UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	DOCKET NO. V-W-84-R-033
	)	
ROGERS PETRO-CHEM, INC.,	)	
DEWAYNN ROGERS AND	)	
KATHLEEN ROGERS,	)	
	)	
RESPONDENTS	)	

1. RESOURCE CONSERVATION AND RECOVERY ACT:

Respondents, by their failure to file a timely Answer to the Amended Complaint, may, upon Motion, be found to be in default (40 C.F.R. 22.17[a][1]).

2. RESOURCE CONSERVATION AND RECOVERY ACT:

Respondents, by their failure to comply with a prehearing order of the Presiding Officer, may, upon Motion, be found to be in default (40 C.F.R. 22.17[a][2].

3. 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).

Appearance of Counsel

For Complainant: Michael R. Berman, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

For Respondents: Mr. DeWaynn Rogers
Rural Route #1
Grove City, Minnesota 56243

INITIAL DECISION

(GRANTING AMENDED MOTION FOR DEFAULT, DATED JANUARY 15, 1985.)

By original Complaint and Compliance Order, dated March 30, 1984, filed by Complainant, Director, Waste Management Division, Region V, United States Environmental Protection Agency (hereinafter "Complainant" or EPA"), "Respondent, Rogers Petro-Chem, Incorporated, of Rural Route #1, Grove City, Minnesota 56243 (hereinafter "Respondent"), is charged with multiple violations of Subtitle C of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), as amended, pursuant to Section 3008 of RCRA, 42 U.S.C. Section 6928.

On May 7, 1984, Respondent, by DeWaynn Rogers, who then professed to be said Respondent's "ex-president," requested "under protest" a hearing on said Complaint, but filed no Answer to the factual allegations on said Complaint contained. Instead, Respondent challenges jurisdiction and alleges violations of Respondent's constitutional rights. 1/

On June 29, 1984, the undersigned Administrative Law Judge wrote the parties advising that he had been designated to preside at the requested hearing and then directed and outlined a prehearing exchange of information by the parties (which generally conforms to the provisions contained in 40 C.F.R. 22.19[b]) and ordered that such prehearing exchange be prepared and filed by the parties on or before July 20, 1984.

1/ It is well established that Administrative Law Judges are precluded from passing on the constitutionality of procedures which they are called upon to administer (Frost v. Weiberger [NY 1974] 375 FS 1312, 1313[11]) and that regulations duly promulgated pursuant to delegation of authority from Congress have the force and effect of law (Engineers P.S. Co. v. SEC, 138 [F.2d] 936, 952 [1943]).

On July 11, 1984, Complainant advised that no settlement could be made and requested that the time for preparing and filing the prehearing exchange, as ordered on June 29, 1984, be extended to August 17, 1984. On July 23, 1984, DeWaynn Rogers, on behalf of Respondent, joined in the request for additional time, and requested a list of legal references. Rogers further stated he did not then know who he would call as witnesses (and wished to reserve the right) and that he did not know the location of records (not described) which he felt were taken by the person who made an inspection of the Respondent facility. He also reported that Respondent, Rogers Petro-Chem, Incorporated, was "broke and out of business" and that he, DeWaynn Rogers, was Respondent's ex-president.

On July 23, 1984, the extension of time for filing said prehearing exchange was extended, for both parties, until August 17, 1984, and Respondent was advised to seek out sources such as county libraries (for the sections requested), and to contact the EPA, Region V, Hearing Clerk and Complainant's Counsel respecting Federal Register materials not otherwise available, and if further questions persisted, he should employ an attorney.

Complainant filed its prehearing data naming its four witnesses, along with a narrative summary of their expected testimony, along with copies of 33 exhibits which Complainant then contemplated identifying or offering in evidence, accompanied by a Certificate, dated August 16, 1984, that a copy of all said data was on said date forwarded to Respondent.

On September 25, 1984, said hearing requested by Respondent was set down to be heard in Minneapolis, Minnesota, on November 7, 1984, and both parties were given until October 26, 1984, to update prehearing data previously filed.

On October 5, 1984, Complainant filed its Motion for Default, stating that Respondent had not filed its prehearing exchange as directed by my letter of June 29, 1984, and that the lack of such information - by a simultaneous exchange by Respondent - puts the government at a disadvantage, as it had supplied information as to the government's case to be presented at said hearing.

On October 10, 1984, Respondent was notified that it would be given until October 29, 1984, to respond to said Motion for Default, filed on October 5, 1984.

On October 26, 1984, Respondent, by its said ex-president, responded to said Motion for Default, citing, by reference, its July 19, 1984, letter (referred to above as July 23), and pointing out that he did not receive a copy of a proposed Default Order as provided by 40 C.F.R. 22.17(a)(3).

On October 11, 1984, Complainant filed its Motion to Amend Complaint, which amended Complaint added said DeWaynn Rogers and Kathleen Rogers (both incorporators and board members of Rogers Petro-Chem, Incorporated), as parties Respondent. The Certificate accompanying said Motion, dated October 11, 1984, certifies that a copy of said Motion and Amended Complaint were on said date sent to DeWaynn Rogers, Rogers Petro-Chem, Incorporated, Route #1, Dover City 2/ Minnesota 56243.

On October 16, 1984, Order Granting Leave to Amend Complaint was issued, whereby Respondents Arthur DeWaynn Rogers and Kathleen Rogers were added as parties Respondent and the name of Respondent Rogers Petro-Chem, Incorporated was changed to Rogers Petro-Chem, Inc. Said Respondents were given 20 days

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2/ Respondents DeWaynn Rogers and Kathleen Rogers reside in Grove City, Minnesota 56243. Said Motion and Amended Complaint were received and signed for by said Respondents which indicates that because of the correct zip code, said mail reached the proper post office.

from date of Service of the Amended Complaint to file their Answers thereto. No Answers have since been filed, by any of the Respondents, to the factual allegations of the Amended Complaint.

On November 27, 1984, Respondent DeWaynn Rogers, on behalf of Rogers Petro-Chem, Inc. et al., acknowledged that he and Kathleen Rogers (natural persons) have been added as "defendants", and failed and thus declined to answer or respond to charges in said Amended Complaint that Respondents violated regulations promulgated pursuant to the Act.

My letter, dated November 7, 1984, to Arthur DeWaynn Rogers, Kathleen Rogers and EPA Counsel (sent by Certified Mail with Return Receipts from all parties received November 13, 1984), directed that Respondents DeWaynn and Kathleen Rogers file Answers to the Amended Complaint "on or before 30 days after receipt of said Complaint" and noted that said Respondents were advised, along with Service of said Complaint, to whom said Answers should be sent, and were then provided with a copy of the Applicable Rules of Practice (40 C.F.R. Part 22). EPA Counsel was there advised that I assumed the Motion for Default, filed October 5, 1984, was withdrawn without prejudice since the Complaint had been amended after October 5, 1984.

On January 15, 1985, Complainant filed its "Amended Motion for Default", accompanied by a Proposed Default Order, alleging (1) that the three Respondents did not file an Answer to (said) Amended Complaint (40 C.F.R. 22.15); (2) failure of Respondents to admit, deny or explain the material allegations... constitutues an admission of same (40 C.F.R. 22.15[d]), and (3) failure to file said Answers and to file a simultaneous prehearing exchange, as directed, of information (to) be presented at the requested hearing puts the government at a disadvantage for the reason that the government has already supplied fully the information it will present at said hearing. Said Motion was sent by Certified Mail to and received by the named Respondents.

On January 17, 1985, I reminded said three Respondents, by Certified Mail, that said "Amended Motion for Default" had been filed pursuant to 40 C.F.R. 22.17(a). Said Certified Mail was received by Respondents on January 19, 1985.

In my said letter, I further advised that the time in which Respondent should reply to said Motion for Default was enlarged until February 14, 1985, and that my ruling on said Motion would issue after that date. Respondent DeWaynn Rogers, by his letter dated February 10, 1985, and received by me on February 20, 1985, renewed his charges previously made that his constitutional rights have been violated, but he again failed and refused to answer or respond to the subject charges, that he and the other parties have violated the pertinent regulations promulgated pursuant to RCRA, as amended, which are alleged in both the original Complaint and the first Amended Complaint.

I find that the Respondents, and each of them, have failed and refused to timely file an Answer or to respond to the factual allegations in said Amended Complaint, charging violations of the Act and, therefore, have admitted same, and that said Amended Motion for a Default Order should be and it is hereby granted.

On this record, I make the following:

Findings of Fact

1. The U.S. Environmental Protection Agency filed its Amended Complaint and Findings of Violation on October 11, 1984.

2. The Respondents, Rogers Petro-Chem, Inc. (Rogers), Arthur DeWaynn Rogers and Kathleen Rogers, did not file an Answer to the Amended Complaint and Findings of Violation.

3. The U.S. EPA filed its prehearing exchange on August 16, 1984.

4. The Respondent, Rogers Petro-Chem, Inc. (Rogers) did not file a prehearing exchange.

5. The Respondents admit that they did not notify the U.S. EPA that it owned and operated a facility for the treatment and storage of hazardous waste within 90 days of the promulgation of regulation under Section 3001 of RCRA.

6. Respondents transported, treated and stored hazardous substances on February 19, 1981, without a permit and without having achieved interim status.

7. The following items were observed by an authorized representative of the U.S. EPA during an inspection of the Rogers Petro-Chem, Inc., facility on February 1981:

a. There was no manifest system for the tracking of hazardous waste.

b. There was no compliance with the manifest system.

c. There were no records kept of the mainifests.

d. There was no detailed chemical and physical analysis of waste.

e. There was no artificial or natural barrier around the facility.

f. There was no control of entry.

g. There were no danger signs posted at the entrance.

h. There was no written schedule for the inspection of the facility for malfunctions, deterioration, operator errors and discharge.

i. There was inadequate personnel training.

j. The requirements for ignitable, reactive and incompatible wastes were not met.

k. The faciity was not operated in a way that would minimize the possibility of a fire, explosion and unplanned sudden or non-sudden release of hazardous waste.

l. The required emergency equipment was not maintained.

m. The required emergency equipment was not tested and maintained.

n. There was no access to communications and no alarm system.

o. There was no adequate aisle space in the hazardous waste storage area.

p. No arrangements with local authorities were made for emergency situations.

q. There was no contingency plan.

r. No qualified person was designated to act as an emergency coordinator.

s. The facility did not meet closure performance standards.

t. No closure plan was prepared.

u. Hazardous waste was not stored in containers in good condition.

v. Hazardous waste was not stored in closed containers in a manner that prevents ruptures and leaks.

w. Waste analysis and trial tests were not obtained prior to treatment.

8. Respondents have not provided U.S. EPA and the Minnesota Pollution Control Agency (hereinafter "MPCA") with a copy of the facility closure plan.

9. On June 24, 1981, MPCA issued a Notice of Violation to Rogers Petro-Chem, Inc. for the following violations which remained unresolved since the February 19, 1981, inspection:

a. Failure to notify the Agency of a spill of hazardous waste and to take proper action to protect human health and the environment as required in 40 C.F.R. 265.56.

b. Failure to store hazardous waste in containers that are in good condition pursuant to 40 C.F.R. 265.171.

c. Failure to store hazardous waste in closed containers and in a manner that prevents ruptures or leaks as required by 40 C.F.R. 265.173.

d. Failure to inspect the container storage area as required by 40 C.F.R. 265.174.

e. Failure to correct manifesting of hazardous waste accepted at facility as required by 40 C.F.R. 265.71.

f. Failure to correct manifest discrepancies and to notify the Agency when discrepancy was not corrected in 15 days after receipt of waste as required by 40 C.F.R. 265.72.

g. Failure to control unauthorized entry to the site by fences, gates, locks and other similar methods as required by 40 C.F.R. 265.14.

h. Failure to maintain emergency equipment as required by 40 C.F.R. 265.32.

i. Failure to prepare and follow a contingency plan for the facility as required by 40 C.F.R. 265.51 through 265.53.

j. Failure to maintain a log at the facility that indicates the date that each shipment arrived, the shipment number, the name of the generator of the the shipment, the location of the shipment at the facility, and the date that the hazardous waste was processed, disposed of or transported as required by 40 C.F.R. 265.73.

k. Failure to comply with the manifest systems for transporters, as required by 40 C.F.R. 263.20.

l. Failure to maintain records of shipments as required by 40 C.F.R. 263.22.

10. The Respondents failed to maintain financial responsibility and liability insurance.

Conclusions of Law

1. The Respondents did not file an Answer to the Amended Complaint in accordance with 40 C.F.R. 22.15 and, therefore, Complainant's Amended Motion for Default (praying that the Respondents, and each of them, should be found in Default) should be and it is hereby granted (40 C.F.R. 22.17[a][1]).

2. The failure of Respondents to admit, deny or explain the material allegations contained in the Complaint constitutes an admission of said allegations (40 C.F.R. 22.15[d]).

3. The lack of an Answer to the Amended Complaint and Findings of Violation prevents this matter from proceeding properly, denies the Complainant knowledge of Respondents' positions in regard to the allegations and prevents a full and fair proceeding in this matter from taking place.

4. Respondents were transporting, treating and storing hazardous substances on February 19, 1981, without a permit and without having achieved interim status, in violation of Section 3005 of RCRA.

5. The Respondents' facility is in violation of the following regulations promulgated under the RCRA Act of 1976, as amended, 42 U.S.C. 6928:

a. Requirement to use manifest system as required by 40 C.F.R. 263.20.

b. Requirement to comply with the manifest system as required by 40 C.F.R. 263.21.

c. Requirement to keep adequate records as required by 40 C.F.R. 263.22.

d. Requirement to obtain detailed chemical and physical analysis of waste as required by 40 C.F.R. 265.13

e. Requirement to have an artificial or natural barrier around facility as required by 40 C.F.R. 265.14.

f. Requirement to control entry as required by 40 C.F.R. 265.14.

g. Requirement to post danger signs at entrance as required by 40 C.F.R. 265.14(c).

h. Requirement to develop and follow a written schedule to inspect facility for malfunctions, deterioration, operators errors and discharges as required by 40 C.F.R. 265.15.

i. Requirement to provide adequate personnel training as required by 40 C.F.R. 265.16.

j. Requirement to meet general requirements for ignitable, reactive or incompatible wastes as required by 40 C.F.R. 265.17.

k. Requirement to maintain and operate the facility to minimize the possibility of a fire, explosion or any unplanned sudden or non-sudden release of hazardous waste as required by 40 C.F.R. 265.31.

l. Requirement to maintain required emergency equipment as required by C.F.R. 265.32.

m. Requirement to test and maintain emergency equipment as required by C.F.R. 265.33.

n. Requirement to provide access to communications or alarm system as required by 40 C.F.R. 265.34.

o. Requirement to maintain adequate aisle space in the hazardous waste storage area as required by 40 C.F.R. 265.35.

p. Requirement to make arrangements with local authorities as required by 40 C.F.R. 265.37.

q. Requirement to prepare and follow a contingency plan for the facility as required by 40 C.F.R. §265.51, 265.52 and 265.53.

r. Requirement to designate a person qualified to act as an emergency coordinator as required by 40 C.F.R. 265.55.

s. Requirement to meet closure performance standards as required by 40 C.F.R. 265.111.

t. Requirement to prepare a closure plan to be kept at the facility as required by 40 C.F.R. 265.112.

u. Requirement to store hazardous waste in containers that are in good condition as required by 40 C.F.R. 265.171.

v. Requirement to store hazardous waste in closed containers and in a manner that prevents ruptures or leaks as required by 40 C.F.R. 265.173.

w. Requirement to obtain waste analysis and trial tests prior to treatment as required by 40 C.F.R. 265.402.

x. Requirement to notify the Agency of a spill of hazardous waste and to take proper action to protect human health and the environment as required in 40 C.F.R. 265.56.

y. Requirement to inspect the container storage area as required by 40 C.F.R. 265.174.

z. Requirement to require proper manifesting of hazardous waste accepted at facility as required by 40 C.F.R. 265.71.

aa. Requirement to correct manifest discrepancies and to notify the Agency when discrepancy was not corrected in 15 days after receipt of waste as required in 40 C.F.R. 265.72.

bb. Requirement to maintain a log at the facility that indicates the date that each shipment arrived, the shipment number, the name of the generator of the shipment, the location of the shipment at the facility and the date that the hazardous waste was processed, disposed of or transported as required by 40 C.F.R. 265.73.

cc. Requirement to comply with the manifest systems for transporters, as required by 40 C.F.R. 263.20.

dd. Requirement to maintain records of shipments as required by 40 C.F.R. 263.22.

ee. Requirement to maintain financial responsibility and liability insurance as required by 40 C.F.R. 265 Subpart H.

6. The Respondent, Rogers Petro-Chem, Inc., did not file an appropriate prehearing exchange as provided for in the 40 C.F.R. 22.19.

ORDER 3/

1. Respondents shall immediately, upon receipt of this Order, cease all generation, transportation, treatment, storage or disposal of any hazardous waste at the facility until such time as compliance is achieved with 40 C.F.R. 262, 40 C.F.R. 263 and 40 C.F.R. 265.

2. Respondents shall, within thirty (30) days of receipt of this Order, take the following actions to fully comply with the closure requirements pursuant to 40 C.F.R. 265 Subpart G:

a. Provide to U.S. EPA and MPCA a copy of the facility closure plan pursuant to 40 C.F.R. 265.112.

b. Provide documentation to U.S. EPA and MPCA that closure occurred in accordance with 40 C.F.R. 265.113.

c. Provide documentation to U.S. EPA and MPCA that all facility equipment and structures have been properly disposed of, or decontaminated by removing all hazardous waste and residues pursuant to 40 C.F.R. 265.114.

d. Provide to U.S. EPA and MPCA certification that closure has been completed pursuant to 40 C.F.R. 265.115.

e. Submit to U.S. EPA and MPCA a sampling plan and waste analysis plan to determine the degree and extent of contaminated soils and water in the area behind the shop pursuant to 40 C.F.R. 265.13(b).

f. Submit to U.S. EPA and MPCA a plan and schedule for the removal of all contaminated soil and treatment for contaminated water in the area behind the shop.

g. Upon removal of the closure and removal plans referenced above, by MPCA, Respondents will immediately complete closure and removal activities in accordance with the schedule in the plans.

3/ Section 22.30 of the Consolidated Rules of Practice, 40 C.F.R. 22.30, sets forth the time and manner in which an Appeal may be taken herefrom and the effect and consequences of this Initial Decision, on Default.

3. The Respondents shall notify U.S. EPA in writing upon achieving compliance with the 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 South 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 Rodney Massey, Division of Solid and Hazardous Waste, Minnesota Pollution Control Agency, 1935 West County Road B-2, Roseville, Minnesota 55113.

4. Pursuant to Section 3008(a)(1), (c) and (g) of RCRA, 42 U.S.C. §6928(a)(1), (c) and (g), a civil penalty 4/ of $60,000 is assessed against the Respondents, 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 Respondents, by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America in said amount.

DATED: February 27, 1985

Marvin E. Jones
Administrative Law Judge

4/ Respondents have inferred an intent to take bankruptcy. This action is not stayed by the Bankruptcy Act, being specifically excluded from a stay by the provisions of 11 U.S.C., Section 362(b)(4) and (5). See also Penn Terra Limited v. Dept. of Environmental Resources, No 83-544 (3d Cir, April 30, 1984); U.S. v. Energy International, Inc., 19 BR 1020 (5D Ohio, 1981).

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with C.F.R. 22.27(a), I have this date forwarded by Certified Mail, Return Receipt Requested, the Original of the foregoing INITIAL DECISION (GRANTING AMENDED MOTION FOR DEFAULT, DATED JANUARY 15, 1985) of Marvin E. Jones, Administrative Law Judge, to Ms. Beverly Thompson (5MFA-14), the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said INITIAL DECISION to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, EPA Headquarters, Washington, D.C., 20460, who shall forward a copy of said INITIAL DECISION to the Administrator.

DATED: February 27, 1985

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ