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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
JEM Mechanical Services, Inc.,	)	**Docket No. TSCA-V-C-46-90**
	)	
Respondent	)	

Toxic Substances Control Act -- Default Order -- Where Respondent failed to respond to order directing Respondent to report the identity of its representation, Respondent was declared to be in default and to have committed the violations charged in the Complaint, and was subjected to the civil penalty proposed by Complainant.

Appearances

For Complainant:

Patricia M. Cosgrove, Esq.
Assistant Regional Counsel
Region V
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60606-3590

For Respondent:

James E. McGlenn, President
JEM Mechanical Services, Inc.
4500 West Mitchell Street
West Milwaukee, WI 53214

Before

Thomas W. Hoya
Administrative Law Judge

DEFAULT ORDER

This Default Order is issued in a proceeding initiated under Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). Complainant is the Regional Administrator, Region V, U.S. Environmental Protection Agency, and Respondent is JEM Mechanical Services, Inc. Respondent is declared by this Default Order to have violated TSCA, 15 U.S.C. §§ 2601 and regulations ("the Regulations") promulgated pursuant to TSCA, 40 C.F.R. Part 763.

Accordingly, an order is imposed on Respondent that assesses a civil penalty of $35,000. This issuance of a Default Order grants Complainant's Motion for Default Order filed September 7, 1994.

Procedural Background

TSCA was amended by the Asbestos Hazard Emergency Response Act ("AHERA"), Public Law 99-519, October 22, 1986, 15 U.S.C. §§ 2641-54. The "Asbestos-Containing Materials in Schools" rule, 40 C.F.R. Part 763, Subpart E, was promulgated pursuant to AHERA.[1]

The Complaint, issued March 20, 1990, contained four counts, each based on alleged failures of management plans prepared by Respondent to contain elements required by this Subpart E. Respondent, a West Milwaukee, Wisconsin firm, prepared these plans for the Local Educational Agency ("LEA") in each of four Wisconsin school districts. The school districts were the Maywood Elementary School, Winnequah Elementary/Middle School, Monona Grove High School, and Cottage Grove Elementary School. The total civil penalty proposed by the Complaint was $43,000, which was subsequently reduced by Complainant to $35,000.

An element in all four counts was the allegation that Respondent's plan failed to contain the linear and\or square footage for each homogeneous sampling area, and the name of the inspector collecting the samples. Counts I and II alleged further that Respondent's plan failed to identify all homogeneous areas of friable suspected asbestos-containing building material ("ACBM") in Maywood Elementary School and Winnequah Elementary/Middle School.

Count III charged that Respondent's plan failed to assess, or complete the assessment of, the friable asbestos-containing surfacing material on the I-beams in the boiler room, and failed to identify all suspected ACBM in Monona Grove High School. Finally, Count IV alleged that Respondent failed to identify the locations

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[1] 52 Fed. Reg. 41,846 (October 30, 1987). AHERA was amended by Public Law 100-368, and the amendment was published in the Federal Register as a notice, 53 Fed. Reg. 29,210 (August 2, 1988).

of all suspected ACBM in Cottage Grove Elementary School.

Respondent, represented by counsel, filed an Answer to the Complaint that admitted many of the allegations, with explanation.[2] Counsel for Respondent engaged in settlement negotiations with Complainant, but eventually withdrew his representation November 10, 1992.

After Complainant reported difficulty in learning from Respondent whether it would represent itself or retain new counsel, Respondent was ordered October 29, 1993 "to report by November 30, 1993 the identity of its representation." Procedure in this case is governed by the Consolidated Rules of Practice issued by the U.S. Environmental Protection Agency ("EPA"), 40 C.F.R. Part 22. Respondent was advised that failure to respond to this October 29 Order could be treated as a default under Section 22.17(a) of the Consolidated Rules. To date, Respondent has not complied with this Order.

Complainant moved September 7, 1994 for a Default Order, based on Respondent's failure to comply with the October 29, 1993 Order. Based on documentation provided by Respondent in the settlement negotiations, Complainant dropped its proposal for penalties for the violations alleged in paragraphs 21-23, 30-32, and 42-44 of the Complaint. Complainant proposed a recalculated civil penalty of $35,000.

The record of this case includes a receipt for service on Respondent by certified mail of the October 29, 1992 Order. The record includes also a copy of a receipt for service on Respondent by certified mail of a letter from Complainant inquiring as to Respondent's representation after the withdrawal of its first counsel. Finally, the record includes a copy of a Federal Express package sent to Respondent August 16, 1994 and returned to Complainant unopened and marked "RTS [Return to Sender] Company Out of Business." According to Complainant, the package transmitted Complainant's August 16, 1994 Status Report in which Complainant stated that it planned to move for default.

Respondent's Violations

As noted, procedurally this case is governed by the Consolidated Rules. Section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a), applying to motions for default, provides in pertinent part as follows.

§ 22.17 Default Order.

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[2]The Answer is undated, but it was stamped as received by the Regional Hearing Clerk on May 16, 1990.

> (a) Default. A party may be found to be in default ... (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer.... Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have twenty (20) days from service to reply to the motion. 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 factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

As described above, Complainant has moved for a default, in the manner prescribed by Section 22.17(a). As further described above, an Order was issued directing Respondent to report the identity of its representation in this case, and to date, Respondent has not complied with this Order.

Accordingly, Respondent is declared in default. Such default, per Section 22.17(a), "constitutes ... an admission of all facts alleged in the Complaint and a waiver of respondent's right to a hearing on such factual allegations."

The Complaint stated an enforceable claim for all of the violations alleged therein. Furthermore, its allegations are supported by admissions made by Respondent in its Answer to the Complaint. In view of these factors, added to the weight of Section 22.17(a), it is concluded that Respondent committed the violations alleged in the Complaint, as discussed in more detail below.

The Complaint alleged that Respondent is JEM Mechanical Services, Inc., a company which was at all times relevant to the Complaint a "person" subject to TSCA.[3] Respondent's Answer admitted this allegation.[4]

Counts I, II, III, and IV of the Complaint charged Respondent with failure to provide the LEA with a management plan for Maywood Elementary School, Winnequah Elementary/Middle School, Monona Grove High School, and Cottage Grove Elementary School that contained the linear and\or square footage for each homogeneous sampling area, and the name of the inspector collecting the samples. This failure was said to violate 40 C.F.R. § 763.93(e)(3)(ii), (iii) and Section

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[3]Complaint, ¶ 3.

[4]Answer, ¶ 1.

203 of TSCA, 15 U.S.C. § 2643.[5]

In addition, Count I alleged that Respondent failed to identify all friable suspected ACBM in the Maywood Elementary School, in violation of 40 C.F.R. § 763.85(a)(4)(iii) and Section 203 of TSCA, 15 U.S.C. § 2643.[6] Count III charged Respondent with failure to identify as suspected ACBM an estimated 6,600 square feet of nonfriable suspected asbestos/cement sheet in various areas of Monona Grove High School, in violation of 40 C.F.R. § 763.85(a)(4)(i) and Section 203 of TSCA, 15 U.S.C. § 2643.[7]

With regard to the allegation in Counts I, II, III, and IV that Respondent violated 40 C.F.R. § 793.93(e)(3)(ii), Section 203 of TSCA, 15 U.S.C. § 2643, Respondent stated in its Answer that "[a]pproximate square or linear footages of materials which were found to be non-asbestos-containing were not included in the reports."[8] This statement constitutes an admission because the regulation in question, 40 C.F.R. § 763.93(e)(3)(ii), does not distinguish between the types of material sampled.

As to the allegation in Counts I, II, III, and IV that Respondent violated 40 C.F.R. § 763.93(e)(3)(iii), Respondent has admitted that not all persons who took part in the inspection activities signed the management plans.[9] As for the allegation in Count I that Respondent violated 40 C.F.R. § 763.85(a)(4)(iii), Respondent admitted that the "initial AHERA inspection failed to

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[5]Complaint, ¶¶ 9-11; 18-20; 27-29; 39-41.

[6]Complaint, ¶¶ 12-14.

[7]Complaint, ¶ 39-41. As noted in the text supra in the summary of the Complaint under the heading "Procedural Background," Count II charged Respondent with failure to identify all friable suspected ACBM in the Winnequah Elementary/Middle School, in violation of 40 C.F.R. § 763.85(a)(4)(iii) and Section 203 of TSCA, 15 U.S.C. § 2643. In addition, Count III charged Respondent with failure to assess, or complete the assessment of, the friable asbestos-containing surfacing material on the I-beams in the boiler room, in violation of 40 C.F.R. §§ 763.85(a)(4)(v) and 763.88, and Section 203 of TSCA, 15 U.S.C. § 2643. Further, Count IV charged Respondent with failure to identify all suspected ACBM in Cottage Grove Elementary School, in violation of 40 C.F.R. § 763.85(a)(4)(i) and Section 203 of TSCA, 15 U.S.C. § 2643. These charges, however, were dropped by Complainant when it moved for a default order (see the text supra, next to last paragraph under the heading "Procedural Background").

[8]Answer, ¶¶ 3, 8, 13, 19.

[9]See Answer, ¶¶ 4, 9, 14, 20.

identify any floor tile in the kiln room...."[10] Finally, as to the allegation in Count III that Respondent violated 40 C.F.R. § 763.85(a)(4)(i), Respondent admitted in its Answer that "the transite panels in question were omitted from the original Inspection Report of the Respondent," and that "a sprayed-on ceiling material was not identified in the wood shop dust collection room...."[11] All of these violations of the cited regulatory sections constituted thereby violations of Section 203 of TSCA, 15 U.S.C. § 2643.

In addition, as stated above, Respondent has been declared in default. As noted, under Section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a), such default "constitutes ... an admission of all facts alleged in the complaint."

Accordingly, it is concluded that Respondent, as charged in the Complaint, violated Section 203 of TSCA, 15 U.S.C. § 2643, and Sections 763.93(e)(3)(ii),(iii), 763.85(a)(4)(iii), and 763.85(a)(4)(i) of the Regulations, 40 C.F.R. §§ 763.93(e)(3)(ii),(iii), 763.85(a)(4)(iii), and 763.85(a)(4)(i). This conclusion is based on Respondent's default, the Complaint, and Respondent's Answer.

Civil Penalty

The remaining issue is the appropriate civil penalty. As noted,[12] when Complainant moved for default, it revised the amount of its proposed civil penalty down to $35,000. As quoted above,[13] one section of the Consolidated Rules states that "the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default." This section suggests an automatic acceptance of the Complaint's proposed $35,000 penalty.

The Consolidated Rules, however, contain also a section titled "Amount of civil penalty" that includes specific instructions for default situations.

§ 22.27 Initial Decision.

. . . .

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[10]Answer, ¶ 6.

[11]Answer, ¶17.

[12]See the text supra, next to last paragraph under the heading "Procedural Background."

[13]See supra pp. 3-4.

> (b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

The sentence referring to a default situation implies a responsibility of the Presiding Officer to review the amount of the civil penalty.[14] Accordingly, it will be reviewed.

Section 22.27(b) of the Consolidated Rules, 40 C.F.R. § 22.27(b), requires that the assessment of any civil penalty be "in accordance with any criteria set forth in the Act." In addition, this section further requires the Presiding Officer to consider any civil penalty guidelines issued under the relevant statute. For determining penalties in administrative civil actions brought pursuant to Section 16 of TSCA, EPA employs a civil penalty guideline titled Interim Final Enforcement Response Policy (ERP) for the Asbestos Hazard Emergency Response Act (AHERA), dated January 31, 1989.

The ERP for AHERA provides for the calculation of a civil penalty in two stages: (1) determination of a "gravity based penalty" ("GBP"), and (2) adjustments to the GBP. The GBP is calculated on a matrix, in which one axis is the circumstances level ranging from 1 to 6 (with 1 reflecting the highest probability that harm will result from a particular violation) and the other axis is the extent of potential harm caused by the violation ("major," "significant," or "minor") based on the quantity of ACBM in the violation.

It was on the basis of the ERP for AHERA that Complainant justified its proposed civil penalty of $35,000. This justification has been reviewed, as discussed briefly below, and adjudged to be reasonable. Accordingly, a civil penalty of $35,000 is assessed against Respondent.

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[14]This responsibility to review the amount of the civil penalty is suggested also by Katzson Bros., Inc. v. U.S. E.P.A., 839 F.2d 1396 (10th Cir. 1988).

For Count I of the Complaint--violation of 40 C.F.R. § 763.93(e)(3)(ii),(iii), and 40 C.F.R. § 763.85(a)(4)(iii)--Complainant proposed a penalty of $6,000. In calculating the GBP under the ERP for AHERA, Complainant determined the extent of the potential harm for both violations to be "minor." In addition, Complainant determined the circumstances level of the violations to be "level 2."[15] Under the gravity based penalty matrix of the ERP for AHERA, two "minor" and "level 2" violations produced for Complainant a proposed GBP of $6,000.

For Count II of the Complaint--violation of 40 C.F.R. § 763.93(e)(3)(ii),(iii)--Complainant proposed a penalty of $3,000. Complainant determined the circumstances level of the violation to be "level 2,"[16] and the extent of the potential harm to be "minor." Under the gravity based penalty matrix of the ERP, Complainant found a GBP penalty of $3,000.

For Count III of the Complaint--violation of 40 C.F.R. § 763.93(e)(3)(ii),(iii), and 40 C.F.R. § 763.85(a)(4)(i)--Complainant proposed a penalty of $23,000. Again, Complainant determined a violation of 40 C.F.R. § 763.93(e)(3)(ii),(iii) to be a "level 2"[17] and "minor" violation, and proposed a penalty of $3,000.

In addition, Complainant determined a violation of 40 C.F.R. § 763.85(a)(4)(i) to be a "level 2"[18] and "major"[19] violation. These factors, using the gravity based penalty matrix, produced a GBP of $20,000.

For Count IV of the Complaint--violation of 40 C.F.R. § 763.93(e)(3)(ii),(iii)--Complainant proposed a penalty of $3,000. Again, in calculating the GBP under the ERP for AHERA, Complainant determined the violation to be a "level 2"[20] and "minor" violation. Under the gravity based penalty matrix of the ERP, Complainant determined a GBP penalty of $3,000.

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[15]See ERP at 32, 37.

[16]See ERP at 37.

[17]See ERP at 37.

[18]See ERP at 32.

[19]Respondent's alleged violation of 40 C.F.R. § 763.85(a)(4)(i) involved an estimated 6,600 square feet of nonfriable suspected asbestos/cement sheet. Complaint, ¶ 33. Violations involving more than 3,000 square feet of ACBM are classified as "major." See ERP at 13.

[20]See ERP at 37.

Accordingly, Complainant calculated a total GBP of $35,000 ($6,000 + $3,000 + $3,000 + $20,000 + $3,000). As noted, after the GBP is calculated, the ERP for AHERA mandates that it be revised if necessary to take account of certain listed adjustment factors. These factors are: respondent's culpability, including any history of violations; Respondent's ability to pay; and the LEA's ability to continue to provide educational services. In this case, Complainant found no basis to adjust the GBP for reason of any of these factors.

The record of this case shows that Complainant applied the ERP for AHERA in a manner that was consistent with its terms. This application provides one justification for the $35,000 civil penalty imposed on Respondent.

The ERP for AHERA is EPA's effort to translate into more specific terms those general guidelines mandated by the statute for imposing civil penalties. Section 16 of TSCA, 15 U.S.C. § 2615, provides a $25,000 maximum penalty for each violation,[21] and directs EPA in assessing penalties to consider the violation's "nature, circumstances, extent, and gravity," and the violator's "ability to pay, ... to continue to do business, prior ... violations, [and] ... culpability, and such other matters as justice may require."

Here Respondent is found to have committed six separate violations, so the statutory maximum is $150,000. That $35,000 is just under one-fourth of this maximum reflects reasonably the moderateness of the violations.

These violations were not a total default of Respondent's obligations in preparing the management plans for these school districts, but simply a performance that was defective in some significant details, as outlined above in the application of the ERP for AHERA. The record suggests a faulty, but not an egregiously careless effort by Respondent. A penalty about one-sixth of the statutory maximum accords with a violation of this magnitude.

As to Respondent's ability to pay a penalty, the record is less clear. There was some indication that Respondent was experiencing financial difficulties,[22] but Respondent did not raise

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[21]Each day a violation continues is considered a separate violation for purposes of this $25,000 maximum. Complainant treated each of Respondent's violations as a one-time occurrence, and that treatment seems reasonable.

[22]See Letter from Fred L. Bardenwerper to Judge Thomas W. Hoya (July 8, 1992)(stating that "JEM is a defunct corporation with no assets, completely out of business, and . . . I have not been paid

ability to pay as an issue, thus perhaps waiving any objection on that ground.[23]

In conclusion, the $35,000 penalty appears justified in terms of the statute. It should be enough both to encourage Respondent to prepare any future management plans more carefully, and enough also to deter other firms in this business from inattentiveness to the legal requirements for these plans.

ORDER[24]

Respondent is found to be in default with respect to the Complaint and, as charged therein, is declared to have violated Section 203 of TSCA, 15 U.S.C. § 2643, and Sections 763.93(e)(3)(ii),(iii), 763.85(a)(4)(iii), and 763.85(a)(4)(i) of the Regulations, 40 C.F.R. §§ 763.93(e)(3)(ii),(iii),

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for my services" in the context of a proposal to withdraw as attorney for Respondent); Complainant's Status Report (July 2, 1992) (stating that Respondent's counsel "indicated that Respondent was experiencing financial difficulties and neither had provided counsel with the cost information nor had maintained contact with counsel of record").

[23]See In re New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB October 20, 1994) at 16 ("where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules. . . .").

[24]This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(b). Pursuant to Section 22.27(c) of the Consolidated Rules, 40 C.F.R. § 22.27(c), an Initial Decision "shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision." Under Section 22.30(a) of the Consolidated Rules, 40 C.F.R. § 22.30(a), the parties have twenty (20) days after service upon them of an Initial Decision to appeal it. The address for filing an appeal is as follows.

Environmental Appeals Board
U.S. EPA
Weststory Building (WSB)
607 14th Street, N.W., 5th Floor
Washington, DC 20005

763.85(a)(4)(iii), and 763.85(a)(4)(i). For this default and these violations, Respondent is assessed a civil penalty of $35,000.

Therefore, pursuant to 40 C.F.R. § 22.17, Respondent is hereby ordered to pay a civil penalty of thirty-five thousand dollars ($35,000). Payment shall become due according to 40 C.F.R. § 22.17(a), and shall be made by forwarding a cashier's or certified check, payable to the "Treasurer, United States of America," to

EPA -- Region V
P.O. Box 70753
Chicago, IL 60673

Failure to pay the civil penalty imposed by this Default Order shall subject Respondent to the assessment of interest and penalty charges on the debt pursuant to 4 C.F.R. § 102.13(b),(e).

Thomas W. Hoya
Administrative Law Judge

Dated: October 27, 1995