UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Asbestos Abatement Services,
River Falls, Wisconsin

Docket No. CAA-031-1994
Judge Greene

Respondent

[formerly:

Kaukauna Electric
and Water Department,
Kaukauna, Wisconsin,

and

Asbestos Abatement Services,
Respondents

ORDER UPON MOTION FOR DEFAULT JUDGMENT

A Motion for Default Judgment has been lodged against Respondent Asbestos Abatement Services [Respondent] for failure to answer the complaint issued herein against it and Kaukauna Electric Company, Greenwood, Wisconsin [Kaukauna].[1] While Complainant and Kaukauna ultimately reached a settlement, the terms of which represent $40,000 of the total amount of the civil monetary penalty sought in the complaint.[2], [3], Respondent did not file an answer to the complaint with the Regional Hearing Clerk.

An Order to Show Cause issued on April 8, 1997, since (1) an answer is required unless Respondent does not care to defend the matter [4] , and (2) the matter cannot proceed to trial in the absence of a filing -- or some information -- that raises a dispute. Complainant responded with, inter alia, a statement of its intent to move for default judgment. Respondent did not respond to the Order to Show Cause.

Subsequently, Complainant filed the instant motion. Respondent did not respond. Accordingly, the matter is ripe for decision.

Default judgments are not favored and are not to be lightly entered for procedural error. Despite the lack of an answer, therefore, the complaint has been reviewed to ensure that a *prima facie* case was stated therein.

Discussion

Complainant's moving papers disclose the following sequence of events:
(1) August 1, 1994: the complaint issued together with a copy of the *Consolidated Rules of Procedure (Rules of Procedure)* which govern this proceeding.
(2) November 18, 1994: counsel for Complainant in a letter to Respondent reminded that an answer had not filed; he advised both that Kaukauna had answered the complaint on August 16, 1994, and that it was "imperative" for Respondent to "answer the complaint as soon as possible." [5] The letter recites that when complaint counsel had earlier telephoned Respondent, Respondent had assured "...that an answer would be forthcoming."
(3) On November 30, 1994, Respondent sent a two-line telephone facsimile (fax) to Robert Thompson, Esq., Assistant Regional Counsel, EPA Region V, who represented Complainant in this matter at the time, rather than to the Regional Hearing Clerk as prescribed at 40 C.F.R. § 22.15(a) of the Rules of Procedure
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(4) April 19, 1995: counsel for Complainant again wrote to Respondent, again to seek an answer to the complaint. 7

(5) March 24, 1997, and May 2, 1997: counsel for Complainant telephoned Respondent to notify that a settlement had been reached with Kaukauna, to extend an offer of settlement to Respondent, and to advise that if an answer was not received "soon," a default motion would be filed by Complainant. 8

The Rules of Procedure set forth the elements required of an answer to a complaint at 40 CFR § 22.15(b):

Contents of the Answer. The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue, and (3) whether a hearing is requested.

Despite the fact that a copy of the *Rules of Procedure* was attached to the complaint, Respondent's fax contains none of the elements required of an answer as set forth at 40 C.F.R. § 22.15(b). Nothing was placed at issue. Nothing was denied. Nothing was admitted. No suggestion of a defense to the charges was put forward. The matter cannot proceed to trial under these circumstances.

Respondent was reminded on two occasions in writing by counsel for Complainant that an answer to the complaint was due, and that failure to answer could be met by motion for default judgment. Respondent was reminded on two occasions in 1997, after the settlement with Kaukauna had taken place, that it would be necessary to answer. Nothing has been received. 9

Accordingly, since no conceivable basis for construing Respondent's fax as an answer, or as serving the purpose of an answer, comes to mind, it must be held that no answer to the complaint has been filed.10

It is determined, therefore, that Complainant's Motion for Default Order for failure to answer the complaint must be, and it is hereby GRANTED.

Findings and Conclusions 11

1. The Director the Air and Radiation Division of the United States Environmental Protection Agency, Region 5 (U.S. EPA), issued to Respondent and to Kaukauna Electric and Water Department a *Complaint and Notice of Opportunity for Hearing* in which Complainant alleged violations of section 112(c)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7412(c)(1), and 40 C.F.R. §§ 61.140-61.157, on August 1, 1994. The complaint proposed that a civil monetary penalty in the amount of $57,640 be assessed against both Respondent and (then Respondent) Kaukauna.

2. Complainant served Respondent by mailing, via certified mail, return receipt requested a copy of the above-referenced complaint together with a copy of the *Rules of Procedure* to the following address: Mr. Richard Enloe, President, Asbestos Abatement Services, 223 W. Cedar Street, River Falls, Wisconsin 54022 .

3. The complaint notified Respondent that it had thirty (30)days from receipt of the complaint to file an answer.

4. Complainant received a domestic receipt card which acknowledged Respondent's receipt of the complaint and *Rules of Practice.* The receipt, dated August 4, 1994, was signed by Janet L. Enloe, thus establishing that the complaint was received by Respondent.

5. On November 18, 1994, Complainant sent a letter to Respondent to notify Respondent that an answer was due and that, as of the date of the letter, no answer to file complaint had been received. In the letter, Respondent was reminded that if an answer was not filed in a timely manner, such failure to file could result in the issuance of a default order.

6. In a telephone facsimile (fax) dated November 30, 1994, Thomas J. Enloe requested a hearing on the matter. This fax was not in the form of an answer as set forth by the *Rules of Procedure*, nor was it directed to the proper official.

7. In a letter dated April 19, 1995, Complainant notified Respondent by certified mail return receipt requested that an answer was due and that an answer still had not been received. In that letter, Respondent was reminded that if an answer was not filed in a timely manner, U. S. EPA could seek a default order.

8. Complainant received a domestic receipt card which acknowledged receipt of the April 19, 1995, letter. The receipt card, dated April 22, 1995, was signed by Janet Enloe, thus establishing that Respondent received the letter.

9. On March 24, 1997, and May 2, 1997, Complainant telephoned Respondent at 715-425-5255 and 1-800-327-2734 to notify Respondent that U. S. EPA and Kaukauna had settled the action against Kaukauna and that U. S. EPA had arranged to collect a substantial portion of the proposed penalty from Kaukauna. Complainant telephoned Respondent to extend an offer of settlement for the remaining $17,640 of the proposed penalty and to notify Respondent that should an answer not be received soon a motion for default order would be filed. No response was received from Respondent.

10. To date, records from the office of the Regional Hearing Clerk at U. S. EPA, Region 5, disclose that no answer has been filed by Respondent with that office.

11. Pursuant to the *Rules of Practice,* 40 C.F.R. § 22.15(a), Respondent had through November 1, 1994, in which to answer the Complaint.

12. The *Rules of Practice* at 40 C.F.R. Part 22 provide at 40 C.F.R. §22-17(a):

A party may be found to be in default (1) after motion, upon failure to file a timely answer to the complaint . . . . Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factural allegations.

13.The *Rules of Procedure* further provide at 40 C.F.R.§22.17(c) that "A default order shall include findings of fact showing grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed . . . . "

14. Section 113(d) of the Act [42 U.S.C. §7413(d)] authorizes the Administrator to issue an administrative complaint which proposes to assess a civil administrative penalty against any person whenever, on the basis of any available information, the Administrator finds that such person has violated or is violating any requirement of Subchapter I of the Act.

15. Pursuant to Section 112(b) of the Act [42 U.S.C. § 7412(b)] the Administrator of the U. S. EPA listed asbestos as a hazardous air pollutant and prescribed a national standard (NESHAP) for asbestos.

16. Section 112(c)(1) of the Act [42 U.S.C. § 7412(c)(1)] and 40 C.F.R. §61.05 prohibit any owner or operator from operating any subject stationary source in violation of any NESHAP.

17. The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. 42 U.S.C. §§ 7412(a)(3) and 7411(a)(3).

18. The asbestos NESHAP includes regulations which govern the emission, handling, and disposal of asbestos. These regulations are codified at 40 C.F.R. § § 61.140-61.157.

19. The asbestos NESHAP applies to, inter alia, each owner or operator of a renovation activity, if the combined amount of regulated asbestos-containing material (RACM) to be stripped, removed, dislodged, cut, drilled, or similarly disturbed is at least: 80 linear meters (260 linear feet) on pipes; or at least 15 square meters (160 square feet) on other facility components; or at least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously. 40 C.F.R. §61.145(a).

20. The owner or operator of a renovation activity means, inter alia, any person who owns, leases, operates, controls, or supervises the facility being renovated or any person who owns, leases, operates, controls, or supervises the renovation operation, or both. 42 U.S.C. § 7412(a)(4) and 40 C.F.R. § 61.141.

21. The term "renovation" is defined as altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component. 40 C.F.R. § 61.141.

22. The term "facility" includes, inter alia, any institutional, commercial, public, industrial or residential structure, installation or building. 40 C.F.R. § 61.141.

23. The term "facility component" is defined as any part of a facility including equipment. 40 C.F.R. §61.141.

24. The term "strip" means to take off RACM from any part of a facility or facility components. 40 C.F.R. §61.141.

25. The term "remove" means to take out RACM or facility components that contain or are covered with RACM from any facility. 40 C.F.R. §61.141.

26. The acronym "RACM" means, and includes, inter alia, friable asbestos material. 40 C.F.R. §61.141.

27. The term "friable asbestos material" is defined as any material which contains more than one percent (1%) asbestos as determined by the method specified in Appendix A, Subpart F, 40 C.F.R. Part 763, Section 1, *Polarized Light Microscopy*, that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure. 40 C.F.R. §61.141.

28. Respondent is a Wisconsin corporation and has a place of business located at 223 W. Cedar Street, River Falls, Wisconsin.

29. Respondent was the asbestos abatement contractor for the demolition activity performed at Kaukauna's Water Department's boiler house located 1130 East John Street, Appleton, Wisconsin.

30. Respondent submitted a notice dated July 19, 1993, to the Wisconsin Department of Natural Resources (WDNR) and U. S. EPA Region 5 which advised that the boiler house contained asbestos and that Respondent intended to remove 2,700 linear feet and 33,000 square feet of RACM from the facility, starting on August 2, 1993.

31. On or before August 3, 1993, Kaukauna's facility contained asbestos, which has been identified as a hazardous air pollutant pursuant to Section 112(b) of the Act, 42 U.S.C. §7412(b) and 40 C.F.R. § 61.01.

32. On or about August 3, 1993, Respondent commenced an asbestos removal operation at Kaukauna's facility.

33. The asbestos removal operation at the facility involved at least 80 linear meters (260 linear feet) and 15 square meters (160 square feet) of pipe insulation material on facility components.

34. On August 3, 1993, an inspector representing WDNR Air Management Specialist, Green Bay area, viewed Kaukauna's electric boiler house where the asbestos demolition work was to be performed by Respondent. At the time of this inspection, asbestos removal had not yet started.

35. In a subsequent inspection on August 10, 1993, the WDNR inspector noted approximately 100 black bags in a pile, labeled as containing asbestos materials. The labels on the bags did not identify the waste generator or the location at which the waste had been generated.

36. On August 30, 1993, the same WDNR inspector noted RACM that had been removed from the boilers and associated components, some of which had been piled on the floor in the location from which it was removed, and some of which had been dropped through an opening in the floor to an uncovered dumpster approximately thirty (30) feet below.

37. Respondent failed to wet adequately all RACM and ensure that it remained wet until collected and contained or treated in preparation for disposal.

38. On August 31, 1993, the inspector entered the boiler containment area. On the lower level, a dumpster had been filled with sealed plastic bags that had no labels.

39. The Administrator of the U. S. EPA lawfully delegated its authority to initiate actions pursuant Section 113(d) of the Act [42 U.S.C. § 7413(d)] to the Regional Administrator of U. S. EPA, Region 5.

40. The Regional Administrator of Region 5 lawfully delegated the authority to initiate actions pursuant to section 113(d) of the Act [42 U.S.C. § 7413(d)] to the Director of the Air and Radiation Division, U. S. EPA, Region 5.

41. Respondent is a "person" as that term is defined at section 302(e) of the Act, 42 U.S.C. § 7602(e).

42. On or before August 3, 1993, Kaukauna's facility was a stationary source as defined at sections 111(a)(3) and 112(a)(3) of the Act, 42 U.S.C. 7411 (a) (3) and 7412 (a) (3).

43. The demolition activity at Kaukauna's facility was subject to the requirements of 40 C.F.R. § 61.140 et seq.

44. The pipe insulation material at the Kaukauna boiler house was RACM as defined at 40 C.F.R. § 61.141.

45. The asbestos removal operation at Kaukauna's facility was a "demolition" as defined at 40 C.F.R. § 61.141.

46. Respondent operated, controlled, or supervised the demolition activity at Kaukauna's boiler house and is therefore an operator of the demolition activity at the boiler house as the term is defined at 40 C.F.R. § 61.141.

47. Asbestos has been identified as a hazardous air pollutant pursuant to section 112(b) of the Act, 42 U.S.C. § 61.01.

48. Respondent's failure to assure that all removed or stripped RACM remained wet until collected, contained or treated in preparation for disposal, constitutes a violation of 40 C.F.R. 61.145 (c) (6) (I) .

49. Respondent's failure to assure that all removed or stripped RACM was carefully lowered to the ground and floor, rather than dropped, thrown or otherwise handled in a manner that could damage or disturb the material constitutes a violation of 40 C.F.R. § 41.145(c)(6)(ii).

50. Respondent's failure to assure that asbestos-containing waste material was transported off the facility site, with the name of the waste generator and the location at which the waste was generated constitutes a violation of 40 C.F.R. § 61.150 (a)(1)(v).

51. The complaint states a *prima facie* case against Respondent.

52. By reason of the facts set forth in the findings above, Respondent violated certain requirements for the removal of asbestos set forth in 40 C.F.R.§§ 61.140-61.157 and section 112(c)(1) of the Act [42 U.S.C.§ 7412(c)(1)].

53. The penalty sought in the complaint was computed in accordance with, and conforms to, the *Clean Air Act Stationary Source Civil Penalty Policy* (October 25, 1991); the *Asbestos and Renovation Civil Penalty Policy* (May 11, 1992); and the civil penalty provisions of sections 113(d) and (e) of the Act. It is fair and reasonable to assess against Respondent, as the contractor for the demolition activity at the site in question, the balance of the civil penalty amount sought in the complaint that was not accounted for by the settlement agreement with Kaukauna, i. e. $17,640, including the consideration of economic benefit derived from failure to comply with the Act and regulations. Motion Exhibits 8 (affidavit of Sherry Finley, Environmental Engineer, U. S. EPA Region 5); 9 (Memorandum to Robert L. Thompson, July 28, 1994); and 10 (Explanation of Penalty Calculation, March 28, 1937, directed to Edward Messina, Esq., Assistant Regional Counsel). Pursuant to 40 C.F.R.§ 22.17, the penalty assessed herein shall become due and payable by Respondent without further proceedings sixty (60) days after issuance of this Order.

ORDER

It is **ORDERED** that Complainant's Motion for Default Judgment shall be, and it is hereby, granted.

And it is FURTHER ORDERED that Respondent shall pay a civil monetary penalty of $17,640 for violations of the Act and regulations found herein.

The above civil penalty shall be paid within ninety (90) days of the date of this Order by certified check made payable to the Treasurer of the United States. The check shall be sent to the following address:

U.S. EPA
Region 5
P. 0. Box 70753
Chicago, Illinois 60673

And it is **FURTHER ORDERED** that Respondent shall send a copy of the check to the Regional Hearing Clerk as follows:

Regional Hearing Clerk (R-19J)
U. S. EPA
77 West Jackson Boulevard
Chicago, Illinois 60604

And it is **FURTHER ORDERED** that Respondent shall send a copy of the check to:

Office of Regional Counsel (C-29-A)
U. S. EPA
77 West Jackson Boulevard
Chicago, Illinois 60604

J.F. Greene
Administrative Law Judge

Dated: June 23, 1997
Washington, D.C.

1 The complaint was issued on August 1, 1994.

2 The complaint sought $57,640 against Kaukauna and Respondent jointly.

3 The Consent Agreement and Order between Complainant and Kaukauna was entered on March 18, 1997.

4 40 C.F.R. § 22.15(a) provides that "Where respondent (1) contests any material fact upon which the complaint is based; (2) contends that the amount of the penalty proposed in the complaint . . . is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the Regional Hearing Clerk" within twenty days.

5 Complainant's memorandum in support of the *Motion for Default Judgment*, May 28, 1997, at (unnumbered) 3, ¶ 5; and Complainant's Motion Exhibit 2, attached to the Memorandum (November 18, 1994, letter to Mr. Richard Enloe from Robert L. Thompson, Esq., Assistant Regional Counsel, U. S. EPA Region 5. Mr. Thompson also included his telephone number and urged Mr. Enloe to call if he had any questions or comments) .

6 See Motion Exhibit #3 attached to the supporting memorandum that accompanies Complainant's motion. The fax reads as follows:

To: Mr. Robert Thompson

Ref. CA 031 1994

This letter is to request a hearing in case # CA 031 1994, as soon as possible so we may take care of this matter. Thank you!

7 Memorandum to Complainant's *Motion for Default Judgment.* (Motion Exhibit 5, letter from Robert L. Thompson, Esq., to Mr. Richard Enloe). The letter stated that Complainant would move for default order if no "further action" was taken by Respondent within ten days. Respondent received the letter on April 22, 1995 (see Motion Exhibit 6).

8 Memorandum in Support of Complainant's Motion for Default Order, May 28, 1997, at (unnumbered) 4, ¶9.

9 Motion Exhibit 7, affidavit of Soja R. Brooks, Regional Hearing Clerk, dated May 7, 1997.

10 40 C.F.R. § 22.15 (d) provides that "Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation."

If Respondent's fax could be construed as an answer, its contents would nevertheless have to be regarded as an admission of the facts alleged in the complaint, since those allegations were neither denied nor explained as required by the above section of the *Rules of Procedure*. Under such circumstances, the matter would, unless settled, almost certainly be the subject of a motion for summary determination as a result of Respondent's failure to raise a triable issue.

11 See 40 CFR §22.17(a), Default Judgment.

CERTIFICATE OF SERVICE

I hereby certify that the original of this order, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on June 23, 1997.

Shirley Smith

Legal Staff Assistant

For Judge J. F. Greene

NAME OF RESPONDENT: Asbestos Abatement Services

DOCKET NUMBER: CAA-031-1994

Soja Brooks

Regional Hearing Clerk

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