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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Cornerstone Baptist Church,	)	Docket No. TSCA-V-C-55-90
	)	
Respondent	)	

ORDER ON DEFAULT

This proceeding was initiated by the U.S. Environmental Protection Agency, Region V, ("EPA") (Complainant) under Sections 16 and 207(a) of the Toxic Substance Control Act ("TSCA" or the "Act"),[1/] 15 U.S.C. §§ 2615 and 2647(a), for the assessment of a civil penalty in the amount of $4,000 against the Cornerstone Baptist Church, Union City, Indiana (Respondent) for failure to comply with 40 CFR Part 763, Subpart E. Specifically, Respondent is alleged, inter alia, to have violated section 203(i) of the Act and 40 CFR § 763.93(a)(1), by failure to develop and submit an asbestos management plan. Section 763.93(a)(1) provides in pertinent part:

1/ Title II of TSCA, commonly referred to as the Asbestos Hazard Emergency Response Act ("AHERA"), was enacted for the purpose of protecting America's school children and school employees from serious health risks which may result from exposure to asbestos. AHERA requires, inter alia, that local education agencies (LEA) develop asbestos management plans for the identification and abatement of hazardous asbestos-containing material in school buildings.

> On or before October 12, 1988, each local education agency shall develop an asbestos management plan for each school, including all buildings that they lease, own, or otherwise use as school buildings, and submit the plan to an Agency designated by the Governor of the State in which the local education agency is located. . . .

On April 24, 1989, EPA issued a Notice of Noncompliance ("NON") informing Respondent of the failure to submit an asbestos management plan and cautioning it as to the serious legal implications that would obtain from continued noncompliance with the Act. Respondent, however, took no corrective action in response to this notice. Thereafter, on May 7, 1990, Complainant filed a formal complaint against Respondent setting forth the specific allegations, supra, and proposing a civil penalty in the amount of $4,000. The complaint was served on Respondent under cover of a Transmittal Letter which highlighted the health risks associated with exposure to asbestos, emphasized the particular need to identify and abate levels of the substance in the Nation's schools and reiterated Respondent's statutory responsibilities as a local education agency (LEA) in the nationwide effort.

On May 12, 1990, Respondent answered the complaint by asserting, in pertinent part, that:

> [T]he Church. . . is not subject to the Toxic Control Act, [sic] 15 U.S.C. § 2601 nor the Environmental Protection Agency Consolidated Rules of Practice (40 C.F.R. Part 22 or 763), but is protected by the First Amendment of the Constitution of the United States of America [sic] which forbids the enactment of any law respecting the establishment of a religion or prohibiting the free exercise thereof.

This letter was interpreted as a request for hearing and, pursuant to the Rules of Practice (40 CFR Part 22), the matter was

forwarded to the Chief Judge for designation of an ALJ to preside at the hearing, by a letter from the Regional Hearing Clerk, dated July 16, 1990. A copy of this letter was sent to the Church. By letter, dated July 21, 1990, Mr. Lloyd D. Shepherd, Pastor of Respondent, informed Chief Judge Frazier that "I have not and will not request a hearing on the matters alleged in the EPA complaint." Respondent reiterated its contention that EPA had no jurisdiction in the matter.

By a letter, dated August 3, 1990, Respondent was informed that the matter was before the ALJ only because the Church had filed an answer which had been interpreted as contesting either, or both, the facts upon which the complaint is based or of the appropriateness of the proposed penalty. Respondent was further informed that if the answer (request for hearing) were withdrawn, the Church would be deemed to have admitted the facts alleged in the complaint and may be found in default. Respondent was informed that its jurisdictional argument was unlikely to be accepted in any forum and given an opportunity to reconsider its position.

In a reply, dated August 23, 1990, Respondent stated that it was seeking further counsel in this matter and that ". . . you may

expect our answer shortly."[2/] This letter was not, however, a reconsideration of the Church's position that it has not and will not request a hearing. The Church has failed to make any further response to my letter of August 3, 1990. Based on this failure, I issued an order on October 16, 1990, terminating the period in which Respondent might reconsider its withdrawal of a request for a hearing. This order had the effect of allowing Complainant to move for a default order.

On January 29, 1991, Complainant filed a motion for a default order pursuant to 40 CFR § 22.17, noting Respondent's withdrawal of its request for hearing. The motion recited that the complaint charged Respondent with failure to develop a management plan for each school building as required by section 203(i) of the Act and 40 CFR § 763.93 and that, under section 22.17(a) of the Rules of Practice, a party, upon motion, may be found in default after failing to file a timely answer to the complaint. Respondent's continued failure to develop a management plan was noted and the motion requested that Respondent be found in default and the full amount of the proposed penalty of $4,000 be assessed against it. The Church did not respond to the motion.

[2/] Although my letter of August 23, 1990, was in letter format, the letter was in effect an order of the Presiding Officer. Pursuant to section 22.17 of the Rules of Practice (40 CFR Part 22), a party may be found to be in default for failure to comply with an order of the Presiding Officer.

FINDINGS OF FACT

1. Respondent, Cornerstone Baptist Church, owns, leases or otherwise uses a building located at 933 N. Howard Street, Union City, Indiana.
2. The building referred to in paragraph 1 above is a "school building," as defined in section 202(13) of TSCA, 15 U.S.C. § 2642(13) and 40 CFR § 763.83.
3. Respondent is a local educational agency (LEA) as defined in section 202(7) of TSCA, 15 U.S.C. § 2642(7) and 40 CFR § 763.83.
4. Respondent has failed to develop and submit an asbestos management plan in accordance with section 203(i) of TSCA, 15 U.S.C. § 2643(i) and 40 CFR Part 763.93.
5. On April 25, 1990, the U.S. Environmental Protection Agency, issued a Complaint and Notice of Opportunity for Hearing to Respondent, pursuant to section 207 of TSCA, 15 U.S.C. § 2647. The complaint alleged that the Respondent had violated 40 CFR § 763.93 by failing to develop and submit an asbestos management plan and was therefore subject to penalties under section 207(a)(3) of TSCA.
6. A civil penalty of $4,000 was proposed to be assessed against the Respondent. Complainant has provided evidence that this penalty was properly determined in accordance with sections 16 and 207 of TSCA, 15 U.S.C. §§ 2615 and 2647.

7. Although Respondent filed an answer which was interpreted as a request for a hearing, it has withdrawn that request and is now in default.

8. Respondent has failed to develop and submit an asbestos management plan.

CONCLUSIONS OF LAW

1. Respondent is in default and has admitted the facts alleged in the complaint.

2. Respondent is a "local education agency" as defined in section 202(7) of the Act, 15 U.S.C. § 2642(7) and 40 CFR § 763.83.

3. Respondent has violated section 203(i) of the Act (15 U.S.C. § 2643(i)) and 40 CFR § 763.93 by failing to develop and submit an asbestos management plan in accordance with 40 CFR § 763.93.

4. Respondent's failure to develop an asbestos management plan is a violation of section 15 of the Act and subjects Respondent to liability for a civil penalty in accordance with sections 16 and 207, 15 U.S.C. §§ 2615 and 2647.

5. The penalty of four thousand dollars ($4,000) proposed in the complaint was properly determined.

D I S C U S S I O N

The only matter warranting discussion is Respondent's argument that, because of the First Amendment, the Act and regulation are not applicable and EPA is without jurisdiction in the matter. AHERA and its implementing regulation, 40 CFR Part 763, Subpart E, is, however, a facially neutral law of general applicability and thus within Supreme Court precedent to the effect that such a law is not unconstitutional merely because it may incidentally effect or restrict religious activities. See, e.g., Employment Division v. Smith, _____ U.S. _____, 110 S.Ct. 1595, 108 L.Ed. 2d 876 (1990) (free exercise clause did not prohibit the State of Oregon from applying its drug laws to the religious use of peyote). See also St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2nd Cir. 1990), cert. denied, _____ U.S. _____, 59 U.S.L.W. 3433 (March 4, 1991) (New York City's Landmark's Law prohibiting alteration or demolition of buildings without approval of Commission did not impose an unconstitutional burden on the free exercise of religion). Inasmuch as there is no evidence that the Act at issue here prevents the Church from practicing its religion or coerces it in any way as to the nature of those practices, the claim that the First Amendment is a bar to the enforcement of the Act and regulation as to Respondent is rejected.

A default order will be entered assessing a penalty of $4,000 against Cornerstone Baptist Church.

O R D E R

It having been determined that Respondent, Cornerstone Baptist Church, violated the Act and regulation as alleged in the complaint, a penalty of $4,000 is assessed against it in accordance with sections 15 and 207 of the Act (15 U.S.C. §§ 2615 and 2647).[3/] The penalty shall be paid within 60 days of the receipt of this Order by the submission of a cashier's or certified check in the amount of $4,000 payable to the Treasurer of the United States, designated on the reverse side "For Deposit Into the Asbestos Trust Fund, 20 U.S.C. § 4022, to the following address:

Regional Hearing Clerk
EPA - Region 5
P.O. Box 70753
Chicago, IL 60673

Failure to make payment in accordance with this Order, may result in this matter being referred to the Attorney General in accordance with section 16(a)(4) of the Act for the institution of an action to recover the penalty in an appropriate U.S. District Court.

Dated this 27th day of March, 1991.

Spencer T. Nissen
Administrative Law Judge

[3/] This Order constitutes an initial decision, which, unless appealed in accordance with section 22.30 of the Rules of Practice (40 CFR Part 22), or unless the Administrator elects sua sponte to review the same as therein provided, will become the final order of the Administrator in accordance with section 22.27(c).