

5/11/98

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
ENVIRONMENTAL MANAGEMENT)
CONSULTANTS, INC.)
_____)

Docket No. TSCA-09-91-0018

1. TSCA-Default Decision - where the Respondent failed to file its prehearing as directed by the Court and also failed to respond to Complainant's Motion for a Default Order, the Court is justified in issuing a Default Order finding liability for the acts alleged and assessing the proposed penalty.

Appearances:

For Complainant:

David McFadden, Esquire
U.S. Environmental Protection
Agency - Region IX
75 Hawthorne Street
San Francisco, California

For Respondent:

Mr. William W. Watson
President
Environmental Management
Consultants, Inc.,
DBA Asbestos Control
Consultants
HC 30 Box 1201
Prescott, Arizona 86301

Before: Thomas B. Yost
Administrative Law Judge

MAY 19 1992

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE PRESIDING OFFICER**

**ENVIRONMENTAL PROTECTION AGENCY
REGION IX
HEARING CLERK**

IN THE MATTER OF:) Docket No. TSCA-09-91-0018
ENVIRONMENTAL MANAGEMENT)
CONSULTANTS, INC.)
_____)

INITIAL DECISION AND DEFAULT ORDER

By Motion for Default Order dated April 1, 1992 Complainant, the Director of the Air and Toxics Division of the United States Environmental Protection Agency, Region 9, moved for an Order assessing a civil penalty in the amount of thirty nine thousand dollars (\$39,000) against Respondent, Environmental Management Consultants, Inc. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules") at 40 C.F.R. Part 22, and 40 C.F.R. §22.17 thereunder, and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Civil Penalty Amount, Complainant's Motion for Default Order is hereby GRANTED.

I. FINDINGS OF FACT

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

1. On July 19, 1991, the Complaint in this action was served on Respondent.
2. Respondent filed an Answer to the Complaint on December 20,

1991.

3. By order dated February 12, 1992, the Presiding Officer directed the parties to each file a prehearing exchange by March 18, 1992.

4. Complainant filed a timely prehearing exchange on March 17, 1992, which included, inter alia, the specific method of determination of the proposed penalty.

5. Respondent has failed to file a prehearing exchange by March 18, 1992, as ordered by the Presiding Officer.

6. The Complaint alleged the facts set forth in paragraphs (a) through (i) below.

(a) The Respondent, an Arizona corporation, is a "person" pursuant to TSCA.

(b) TSCA Section 16(a)(1), 15 U.S.C. § 2615(a)(1), authorizes the Administrator of EPA to assess a civil penalty of up to \$25,000 per day for each violation of TSCA Section 15, 15 U.S.C § 2614.

(c) Globe Unified School District ("GUSD") is a "Local Educational Agency" ("LEA"), as defined in TSCA Section 202(7), 15 U.S.C. § 2642(7), and 40 C.F.R. § 763.83.

(d) GUSD owns, at the minimum, three buildings which constitute the Globe Junior High School ("GJHS"), located in Globe, Arizona.

(e) Each of the buildings referred to in Paragraph [d] is a "school building," as defined in TSCA Section 202(13), 15 U.S.C. § 2642(13), and 40 C.F.R. § 763.83.

(f) The Respondent, an "accredited asbestos contractor," as

defined in TSCA Section 202(1), and 40 C.F.R. § 763.83, was designated by, and contracted with GUSD to develop an asbestos management plan for each of the GJHS school buildings, pursuant to 40 C.F.R. § 763.93(e) ("management plan").

(g) 40 C.F.R. § 763.93, promulgated pursuant to TSCA Section 203(i), 15 U.S.C. § 2643(i), requires, inter alia, that each management plan include i) a blueprint, diagram, or written description of each school building that identifies clearly each location and approximate square or linear footage of homogeneous areas where material was sampled for Asbestos-Containing Material ("ACM"), and ii) homogeneous areas where friable suspected Asbestos Containing Building Material ("ACBM") is assumed to be ACM, and where nonfriable suspected ACBM is assumed to be ACM. 40 C.F.R. § 763.93(e)(ii).

(h) 40 C.F.R. § 763.93 requires, inter alia, that each management plan include an evaluation of the resources needed to complete response actions successfully and carry out reinspection, operations and maintenance activities, and periodic surveillance and training. 40 C.F.R. § 763.93(e)(11).

(i) Respondent has failed to comply with the requirements specified in paragraphs [g] and [h] above, and in doing so has violated TSCA Section 15(1)(D), 15 U.S.C. § 2614(1)(D).

7. The buildings referred to in Paragraph 6(d) are located at 367 Devereaux Street, Globe, Arizona.

8. On April 1, 1992, Complainant filed a Motion for Default Order. The Motion was served on the Respondent by first class mail

on April 2, 1992.

II. 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:

9. The Complaint in this action was served upon and received by the Respondent.

10. The Consolidated Rules required the Respondent to file a prehearing exchange by the due date specified in the order of the Presiding Officer. 40 C.F.R. § 22.17(a)

11. Respondent's failure to file a prehearing exchange constitutes an admission of all of the factual allegations in the Complaint, including the allegations set forth in paragraphs 6(a) through (i) above, and a waiver of Respondent's right to a hearing on such factual issues. 40 C.F.R. §§22.15(d) and 22.17(a).

12. Respondent is a "person" pursuant to TSCA.

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

14. Respondent violated Section 15(1)(D) of TSCA, 15 U.S.C. 2614(1)(D), and the requirements of 40 C.F.R. § 763.93, by failing to properly develop the management plan for the GJHS school buildings located at 367 Devereaux Street, Globe, Arizona.

15. Section 16(a)(1) of TSCA, 15 U.S.C. 2615(a)(1), authorizes the assessment of a civil penalty of up to \$25,000 per day for each violation of TSCA by persons other than an LEA. The Complaint sought a penalty of \$39,000.

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

17. Respondent's failure to file a timely prehearing exchange is grounds for the entry of a Default Order against the Respondent assessing a civil penalty for the violations described above.

III. DETERMINATION OF CIVIL PENALTY AMOUNT

Having found that Respondent has violated Section 15(1)(D) of TSCA, 15 U.S.C. 2614(1)(D), and the requirements of 40 C.F.R. 763.93 by failing to properly develop the management plan for the GJHS school buildings, I have determined pursuant to 40 C.F.R. §22.17(a) and (c) that thirty nine thousand dollars (\$39,000), the penalty amount proposed in the Complaint, is the appropriate civil penalty to be assessed against the Respondent.

Under the Consolidated Rules, the amount of the proposed civil penalty "shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act." 40 C.F.R. §22.14(c). Administrative civil penalties are to be assessed and collected pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, which provides that EPA shall take into account the nature, circumstances, extent and gravity of the violation, as well as ability to pay, ability to continue to do business, history of prior violations, the degree of culpability and any other factors as justice may require.

The applicable civil penalty guideline is the Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act, dated January 31, 1989. The policy is attached to Complainant's prehearing exchange as exhibit 4, and is incorporated herein by reference.

In considering the nature, circumstances, extent, and gravity of the violation, it should be noted that the violations alleged in the Complaint concern Respondent's failure to adequately develop a management plan. In particular, Respondent has failed to include specific information in the management plan which is required by 40 C.F.R. § 763.93. A key element of TSCA and the Asbestos-Containing Materials in Schools Rule, 40 C.F.R. Part 763, Subpart E ("the Rule") for preventing the exposure of children to asbestos in public and nonprofit private elementary and secondary schools is the requirement that management planners who develop asbestos management plans include all of the information specified in the Rule. Such information includes inspection results, inspection plans, detailed descriptions for dealing with asbestos incidents, and detailed descriptions of the asbestos-containing materials in and around the school buildings, as well as other information geared towards developing an effective, efficient, and safe program for dealing with asbestos-containing materials in schools. The Respondent's failure to properly develop an asbestos management plan including all of the required information demonstrates a lack of regard for the health and safety of the children, teachers, and employees who must work and study in the school buildings addressed

by Respondent's management plans, as well as a disregard for the law.

Under the Interim Final Enforcement Policy the base (unadjusted) penalty is calculated on a matrix, using on one axis circumstance levels ranging from 1 (highest) to 6 (lowest) and on the other axis the extent of potential harm caused by the violation (major to minor) based on the quantity of asbestos-containing materials involved in the violation. The circumstance level in the Interim Final Enforcement Response Policy for failing to properly develop an asbestos management plan is level two. The extent level is for each school building is properly designated as significant, based on the information in the inspection report for Globe Junior High School that at least 2500 square feet of Asbestos Containing Building Material ("ACBM") exists in the school as a whole, and the likelihood that the amount of ACBM in each school building is greater than 160 square feet. The base (unadjusted) penalty amount for a level two violation of significant extent is \$13,000 per building, for a total of \$39,000 for three buildings.

No upward or downward adjustment has been made in the penalty amount for culpability. Respondent, an accredited management planner, is charged with knowing the requirements of the AHERA regulations, and also had significant control over the situation to avoid committing the violations. In addition, in failing to file a timely prehearing exchange, Respondent has not shown a cooperative attitude which would warrant a reduction based on this factor.

No upward adjustment has been made for history of violations, since at the time the Complaint was filed the Respondent had no prior violations of TSCA.

Respondent has failed to produce any data that indicate an inability to pay or inability to continue in business. In the absence of such information, it would be inappropriate to mitigate the penalty amount.

There are no other factors apparent that would warrant a penalty adjustment in the interests of justice.

Accordingly, the appropriate civil penalty is thirty nine thousand dollars (\$39,000).

IV. COMPLIANCE WITH TSCA AND THE IMPLEMENTING REGULATIONS

As specified below, in addition to paying a civil penalty, Respondent is ordered come into compliance with TSCA and the Rule, specifically, the requirements specified in paragraphs 14 and 16 of the Complaint. Correction of the above deficiencies is necessary to ensure proper management of ACBM at GJHS.

IV. DEFAULT ORDER

WHEREFORE, pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. §22.17, Complainant's Motion for Default Order is hereby GRANTED. Respondent is hereby ORDERED to comply with all of the terms of this Default Order:

A. Respondent is hereby assessed a civil penalty in the amount of thirty nine thousand dollars (\$39,000) and ordered to pay such civil penalty as directed in this Default Order.

1. 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.

2. Respondent shall pay the civil penalty by certified or cashier's check payable to the Treasurer of the United States within sixty (60) days after issuance of the Default Order. The check shall be sent by certified mail, return receipt requested, to:

U.S. Environmental Protection Agency
Region IX
Regional Hearing clerk
P.O. Box 360863M
Pittsburgh, PA 13251

3. At the time payment is made to the above address, Respondent shall send a copy of the check by certified mail, return receipt requested, to the following address:

Regional Hearing Clerk (RC-1)
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

B. Within one hundred and twenty (120) days after the date of issuance of this Default Order, the Respondent shall come into compliance with the requirements specified in Paragraphs 14 and 16 of the Complaint for the management plan for Globe Junior High School.

1. Respondent shall submit to Complainant for review and approval a plan and schedule for coming into compliance with the above requirements within thirty (30) days after the date of issuance of this Default Order.

2. Within ten (10) days after compliance with the above

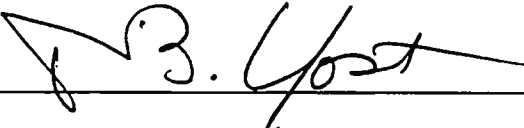
requirements is achieved, Respondent shall send to Complainant written documentation of such compliance, along with written certification, signed by Respondent's president, that such compliance has been achieved.

3. All correspondence to Complainant concerning compliance with the above requirements shall be sent to:

Jo Ann Semones
Chief, Asbestos Programs Section (A-4-4)
Air & Toxics Division
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

IT IS SO ORDERED.

Date: 5/11/92



Thomas B. Yost
Administrative Law Judge

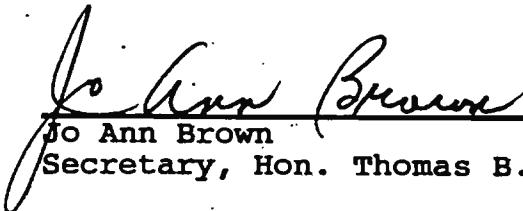
CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 C.F.R. § 22.27(a), I have this date forwarded via certified mail, return-receipt requested, the Original of the foregoing INITIAL DECISION/DEFAULT ORDER of Honorable Thomas B. Yost, Administrative Law Judge, to Mr. Seven Armsey, Regional Hearing Clerk, Office of Regional Counsel, United States Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, California 94105, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said INITIAL DECISION/DEFAULT ORDER to all parties, he shall forward the original, along with the record of the proceeding, to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C.,

who shall forward a copy of said INITIAL DECISION/DEFAULT ORDER to the Administrator.

Dated: 5/11/92


Jo Ann Brown
Secretary, Hon. Thomas B. Yost

CERTIFICATE OF SERVICE

I hereby certify that the INITIAL DECISION AND DEFAULT ORDER of the Presiding Officer, Thomas B. Yost, in the matter of Environmental Management Consultants, (TSCA-09-91-0018), dated May 11, 1992 has been filed with the Regional Hearing Clerk, and copies were served on Counsel for EPA, and on Respondent, as indicated below:

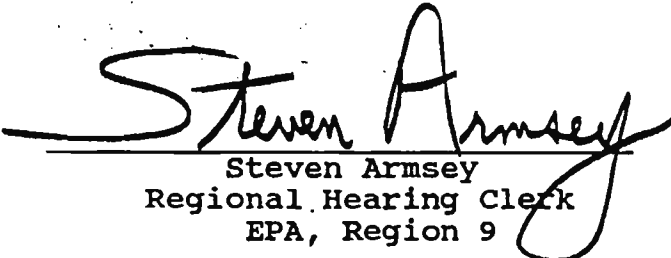
William W. Watson, President
ENVIRONMENTAL MANAGEMENT
CONSULTANTS, INCORPORATED
(dba Asbestos Control Consultants)
HC 30 - Box 1201
Prescott, Arizona 86301

First Class Mail
(Certified: P 424 454 821)

David McFadden, Esq.
Office of Regional Counsel
ENVIRONMENTAL PROTECTION AGENCY
75 Hawthorne Street
San Francisco, CA. 94105

Hand Delivered

Dated at San Francisco, Calif., this 20th day of May, 1992.


Steven Armsey
Regional Hearing Clerk
EPA, Region 9