UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Testa Excavating Co., Inc.	)	
	)	Docket No. CAA-I-92-1061
and	)	
	)	
Thomas C. O'Brien,	)	
	)	
Respondents	)	

ORDER ON DEFAULT

This proceeding for the assessment of a civil penalty was initiated on June 17, 1992, by the issuance of a complaint by the Regional Administrator of the U.S. Environmental Protection Agency, Region I (Complainant), pursuant to Section 113(d) of the Clean Air Act, as amended (Act), 42 U.S.C. § 7413(d). The complaint alleged violations of Section 112 of the Act, 42 U.S.C. § 7412, and the National Emission Standard for Hazardous Air Pollutants for asbestos (Asbestos NESHAP), 40 C.F.R. Part 61, Subpart M, by Respondent Testa Excavating Co., Inc., (Testa or Respondent) and Respondent Thomas C. O'Brien, Owner, AMO-O'Brien (O'Brien). Respondents were charged with two counts of violating the Act and the Asbestos NESHAP for failure to provide the Administrator with prior written notice of intention to demolish facilities as defined by the Act and the cited regulation. Count I of the complaint

concerned buildings located at 126-134 Wardwell Street in Stamford, Connecticut. Count II concerned a building located at 354 Connecticut Avenue in Norwalk, Connecticut.

Complainant initially proposed to assess a civil penalty against Respondents in the amount of $32,000 for the alleged violations. Complainant contended that the proposed penalty was in accordance with Section 113 of the Act, EPA's "Clean Air Act Stationary Source Civil Penalty Policy," dated October 25, 1991 (Penalty Policy), and the May 5, 1992 Appendix III to the Penalty Policy (Appendix III), which is entitled the Asbestos Demolition and Renovation Civil Penalty Policy. Subsequent to the filing of the complaint, Complainant reduced the proposed penalty to $12,000[1], based on information provided by Respondents concerning the nature of the violations and their size. Complainant determined that the violations involved "no notice but probable substantive compliance," and that a $5,000 penalty for each violation and a general penalty of $2,000 for the "size of the violator" was appropriate under the terms of the Penalty Policy and Appendix III.

On July 24, 1992, Respondent filed an Answer to the Complaint in which Respondent admitted, *inter alia*, that it did not provide

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[1] Complainant further reduced the penalty to be assessed against Respondent Testa to $10,000, as a result of a Consent Agreement and Order, filed October 27, 1993, between EPA and Respondent O'Brien in which O'Brien agreed to pay a penalty of $2,000.

written notice of intention to demolish the facilities cited in the complaint, but denied that it had violated the Asbestos NESHAP and Section 112 of the Act through its activities at the cited facilities. Respondent asserted that the requirements of 40 C.F.R. § 61.145(b) and (c) were inapplicable, because it was not the "owner or operator of a demolition or renovation activity," as defined in 40 C.F.R. § 61.141. On September 2, 1992, Respondent filed an Amended Answer to the Complaint in which it denied Complainant's allegation that each of the buildings referenced in Count I and II of the Complaint was a "facility" as defined in 40 C.F.R. § 61.141[2]. In its Memorandum in Support of Motion to Amend Answer, Respondent referred only to the buildings located at 126 and 134 Wardwell [buildings cited in Count 1] as "one and two family homes," and on this basis claimed that they were not "encompassed within the Statute and Regulations . . ." Because the

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[2] "Facility," is defined in 40 C.F.R. § 61.141 as follows:

> Facility means any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive waste disposal site. For purposes of this definition, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation, or building. Any structure, installation or building that was previously subject to this subpart is not excluded, regardless of its current use or function.

definition of "facility," (*supra* note 2) excludes buildings having four or fewer dwelling units, this contention, if established, would be a valid defense. It, of course, says nothing about the structure on Connecticut Avenue in Norwalk, which was cited in Count II.

By letter, dated October 14, 1992, the ALJ directed the parties to submit prehearing exchanges by December 18, 1992, if a settlement had not been reached by that time. Respondent was directed to:

1. State the factual basis for the assertion that the demolished structures referred to in the complaint were one and two family homes and thus not facilities as defined in the regulation.

2. Describe Testa's [Respondent's] principal business and state factual basis for denial of allegation that Testa was an "owner or operator of a demolition or renovation activity" as defined in 40 C.F.R. § 61.141.

3. Describe relationship between Testa and Respondent O'Brien for the demolitions referred to in the complaint. Include a description of activities performed by Testa and O'Brien on the mentioned projects.

4. Submit a statement of the quantity or Testa's best estimate of RACM encountered in the demolition of the structures referred to in the complaint.

At the request of Complainant, the parties were granted an initial extension of time to February 5, 1993, to file prehearing exchanges, and on subsequent motions by Complainant, this date was

extended to June 11, 1993[3]. On June 4, 1993, Counsel for Respondent, Michael Gene Clear, Esq., served a Withdrawal of Appearance, and on June 10, 1993, Complainant filed its Prehearing Memorandum and supporting exhibits. To date, Respondent has not filed a prehearing exchange nor has it requested an extension of time to file such an exchange.

On January 10, 1994, Complainant submitted a Status Report, in which it was reported that Respondent was involved in a state receivership process entitled Sam J. Testa v. Testa Excavating Co., Inc., Docket No. CV93-0129219 (Stamford/Norwalk Judicial District of the Connecticut Superior Court). Finally, on June 10, 1994, Complainant moved for a Default Order against Testa Excavating Co., Inc., pursuant to 40 C.F.R. § 22.17, for failing to file a prehearing exchange as ordered by the ALJ. 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, and may result in the assessment of the full amount of the penalty demanded in the complaint. *Id.*

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[3] Subsequently, additional extensions of time to file its prehearing exchange were requested by Respondent O'Brien, while it negotiated a Consent Agreement with Complainant. Because of the settlement with O'Brien (*supra* note 1), the facts described herein pertain only to Respondent Testa Excavating Co., Inc.

As indicated above, Respondent has failed to submit a prehearing exchange or provide any basis for excusing such failure and has not responded to the motion for default. Although Complainant appears not to dispute Testa's characterization of the buildings in Stamford, identified in Count I of the complaint, as "one and two family homes," it, nevertheless, contends that these buildings are within the definition of a facility as defined in 40 C.F.R. § 61.141, because the demolition was part of a commercial "redevelopment project," (Prehearing Memorandum, at 7). Complainant cites the preamble to the rule in support of this contention (55 Fed. Reg. 48412, November 20, 1990, and asserts that this interpretation has been communicated to the regulated community and enforced by EPA for years. Because the purpose for demolishing a building has nothing to do with the risks associated with the presence of asbestos, the logic of this interpretation of the rule is difficult to fathom. Nevertheless, it appears to be established EPA policy and will be accepted for the purpose of this proceeding. Accordingly, I find Respondent Testa to be in default and grant Complainant's motion for a default order.

The following findings of fact and conclusions of law as to issues of liability and penalty are made pursuant to Section 22.17(c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22.

INITIAL FINDINGS OF FACT

1. On June 17, 1992, Complainant issued a Complaint and Notice of Opportunity for Hearing (Complaint) against Respondent, alleging violations of Section 112 of the Act, 42 U.S.C. § 7412, and Asbestos NESHAP, 40 C.F.R. Part 61, Subpart M.

2. On July 24, 1992, Respondent Testa filed an Answer to the Complaint.

3. On September 2, 1992, Respondent Testa filed an Amended Answer to the Complaint.

4. By letter dated October 14, 1992, the Administrative Law Judge directed the parties to submit their respective prehearing exchanges by December 18, 1992, if a settlement had not been reached by that date.

5. At the request of Complainant, the parties were granted an extension of time to June 11, 1993 to file prehearing exchanges.

6. On June 4, 1993, Counsel for Respondent Testa submitted a Withdrawal of Appearance as counsel.

7. On June 10, 1993, Complainant filed its Prehearing Memorandum.

8. No prehearing exchange has been filed by Respondent Testa.

9. On January 10, 1994, Complainant submitted a Status Report in which it was reported that Respondent Testa was involved in a state receivership process entitled Sam J. Testa v. Testa Excavating Co., Inc., Docket No. CV93-0129219 (Stamford/Norwalk Judicial District of the Connecticut Superior Court).

INITIAL CONCLUSIONS OF LAW

1. Respondent has failed to comply with the Order of the presiding Administrative Law Judge to file its prehearing exchange, and has failed to show good cause as to why its prehearing exchange has not been filed, and is, therefore, in default pursuant to 40 C.F.R. § 22.17(a).

2. Respondent's involvement in a state receivership process does not constitute good cause for its failure to file its prehearing exchange. *See* In re Bio-Regional Energy Associates, Ltd., Docket No. III-423-C, at 4 (Jul. 28, 1992) (Order on Default); *See also* 40 C.F.R. § 22.17.

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

Therefore, I make the following additional findings of fact and conclusions of law as alleged by Complainant.

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In 1973, under Section 112(b) of the Act, as previously amended[4], 42 U.S.C. § 7412(b), the Administrator of the U.S. Environmental Protection Agency promulgated the National Emission Standards for Hazardous Air Pollutants for asbestos. Since that

[4] Pub. L. No. 95-95, 91 Stat. 385 (August 7, 1977). References herein to the "Act" are references to the Clean Air Act as amended in 1990. Any reference to the "Act as previously amended" is a reference to the Clean Air Act as amended in 1977.

time, those regulations have been revised and repromulgated and are codified at 40 C.F.R. Part 61, Subpart M (Asbestos NESHAP) (55 Fed. Reg. 48406 (November 20, 1990)).

2. Pursuant to the Asbestos NESHAP, the notification and work practice requirements of 40 C.F.R. § 61.145(b) and (c) apply to each owner or operator of a demolition activity at a facility if the combined amount of regulated asbestos-containing material (RACM) is at least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or at least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously (Threshold Quantity) (40 C.F.R. § 61.145(a)(1)).

3. Pursuant to the Asbestos NESHAP, only the notification requirements of 40 C.F.R. §§ 61.145(b)(1), (2), (3)(i), (3)(iv), (4)(i) through (4)(vii), (4)(ix), and (4)(xvi) apply to each owner or operator of a demolition activity in a facility if the combined amount of RACM is less than the Threshold Quantity (40 C.F.R. § 61.145(a)(2))[5].

4. Pursuant to the Asbestos NESHAP, each owner or operator of a demolition activity in a facility described in 40 C.F.R. § 61.145(a)(1) is required to provide the Administrator with written notice of intention to demolish at least 10 working days before

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[5] Because it is undisputed that some asbestos was encountered in the demolitions at issue, it is unnecessary to address Complainant's assertion that notification is required even if no asbestos is present.

asbestos stripping or removal work or any other activity begins (40 C.F.R. § 61.145(b)(3)(i)).

5. Pursuant to the Asbestos NESHAP, each owner or operator of a demolition activity in a facility described in 40 C.F.R. § 61.145(a)(2) is required to provide the Administrator with written notice of intention to demolish at least 10 working days before demolition begins (40 C.F.R. § 61.145(b)(3)(i)).

6. Respondent Testa is a corporation organized under the laws of Connecticut, does business in Connecticut, and is located in Stamford, Connecticut.

7. Respondent Testa is a "person," as that term is defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e).

8. Each of the buildings in question in this case, located at 126-134 Wardwell Street in Stamford, Connecticut, and 354 Connecticut Avenue in Norwalk, Connecticut, is a "facility," as that term is defined in 40 C.F.R. § 61.141.

9. At all times relevant herein, Respondent Testa was an "owner or operator of a demolition or renovation activity," as defined in 40 C.F.R. § 61.141, with respect to each of the above-referenced facilities or each of the demolitions referenced below, or both.

10. Beginning on or about June 26, 1991, Respondent Testa participated in a "demolition," as defined in 40 C.F.R. § 61.141, at 126-134 Wardwell Street in Stamford, Connecticut (Wardwell Street Demolition).

11. At no time before or during the Wardwell Street Demolition did Respondent Testa provide the Administrator with written notice of intention to demolish the facility located at 126-134 Wardwell Street in Stamford, Connecticut.

12. Accordingly, Respondent Testa violated the Asbestos NESHAP and Section 112 of the Act during the course of the Wardwell Street Demolition.

13. Beginning on or about November 26, 1991, Respondent Testa participated in a "demolition," as defined in 40 C.F.R. § 61.141, at 354 Connecticut Avenue in Norwalk, Connecticut (Connecticut Avenue Demolition).

14. At no time before or during the Connecticut Avenue Demolition did Respondent Testa provide the Administrator with written notice of intention to demolish the facility located at 354 Connecticut Avenue in Norwalk, Connecticut.

15. Accordingly, Respondent Testa violated the Asbestos NESHAP and Section 112 of the Act during the course of the Connecticut Avenue Demolition.

CONCLUSION

Respondent's Answer and Amended Answer to the Complaint do not raise any matter which could support a decision that Complainant has failed to establish a prima facie case or that could justify the dismissal of the complaint. Further, an examination of the prehearing exchange documents submitted by Complainant supports the allegations in the Complaint that Respondent violated the Asbestos

NESHAP and Section 112 of the Act. I therefore find that Respondent has violated the Asbestos NESHAP and the Act by failing to provide the Administrator with prior written notice of intention to demolish a facility covered by the Act and the Asbestos NESHAP.

PENALTY

Section 113(e) of the Act and the Civil Penalty Policy, as well as Appendix III to the Penalty Policy, mandate that several factors including the size of the business, the economic impact of the penalty on the business, the duration of the violation, and the seriousness of the violation be considered in setting the proposed penalty. As pointed out above, Complainant initially proposed a civil penalty of $32,000. No allocation of this proposed penalty was made between the Respondents[6]. Subsequently, Complainant reduced the proposed penalty to $10,000, based on information provided by Respondents concerning the nature of the violation and Respondents' size, as well as the settlement between Complainant and Respondent O'Brien[7]. Moreover, Complainant's Prehearing Memorandum indicates that Complainant considered, *inter alia*, Respondent's net worth in calculating the revised proposed penalty.

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[6] In cases involving more than one party, the Civil Penalty Policy recommends that the Government seek a "sum for the case as whole, which the defendants allocate among themselves." Clean Air Act Stationary Source Civil Penalty Policy, Section VIII.

[7] EPA's assessment of $10,000 against Respondent is apparently based on the Penalty Policy which states, "If the case is settled as to one defendant, a penalty of not less than the balance of the settlement figure for the case as a whole must be obtained from the remaining defendants." *Id.*

Respondent, on the other hand, has offered no information to challenge the proposed penalty, and the record in this matter provides no information to suggest that the proposed penalty constitutes an unreasonable application of the Penalty Policy in this case. Therefore, I conclude, based on the entire record, that Complainant has properly considered the factors delineated in the Act and the Penalty Policy. Accordingly, I find that the appropriate civil penalty to be assessed against Respondent Testa is $10,000.

ORDER[8]

Accordingly, IT IS ORDERED, pursuant to Section 113(d) of the Clean Air Act, as amended, 42 U.S.C. § 7413(d), that Respondent Testa Excavating Co., Inc., be assessed a civil penalty of ten thousand dollars ($10,000).

Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the order of the "Treasurer, United States of America," to the following address within sixty (60) days after the final order is issued:

USEPA - Region I
P.O. Box 360197M
Pittsburgh, PA 15251

[8] Pursuant to 40 C.F.R. § 22.17(b), this Order constitutes an Initial Decision. Unless an appeal is taken pursuant to 40 C.F.R. § 22.30(a) or the Environmental Appeals Board elects to review this decision, *sua sponte*, pursuant to 40 C.F.R. § 22.30(b), this Order shall become the final order of the Environmental Appeals Board in accordance with 40 C.F.R. § 22.27(c).

In addition, Respondent shall mail a copy of the check to the following persons:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region I (RCG)
J.F.K. Federal Building
Boston, MA 02203

and

Chief, Toxic Pollutants Compliance Section
U.S. Environmental Protection Agency
Region I (ATP)
J.F.K. Federal Building
Boston, MA 02203
Attention: Asbestos NESHAP Coordinator

Dated: March 28, 1995

Spencer T. Nissen
Administrative Law Judge