5/31/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
ENVIRONMENTAL RESOURCE SERVICES, INC.,	)	**TSCA Docket No. VII-93-T-064A**
	)	
	)	
Respondent	)	

Asbestos Hazard Emergency Response Act -- Default Order -- Where Respondent failed to file prehearing exchange as directed, Respondent was declared to be in default and to have committed the violations charged in the Complaint. The $20,000 civil penalty proposed in the Complaint was reduced to $18,000 through a review of the Agency's relevant penalty policy.

Appearances

For Complainant:

I. Pearl Fain, Esquire
Assistant Regional Counsel
Region VII
U.S. Environmental Protection Agency
726 Minnesota Avenue
Kansas City, KS 66101

For Respondent:

Robert Scudder, President
Environmental Resource
Services, Inc.
10008 Sapp Brothers Drive
Omaha, NE 68138

Before

Thomas W. Hoya
Administrative Law Judge

DEFAULT ORDER

This Default Order is issued in a proceeding initiated under Section 15(1)(D) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2614(1)(D). Complainant is the Director of the Air and Toxics Division, Region VII, U.S. Environmental Protection Agency ("EPA"); and Respondent is Environmental Resource Services, Inc. The basis of the Default Order is Respondent's failure to file a required Prehearing Exchange. By this Default Order, Respondent is declared to have violated Title II of TSCA, known as the Asbestos Hazard Emergency Response Act ("AHERA") and regulations promulgated pursuant thereto, 40 C.F.R. Part 763.

Accordingly, an order is imposed on Respondent that assesses a civil penalty of $18,000. This issuance of a Default Order grants Complainant's Motion for Default Order filed on December 7, 1995.

Procedural Background

1. On March 8, 1994, Complainant issued to Respondent a Complaint alleging two violations of Section 15(1)(D) of TSCA, 15 U.S.C. § 2614(1)(D), and proposing a $20,000 penalty.

2. On May 26, 1994 Respondent faxed a letter regarding the Complaint to the Regional Hearing Clerk of Region VII. Respondent's letter was treated as an Answer to the Complaint.

3. On April 5, 1995 the Presiding Judge directed the parties to submit their Prehearing Exchanges by May 31, 1995.

4. On May 31, 1995 Complainant filed its Prehearing Exchange, but to date Respondent has not filed its Prehearing Exchange.

5. The Consolidated Rules of Practice ("Consolidated Rules"), 40 C.F.R. Part 22, provide that a party may be found to be in default, inter alia, upon failure to comply with a prehearing order of the Presiding Judge. 40 C.F.R. § 22.17(a). "Default by respondent constitutes, for purpose 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." Id.

6. On December 7, 1995, Complainant filed a Motion for Default Order, alleging Respondent's failure to file its Prehearing Exchange as grounds for default. The file in this matter includes a return receipt showing that Respondent was served with the Motion.

Findings of Fact and Conclusions of Law

7. Respondent Environmental Resource Services, Inc., of Lincoln, Nebraska, is a business incorporated under the laws of the State of Nebraska.

8. The Lawrence Public Schools, of Lawrence, Nebraska, and the Silver Lake Public Schools, of Roseland, Nebraska, are each a "local education agency" or "LEA" as such term is defined at 40 C.F.R. § 763.83.

9. The Lawrence Public Schools and the Silver Lake Public Schools delegated and assigned to Respondent their duties to carry out the requirements of 40 C.F.R. § 763.84 and 40 C.F.R. § 763.90(I) regarding asbestos in schools.

10. "Asbestos-containing material" or "ACM" is defined in 40 C.F.R. § 763.83 with respect to school buildings as "any material or product which contains more than 1 percent asbestos," and "asbestos-containing building material" or "ACBM" is defined as "surfacing ACM, thermal system insulation ACM, or miscellaneous ACM that is found in or on interior structural members of other parts of a school building."

11. The term "response action" is defined at 40 C.F.R. § 763.83 as "a method, including removal, encapsulation, enclosure, repair, operations and maintenance that protects human health and the environment from friable ACBM."

12. The term "functional space" is defined at 40 C.F.R. § 763.83 as "a room, group of rooms ... designated by a person accredited to ... design abatement projects, or conduct response actions."

13. On or about December 31, 1991 Respondent conducted air clearance monitoring in the shop area and second floor hall area, two functional spaces in the main Lawrence Public School building in Lawrence, Nebraska from which ACBM had been removed, to confirm proper completion of an asbestos response action. These areas involved less than 260 linear feet of ACBM.

14. Respondent collected one air clearance sample from the shop area and one air clearance sample from the second floor hall area.

15. The samples collected from the two functional spaces were analyzed by phase contrast microscopy.

16. Under 40 C.F.R. § 763.90(I)(5), "to confirm completion of removal, encapsulation or enclosure of ACBM that is greater than small-scale short-duration and less than or equal to 160 square feet or 260 linear feet," five air monitoring samples from each functional space must be collected and analyzed in the prescribed manner. The asbestos response action is deemed complete when the results of the five samples collected in the affected functional space and analyzed by phase contrast microscopy show that the concentration of fibers for each of the five samples is less than or equal to 0.01 fibers per cubic centimeter.

17. Respondent's collection of only one sample from each functional space failed to confirm the proper completion of the response action.

19. On or about December 29, 1991 Respondent conducted air clearance monitoring in the

holding tank area, a functional space in the Silver Lake High School building, Roseland, Nebraska from which 188 square feet of ACBMs had been removed, to confirm proper completion of an asbestos response action. The area contained more than 160 square feet of ACBM, but less than 3,000 square feet of ACBM.

20. Respondent collected one air clearance sample from the north area and one air clearance sample from the south area of the tank room.

21. Under 40 C.F.R. § 763.90(I), certain procedures must be followed for confirming completion of the response action, such as, under 40 C.F.R. § 763.90(I)(2), analyzing air samples collected for clearance purposes by the transmission microscopy (TEM) method.

22. Under 40 C.F.R. § 763.90(I)(2) and 40 C.F.R. Part 763, Subpart E, Appendix A, Part II, ¶ B.17, a minimum of thirteen samples must be collected from each site.

23. Respondent's collection of only two samples failed to confirm the proper completion of the response action.

24. It is a violation of Section 15(1)(D) of TSCA, 15 U.S.C. § 2614(1)(D), for any person to fail or refuse to comply with any requirement of Title II of TSCA or any rule promulgated or order issued thereunder. 40 C.F.R. § 763.97(b)(1).

25. By collecting only one air clearance sample from each of the two functional spaces in the main Public School building in Lawrence, Nebraska when 40 C.F.R. § 763.90(I)(5) required that five samples be collected from each, Respondent violated Section 15(1)(D) of TSCA, 15 U.S.C. § 2614(1)(D), as alleged in Count I of the Complaint.

26. By collecting only two air clearance samples from the functional space in Silver Lake High School, Roseland, Nebraska when 40 C.F.R. § 763.90(I)(2) and 40 C.F.R. Part 763, Subpart E, Appendix A, Part II, ¶ B.17 required that a minimum of thirteen samples be collected, Respondent violated Section 15(1)(D) of TSCA, 15 U.S.C. § 2614(1)(D), as alleged in Count II of the Complaint.

Penalty

27. The record in this proceeding does not indicate any history of prior violation of TSCA by Respondent.

28. Complainant asserted that it took due notice of the nature, circumstances, history of prior violations, if any, extent and gravity of Respondent's violations, and degree of culpability in accordance with the Guidelines for Assessment of Civil Penalties under TSCA (45 Fed. Reg. 59770, September 10, 1980), and the Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act, dated January 31, 1989 ("ERP").

29. Complainant asserted further that it calculated a so-called "gravity based penalty" for each

violation as provided in the ERP's penalty matrix for persons other than LEA[1]. ERP at 17-18. Complainant made no adjustments to these gravity based penalties for any factors such as history of prior violations or degree of culpability, so it proposed that the gravity based penalty for each count be assessed against Respondent.

30. The ERP's penalty matrix is composed of two axes, representing the extent of environmental harm that could result from a given violation, and the circumstances of the violation. The extent axis comprises three levels--major, significant and minor, representing the amount of ACBM involved in the violation. A violation is considered: minor, if it involves less than or equal to 160 square feet or 260 linear feet of ACBM; significant, if it involves more than 160 square feet or 260 linear feet but not more than 3000 square feet or 1000 linear feet of ACBM; and major, if it involves more than 3,000 square feet or 1,000 linear feet. The circumstances axis includes six levels, designated as numbers one through six; the lower the number, the more serious the violation. The different types of AHERA violations by persons other than LEAs are listed in Appendix B of the ERP (at 28-31); for each type of violation, one of the six numbered circumstance levels is designated. In the matrix, at the intersection of each of the three extent levels with each of the six circumstance levels, a dollar amount is listed, which is the so-called "gravity based penalty" for a violation of that extent and that circumstance. This gravity based penalty may then be adjusted upward or downward to take account of such factors as prior violations or degree of culpability.

31. On its penalty calculation worksheet, Complainant assessed the violation in Count I as being of minor extent and as having a circumstance level of 2, resulting in a gravity based penalty of $3,000 according to the ERP's penalty matrix. Complainant's Prehearing Exchange, Exhibit 2 (May 31, 1995) Less than 260 linear feet of ACBM was involved in this violation, correctly warranting the minor extent level. As to the circumstance level, Respondent failed to collect five air clearance samples from each functional space, as required by 40 C.F.R. § 763.90(I)(3) through (5). The ERP does not list this exact type of violation, but does list, with a circumstance level of 1, the following general violation of 40 C.F.R. § 763.90(I): "An abatement contractor completed the response action without having cleared the response action using the required air monitoring, and/or the average asbestos concentration in the air samples exceeded the levels specified in Section 763.90(I)." ERP at 31. This quoted violation encompasses the violation alleged in Count I, and consequently the appropriate circumstance level is 1. In the ERP matrix, the intersection of the minor extent level and the circumstance level of 1 indicates a gravity based penalty of $5,000. Thus $5,000 is the appropriate gravity based penalty for the violation in Count I.

32. The violation alleged in Count II was assessed by Complainant on the penalty worksheet to be of significant extent and with a circumstance level of one, resulting in a proposed

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[1] Such "other persons" are described in the ERP as persons who inspect LEAs for ACBM for the purpose of AHERA inspection requirements, prepare AHERA management plans, design and/or conduct response actions at LEAs, analyze bulk samples or air samples for the LEAs AHERA requirements, or contract with the LEA to perform any other AHERA related function. ERP at 2.

penalty of $17,000. Complainant's Prehearing Exchange, Exhibit 2 (May 31, 1995). The significant extent level accurately reflects that the square footage of ACBM involved in this violation was more than 160 but less than 3,000. As to the circumstance axis, the ERP prescribes a level of 2 for a situation in which a person designated by the LEA did not collect air samples using the sampling described in 40 C.F.R Part 763, Subpart E, Appendix A to clear response actions. ERP at 30. Respondent was required by that sampling to collect thirteen air clearance samples for each testing site for final analysis, but collected only one sample from the north area and one sample from the south area of the holding tank area in which it was conducting its monitoring. In the ERP matrix, the intersection of the significant extent level and the circumstance level of 2 indicates a gravity based penalty of $13,000.

33. Complainant concluded, correctly, that no factors, such as past history of violations or degree of culpability, exist in this case to require an adjustment of the gravity based penalties for the two counts. The total penalty to be imposed on Respondent is thus $5,000 for Count I and $13,000 for Count II, for a total of $18,000.

34. This $18,000 civil penalty is reasonable in terms of TSCA. Section 16 of TSCA provides for persons other than LEAs, such as Respondent, to be subject to a maximum civil penalty of $25,000 per day. Both of Respondent's violations are classified under the ERP as one-day violations. That classification is sensible, and thus the maximum civil penalty for Respondent is $50,000. The amount developed above--$18,000--is just over one-third of this statutory maximum. This fraction of the maximum for Respondent is reasonable in light of several factors that mitigate the seriousness of its offense. These factors include: no prior violations of TSCA by Respondent were shown; Respondent's violations were not a total failure of performance of its obligations, but simply an inadequate performance; and no actual harm to the environment from Respondent's violations was shown. In this situation, a penalty of $18,000, or just over one-third of the statutory maximum, should achieve appropriate deterrence, the objective of civil sanctions. As for Respondent's ability to pay, Respondent has apparently filed for bankruptcy, with Complainant listed as a creditor. Complainant's Jan. 12, 1996 letter to the undersigned. Reducing Complainant's claim to a specific amount in this Default Order should assist the processing of the claim in the bankruptcy proceeding.

ORDER[2]

Respondent is found to be in default for its failure to have filed a prehearing exchange as directed, and accordingly is found to have committed two violations of Section 15(1)(D) of TSCA, 15 U.S.C. § 2614(1)(D), as charged in the Complaint and in Complainant's Motion for Default Order. Complainant's Motion is thus granted. For Respondent's default and these two violations, Respondent is assessed a civil penalty of $18,000.

Therefore, pursuant to 40 C.F.R. § 22.17, Respondent is hereby ordered to pay a civil penalty of eighteen thousand dollars ($18,000). Payment of the penalty shall become due, according to 40 C.F.R. § 22.17(a), in sixty days from the date this Default Order becomes final. Payment shall be made by forwarding a cashier's or certified check, payable to "Treasurer, United States of America," to:

Mellon Bank
(Regional Hearing Clerk)
EPA - Region 7
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

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.

Dated: May 31, 1996

Thomas W. Hoya
Administrative Law Judge

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[2] This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(b). Pursuant to Section 22.27© 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