

12/16/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	:	
	:	
House Analysis & Associates	:	Docket No. CAA-III-006
and Fred Powell	:	
	:	
	:	
Respondent	:	
	:	

Clean Air Act, 42 U.S.C. §7401 et seq. Where respondent failed to comply with order of Administrative Law Judge requiring the exchange of prehearing information, respondent was found to be in default pursuant to 40 C.F.R. § 22.17, and to have admitted violations charged. The full amount of the penalty proposed in complaint was assessed.

ORDER ON DEFAULT

By: J. F. Greene	Dated: <u>December 16, 1992</u>
Administrative Law Judge	

APPEARANCES:

For Complainant: Matthew C. Frank
Assistant Regional Counsel
U. S. Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia, PA 19107

For Respondent: Fred Powell, Ph. D.
House Analysis & Associates
P. O. Box 504
Huntingdon Valley, PA 19006

INTRODUCTION

This proceeding was initiated pursuant to Section 113(d) of the Clean Air Act ("the Act"), 42 U.S.C. §7413(d), by issuance of a complaint on June 30, 1992, which charged House Analysis & Associates and Fred Powell ("respondent") with violations of the Act. Respondent submitted its Answer on August 4, 1992.

The complaint charged respondent with violations of Sections 113 and 114 of the Act, 42 U.S.C. §§ 7413 and 7414, for respondent's alleged failure to provide certain information regarding asbestos-containing materials found in a rental storage unit utilized by respondent. Complainant sought a civil penalty of \$51,000 for the violations alleged in the complaint.

On February 27, 1992, Mr. Richard D. Ponak of the U. S. Environmental Protection Agency (EPA) conducted an inspection of storage unit J264, Public Storage Rental Spaces, Public Storage Management, Inc., 950 Jaymor Road, Southampton, Pennsylvania ("the storage unit"), which was being utilized by respondent. At the time of the inspection, Mr. Ponak observed approximately sixty (60) bags and several open boxes of asbestos-containing duct and piping insulation ("stored asbestos-containing material"). Analysis of samples taken at the time of the inspection confirmed that the material was in fact asbestos.

On or about April 6, 1992, pursuant to the authority of, inter alia, Section 114(a) of the Act as amended, 42 U.S.C. §7414(a), EPA issued a letter to respondent ("Section 114 information demand") in

order to obtain certain information regarding the stored asbestos-containing material, and in order to determine whether respondent was in violation of, inter alia, the National Emission Standard for Hazardous Air Pollutants ("NESHAP") for asbestos, 40 C.F.R. Part 61, Subpart M.

On or about April 16, 1992, respondent submitted a written response to the Section 114 information demand. However, EPA considered respondent's submission to be inadequate and incomplete, in that the response failed to provide required information relating to the asbestos-containing material located in the storage unit.

On or about April 30, 1992, EPA issued a Compliance Order pursuant to Section 113(a)(3) of the Act ("Compliance Order"), which ordered respondent to provide the information regarding the asbestos-containing material located in the storage unit within five (5) days. Respondent failed to submit any further information to EPA. EPA regarded this failure as a violation of the Section 114 information demand or the Compliance Order.

Complainant thereupon issued a complaint to respondent on June 30, 1992, alleging violations of Section 113(a)(3) and 114(a) of the Act, 42 U.S.C. §§7413(a)(3) and 7414(a). Respondent submitted its Answer on or about August 4, 1992. Subsequently, on August 19, 1992, it was reported that settlement could not be achieved. By Order dated August 25, 1992, the parties were directed to exchange information in anticipation of trial including witness lists and copies of documents to be offered in evidence. Complainant was

specifically directed to show the rationale for the proposed civil penalty; respondent was specifically directed to state whether or not it would contest the civil penalty proposed and, if so, to submit financial data to support any assertion of inability to pay.

Complainant made a timely submission of its prehearing exchange on September 22, 1992. Complainant's prehearing exchange listed as witnesses the EPA inspector who had visited Respondent's storage unit, and an additional witness to explain the calculation of the penalty. Attached exhibits included EPA's "Clean Air Act Stationary Source Civil Penalty Policy," dated October 25, 1991, as clarified January 17, 1992. Respondent neither submitted its prehearing exchange nor requested an extension of time. On September 30, 1992, complainant moved for an accelerated decision as to liability and penalty or, in the alternative, a default order against respondent.

In view of the fact that respondent twice failed to submit information as requested, failed to file pretrial exchange as ordered, and did not respond to complainant's motion, and it having been concluded that respondent is in default, complainant's motion for default is hereby granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Authority for the issuance of the Complaint and Notice of Opportunity for Hearing is contained in Section 113(d) of the Act, 42 U.S.C. §7413(d).

2. Section 114(a) of the Act, 42 U.S.C. §7414(a), authorizes the Administrator of EPA, for the purposes of determining whether

any person is in violation of an emission standard under Section 112 of the Act, 42 U.S.C. §7412, to require any person who is subject to the requirements of any such emission standard to establish and maintain records; make reports; install, use, and maintain monitoring equipment; sample emissions (in accordance with procedures or methods, at locations, at intervals, during periods and in such manner as the Administrator shall prescribe); and provide such other information as the Administrator may reasonably require.

3. Section 113(a)(3)(B) of the Act, 42 U.S.C. §7413(a)(3)(B), authorizes the Administrator of EPA to make findings of violation and issue an order requiring persons to comply with, inter alia, the requirements of Section 114 of the Act.

4. Respondent Fred Powell, individually and/or doing business as House Analysis & Associates, is an asbestos contractor located in Huntingdon Valley, Pennsylvania. At all times relevant to this complaint, respondent has been doing business in the Commonwealth of Pennsylvania.

5. Respondent is a "person," as that term is defined in Section 302(e) of the Act, 42 U.S.C. §7602(e), and within the meaning of Section 113(d) of the Act, 42 U.S.C. §7413(d).

6. At all times relevant to this complaint, respondent, through Sue Powell, utilized a storage unit, number J264, at Public Storage Rental Spaces, Public Storage Management, Inc., 950 Jaymor Road, Southampton, Pennsylvania.

7. On February 27, 1992, a duly-authorized EPA inspector observed bagged and unbagged asbestos-containing material located in the above-referenced storage unit.

8. Pursuant to Section 114(a) of the Act, 42 U.S.C. §7414(a), EPA issued a letter to respondent, dated April 6, 1992 ("Section 114 letter") which required respondent, inter alia, to provide certain information regarding the stored asbestos-containing material in order to determine whether violations of the National Emission Standard for Asbestos ("Asbestos NESHAP"), codified at 40 C.F.R. Part 61, Subpart M, and promulgated pursuant to Sections 112 and 114 of the Clean Air Act, 42 U.S.C. §§7412 and 7414, had occurred. The Section 114 letter required respondent to submit all information to EPA within fourteen (14) calendar days of its receipt of EPA's Section 114 letter. The Section 114 letter is attached (Attachment 1.)

9. By letter dated April 16, 1992, respondent submitted a written response to the Section 114 letter. However, said written response failed to provide EPA with all of the information required pursuant to the Section 114 letter. Specifically, respondent failed to provide any substantive response to the following paragraphs of the Section 114 letter:

- (1) Describe in detail the origin(s) of the bagged and unbagged stored asbestos material, including, but not limited to, the names and address of each and every site from which this stored asbestos material was originally removed;
- (2) State exactly what work was undertaken by you or your company at each and every location identified in Number 1 immediately above;

- (3) Describe any asbestos-containing material of any kind that you and/or your company stripped or removed from any site or location identified in Number 1 immediately above, and estimate the volume of material stripped or removed from each such site or location;
- (4) Describe in detail the manner in which the stored asbestos material was disposed of, including, but not limited to, the following information:
 - (a) location(s) at which the stored asbestos material was disposed;
 - (b) copies of waste shipment manifests or other records;
 - (c) evidence, including air monitoring results, that storage unit J264 was properly decontaminated in accordance with 40 C.F.R. Part 61, Subpart M;
 - (d) the names of any and all persons who participated in the disposal and/or cleanup of the stored asbestos material located in said storage unit.
- (6) List all previous violations assessed by any federal, state or local regulatory agency against House Analysis & Associates, associated with the handling of asbestos;

10. Respondent's failure to submit the information required by the Section 114 letter constitutes a violation of Section 114(a) of the Act, 42 U.S.C. §7414(a).

11. Pursuant to Section 113(a)(3)(B) of the Act, 42 U.S.C. §7413(a)(3)(B), EPA issued a Compliance Order, dated April 30, 1992, which required respondent to submit, within five days of its receipt of the Order, all of the information required to be provided pursuant to the Section 114 letter, as described in Paragraph 9 above.

12. Respondent failed to submit to EPA the information

required pursuant to the Section 114 letter, as described in Paragraph 9 above, in accordance with the requirements of the Compliance Order.

13. Respondent's failure to comply with the requirements of the Compliance Order constitutes a separate violation of Section 113(a)(3)(B) of the Act, 42 U.S.C. §7413(a)(3)(B).

14. By Order of August 25, 1992, the parties were ordered to engage in pretrial exchange no later than September 22, 1992. Respondent was directed to submit such financial materials as would support any claim that it could not afford to pay the penalty proposed by complainant. Complainant's exchange was filed on September 22, 1992. Respondent filed no exchange, and has not explained its failure to do so.

15. Thereafter, complainant moved for accelerated decision, or, in the alternative, for default. Respondent did not respond to complainant's motion.

16. Respondent's failure to comply with the pretrial order constitutes a default. Respondent is considered to have admitted all facts alleged in the complaint and to have waived a hearing on the factual allegations. 40 C.F.R. §22.17(a).

17. Section 113(d) of the Act, 42 U.S.C. §7413(d), authorizes a civil administrative penalty of up to \$25,000 per day for each violation of the Act.

18. EPA proposed that a civil penalty of fifty-one thousand dollars (\$51,000) be assessed against respondent as follows:

A. Count I:

- | | | |
|----|---|-------------|
| 1. | Length of time of violation:
(Measured from at least
April 14, 1992). | \$ 8,000.00 |
| 2. | Importance to the regulatory
scheme:
(Incomplete Response to Section
114 Requirement to Provide
Information). | \$15,000.00 |
| 3. | Size of the violator: | \$ 5,000.00 |

B. Count II:

- | | | |
|----|--|-------------|
| 1. | Length of time of violation:
(Measured from at least
May 6, 1992). | \$ 8,000.00 |
| 2. | Importance to the regulatory
scheme:
(Violation of Compliance
Order). | \$15,000.00 |

\$51,000.00

19. The proposed civil penalty was determined in accordance with Section 113 of the Act and EPA's Clean Air Act Stationary Source Civil Penalty Policy, of October 25, 1991. In determining the amount of any penalty to be assessed, Section 113(e) of the Act, 42 U.S.C. §7413(e) requires EPA to take into consideration the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

20. The gravity component for Counts I and II of the Complaint was derived by adding together the dollar amounts

assigned to each of the specific objective factors which are enumerated in the Penalty Policy. These factors are designed to measure the seriousness of violations and reflect the considerations listed in the Clean Air Act. Pursuant to the Penalty Policy, the total penalty proposed in the instant case for failure to respond adequately to EPA's Section 114 information demand and for failure to respond to the Compliance Order was calculated as follows:

Count I:

1. Actual or possible harm:

a.	Level of Violation (this amount is zero because no violation of an emission standard was alleged.)	\$	0.00
b.	Toxicity of Pollutant (This amount is zero because no violation of an emission standard was alleged.)	\$	0.00
c.	Sensitivity of Environment (This amount is zero because no violation of an emission standard was alleged.)	\$	0.00
d.	Length of Time of Violation: (Measured from at least April 28, 1992).	\$	8,000.00

2. Importance to the regulatory scheme:

Incomplete Response to Section 114 Demand to Provide Information	\$15,000.00
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3. Size of the violator: \$ 5,000.00

(Based on an assumption that Respondent's net worth is between \$ 100,001 - \$1,000,000).

Count II:

1. Actual or Possible Harm:

- | | | |
|----|---|-------------|
| a. | Level of Violation
(This amount is zero because
no violation of an emission
standard was alleged.) | \$ 0.00 |
| b. | Toxicity of Pollutant
(This amount is zero because
no violation of an emission
standard was alleged.) | \$ 0.00 |
| c. | Sensitivity of Environment
(This amount is zero because
no violation of an emission
standard was alleged.) | \$ 0.00 |
| d. | Length of Time of Violation:
(Measured from at least
May 6, 1992). | \$ 8,000.00 |

2. Importance to the regulatory scheme:

Violation of Compliance Order	\$15,000.00
<u>TOTAL PROPOSED PENALTY:</u>	<u>\$51,000.00</u>

21. EPA considered several other factors set forth in Section 113(e) of the Act, 42 U.S.C. §7413(e), in determining the appropriate penalty for violations of the Act. In this case, respondent had no history of violation. No adjustment for culpability was appropriate. No cleanup costs were incurred by the United States in response to respondent's violations. EPA has not argued that respondent gained substantial economic benefit as a result of its noncompliance. Thus the gravity component for Counts I and II of the Complaint remained unadjusted.

Respondent was notified in the complaint that the penalty amount would be based upon respondent's ability to pay and ability to continue in business. Further, the Order of August 25, 1992, directed respondent to exchange evidence to support any claim that

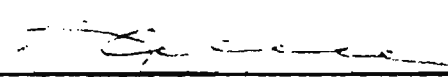
it was unable to pay a penalty in the amount proposed in the complaint. However, respondent made no prehearing exchange.

ORDER¹

Accordingly, IT IS ORDERED, pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. 7413(d), that respondent, House Analysis & Associates and Fred Powell, be assessed a civil penalty of \$51,000.

Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address with sixty (60) days after the final order is issued. 40 C.F.R. §22.17(a).

EPA Region III
Regional Hearing Clerk
P. O. Box 360515M
Pittsburgh, PA 15251



J. F. Greene
Administrative Law Judge

Dated: December 16, 1992
Washington, D.C.

¹ Pursuant to 40 C.f.R. §22.17(b), this Order constitutes the initial decision in this matter. Unless an appeal is taken pursuant to 40 C.F.R. §22.30, or the Administrator elects to review this decision on his own motion, this decision becomes the Final Order of the Administrator. 40 C.F.R. §22.27(c).

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 December 16, 1992.


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

NAME OF RESPONDENT: House Analysis & Associates and Fred Powell
DOCKET NUMBER; CAA-III-006

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