

2/20/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF)
)
NICO HAZARDOUS WASTE)
MANAGEMENT, INC.,)
)
Respondent)

Docket No. TSCA (ASB) VIII-91-04

ORDER ON DEFAULT

This cause came to be heard on the motion of the Complainant, United States Environmental Protection Agency (EPA), in the above-entitled cause, filed on December 2, 1991 pursuant to 40 C.F.R. § 22.17. Respondent did not reply to the motion. The Administrative Law Judge, having considered the motion of counsel for Complainant, makes the following findings of fact and conclusions of law.

I. Findings of Fact

1. On or about December 22, 1990, Respondent was served with a Complaint issued by Complainant, alleging three counts of violations of Section 203 of the Toxic Substances Control Act and 40 C.F.R. § 763.90. Respondent was assessed a proposed penalty of \$60,000 for these violations.

2. On or about January 8, 1991, Respondent served upon the Regional Hearing Clerk a denial of the allegations contained in the Complaint and a request for hearing before the Administrative Law Judge.

3. By letter dated February 15, 1991, the Administrative Law Judge directed both parties to submit their respective prehearing exchange no later than May 8, 1991. Both parties were served via certified mail, return receipt requested.

4. Complainant filed its prehearing exchange on May 8, 1991.

5. Respondent, to date, has failed to file its prehearing exchange.

6. On June 4, 1991, the Administrative Law Judge issued an Order to Show Cause directing Respondent to show cause, within ten days of the service date of the Order, why its prehearing exchange or a motion for extension of time in which to file its prehearing exchange had not been filed in this matter. The Administrative Law Judge cited to Respondent the relevant portion of 40 C.F.R. § 22.17(a) which provides that a party may be found to be in default upon failure to comply with a prehearing order of the Presiding Officer. The Order to Show Cause was delivered to Respondent via certified mail, return receipt requested.

7. On September 10, 1991, the Administrative Law Judge received an unsigned copy of a letter, mailed on September 5, 1991, and dated June 13, 1991, with an /s/ in the signature block. The letter stated:

SUBJECT: DOCKET NO. TSCA (ASB) VIII-91-04

Dear Sir:

This is to notify you and all parties concerned that Nico Hazardous Waste Management, Inc. is no longer in business and is insolvent. As such it will no longer be able to respond to this action, and has no assets.

Since there are no assets to protect, no bankruptcy petition will be filed.

Sincerely,

/s/
Donald V. Nedrud
President

DVN:dn

II. Conclusions of Law

1. Respondent's untimely response to the Order to Show Cause does not constitute a basis upon which Respondent may be relieved of its obligation to comply with the prehearing order of February 15, 1991 or otherwise constitute good cause for failure to file its prehearing exchange or a motion for an extension of time to file same.

2. Respondent has failed to comply with the order of the Administrative Law Judge to file its prehearing exchange, and has failed to comply with the Administrative Law Judge's Order to Show Cause, or in any other way to show good cause as to why its prehearing exchange has not been filed, and is therefore in default pursuant to 40 C.F.R. § 22.17(a).

3. Pursuant to 40 C.F.R. § 22.17, said default constitutes an admission by Respondent of all the facts alleged in the

Complaint and a waiver of Respondent's right to a hearing on such factual allegations. Therefore, I make the following:

III. Additional Findings of Fact and Conclusions of Law as Alleged in Complaint

1. EPA has jurisdiction of this matter under Section 16 of the Toxic Substances Control Act, 15 U.S.C. § 2615, for violations of the Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2641, et seq., Public Law 99-519 (October 22, 1986).

2. Respondent performed asbestos removal actions in three school buildings for the Mount Ellis Academy located in Bozeman, Montana. (The three buildings are the Administration Building, Girls Dormitory, and the Industrial Arts Building.)

3. The buildings referred to in Paragraph 2 are "school buildings," as defined in Section 202(13) of TSCA, 15 U.S.C. § 2642(13) and 40 C.F.R. § 763.83. The three school buildings are hereinafter referred to as the "School Buildings."

4. Respondent is an "accredited asbestos contractor," as defined in Section 202(1) of TSCA, 15 U.S.C. § 2642(1) and 40 C.F.R. § 763.83.

5. Respondent conducted three asbestos removal actions in areas of the three School Buildings for the Mount Ellis Academy. During these actions, Respondent removed sprayed-on ceiling material and replaced it with nonasbestos containing material.

6. On or about July 12, 1990, Jay M. Sinnot, Environmental Engineer, U.S. Environmental Protection Agency, Region VIII, Montana Operations Office, conducted an inspection of the School

Buildings, to determine compliance with AHERA and its implementing regulations at 40 C.F.R. Part 763 Subpart E. This inspection will hereinafter be referred to as the "Compliance Inspection."

7. During the Compliance Inspection, the Inspector observed that Respondent: 1) failed to properly perform the response actions in the three School Buildings by failing to collect five air samples to monitor the air for clearance after each removal action as required by 40 C.F.R. 763.90(i)(2)(i).

8. Pursuant to Section 203(D)(2)(i), 15 U.S.C. § 2643(D)(2)(i) and 40 C.F.R. § 763.90, Respondent, as an accredited asbestos contractor which contracted with the School District to perform the removal actions, is required to properly conduct each removal action in each school building in which Respondent contracts to perform a response action.

9. The Respondent, an accredited asbestos contractor, failed to properly conduct the response actions.

10. Pursuant to Title I of TSCA Section 15, 15 U.S.C. Section 2614, it is unlawful for any person to fail to comply with any rule or regulation promulgated under TSCA.

11. Pursuant to Title I of TSCA Section 15, 15 U.S.C. Section 2614, it is unlawful for any person to fail to establish or maintain any record required by TSCA.

12. Pursuant to Section 207(a), failure to comply with the requirements of Section 207(a) is a failure to comply with respect to each school building. Each failure with respect to each school building constitutes a separate violation of TSCA.

13. Respondent failed to properly perform the response action for the Administration Building, the Girls Dormitory and the Industrial Arts Building, by failing to collect five air samples for clearance after each removal action.

14. Respondent's failure to collect five air samples for clearance after each removal action in the three School Buildings constitutes three violations of Section 203(D)(2)(i) of TSCA, and 40 C.F.R. 763.90(i)(2)(i).

IV. Discussion and Ultimate Conclusion

Respondent's answer to the Complaint does not raise any matter which could support a decision that Complainant has failed to establish a prima facie case or could justify the dismissal of the Complaint. An examination of the prehearing exchange documents submitted by Complainant buttresses the allegations in the Complaint that Respondent violated Section 203(D)(2)(i) of TSCA and 40 C.F.R. § 763.90(i)(2)(i) as alleged. I therefore conclude that Respondent is in violation of Section 203(D)(2)(i) of TSCA, 15 U.S.C. § 2643(D)(2)(i), and 40 C.F.R. § 763.90(i)(2)(i).

V. The Penalty

Section 15 of TSCA, 15 U.S.C. § 2614, authorizes the assessment of a civil penalty of up to \$25,000 for each day during which each violation of Title II of TSCA continues. EPA's policy with respect to the assessment of civil penalties is guided by the "Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act" dated January 31, 1989. Based upon the

facts alleged in this Complaint and upon the nature, circumstances, extent and gravity of the violations, Respondent's history of prior violations of TSCA, the degree of culpability of Respondent, Respondent's ability to pay, and such other matters as justice may require, as known at this time, Respondent is hereby assessed the following civil penalty for the violations alleged in this Complaint:

The Administrative Building

Count 1: Failure to properly perform the response action by failing to collect five air samples for clearance in the administration building: \$20,000

The Girls Dormitory

Count 2: Failure to properly perform the response action by failing to collect five air samples for clearance in the girls dormitory: \$20,000

The Industrial Arts Building

Count 3: Failure to properly perform the response action by failing to collect five air samples for clearance in the Industrial Arts Building: \$20,000

TOTAL CIVIL PENALTY \$60,000

The penalty has been calculated in accordance with the "Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act" dated January 31, 1989 (the Policy). As stated on page 17 of that Policy, the penalty policy for accredited asbestos contractors (known in the Policy and herein as "other persons") has been developed in accordance with the TSCA Civil

Penalty Policy, 45 Fed. Reg. 59770, September 10, 1980. The categories used and the dollar figures arrived at in this particular case follow.

As prescribed by the Policy, an initial Gravity Based Penalty (GBP) was determined by looking to the nature, extent, and circumstances of the violation. As stated in the Policy on page 18, the nature of the violation is a chemical control violation. The circumstance levels for "other persons" violations are determined according to the chart in Appendix B of the Policy. According to Appendix B at page 36, the violations in Counts 1-3 are Level 2 circumstances, because Respondent did not collect air samples using sampling techniques as described in 40 C.F.R. § 763.90(i)(2)(i). Page 12 of the Policy states that Level 2 violations are likely to cause harm, and failing to identify and inspect all ACM in a school is very likely to cause harm. The extent category is determined from the amount of asbestos involved. According to the discussion on page 13 of the Policy, the extent in this case is presumed to be "major" because the amount of asbestos involved was not readily determined. The GBP is determined using Table B on page 17 of the Policy. With level 2 circumstances and major extent, the penalty for Count 1 is \$20,000, the penalty for Count 2 is \$20,000 and the penalty for Count 3 is \$20,000. These penalty amounts are based on one day of violation for each of the School Buildings. No adjustments were made to the penalty based on the adjustment factors of culpability, history of such violations, ability to pay, ability to continue in business, and such other

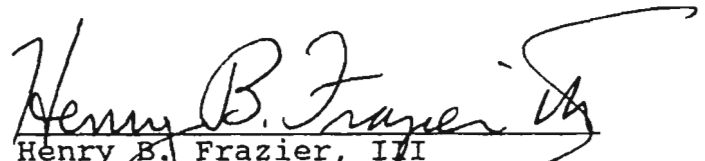
matters as justice may require. Although Respondent has alleged no ability to pay any penalty, Respondent has provided no evidence to support this allegation.

Pursuant to 40 C.F.R. § 22.17, the penalty of \$60,000 proposed in the Complaint shall become due and payable by Respondent without further proceedings sixty (6) days after the issuance of this Default Order.¹

ORDER

Under the authority of the Toxic Substances Control Act and the Consolidated Rules of Practice, 40 C.F.R. Part 22, Complainant's Motion for Default Order is hereby granted. Within sixty (60) days of the date of this Order, Respondent shall submit by cashier's or certified check, payable to Treasurer, United States of America, payment in the amount of sixty thousand dollars (\$60,000) addressed to:

EPA - Region 8
(Regional Hearing Clerk)
P.O. Box 360859M
Pittsburgh, PA 15251


Henry B. Frazier, III
Chief Administrative Law Judge

Dated: February 20, 1992
Washington, DC

¹See 40 C.F.R. § 22.30 for provisions governing an appeal from this Default Order.

CERTIFICATE OF SERVICE

I certify that the original of the ORDER ON DEFAULT together with the record in this matter was sent pouch mail to the Headquarters Hearing Clerk.

I certify that a copy of the ORDER ON DEFAULT was forwarded to the following on this the 27th day of February, 1992.

Donald E. Nedrud
President
NICO Hazardous Waste
Management, Inc.
1717 So. Willson Avenue
Bozeman, MT 59715

Certified Mail
Return Receipt Requested

Linda S. Kato, Attorney
U.S. EPA Region VIII
Office of Regional Counsel
999 18th St., Suite 500
Denver, CO 80202

Hand-Carried


Joanne McKinstry
Regional Hearing Clerk