9-7-90

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: MANTER HALL SCHOOL, Respondent.	Docket No. AHERA-I-90-1044

INITIAL DECISION AND DEFAULT ORDER

By Motion for Default Order, dated June 27, 1990, Complainant, the Regional Administrator of the United States Environmental Protection Agency, Region I, moved for a Default Order assessing a civil penalty in the amount of four thousand dollars ($4,000) against Respondent, Manter Hall School, for violation of Title II of the Toxic Substances Control Act, 15 U.S.C. § 2641 et seq., as alleged in a Complaint, dated March 28, 1990. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Consolidated Rules") at 40 C.F.R. Part 22, and 40 C.F.R. § 22.17 thereunder, and based upon the entire record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Civil Penalty Amount, Complainant's Motion for Default Order is hereby GRANTED.

I. FINDINGS OF FACT

Pursuant to 40 C.F.R. §22.17(c) and based on the entire record, I make the following findings of fact:

1. The Complaint in this action, together with a copy of

the Consolidated Rules, was served upon the Respondent by Certified Mail, Return Receipt Requested, on April 4, 1990. The properly executed Return Receipt, a copy of which is attached to Complainant's Motion for Default Order, is incorporated by reference herein.

2. Respondent failed to file an Answer to the Complaint within twenty (20) days of Respondent's receipt of the Complaint. Moreover, the record in this case indicates that Respondent did not, in any manner, otherwise admit, deny, or explain the factual allegations in the Complaint, nor did Respondent address the Complaint in any other manner even after written notice dated May 22, 1990, and sent by Certified Mail, Return Receipt Requested, from Complainant's counsel of the need for a response. This notice and properly executed Return Receipt, copies of which are attached to Complainant's Motion for Default Order, are incorporated by reference herein.

3. The Complaint alleges that Respondent is a "Local Educational Agency" ("LEA"), as defined in Title II of the Toxic Substances Control Act ("TSCA"), 42 U.S.C. § 2641 et seq., and specifically, in Section 202(7) of TSCA Title II, 15 U.S.C. § 2642(7), and in 40 C.F.R. § 763.83.

4. The Complaint alleges that Respondent owns, leases, or otherwise uses, at the minimum, one (1) "school building," as

defined in Section 202(13) of TSCA Title II, 15 U.S.C. § 2642(13), and in 40 C.F.R. § 763.83, located in Cambridge, Massachusetts.

5. The Complaint alleges that the Commonwealth of Massachusetts submitted to the United States Environmental Protection Agency ("EPA"), Region I, pursuant to Section 205(e) of TSCA Title II, 15 U.S.C. § 2645(e), a written statement on the status of asbestos management plan submissions and deferral requests of such submissions by LEAs in the Commonwealth ("Status Report").

6. The Complaint alleges that the Status Report referenced in Paragraph 5 indicates that Respondent neither submitted a valid asbestos management plan, nor submitted a valid management plan deferral request, for the school building referenced in Paragraph 4.

7. The Complaint alleges that, on or about April 13, 1989, Respondent received from EPA a Notice of Noncompliance ("NON") notifying Respondent of the violations alleged in the Complaint. The NON provided Respondent with sixty (60) days from the issuance of the NON to correct the violations, notify EPA thereof, and provide documentation of such compliance. The Complaint further alleges that Respondent has failed to provide

EPA with adequate notice and documentation of such compliance.

II. CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. 22.17(c) and based on the entire record, I make the following conclusions of law:

8. The Complaint in this action was lawfully and properly served upon the Respondent, in accordance with 40 C.F.R. § 22.05(b)(1) of the Consolidated Rules.

9. Respondent was required to file an Answer to the Complaint within twenty (20) days of the service of the Complaint. 40 C.F.R. § 22.15(a).

10. Respondent's failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes an admission of all facts alleged in the Complaint (including the allegations set forth in Paragraphs 3 through 7 above), and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a) and 22.15(d).

11. Respondent is a "Local Educational Agency," as defined in Section 202(7) of TSCA Title II, 15 U.S.C. § 2642(7), and in 40 C.F.R. § 763.83.

12. The building which Respondent owns, leases, or otherwise uses, located in Cambridge, Massachusetts, is a "school building," as defined in Section 202(13) of TSCA Title II, 15 U.S.C. § 2642(13), and in 40 C.F.R. § 763.83.

13. Sections 203(i) and 205(d) of TSCA Title II, 15 U.S.C. §§ 2643(i) and 2645(d), require that Respondent, by October 12, 1988, either have developed a valid asbestos management plan for

each school building which Respondent owns, leases, or otherwise uses as a school building, or have submitted a valid request for deferral of submission of the management plan until May 9, 1988.

14. Section 207(a)(3) of TSCA Title II, 15 U.S.C. § 2647(a)(3), and 40 C.F.R. § 763.97(a), make it unlawful for Respondent to fail to develop such an asbestos management plan, and provide that each separate failure to comply with respect to a single school building constitutes a violation of Section 207(a)(3) of TSCA Title II.

15. Section 207(a) of TSCA Title II, 15 U.S.C. § 2647(a), authorizes the assessment of a civil penalty of not more than five thousand dollars ($5,000) for each day during which Respondent's violation continues, and states that any civil penalty collected shall be used by the LEA to comply with TSCA Title II, with any portion remaining unspent to be deposited into the Asbestos Trust Fund, established pursuant to Section 5 of the Asbestos Hazard Emergency Response Act of 1986, codified at 20 U.S.C. § 4022.

16. Respondent violated Section 207(a)(3) of TSCA Title II, 15 U.S.C. § 2647(a)(3), by failing to develop an asbestos management plan, pursuant to Section 203(i) of TSCA Title II, 15 U.S.C. § 2643(i), and regulations thereunder at 40 C.F.R. Part 763, Subpart E, for the school building referenced in Paragraph 12 above.

17. Respondent's violation, described in Paragraph 16 above, constitutes a violation of Section 207(a)(3) of TSCA Title

II, 15 U.S.C. § 2647(a)(3), for which a civil penalty may be assessed.

18. When the Regional Administrator finds that a default has occurred, she shall issue a Default Order against the defaulting party and the order shall constitute the Initial Decision. 40 C.F.R. § 22.17(b). The Regional Administrator may delegate to a Regional Judicial Officer her authority to act in a given proceeding pursuant to 40 C.F.R. § 22.04(b)(3).

19. Respondent's failure to file a timely Answer to the Complaint in this action, or otherwise respond to the Complaint, is grounds for the entry of a Default Order against the Respondent assessing a civil penalty for the TSCA Title II violation referenced in Paragraph 16 above, and a Default Order is so entered. 40 C.F.R. § 22.17.

III. DETERMINATION OF CIVIL PENALTY AMOUNT

Having found that Respondent has violated Sections 203(i) and 207(a)(3) of TSCA Title II, 15 U.S.C. §§ 2643(i) and 2647(a)(3), and regulations thereunder at 40 C.F.R. Part 763, Subpart E, I have determined pursuant to 40 C.F.R. §§ 22.17(a) and 22.17(c) that four thousand dollars ($4,000), the penalty amount proposed in the Complaint, is the appropriate civil penalty to be assessed against the Respondent.

Section 207(c) of TSCA Title II, 15 U.S.C. § 2647(c), provides that, in determining the amount of the civil penalty, the following shall be considered: the significance of the

violation, the culpability of the violator, including any history of previous TSCA Title II violations, the ability of the violator to pay the penalty, and the ability of the violator to continue to provide educational services to the community. EPA has issued an Interim Final Enforcement Policy for the Asbestos Hazard Emergency Response Act, dated January 31, 1989, interpreting the enforcement considerations set forth in Section 207(c) of TSCA Title II. In addition, Section 207(a) of TSCA Title II, 15 U.S.C. § 2647(a), provides that the civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as civil penalties assessed and collected under Section 16 [15 U.S.C. § 2615] of TSCA Title I, 15 U.S.C. § 2601 et seq. I have determined that the penalty amount recommended in the Complaint is appropriate based upon Sections 207(a) and 207(c) of TSCA Title II and the above referenced EPA enforcement policy.

IV. DEFAULT ORDER

Respondent is hereby ORDERED to comply with the following terms of this Default Order:

A. Respondent is hereby assessed a civil penalty in the amount of four thousand dollars ($4,000), and ordered to pay such civil penalty as directed in this Default Order.

B. Pursuant to Section 207(a) of TSCA Title II, 15 U.S.C. § 2647(a), and 40 C.F.R. § 22.41, Respondent shall use the civil penalty for purposes of complying with the requirements of TSCA Title II, and in particular, the requirements of Sections 203(i)

and 205(a) of TSCA Title II, 15 U.S.C. §§ 2643(i), and 2645(a), and the regulations thereunder at 40 C.F.R. Part 763, Subpart E, governing the development and submission of asbestos management plans.

C. Pursuant to 40 C.F.R. § 22.27(c), this Default Order shall become final within forty-five (45) days after service upon the parties unless it is appealed to the EPA Administrator or the Administrator elects, sua sponte, to review it. Respondent shall, within ninety (90) calendar days after this Default Order has become final, forward a cashier's or certified check, payable to the order of the "Treasurer of the United States of America," in the amount of four thousand dollars ($4,000), unless waived in whole or in part pursuant to Paragraph E of this Default Order. The check shall state on the reverse side, "For Deposit Into the Asbestos Trust Fund, 20 U.S.C. § 4022." Respondent shall mail the check by Certified Mail, Return Receipt Requested, to the following address:

U.S. Environmental Protection Agency
Headquarters Accounting Operations Branch
Attention: Asbestos Trust Fund
P.O. Box 360277M
Pittsburgh, PA 15251

In addition, Respondent shall a mail a copy of the check, by first class mail, to the following persons:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region I (RCG-38)
J.F.K. Federal Building
Boston, MA 02203

and

Regional Asbestos Coordinator
U.S. Environmental Protection Agency
Region I (ATC-117)
J.F.K. Federal Building
Boston, MA 02203

D. Simultaneously with the payment described in Paragraph C, Respondent shall provide an accounting of the costs, if any, incurred by Respondent in developing and submitting its asbestos management plans, and any other costs incurred by Respondent in complying with the requirements of TSCA Title II, 15 U.S.C. § 2641 et seq. (collectively, the "costs of compliance"). The accounting shall conform with generally accepted accounting principles. The accounting shall include notarized receipts, an independent auditing, or other equivalent proof of expenditures. A full copy of the accounting shall be provided, by first class mail, to the Regional Hearing Clerk and the Regional Asbestos Coordinator, as indicated in Paragraph C.

E. The Respondent shall pay the full civil penalty amount in Paragraph A, as described in Paragraph C, unless waived in whole or in part pursuant to this Paragraph E:

1. If the costs of compliance are equal to, or exceed the civil penalty amount in Paragraph A, the costs of compliance shall represent full payment of the penalty, and no further payment is necessary.

2. If the costs of compliance are less than the civil penalty amount in Paragraph A, Respondent shall pay, in lieu of the civil penalty amount, only the amount equal to the civil penalty amount minus the costs of compliance.

The penalty specified in Paragraph A, above, shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

F. Pursuant to 31 U.S.C. § 3717, an executive agency like EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty if it is not paid within ninety (90) calendar days after this Default Order becomes final as set forth in Paragraph C. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). In addition, a penalty charge of six percent per year will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. § 102.13(e).

G. Respondent shall otherwise comply with all applicable provisions of TSCA Title II, rules promulgated thereunder, and other environmental laws. Nothing in this Default Order shall be construed as relieving Respondent of the duty to comply with

any of these provisions in a timely manner.

H. There remains nothing further in this action.

IT IS SO ORDERED.

Date: 9-7-90

Robert A. DiBiccaro
Regional Judicial Officer
U.S. EPA - Region I

Docket No. AHERA-I-90-1044

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 1990, the original of the foregoing Initial Decision and Default Order was filed with the Regional Hearing Clerk, EPA Region I, and that true and correct copies were sent to the following persons in the following manner:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED:

Robert Hall, Director
Manter Hall School
71 Mount Auburn Street
Cambridge, Massachusetts 02141

HAND DELIVERY:

Hugh W. Martinez
Office of Regional Counsel
U.S. Environmental Protection Agency
Region I (RCA-37)
J.F.K. Federal Building
Boston, Massachusetts 02203.

I further certify that on this date a copy of the foregoing Initial Decision and Default Order, Certificate of Service and a complete copy of the file were served on the Hearing Clerk, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, by EPA Pouch Mail.

Date: September 7, 1990

Marianna B. Dickinson
Marianna B. Dickinson
Regional Hearing Clerk
U.S. EPA - Region I