7/2/84

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA# V-W-83-R-071
LIFEGUARD INDUSTRIES, INC.	)	
	)	DEFAULT ORDER
Respondent	)	

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1. Resource Conservation and Recovery Act - Default Orders - Failure of the Respondent to file prehearing responses ordered by the Court pursuant to 40 CFR §22.19(e) constitutes a violation of 40 CFR §22.17(a)(2) and, thus, provides the basis for the issuance of a default order.

2. Resource Conservation and Recovery Act - Effect of Bankruptcy Proceedings - A civil action instituted by the U.S. Government under RCRA is not stayed by the provisions of 11 U.S.C. §362(a), since such actions are specifically excluded from a stay by 11 U.S.C. §362(b)(4) and (5).

Appearances:

Richard Mednick, Esquire
U.S. Environmental Protection Agency
Chicago, Illinois
For the Complainant

Marc D. Mezibov, Esquire
Furer, Moskowitz & Mezibov
Cincinnati, Ohio
For the Respondent

Mark Alan Greenberger, Esquire
Freiberg, Katz & Greenberger
Cincinnati, Ohio
Interim Trustee for Respondent
in Bankruptcy Proceedings

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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U.S. ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	DEFAULT ORDER
LIFEGUARD INDUSTRIES, INC. 1460 West Mitchell Avenue Cincinnati, Ohio 45323	)	DOCKET NO. VW-83-R-071
OHD 004 248 183	)	

PRELIMINARY STATEMENT

This is a proceeding under Section 3008 of the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. 6928, instituted by a Complaint filed by the Director of Waste Management Division, Region V, United States Environ- Environmental Protection Agency, against the Respondent, Lifeguard Industries, Inc., on September 14, 1983. A $25,000.00 civil penalty was assessed in the Complaint for alleged violations of RCRA. Respondent filed an Answer to the Complaint on October 17, 1983. The matter was referred to the undersigned by Order of Designation on November 8, 1983.

On November 29, 1983, the undersigned issued a letter to the Complainant and Respondent, requiring a prehearing exchange between the parties by December 27, 1983. As part of this prehearing exchange, the parties were required to submit a list of of witnesses intended to be called at the hearing with a brief narrative summary of their expected testimony, copies of all all documents and exhibits intended to be introduced into evidence, and views as to the place of hearing with the basis for such views. In addition, the Complainant was required to

submit the specific method of determination of the proposed penalty, views as to the seriousness of the violation and any good faith efforts to comply with the applicable requirements, as well as views as to the third defense set forth in the Answer. The letter also required that, by January 10, 1984, the parties reply to statements or allegations of the other contained in the prehearing exchange.

On December 12, 1983, the Complainant filed a Statement Regarding Settlement Negotiations, and together with concurrence of the Respondent, requested an extension of the time for filing prehearing exchanges and replies. In an Order dated December 19, 1984, the undersigned extended the time period for filing prehearing exchanges until February 15, 1984, and for filing replies until February 29, 1984.

In a letter dated February 23, 1984, the Complainant requested an additional extension of the time for filing prehearing exchanges and replies. By Order dated February 28, 1984, the undersigned extended the time period for filing prehearing exchanges until April 9, 1984, and for filing replies until April 23, 1984. The Complainant fully responded to the requirements of the prehearing exchange on April 9, 1984. The Respondent made no response to the prehearing exchange, and did not file a reply.

On May 3, 1984, the Complainant filed a Motion for Default Order. In a letter dated May 7, 1984, counsel for Respondent responded to said Motion for Default Order by claiming a stay

of this administrative proceeding because of an ongoing Chapter 7 bankruptcy proceeding involving the Respondent.

This administrative proceeding is not stayed as a result of the bankruptcy proceeding involving the Respondent. This is a proceeding to enforce the regulatory powers of a governmental unit, and as such is not stayed by a proceeding in bankruptcy.1

Through the documents and exhibits submitted for the prehearing exchange on April 9, 1984, the Complainant has established a prima facie case against the Respondent, that is, that the Respondent has failed to achieve compliance with certain requirements for the storage of hazardous waste set forth at 40 CFR Parts 262, 265 and 270, and at Ohio Administative Code 3745-52, 3745-54, and 3745-55. All of the above requirements are enforceable by U.S. EPA under Section 3008 of RCRA, 42 U.S.C. 6928. Said documents and exhibits are hereby incorporated into and made a part of the record of this proceeding.

By reason of the foregoing, the Respondent is hereby found to be in default pursuant to the Consolidated Rule of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 CFR Part 22.17. Such default constitutes an admission of all facts alleged in the Complaint and a waiver of hearing by the Respondent.

FINDINGS OF FACT

1. Section 3010 of RCRA requires any person who generates or transports hazardous waste or owns or operates a facility for the treatment, storage or disposal of hazardous waste to notify U.S. EPA of such activity within 90 days of the promulgation of regulations under Section 3001 of RCRA. Section 3010 of RCRA also provides that no hazardous waste subject to regulations may be transported, treated, stored, or disposed of unless the required notification has been given, 42 U.S.C. 6930.

2. U.S. EPA published regulations concerning the generation, transportation, and treatment, storage or disposal of hazardous waste on May 19, 1980. These regulations are codified at 40 CFR Parts 260 through 265. Notification to U.S. EPA of hazardous waste handling was required in most instances no later than August 8, 1980.

3. Section 3005 of RCRA requires U.S. EPA to publish regulations requiring each person owning or operating a hazardous waste treatment, storage, or disposal facility to obtain a RCRA permit. Such regulations were published on May 19, 1980, and are codified at 40 CFR Parts 270 and 271 (formerly Parts 122 and 124). The regulations require that persons who treat, store, or dispose of hazardous waste submit Part A of the permit application in most instances no later than November 19, 1980.

4. Section 3005(e) of RCRA provides that an owner or operator of a facility shall be treated as having been issued a permit pending final administrative disposition of the permit application provided that: (1) the facility was in existence on November 19, 1980; (2) the requirements of Section 3010(a) of RCRA concerning notification of hazardous waste activity have been complied with; and (3) application for a permit has been made. This statutory authority to operate is known as interim status. U.S. EPA regulations implementing these provision are found at 40 CFR Part 270.

5. On July 15, 1983, the State of Ohio was granted Phase I Interim Authorization to administer and enforce sections of their hazardous waste program in lieu of the Federal program (See 40 CFR §271.121 et seq.). As a result, facilities in Ohio qualifying for interim status under 40 CFR §270.70 are regulated under Ohio provisions instead of the Federal regulations set forth at 40 CFR Part 265.

6. A generator may accumulate hazardous waste on site for 90 days or less without a permit or interim status provided that the standards specified in 40 CFR 262.34 (Ohio Administrative Code 3745-54-34) are met.

7. The Respondent, Lifeguard Industries, Inc., owns and operates a facility at 4460 West Mitchell Avenue, Cincinnati, Ohio.

8. RCRA compliance inspections of the facility were conducted by Ohio OEPA as an authorized representative of U.S. EPA

on February 15, 1983 and May 12, 1983.

9. At the time of the inspections, the Respondent was storing substances including solvents (U.S. EPA I.D. No. D001) which have been identified or listed as hazardous waste under Section 3001 of the Act, without a permit and without having achieved interim status, in violation of Section 3005(a) of RCRA. Interim status was not achieved because the Respondent failed to submit Part A of the application for a permit by November 19, 1980 as required by 40 CFR 270.10 and Section 3005 of RCRA. Interim status was also not achieved because Respondent failed to submit a notification of hazardous waste activity by August 19, 1980. Respondent filed a notification pursuant to Section 3010 of RCRA on May 9, 1983. Respondent has not submitted a RCRA Part A permit application.

10. At the time of the inspections, it was determined that hazardous wastes had been stored on site which were not marked with the date accumulation started, and which had been stored on site for over 90 days in violation of 40 CFR 262.34 (Ohio Administrative Code 3745-54-34).

11. In a February 22, 1983 letter and a May 17, 1983 letter, the Respondent was notified by the Ohio OEPA that the following violations were observed during the February 15, 1983 and May 12, 1983 inspections:

(a) Failure to include information on manifests as required by 40 CFR 262.21(a)(2). Ohio Administrative Code 3745-52-21(A)(2).

(b) Failure to package, label, mark, and placard hazardous waste before transport or offering them for transport off-site in accordance with applicable United States Department of Transportation regulations as required by 40 CFR 262.30,31,32, and 33. Ohio Administrative Code 3745-52-30, 31,32, and 33.

(c) Failure to comply with provisions for the short-term accumulation of hazardous waste on-site without a permit as required by 40 CFR 262.34. Ohio Administrative Code 3745-52-34.

(d) Failure to obtain chemical and physical waste analyses and to develop and follow a written waste analysis plan as required by 40 CFR 265.13. Ohio Administrative Code 3745-54-13.

(e) Failure to prevent unknowing entry and minimize unauthorized entry to the facility and to post "Danger-Unauthorized Personnel Keep Out" signs as required by 40 CFR 265.14. Ohio Administrative Code 3745-54-14.

(f) Failure to comply with the general inspection requirements of 40 CFR 265.15 (Ohio Administrative Code 3745-54-15) including, but not limited to, failure to develop and follow a written inspection schedule and to maintain an inspection log.

(g) Failure to meet facility personnel training requirements and to maintain training records as required by 40 CFR 265.16 Ohio Administrative Code 3745-54-16.

(h) Failure to take precautions to prevent the accidental ignition or reaction of ignitable or reactive waste as required by 40 CFR 265.17. Ohio Administrative Code 3745-54-17.

(i) Failure to equip the facility with necessary equipment for preparedness and prevention as required by 40 CFR 265.32(b) and (c). Ohio Administrative Code 3745-54-32 (B) and (C).

(j) Failure to test and maintain equipment as required by 40 CFR 265.33 Ohio Administrative Code 3745-54-33.

(k) Failure to provide personnel with immediate access to commuinications or alarm systems as required by 40 CFR 265.34. Ohio Administrative Code 3745-54-34.

(l) Failure to maintain adequate aisle space as required by 40 CFR 265.35. Ohio Administrative Code 3745-54-35.

(m) Failure to make or attempt to make arrangements with local authorities for preparedness or prevention as required by 40 CFR 265.37(a). Ohio Administrative Code 3745-54-37(A).

(n) Failure to have a contingency plan as required by 40 CFR 265.51 (Ohio Administrative Code 3745-54-51) which satisfies the conditions of 40 CFR 265.52 (Ohio Administrative Code 3745-54-52) and which is maintained as provided by 40 CFR 265.53. (Ohio Administrative Code rule 3745-54-53).

(o) Failure to have an emergency coordinator as required by 40 CFR 265.55 Ohio Administrative Code 3745-54-55.

(p) Failure to maintain containers in good condition as required by 40 CFR 265.171. Ohio Administrative Code 3745-55-71.

(q) Failure to properly manage containers as required by 40 CFR 265.173. Ohio Administrative Code 3745-55-73.

CONCLUSIONS

By reason of the facts set forth in the Findings above, the Respondent has failed to achieve interim status, and has failed to achieve full compliance with the requirements for the storage of hazardous waste, and as such Respondent is in violation of 40 CFR Parts 262,264, 265 and 270, and Ohio Administrative Code 3745-52, 3745-54 and 3745-55.

Pursuant to 40 CFR §22.17, the penalty proposed to be assessed in the Complaint, $25,000, shall become due and payable by the Respondent, Lifeguard Industries, Inc., without further proceedings upon the issuance of this Order by Default.

ORDER

The Respondent having failed to file a prehearing response by the 9th day of April, 1984, as required by ORDER of the undersigned dated the 28th day of February, 1984, upon application and affidavit of the Complainant, default judgment is entered against said Respondent, and it is hereby ORDERED that;

1. The Respondent shall within 30 days of receipt of this Order dispose of all drums on site at a RCRA approved treatment, storage, or disposal facility.

2. Any future storage of hazardous waste at the facility for a period of less than 90 days shall be in compliance with the provisions of Ohio Administrative Code 3745-54-34.

3. Prior to any future storage of hazardous waste at the facility for a period of more than 90 days, the Respondent shall submit Part A and Part B of a permit application pursuant to Section 3005 of RCRA, 42 U.S.C. 6930, to Mr. Valdas Adamkus, Regional Administrator, Region V, U.S. Environmental Protection Agency, and obtain a permit as required by 40 CFR Part 270.

4. The Respondent shall notify U.S. EPA in writing upon achieving compliance with this ORDER and any part thereof. This notification shall be submitted no later than the times stipulated above to the U.S. EPA, Region V, Waste Management Division, 230 S. Dearborn Street, Chicago, Illinois 60604, Attention: Technical, Permits, and Compliance Section. A copy of these documents and all correspondence with U.S. EPA regarding this ORDER shall also be submitted to David Duell, Office of Hazardous Materials Management, Ohio Environmental Protection Agency, 361 Broad Street, Columbus, Ohio 43216.

5. Pursuant to Section 3008(a)(1), (c) and (g) of RCRA, 42 U.S.C. §6928(a)(1), (c) and (g), a civil penalty of $25,000 is assessed against the Respondent, Lifeguard Industries, Inc., for the violations of RCRA set forth herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final Order upon the Respondent, Lifeguard Industries, Inc., by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America in said amount.2

Dated: July 2, 1984

Thomas B. Yost
Administrative Law Judge

(1) See Bankruptcy Act, 11 U.S.C. §362(b) (1978); Penn Terra Limited v.Department of Environmental Resources, No. 83-5448 (3rd Cir., April 30, 1984); United States v. Energy International, Inc., 19 B.R. 1020 (S.D. Ohio, 1981).

(2) See §22.30 of the Consolidated Rules of Practice, 40 CFR §22.30 with respect to the effect and consequences of this Default Order.

CERTIFICATE OF SERVICE

I hereby certify that the original of the Complainant's PROPOSED DEFAULT ORDER was personally served on the indicated date on:

Mary Langer
Regional Hearing Clerk
U.S. EPA, Region V
230 S. Dearborn Street
Chicago, Illinois 60604