

INTRODUCTION

The United States Environmental Protection Agency ("Complainant" or "EPA") initiated this proceeding under Section 16 of the Toxic Substances Control Act ("the Act"), 15 U.S.C. § 2615, by issuing a complaint on September 4, 1991, charging Hutch's Enterprises, Inc. ("Respondent") with violations of the Act. Respondent submitted its Answer on October 3, 1991. The complaint charged Respondent with violations of the Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C. §§ 2614 and 2646, for failure to comply with the Asbestos-Containing Materials in Schools Rule, 40 C.F.R. Part 763, Subpart E ("the Rule"), relating to Respondent's failure to employ an accredited supervisor to conduct and/or supervise a removal of asbestos-containing materials at the Cameron County Junior/Senior High School, Emporium, Pennsylvania. For these violations, Complainant initially sought a civil penalty of \$ 80,000. However, as a result of revisions to EPA's AHERA Penalty Policy, EPA now seeks an total penalty of \$ 40,000 for the violations alleged in the Complaint.

FINDINGS OF FACT

1. Between August 15 and August 22, 1988, inclusive, Respondent conducted an asbestos abatement project involving the removal of approximately 2,800 square feet of asbestos-containing surfacing material at the Cameron County Junior/Senior High School ("the asbestos abatement project").
2. Jack Stickle, Respondent's employee, was designated the "onsite supervisor" for the project.

3. On or about September 13, 1989, EPA Inspector Edward Maurer conducted an inspection of the asbestos abatement work undertaken by the Respondent at the Cameron County Junior/Senior High School to determine Respondent's compliance with the provisions of the Asbestos School Hazard Abatement Act ("ASHAA"). As a result of Mr. Maurer's inspection, it was determined that Respondent violated the provisions of the Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C. §§ 2641 et seq., and the "EPA Model Contractor Accreditation Plan" ("the Model Plan"), 40 C.F.R. Part 763, Subpart E, Appendix C, by employing an unaccredited supervisor to supervise the asbestos abatement project.

4. Prior to undertaking the supervision of the asbestos abatement project, Mr. Stickle had only completed a 3-day training course required for accreditation as an asbestos abatement worker, pursuant to Section I.E. of the Model Plan.

5. Mr. Stickle failed to complete the four days of specialized training required for accreditation as an asbestos abatement supervisor, in accordance with the requirements of Section I.D of the Model Plan.

6. The "worker training" was inadequate for accreditation as a supervisor because it failed to cover the following topics expressly required under Section I.D. of the Model Plan: the physical characteristics of asbestos-containing materials, insurance and liability issues, recordkeeping for asbestos abatement projects, supervisory techniques for asbestos abatement activities, and contract specifications. See 40 C.F.R. Part 763,

Subpart E, Appendix C, Section I.D.(a) and (k)-(n).

7. On September 4, 1991, EPA filed an Administrative Complaint against Respondent, alleging violations of AHERA, 15 U.S.C. §§2614 and 2646, for failure to comply with the Asbestos-Containing Materials in Schools Rule, 40 C.F.R. Part 763, Subpart E ("the Rule"). Specifically, EPA alleged that Respondent employed one (1) unaccredited supervisor to conduct and/or supervise a removal of asbestos-containing material at Cameron County Junior/Senior High School, Emporium, Pennsylvania, in violation of the Rule.

8. The Complaint proposed a civil penalty of \$80,000 for this violation. Subsequently, EPA revised its penalty and currently seeks a total proposed penalty of \$40,000.

9. Respondent filed its Answer to Complaint and Request for Hearing on October 3, 1991.

10. On October 23, 1991, the proceeding was assigned to the Presiding Judge issuing this Default Order.

11. By order dated November 13, 1991, the parties were directed to exchange information regarding the anticipated hearing, including witness lists and copies of documentary evidence to be introduced. Complainant was also directed to show the rationale for the proposed civil penalty; Respondent was further directed to submit financial data to support any inability to pay claim.

10. Pursuant to the Order of this Court, dated November 13, 1991, and following several extensions of time, Complainant made

a timely and complete submission of its prehearing exchange on May 18, 1992.

11. Respondent did not submit its prehearing exchange nor request an additional extension of time.

CONCLUSIONS OF LAW

Pursuant to Section 16 of the Act, 15 U.S.C. §2615, Complainant has the authority to institute enforcement proceedings concerning violations of the Toxic Substances Control Act. Respondent's answer to the complaint does not raise any questions which could support a decision that Complainant has failed to establish a prima facie case.

Complainant's prehearing exchange submission, as well as its Motion for Accelerated Decision and this Motion for Default, support the allegations in the complaint that Respondent has violated the Act. Complainant has established a prima facie case to support the allegations in the complaint that Respondent has violated 15 U.S.C. §§2614 and 2646. Pursuant to Section 22.17(a) of the EPA Rules of Practice (Rules), 40 C.F.R. §22.17(a), Respondent's failure to comply with the prehearing order of this Court amounts to a default and constitutes an admission of all facts alleged in the complaint and a waiver of a hearing on the factual allegations.

It is concluded that Respondent violated Sections 15 and 206 of the Act, 15 U.S.C. §§2614 and 2646.

THE PENALTY

The penalty imposed on Respondent was initially calculated in accordance with EPA's "Unaccredited Supervisor/Worker

Violations under AHERA Interim Final Enforcement Response Policy" ("the 1990 Penalty Policy"), which provided, inter alia, that penalties for use of an unaccredited supervisor should be assessed on a per day basis.

The 1990 Penalty Policy contemplated that penalties would be calculated in two stages: (1) determination of a gravity-based penalty ("GBP") by use of a matrix, and (2) adjustments to the GBP.

The GBP for Counts I through VIII of the Complaint was derived by identifying the Circumstance Level and Extent Level of the violation, and locating the appropriate dollar amount on the GBP matrix. The Circumstance Level reflects the probability that harm will result from a particular violation. The Extent Level is determined by the quantity of asbestos-containing material removed in violation of the regulations. First, EPA determined that Respondent's failure to use an accredited supervisor for the asbestos abatement project constitutes a Circumstance Level Three violation.

Next, EPA determined that the amount of asbestos involved constituted a Significant Extent under the 1990 Penalty Policy. Violations involving more than 160 square feet or 260 linear feet and less than or equal to 3,000 square feet or 1,000 linear feet of asbestos-containing building material are to be classified as Significant Extent violations. In this case, the asbestos abatement project involved the removal of 2,880 square feet of asbestos-containing building material. This number is within the Significant Extent violation category.

The unadjusted GBP figure for a Circumstance Level Three, Significant Extent violation is indicated on the GBP matrix as being \$ 10,000. In accordance with the 1990 Penalty Policy, the Complaint proposed a penalty of \$ 10,000 per day for 8 days (the duration of the asbestos abatement project) for a total unadjusted GBP figure of \$ 80,000.

However, in November 1990, Congress passed the Asbestos Hazard Abatement Reauthorization Act of 1990 ("ASHARA"). ASHARA amended section 207 of AHERA, 15 U.S.C. § 2647, to add a new subsection (g), which, among other things, establishes penalties of \$ 5,000 per day, per violation, for certain violations involving the failure of a contractor and his/her employees to obtain proper accreditation. As a result, on January 27, 1992, EPA issued "Changes Relating to Accreditation Violations/Penalty Amounts Resulting from ASHARA Reauthorization/Amendment" ("the 1992 Revisions"), pursuant to which the penalty for use of an unaccredited supervisor is now to be calculated at \$ 5,000 per day. In addition, the 1992 Revisions provide that the changes to the 1990 Penalty Policy are applicable to cases which have been filed since November 28, 1991.

Although the current action against Respondent was filed on September 4, 1991 - more than two months prior to the applicability date contained in the 1992 Revisions - EPA determined that the application of the 1992 Revisions to the current action would result in the lowest penalty to Respondent and reflects more than three years of development of EPA's experience and information regarding the appropriate penalties to

be assessed for use of unaccredited supervisors to supervise an asbestos abatement project at a school. Therefore, EPA recalculated Respondent's penalty under the 1992 Revisions and now seeks an unadjusted GBP of \$40,000 for the violations alleged in Counts I through VIII of the Complaint.

EPA considers several other factors set forth in the EPA Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act, 45 Fed. Reg. 59770, effective March 10, 1980 ("the Guidelines"), in determining the appropriate penalty for violations of the Act. In this case, the Respondent had no history of violations; no adjustment for culpability or attitude was appropriate; there were no cleanup costs incurred by the United States in response to Respondent's violations; and EPA has determined that the Respondent gained no substantial economic benefit as a result of its noncompliance.

Respondent has not formally raised the issue of its ability to pay/ability to continue in business in this proceeding. As part of this Court's Order setting prehearing procedures, Respondent was expressly required to indicate whether it intends to take the position that it is unable to pay the proposed penalty, or that payment will have any adverse effect on Respondent's ability to continue to do business. However, Respondent has never submitted a Prehearing Exchange in this proceeding. While there was some discussion of these issues during the course of settlement discussions between the parties earlier in these proceedings, EPA and the Presiding Judge have never been put on notice that the issues would be presented by Respondent at

hearing. Inasmuch as Respondent has failed to file its Prehearing Exchange and raise this issue, it is not in controversy in this proceeding.

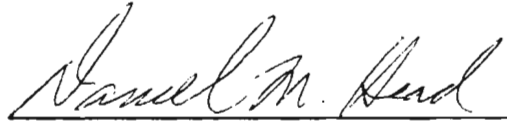
Moreover, no information in the possession of EPA or the Presiding Judge could justify an adjustment to the GBP to account for Respondent's inability to pay or continue in business, especially since EPA is now seeking a total penalty of \$40,000. In the absence of any argument by Respondent that it is unable to pay, and given that there is no evidence in the record before the Presiding Judge that Respondent may be unable to pay or continue in business, the unadjusted GBP should be assessed. Thus the \$40,000 GBP for Counts I through VIII of the Complaint should remain unadjusted.

ORDER¹

IT IS ORDERED, pursuant to Section 16 of the Toxic Substances Control Act, 15 U.S.C. 2614, that Respondent Hutch's Enterprises, Inc. be assessed a civil penalty of \$40,000.

Pursuant to Section 22.17(a) of the Rules, payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days after the final order is issued:

EPA Region III
Regional Hearing Clerk
P.O. Box 360515M
Pittsburgh, PA 15251


Daniel M. Head
Administrative Law Judge

Dated this 27th day of September, 1993.
Washington, DC

¹ Pursuant to Section 22.17(b) of the Rules, this Default Order constitutes the Initial Decision in this matter. Unless an appeal is taken pursuant to Section 22.30 of the Rules, or the Environmental Appeals Board elects to review this Initial Decision on its own motion, this Initial Decision shall become the Final Order of the Environmental Appeals Board, as provided for in Section 22.27(c) of the Rules.