UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

P & J ABATEMENT, INC. Cudahy, Wisconsin	:	Docket No. TSCA-V-C-01-91
Respondent	:	Judge Greene

ORDER
UPON MOTION FOR "ACCELERATED DECISION"

This matter arises under Section 16(a) of the Toxic Substances Control Act ("TSCA," or "the Act"), 15 U.S.C. § 2615(a), which provides for the assessment of civil penalties for violations of Section 15 of TSCA (15 U.S.C. § 2614) and duly promulgated regulations in an amount not to exceed $25,000 per day for each such violation.[1] The Act was amended by the Asbestos Hazard Emergency Response Act ("AHERA"), Public Law 99-519 on October 22, 1986 [see 15 U.S.C. § 2641 et seq.]. Section 15 of the Act, as

[1] Section 16(a) of TSCA, 15 U.S.C. § 2615(a), provides that "(A)ny person who violates a provision of section 2614 [section 15] of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 of this title."

amended, provides in pertinent part that it shall be unlawful for any person to fail or refuse to comply with any requirement of AHERA or any rule promulgated or order issued pursuant to AHERA.[2]

The complaint charged respondent with four violations of 40 C.F.R. Part 763, Subpart E, known as the "Asbestos-Containing Materials in Schools" rule, promulgated at 52 Federal Register 41846 pursuant to authority in section 203 of TSCA, 15 U.S.C. § 2643. Specifically, it was alleged that respondent failed to inspect visually certain areas in the library and adjacent hallway, and in the boiler room of the St. Sebastian School, Milwaukee, Wisconsin, in violation of 40 C.F.R. § 763.90 (i)(1)[3]; and that respondent failed to conduct proper air clearance monitoring in the same areas[4] in violation of 40 C.F.R. § 763.90(i)(2)(i). Violations of these regulations, as noted above, constitute violations of section 15 of the Act, 15 U.S.C. § 2614.[5] The total penalty proposed for the alleged violations was $25,000.[6]

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[2] Specifically, section 15 of the Act provides, in pertinent part, that "It shall be unlawful for any person to -- (1) fail or refuse to comply with . . . (D) any requirement of subchapter II [Asbestos Hazard Emergency Response] of this chapter [i.e. Chapter 53 of Title 15 -- Toxic Substances Control] or any rule promulgated or order issued under subchapter II of this chapter; . . . ."

[3] **Complaint and Notice of Opportunity for Hearing**, Count I-A, ¶¶ 12-16; Count I-C, ¶¶ 23-26..

[4] **Id**, ¶¶ 17-22 (Count I-B) and 27-31 (Count I-D).

[5] See note 2, **supra**.

[6] Complainant had proposed $10,000 for failure to inspect visually the library/hallway; $1500 for failure to inspect visually the boiler foom; $13,000 for failure to undertake air clearance in the library/hallway; and $3000 for failure to undertake air clearance for the boiler room. Although these proposals totalled $27,500, complainant sought $25,000.

In answering the complaint and requesting a hearing, respondent did not plead specifically to the charges.

Despite lengthy settlement efforts, the parties were unable to settle. Pretrial exchange and stipulations were filed according to schedule. Thereafter, complainant moved for "accelerated decision" as to both liability for the violations alleged in Counts I-B and I-D, and as to the penalty proposed, asserting that no genuine issue of material fact exists and that complainant is entitled to judgment as a matter of law. In its motion for "accelerated decision," complainant indicated that information from respondent had caused a withdrawal of the request for civil penalties for the alleged failure to inspect certain areas visually (Counts I-A and I-C). Accordingly, since the charges pertaining to visual inspection are not being pursued, they will be dismissed.[7]

Respondent's response to the motion does not set forth evidence that places at issue any of the facts alleged in Count I-B and I-D of the complaint.

Count I-B of the complaint sets forth the gist of 40 C.F.R. § 763.90(i)(6), to the effect that air clearance monitoring procedures for demonstrating completion of a response action involving less than 3000 square feet of asbestos-containing building material require the analysis of a minimum of five air

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[7] See complainant's **Motion for Accelerated Decision**, at 20-21. In fact, the parties have stipulated that respondent was not responsible for completing the visual inspections of the boiler room and library of the St.2 Sebastian School. (**Stipulations** of the parties, at 3, ¶ 15).

clearance samples for each affected functional space.[8] It is alleged that respondent had failed to collect a minimum of five air samples, as provided by 40 C.F.R. §§ 763.90(i)(2)(i) and 763.90 (i)(6), from the functional space in question (the hallway and library), where a total of approximately 1400 square feet of asbestos containing building material was removed. Count I-D of the complaint sets forth the air clearance monitoring procedures for demonstrating completion of a response action involving less than 160 square feet of asbestos containing building materials as provided in 40 C.F.R. § 763.90(i)(5), and alleges that respondent failed to conduct proper air clearance monitoring of the boiler room, where approximately 125 square feet of friable, suspect, asbestos containing thermal system insulation had been removed from two boilers.[9] Failure to conduct a minimum of five air clearance samples for the affected space (boiler room) was alleged to violate 40 C.F.R. §§ 763.90(i)(2)(i) and 763.90(i)(5). Complainant proposes a penalty of $13,000 for the alleged failure to conduct proper air clearance monitoring for the hallway/library, and $3000 for the alleged failure in the boiler room.[10]

40 C.F.R. § 763.90 (i)(2)(i) provides in pertinent part that "(A) person designated by the local education agency shall collect air samples . . . to monitor air for clearance after each removal,

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[8] **Complaint** at 5, ¶ B-17.

[9] The parties stipulated that respondent collected two air clearance monitoring samples from the hallway/library, and one air sample from the boiler room. **Stipulations** of the parties, ¶ 102.

[10] **Id.** at 8; **Motion for Accelerated Decision** at 1.

encapsulation, and enclosure project involving ACBM[11] except for projects that are of small scale, short duration." The parties have stiplated that respondent was designated by the St. Sebastian School to collect air samples in connection with the removal projects.[12]

40 C.F.R. § 763.90(i)(3) provides in pertinent part that:

> . . . . an action to remove, encapsulate, or enclose ACBM shall be considered complete when the average concentration of asbestos of **five air samples collected within the affected functional space and analyzed** . . . is not statistically significantly different . . . from the average asbestos concentration of five air samples collected at the same time outside the affected functional space and analyzed in the same manner, and the average asbestos concentration of the three field blanks described in Appendix A of this subpart E is below the filter background level, as defined in Appendix A of this subpart E, of 70 structures per square milimeter (70 s/mm).[13] [Emphasis added]

40 C.F.R. § 763.90(i)(6) provides, in pertinent part, that

> . . . . a local education agency may analyze air monitoring samples collected for clearance purposes by PCM to confirm completion of removal, encapsulation, or enclosure of ACBM that is less than or equal to **3000 square feet**. . . (T)he action shall be considered complete when the results of samples collected in the affected functional space and analyzed . . . show that the concentration of fibers **for each of the five samples** is less than or equal to a limit quantitation for PCBBBM ().01 fibers per cubic centimeter, 0.01 f/cm . . . . [Emphasis added]

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[11] Asbestos containing building material.

[12] **Stipulations** of the parties, at 2, ¶ 8.

[13] The footnote in the original CFR is omitted in this quotation.

40 C.F.R. § 763.90(i)(5) provides in pertinent part that

> At any time, a local education agency may analyze air monitoring samples collected for clearance purposes by phase contrast microscopy (PCM) to confirm completion of removal, encapsulation, or enclosure of ACBM that is greater than small-scale, short-duration and **less than or equal to 260 square feet** . . . (T)he action shall be considered complete when the results of samples collected in the affected functional space and analyzed . . . show that the concentration of fibers for **each of the five samples** is less than or equal to a limit of quantitation for PCM (0.01 f.cm.) of air. [Emphasis added]

These regulations, by which respondent is bound in its removal, encapsulation, and enclosure activities, clearly provide that five samples must be collected and analyzed, and must show certain results, before the "action" can be considered "complete." Respondent has stipulated that it took only one sample in the boiler room, and only two samples in the hallway/library areas. Accordingly, it is clear that respondent did not observe the requirements of the regulations.

No different standard of liability has been provided with respect to violations of Subchapter II of the Act (Asbestos Hazard Emergency Response) than for violations of Subchapter I (Control of Toxic Substances). Indeed, as has been noted above, section 15(1) of Subchapter I of TSCA was amended to provide that rules promulgated or orders issued under subchapter II pursuant to the Asbestos Hazard Emergency Response Act constitute violations of section 15 of TSCA. Accordingly, no showing of intent to violate or knowledge of violations of the regulations need be made;

asbestos-removing businesses are strictly liable for violations of these regulations, regardless of whether such violations may have been inadvertent or unintended, and regardless of whether the individuals who performed the removal actions or their employers even knew of such violations.

Complainant has moved for full "accelerated decision" herein. However, only the liability portion of this matter is decided. Respondent asks for,[14] and must be given an opportunity to address the appropriateness of the penalty sought by complainant, unless that issue can be settled. "Accelerated decision" as to the amount of the penalty, or even as to whether a penalty will be assessed for violations, as distinct from liability for the violations, is granted only in rare circumstances.[15] Generally there is great reluctance to impose civil sanctions without providing the violator with an opportunity for an oral evidentiary hearing. Often credibility determinations must be made in order to determine the appropriate amount of penalty, and, in this connection, live testimony can be helpful. A principal consideration in determining whether a penalty may be assessed in the absence of such a hearing is whether it is reasonable to believe that additional, relevant,

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[14] Respondent's response to the motion for "accelerated decision" specifically requests a "hearing . . . to reduce the $16,000 penalty considerably due to the circumstances of the allegations . . . ."

[15] Decision and Order **In the Matter of Jenny Rose, Inc.**, Docket No. IF&R-III-395-C, February 22, 1993.

material, and credible evidence would be obtained.[16] It is seldom clear that there is nothing to be gained from an oral evidentiary hearing.[17]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is and was at all relevant times a person subject to the Act and regulations issued at 40 C.F.R. Part 763, pursuant to authority.

2. Respondent contracted with the St. Sebastian School, Milwaukee, Wisconsin, to remove asbestos containing building materials and thermal system insulation from certain areas of the school. Respondent was the person designated to collect air samples, as provided in 40 C.F.R. § 763.90(i)(2)(i), to monitor for air clearance following the removal projects.

3. Respondent was required to collect a minimum of five air samples from the hallway/library area, and a minimum of five air samples from the boiler room of the school, as provided by 40 C.F.R. §§ 763.90(i)(6), 763.90(i)(5), and 763.90(i)(3). Respondent did not collect five air samples from either area, in violation of these regulations and in violation of 15 U.S.C. § 2614 (section 15

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[16] See **In the Matter of Bestech, Inc.**, Docket No. IF&R-004-91-7073-C, March 1[illegible], 1992; **Environmental Protection Agency v. Streeter Flying Service, Inc.**, IF&R VII-612C-85P, August 27, 1985; **In re World Wide Industrial Supply**, FIFRA 1085-01-13-012P, January 9, 1986.

[17] Order Denying Motion for "Accelerated Decision" as to Penalty for Certain Counts, **Swing-A-Way Manufacturing Co.**, Docket No. EPCRA-VII-91-T-650-E, March 12, 1993.

of TSCA).

4. Accordingly, respondent is liable for a civil penalty for these violations of the regulations and the Act.

ORDER

It is hereby ordered that:

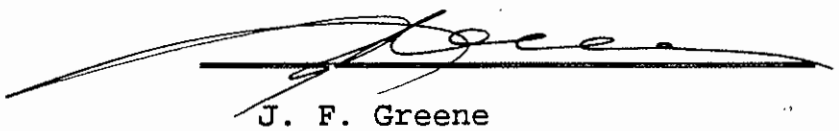
1. Complainant's motion for accelerated decision as to liability for the violations alleged in the complaint is hereby granted.

2. Complainant's motion for accelerated decision as to the amount of the penalty is denied.

3. Counts I-A and I-C of the complaint are dismissed with prejudice.

4. No later than April 22, 1994, the parties shall confer for the purpose of making an effort to settle the penalty issue in this matter.

5. During the week ending April 29, 1994, the parties shall report to this office upon the status of their effort to settle the penalty issue.



J. F. Greene
Administrative Law Judge

Washington, D. C.
March 22, 1994

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on March 23, 1994.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: P & J Abatement, Inc.
DOCKET NUMBER: TSCA-V-C-01-91

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