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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
JIFFY BUILDERS, INC.	)	Docket No. VII-97-CAA-132
	)	
Respondent	)	

DEFAULT ORDER

Whereas, Jiffy Builders, Inc. ("Respondent"), for the second time, without justification or excuse, failed to file a Prehearing Exchange as directed, Respondent is declared to be in default and to have committed the violations charged in the Complaint. The $22,000 civil penalty proposed in the Complaint is assessed against Respondent.

Appearances:

For Complainant:

Henry F. Rompage
Assistant Regional Counsel
United States Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

For Respondent:

Charles F. Speer, Esquire
Truman K. Eldridge, Esquire
Armstrong, Teasdale, Schlafly & Davis
2345 Grand, Suite 2000
Kansas City, Missouri 64108

Before:

William B. Moran
United States Administrative Law Judge

This Default Order is issued in a proceeding initiated pursuant to Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d). Complainant is the Director of the Air, RCRA and Toxics Division, Region VII, United States Environmental Protection Agency, ("EPA") and Respondent is Jiffy Builders, Inc. The basis of the Default Order is Respondent's failure to file a required Prehearing Exchange. By this Default Order, Respondent is declared to have violated Section 112 of CAA, 42 U.S.C. § 7412 and the regulations promulgated pursuant thereto, at 40 C.F.R. Part 61, Subpart M and Section 114 of CAA, 42 U.S.C. § 7414.

Accordingly, an order is imposed on Respondent that assesses a civil penalty of $22,000. This issuance of Default Order grants Complainant's Motion for a Default Order filed on April 27, 1998.

PROCEDURAL BACKGROUND

1. On August 29, 1997, Complainant issued to Respondent a Complaint alleging violations of the CAA, Section 112, 42 U.S.C. § 7412 and Section 114, 42 U.S.C. § 7414 and proposing a $22,000 penalty.

2. On September 4, 1997, Respondent sent a letter regarding the Complaint to the Regional Hearing Clerk of Region VII. Respondent's letter was treated as an Answer to the Complaint.

3. On September 30, 1997, the Presiding Judge directed the Parties to submit their Prehearing Exchange by December 1, 1997, for Complainant and by December 22, 1997, for Respondent.

4. On October 31, 1997, Complainant filed its Prehearing Exchange but the Respondent did not file its Prehearing Exchange.

5. The Consolidated Rules of Practice ("Consolidated Rules"), 40 C.F.R. Part 22, provide that a party may be found in default, *inter alia,* upon failure to comply with a prehearing order of the Presiding Judge. 40 C.F.R. § 22.17(a).

> 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 allegation.

Id.

6. On January 13, 1998, Complainant filed a Motion for Default Order, alleging Respondent's failure to file its Prehearing Exchange as grounds for default. The file in this matter includes a return receipt showing Respondent was served with the Motion.

7. An Order to Show Cause was issued on February 10, 1998. Respondent submitted responsive documents dated February 19, 1998, and February 20, 1998, the latter being a request for enlargement of time. Complainant had no objection and by Order of March 3, 1998, Respondent was given until March 4, 1998, to respond to the Order to Show Cause. On March 4, 1998, Respondent complied with the Order to Show Cause.

8. By Order of March 25, 1998, Complainant's Motion was denied and Respondent was ordered to submit its Prehearing Exchange by April 20, 1998. In bold print the Order noted that the Respondent, Jiffy:

> **is now represented by counsel and is expected to comply in a timely fashion with all Orders . . .**

Order at 1.

9. On April 27, 1998, Complainant filed its second Motion for Default Order, averring that, as of April 27, 1998, Respondent had still not filed its Prehearing Exchange.

10. On May 5, 1998, Respondent's counsel filed a Motion to Enlarge Time to File Prehearing Exchange together with a one and one-half page response designated as

"Respondent's Prehearing Exchange."

11. On May 21, 1998, EPA filed its Response to Respondent's Motion for Enlargement of Time to File Prehearing Exchange along with a Motion to File Response Out of Time.[(1)]

12. On May 22, 1998, Respondent filed its response to EPA's May 21st filing.

FINDINGS OF FACT AND CONCLUSION OF LAW

13. The Respondent has, for the second time in this proceeding and without presenting justification, failed to comply with my Order directing that its Prehearing Exchange be submitted by April 20, 1998.

14. The Respondent is again in default. 40 C.F.R. § 22.17(a)(2) of the Consolidated Rules of Practice provides that a party may be found in default ***after motion or sua sponte*** upon failure to comply with a prehearing order.

15. As noted in my Default Order in Gwinnett County Department of Public Utilities, Docket No. CWA-404-97-10, October 21, 1997, the parties are required to adhere to the procedural rules. This standard applies not only to EPA but equally to respondents.

16. The Respondent's default is unexcused.

17. Respondent Jiffy Builders, Inc. of Columbia, Missouri is a business incorporated under the laws of the State of Missouri.

18. In July and August, 1996, Respondent contracted with Paul M. Wooldridge, owner, to demolish the Cochran Building in the 400 block of East High Street, Boonville, Missouri.

19. Respondent's activities referenced in paragraph 18 above constituted a demolition activity as the term is defined at 40 C.F.R. § 61.141.

20. At the time of the demolition referred to in paragraph 18, Respondent was the "owner or operator of a demolition activity" as defined at 40 C.F.R. § 61.141.

21. 40 C.F.R. § 61.145(a) requires the owner or operator of a demolition activity, prior to commencement of the demolition, to thoroughly inspect the facility for the presence of asbestos.

22. On or about July and August, 1996, Respondent failed to thoroughly inspect the facility Cochran Building for the presence of asbestos prior to Respondent's commencement of the demolition activity at the facility, as required by 40 C.F.R. § 61.145(a) and Section 112 of the CAA, 42 U.S.C. § 7412.

23. Respondent completely demolished the facility Cochran Building.

24. Respondent's failure to comply with 40 C.F.R. § 61.145(a) is a violation of Section 112 of the CAA 42 U.S.C. § 7412.

25. 40 C.F.R. § 61.145(b) requires that each owner or operator of a demolition activity provide the Administrator with written notice of intention to demolish (setting forth specified information), at least ten (10) working days before asbestos removal work or any other activity begins that would break up, dislodge, or similarly disturb asbestos material.

26. On or about July and August, 1996, Respondent completely demolished the facility Cochran Building and failed to provide the Administrator (or delegatee) written notice of intention to demolish the facility Cochran Building as required by 40 C.F.R. § 61.145(b) Sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412 and 7414.

27. Respondent's failure to comply with 40 C.F.R. § 61.145(b) is a violation of Sections 112 and 114 of the CAA, 42 U.S.C. §§ 7412 and 7414.

28. Section 113(d) of the CAA, 42 U.S.C. § 74139(d) authorizes a civil penalty of up to $25,000 per day for each violation of the CAA.

PENALTY

29. The record in this proceeding does not indicate any history of prior violations of the CAA by Respondent.

30. Complainant asserted that it took due notice of the nature, circumstances, extent and gravity of the above-cited violations in accordance with the CAA, Section 113(e), 42 U.S.C. § 7413(e), and the Stationary Source Civil Penalty Policy, October 25, 1991 and the May 5, 1992, Final Revisions to the Asbestos Demolition Renovation Civil Penalty Policy dated August 22, 1989, as well as Respondent's history of any prior violations and degree of culpability.

31. Complainant asserted further that it calculated the penalty without making any upward adjustments for any factors such as history of prior violations or degree of culpability, in arriving at the proposed penalty of $22,000 set forth in the Complaint.

32. The $22,000 civil penalty is reasonable in terms of the CAA. Section 113 of the CAA provides for persons such as Respondent, to be subject to a maximum penalty of $25,000 per violation per day. Complainant alleged only two (2) violations, subjecting Respondent to a maximum penalty of $50,000. The amount above is over one-third, but less than one-half of this statutory maximum penalty. This fraction of the maximum penalty for Respondent is reasonable in this matter. Respondent failed to inspect the facility for asbestos. If the presence of asbestos had been found, proper removal techniques as required by law should have been applied. Respondent failed to provide notification as required, depriving EPA (or delegatee) the opportunity to inspect to assure no asbestos was present. Often, the regulatory agency inspector does find asbestos present. At that point, proper removal techniques could be employed. Conversely, Respondent has no prior history of a violation which would justify assessing an even higher civil penalty. In this situation a civil penalty of $22,000, or between one-third and one-half of the statutory maximum, should achieve appropriate deterrence, the object of civil sanctions.

ORDER[(2)]

Respondent is found to be in default for its failure to file a Prehearing Exchange as directed, and accordingly, is found to have committed two (2) violations of the CAA, Section 112 and 114, 42 U.S.C. §§ 7412 and 7414, as charged in the Complaint and in Complainant's Motion for Default Order. Complainant's Motion is thus GRANTED

For Respondent's Default and these two (2) violations, Respondent is assessed a civil penalty of $22,000.

Therefore, pursuant to 40 C.F.R. § 22.17, Respondent is hereby ordered to pay a civil penalty of Twenty-Two Thousand Dollars ($22,000). Payment of the penalty shall become due, according to 40 C.F.R. § 22.17(a), in sixty (60) days from the date this Default Order becomes final. Payment shall be made by forwarding a cashier's check or certified check, payable to "Treasurer, United States of American," to:

Mellon Bank
(Regional Hearing Clerk)
EPA-Region VII
PO Box 360748M
Pittsburgh, Pennsylvania 15251

Failure to pay the civil penalty imposed by this Default Order shall subject Respondent to the assessment of interest and penalty charges on the debt pursuant to 4 C.F.R. § 102.13.

_____
William B. Moran

Dated: June 2, 1998
Washington, D.C.

1. EPA's May 2, 1998, Response and its accompanying Motion to File the Response Out of Time is Denied.

2. This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(b). Pursuant to Section 22.27(c) of the Consolidated Rules, 40 C.F.R. § 22.27(c), an Initial Decision "shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, *sua sponte*, to review the initial decision." Under Section 22.30(a) of the Consolidated Rules, 40 C.F.R. § 22.30(a), the parties have twenty (20) days after service upon them of an Initial Decision to appeal it. The address for filing an appeal is as follows:

Environmental Appeals Board
U.S. Environmental Protection Agency
Weststory Building (WSB)
607 14th Street, N.W., 5th Floor
Washington, D.C. 20005

In the Matter of Jiffy Builders, Inc., Respondent
Docket No. VII-97-CAA-132

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Default Order**, dated June 2, 1998, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

Venessa Cobbs
Regional Hearing Clerk
U.S., EPA, Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

Copy by Certified Mail to:

Counsel for Complainant

Henry F. Rompage, Esquire
Senior Assistant Regional Counsel
U.S., EPA, Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

Counsel for Respondent

Charles F. Speer, Esquire
Truman K. Eldridge, Esquire
Armstrong, Teasdale, Schlafly & Davis
2345 Grand Avenue, Suite 2000
Kansas City, Missouri 64108

_____

Elaine Malcolm
Legal Assistant

Dated: June 2, 1998
Washington, D.C.