

9/30/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

RECEIVED
OCT 01 1993
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

IN THE MATTER OF)
)
JEFFERSONVILLE BAPTIST SCHOOL,) DOCKET NO. TSCA-V-C-029-92
)
Respondent)

ORDER ON DEFAULT

The Complainant, the Director of the Environmental Sciences Division of the United States Environmental Protection Agency (U.S. EPA), Region V, filed, on April 9, 1993, a motion requesting entry of a default order against the Respondent, Jeffersonville Baptist School, in the above case, pursuant to 40 C.F.R. Section 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Consolidated Rules). The Motion alleged that Respondent has failed to file an Answer to the March 30, 1992 Complaint, and that Respondent failed to respond to two orders issued by the Presiding Officer.

On August 13, 1993, I issued an order denying, at that time, Complainant's motion for a default order. Instead, I gave Respondent a final opportunity to file a substantive Answer to the Complaint and to comply with my letter directing a prehearing exchange.

Respondent was directed to file an Answer to the Complaint and Notice of Opportunity for Hearing within twenty (20) days of receipt of my order of August 13, 1993. (See Section III "Opportunity to Request a Hearing" at pp. 5-6 of the Complaint and Notice of Opportunity for Hearing of March 30, 1992.) Respondent was also directed to comply with my letter of July 9, 1992, directing a prehearing exchange, and to submit said prehearing exchange with the Answer to the Complaint. Respondent was further informed that failure to comply with my order would result in my issuing the default order submitted by Complainant on April 9, 1993.

Respondent has not filed a substantive answer to the Complaint. Respondent has not filed a prehearing exchange. Respondent has not moved for an extension of time to comply with my order directing Respondent to file the Answer and the prehearing exchange. Therefore, I must find that Respondent has failed to comply with my order of August 13, 1993. I am compelled to find that Respondent is in default.

FINDINGS OF FACT

Based upon the record before me, I make the following Findings of Fact:

1. The Respondent is the Jeffersonville Baptist School, located in Jeffersonville, Indiana 47130.
2. The Toxic Substances Control Act (TSCA), 15 U.S.C. Section 2601 et seq., was amended pursuant to the Asbestos Hazard Emergency Response Act (AHERA) Pub. L. No. 99-519, 100 Stat. 2970 (October 22, 1986). AHERA was subsequently amended pursuant to Pub. L. No. 100-368 (July 18, 1988) and Pub. L. No. 101-687 (November 28, 1990). See 15 U.S.C. Section 2641 et seq. Pursuant to

Section 203(i) of TSCA, 15 U.S.C. § 2643(i), U.S. EPA promulgated the Asbestos Containing Materials in Schools Rule, 40 C.F.R. Part 763, Subpart E (52 Fed. Reg. 41846, hereinafter "the Rule").

3. The Respondent is a Local Education Agency ("LEA") as defined in Section 202(7) of TSCA, 15 U.S.C. § 2642(7), and 40 C.F.R. § 763.83.

4. The Respondent owns, leases or otherwise uses a building located at 5015 East Highway 62, Jeffersonville, Indiana 47130.

5. The building referred to in Paragraph 4 is a "school building" as defined in Section 202(13) of TSCA, 15 U.S.C. § 2642(13), 40 C.F.R. § 763.83.

6. 40 C.F.R. § 763.93 and Section 205(a) of TSCA, 15 U.S.C. § 2645, require that each LEA, by October 12, 1988, or by May 9, 1989, if the LEA received a deferral from the State, submit a management plan for each school, including all buildings that they lease, own or otherwise use as a school building.

7. Section 205(e) of TSCA, 15 U.S.C. § 2645, required each state to submit to U.S. EPA, by December 31, 1988, a written statement on the status of the management plan submissions and deferral requests by LEAs in the State ("status report").

8. Section 205(e)(2) of TSCA, 15 U.S.C. § 2645, required each state to submit an updated report on the status of management plan submissions to U.S. EPA by December 31, 1989.

9. The status report submitted to U.S. EPA by the State of Indiana ("State"), described in Paragraph 9 above, and subsequent status reports submitted by the State, indicate that Respondent has not submitted a management plan for its school building located at 5015 East Highway 62, Jeffersonville, Indiana 47130.

10. Respondent failed to develop an asbestos management plan pursuant to Section 203(i) of TSCA, 15 U.S.C. § 2643(i) and 40 C.F.R. § 763.93.

11. On March 30, 1992, Complainant initiated a civil administrative proceeding for the assessment of a civil penalty pursuant to Section 207(a) of TSCA, 15 U.S.C. § 2601 et seq., by issuing an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint").

12. On April 1, 1992, Respondent signed the return receipt for the Complaint. See Comp. Ex. 6.

13. The Complaint alleged that Respondent failed to develop an asbestos management plan required by 40 C.F.R. § 763.93, promulgated under the authority of Section 203(i) of TSCA, 15 U.S.C. § 2643(i), therefore subjecting Respondent to civil penalties pursuant to Section 207(a) of TSCA, 15 U.S.C. § 2647(a). Pursuant to Section 207(a) of TSCA, 15 U.S.C. § 2647(a), Complainant proposed a civil penalty of four thousand dollars (\$4,000).

14. Respondent responded to the Complaint by a letter dated April 22, 1992, which Respondent claimed was not an Answer to the Complaint. See Respondent's November 12, 1992 letter.

15. The Presiding Officer issued a prehearing exchange order on July 9, 1992.

16. Complainant filed its prehearing exchange in this matter on September 22, 1992, pursuant an Order by the Presiding Officer.

17. The Presiding Officer issued an Order on October 27, 1992, directing Respondent to show cause why it had not filed its prehearing exchange by September 22, 1992.

18. Respondent responded to the Presiding Officer's October 27, 1992 Order by a letter dated November 12, 1992.

19. Respondent's letter dated November 12, 1992, stated that, inter alia, Respondent admitted receiving the Complaint and the Presiding Officer's two previous Orders, but stated it would not answer them.

20. On April 9, 1993, Complainant filed a Motion for Default Order.

21. The Motion for Default Order alleged that the proposed civil penalty of four thousand dollars (\$4,000) was prepared in accordance with the Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act ("Policy"), dated January 31, 1989, as amended January 19, 1990.

22. As stated on page 2 of the Policy, the Policy calls for administrative civil penalties to be issued to LEAs for violations identified in TSCA Section 207(a), 15 U.S.C. § 2647(a).

23. Pursuant to the Policy, failure to submit a management plan on or before the AHERA deadlines is considered to be a "Level 2, one day" violation. Policy, Pg. 28.

24. In determining the extent of violation for any given AHERA violation, the Policy states that "in situations where the quantity of asbestos involved in the AHERA violations cannot be readily determined, the civil penalty is to be calculated using the major extent category." Policy, pg. 13.

25. The Motion for Default Order states that because the asbestos program does not have any information regarding the physical construction of Respondent's building, Complainant calculated the base penalty using the major extent category.

26. The penalty matrix for LEAs is listed in Table "A" on page 11 of the Policy. The penalty for level 2, major extent category violation is four thousand dollars (\$4,000).

27. Section 207 of AHERA also requires that the Complainant consider the following factors in assessing a civil penalty against an LEA: a) seriousness of the violation; b) culpability, including history of noncompliance; c) ability to pay and d) the ability of Respondent to continue to provide educational services to the community.

28. The Motion for Default Order states that Complainant did not make any adjustments to the civil penalty based on culpability because it has not been shown that Respondent did not know of its responsibilities under AHERA, nor does Respondent have any history of past violation.

29. The Motion for Default Order states that Complainant did not have any information from Respondent upon which a determination of ability to pay could be made. Therefore, based on information reasonably available to it, Complainant did not adjust the civil penalty based on ability to pay or the ability of Respondent to continue to provide educational services to the community.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17(c) and based on the entire record, I make the following conclusions of Law:

1. The Complaint in this action was lawfully and properly served upon the Respondent, in accordance with 40 C.F.R.

§ 22.05(b)(1) of the Consolidated Rules.

2. Respondent was required to file an Answer to the Complaint within twenty (20) days of the service of the Complaint. 40 C.F.R. § 22.15(a).

3. Respondent's failure to file an Answer to the Complaint and failure to respond to the Presiding Officer's Orders, constitute an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a) and 22.15(d).

4. Respondent is a "Local Educational Agency," as defined in Section 202(7) of TSCA, 15 U.S.C. § 2642(7), and in 40 C.F.R. § 763.83.

5. The building which Respondent owns, leases, or otherwise uses, located at 5015 East Highway 62, Jeffersonville, Indiana 47130, is a "school building," as defined in Section 202(13) of TSCA, 15 U.S.C. § 2642(13), and in 40 C.F.R. § 763.83.

6. Sections 203(i) and 205(d) of TSCA Title II, 15 U.S.C. §§ 2643(i) and 2645(d), require that Respondent, by October 12, 1988, either have developed a valid asbestos management plan for each school building which Respondent owns, leases, or otherwise uses as a school building, or have submitted a valid request for deferral of submission of the management plan until May 9, 1989.

7. Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3), and 40 C.F.R. § 763.97(a), make it unlawful for Respondent to fail to develop such an asbestos management plan and provide that each separate failure to comply with respect to a single school building constitutes a violation of Section 207(a)(3) of TSCA.

8. Section 207(a) of TSCA, 15 U.S.C. § 2647(a), authorizes the assessment of a civil penalty of not more than five thousand dollars (\$5,000) for each day during which Respondent's violation continues, and states that any civil penalty collected shall be used by the LEA to comply with TSCA Title II, with any portion remaining unspent to be deposited into the Asbestos Trust Fund, established pursuant to Section 5 of the Asbestos School Hazard Abatement Act of 1984, codified at 20 U.S.C. § 4022.

9. Respondent violated Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3), by failing to develop an asbestos management plan, pursuant to Section 203(i) of TSCA, 15 U.S.C.

§ 2643(i), and regulations thereunder at 40 C.F.R. Part 763, Subpart E, for the school building referenced in Paragraph 5 above.

10. Respondent's violation, described in Paragraph 9 above, constitutes a violation of Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3), for which a civil penalty may be assessed.

11. When the Presiding Officer finds that a default has occurred, he or she shall issue a Default Order against the defaulting party and the order shall constitute the Initial Decision. 40 C.F.R. § 22.17(b).

12. Respondent's failure to file a timely Answer to the Complaint in this action and Respondent's failure to respond to the Presiding Officer's Orders, are grounds for the entry of a Default Order against the Respondent assessing a civil penalty for the TSCA violation referenced in Paragraph 9 above. A Default Order is so entered. 40 C.F.R. §§ 22.16 and 22.17.

DETERMINATION ON CIVIL PENALTY AMOUNT

Having found that Respondent has violated Sections 203(i) and 207(a)(3) of TSCA, 15 U.S.C. § 2643(i) and 2647(a)(3), and regulations thereunder at 40 C.F.R. Part 763, Subpart E, I have determined pursuant to 40 C.F.R. §§ 22.15(d) and 22.17(c) that four thousand dollars (\$4,000), the penalty amount proposed in the Complaint, is the appropriate civil penalty to be assessed against the Respondent.

Section 207(c) of TSCA, 15 U.S.C. § 2647(c), provides that, in determining the amount of the civil penalty, the following shall be considered: the significance of the violation, the culpability of the violator, including any history of previous violations, the ability of the violator to pay the penalty and the ability of the violator to continue to provide educational services to the community. EPA has issued an Interim Final Enforcement Policy for AHERA dated January 31, 1989, interpreting the enforcement considerations set forth in Section 207(c) of TSCA. In addition, Section 207(a) of TSCA, 15 U.S.C. § 2647(a), provides that the civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as civil penalties assessed and collected under Section 16 of TSCA, 15 U.S.C. § 2615 et seq. I have determined that the penalty amount recommended in the Complaint is appropriate based upon Sections 207(a) and 207(c) of TSCA and the above referenced EPA enforcement policy.

DEFAULT ORDER

Respondent is hereby ORDERED to comply with the following terms of this Default Order:

A. Respondent is hereby assessed a civil penalty in the amount of four thousand (\$4,000), and ordered to pay such civil penalty as directed in this Default Order.

B. Pursuant to 40 C.F.R. § 22.27(c), this Default Order shall become final within forty-five (45) days after service upon the parties unless it is appealed to the EPA Administrator or the

Administrator elects, sua sponte, to review it. Respondent shall, sixty (60) calendar days after this Default Order has become final, forward a cashier's or certified check, payable to the order of the "Treasurer of the United States of America," in the amount of four thousand dollars (\$4,000), unless waived in whole or in part pursuant to Paragraph D of this Default Order. The check shall state on the reverse side, "For Deposit into The Asbestos Trust Fund, 20 U.S.C. § 4022." Respondent shall mail the check by Certified Mail, Return Receipt Requested, to the following address:

U.S. Environmental Protection Agency
 Headquarters Accounting Operations Branch
 Attention: Asbestos Trust Fund
 P.O. Box 360277M
 Pittsburgh, PA 15251

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

Regional Asbestos Coordinator
 U.S. Environmental Protection
 Agency, (SP-14J)
 77 West Jackson Boulevard
 Chicago, Illinois 60604-3590

and

Regional Hearing Clerk
 U.S. Environmental Protection
 Agency, (MF-10J)
 77 West Jackson Boulevard
 Chicago, Illinois 60604-3590

C. Simultaneously with the payment described in Paragraph B, Respondent shall provide an accounting of the costs, if any, incurred by Respondent in developing and submitting its asbestos management plan, and any other costs incurring by Respondent in

complying with the requirements of AHERA, 15 U.S.C. § 2641 et seq. (collectively, the "costs of compliance"). The Accounting shall conform with generally accepted accounting principles. The accounting shall include notarized receipts, an independent auditing, or other equivalent proof of expenditures. A full copy of the accounting shall be provided, by first class mail, to the Regional Hearing Clerk and the Regional Asbestos Coordinator, as indicated in Paragraph B.

D. The Respondent shall pay the full civil penalty amount in Paragraph A, as described in Paragraph B, unless waived in whole or in part pursuant to this Paragraph D.

1. If the costs of compliance are equal to, or exceed the civil penalty amount in Paragraph A, the costs of compliance shall represent full payment of the penalty, and no payment pursuant to Paragraph B is necessary.

2. If the costs of compliance are less than the civil penalty amount in Paragraph A, Respondent shall pay, in lieu of the civil penalty amount, only the amount equal to the civil penalty amount minus the costs of compliance.

The penalty specified in Paragraph A, above, shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

E. Pursuant to 31 U.S.C. § 3717, an executive agency like EPA is authorized to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin

to accrue on the civil penalty if it is not paid sixty (60) calendar days after this Default Order becomes final as set forth in Paragraph B. In addition, a penalty charge of six percent per year will be assessed on any portion of the debt which remains delinquent more than thirty (30) days after payment is due.

F. Respondent shall otherwise comply with all applicable provisions of AHERA, rules promulgated thereunder, and other environmental laws. Nothing in this Default Order shall be construed as relieving Respondent of the duty to comply with any of these provisions in a timely manner.

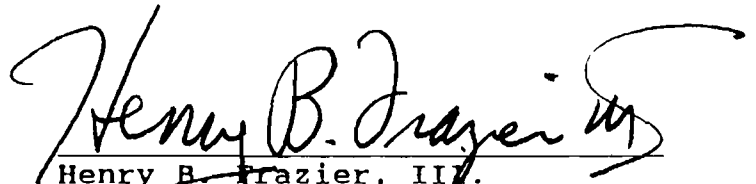
G. Pursuant to 40 C.F.R. § 22.30(a), any party may appeal an adverse ruling or Order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board and upon all other parties within twenty (20) days after the initial decision is served upon the parties. The address for the Environmental Appeals Board is:

Environmental Appeals Board
U.S. Environmental Protection Agency
401 M Street, S.W. (1900)
Washington, D.C. 20460

IT IS SO ORDERED.

Date:

September 30, 1993


Henry B. Frazier, II.
Chief Administrative Law Judge

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

1993 OCT 20 11 2:32

IN THE MATTER OF:

JEFFERSONVILLE BAPTIST SCHOOL

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DOCKET NO. TSCA-V-C-029-92

CERTIFICATE OF SERVICE

I hereby certify the Order of Default in the above referenced case, and this certificate have been serve as indicated below:

Order of Default and Certificate mailed Certified Mail Return Receipt Requested on October 7, 1993 to:

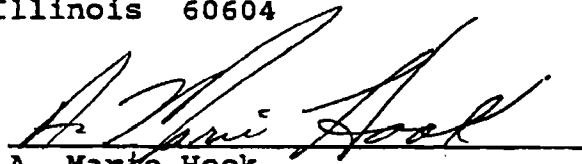
Reverend William W. Atkins
Pastor
Jeffersonville Baptist Temple
5015 East Highway 62
Jeffersonville, IN 47130

Certificate and file mailed Certified Mail Return Receipt Requested on October 7, 1993 to:

Bessie Hammiel
Regional Hearing Clerk
U.S. Environmental Protection Agency
401 M Street S.W., A-110
Washington, D.C. 60204

Certificate and Initial Decision hand delivered October 7, 1993 to:

Deborah A. Schmitt, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago, Illinois 60604
CS-3T



A. Marie Hook
Regional Hearing Clerk
U.S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago, Illinois 60604

Dated: October 6, 1993