PADER certifying that the closure plan and the Preparedness, Prevention, and Contingency Plan required by paragraphs (f) and (g) of this Default Order, respectively, have been submitted.

(i) Within sixty (60) days after this Default Order

beomes final, pay a civil penalty of fifty-five thousand four hundred dollars ($55,400). Such penalty shall become due and payable by Respondent without further proceedings sixty (60) days after this Default Order becomes final, as provided in 40 C.F.R. § 22.17 (a). Payment shall be made by forwarding a cashier's or certified check, payable to the United States of America, to EPA Region III, Regional Hearing Clerk, P.O. Box 360515M, Pittsburgh, Pennsylvania 15251. At the same time payment is made, a copy of the check shall be mailed to the Regional Hearing Clerk (3RC00), U.S. EPA Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107.

The following notice concerns interest and late payment penalty charges that will accrue if the civil penalty set forth above is not paid within sixty days of Respondent's receipt of this Default Order:

> Pursuant to 31 U.S.C. Section 3717, an executive agency is entitled to assess interest and penalties on debts owed to the United States. Interest will begin to accrue on any such debt if it is not paid from the date on which the notice of debt and the interest requirements is first mailed to the debtor. (See 4 C.F.R. Section 102.13(b).) Interest will be assessed at the United States Treasury tax and loan rate. (See 4 C.F.R. Section 102.13(c).) In addition, a penalty charge of six percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment of the civil penalty is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment of such penalty is due. (See 40 C.F.R. Section 102.13(e).)

Thus, to avoid the assessment of interest on the civil penalty imposed by this Default Order, you must pay such civil penalty within 60 days of the date on which this Default Order becomes a Final Order. To avoid the assessment of penalty charges on the debt, you must pay the civil penalty within 90 days of the date on which this Default Order becomes a Final Order.

This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(b). This Default Order shall become final no later than forty-five (45) after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental

Appeals Board is taken from it by any party to the proceedings, or (2) the Environmental Appeals Board elects sua sponte, to review the Initial Decision. The procedures for appeal of an Initial Decision are set forth in 40 C.F.R. § 22.30, which provides that parties have twenty (20) days after service upon them of an Initial Decision to appeal it.

T. Thomas W. Hoya

Thomas W. Hoya
Administrative Law Judge

Dated: December 31, 1992

Certificate of Service

I hereby certify that copies of the Default Order in the matter of Dworkin Electroplaters, Inc., RCRA-III-187 were distributed as follows.

Certified Mail To:

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Certified Mail To:

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Hand Delivered To:

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Date: JAN 5 1993

Lydia A. Guy
Regional Hearing Clerk