UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OFFICE OF
THE ADMINISTRATIVE
LAW JUDGES

September 27, 1996

Karen Maples
Regional Hearing Clerk
U.S. EPA
290 Broadway, 17th Floor
New York, NY 10007-1866

Re: 501 Madison Avenue Associates, J.M.J. Cross Enterprises, Inc. & Georgio Neofytides
CAA Docket No. II-94-0110

Dear Ms. Maples:

Enclosed for distribution in accordance with 40 C.F.R. §22.27(a) are five copies of the Default Order in the above referenced proceeding. A certificate of service that shows service of a copy of the Default Order upon the parties should be sent to the Headquarters Hearing Clerk.

The original of the Default Order, together with the record in this matter, has been delivered to the Headquarters Hearing Clerk; and thus it is unnecessary for you to send your file to the Hearing Clerk.

As we have been having a problem with service upon Mr. Neofytides please mail his copy by regular and certified mail.

Sincerely,

Thomas W. Hoya
Administrative Law Judge

Enclosures

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
501 Madison Associates;	)	
J.M.J. Cross Enterprises, Inc.;	)	Docket No. CAA-II-94-0110
and	)	
Georgio Neofytides,	)	
	)	
Respondents	)	
formerly captioned		
501 Madison Associates; and	)	
J.M.J. Cross Enterprises,	)	
Inc.,	)	
	)	
Respondents	)	
and		
501 Madison Associates; and	)	
Temmon & Associates, Inc.,	)	
	)	
Respondents	)	

Clean Air Act -- Default Order -- Where Respondent failed to respond to the Complaint, Respondent was declared to be in default and to have committed the violations charged in the Complaint, and was subjected to the civil penalty proposed by the Complaint.

Appearances

For Complainant: Kate Donnelly
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region II
290 Broadway - 16th Floor
New York, New York 10007

For Respondent: No appearance

Before

Thomas W. Hoya, Administrative Law Judge

DEFAULT ORDER

This Default Order is issued in a case brought under the authority of the Clean Air Act ("the Act"), as amended, 42 U.S.C. § 7401 et seq. The Complaint was filed pursuant to Section 113(d), 42 U.S.C. § 7413(d), and it charged a violation of the National Emission Standard for Asbestos, 40 C.F.R. Part 61, promulgated pursuant to the Act. Complainant is the Regional Administrator, Region II, U.S. Environmental Protection Agency ("EPA"). There have been several Respondents involved in this case, and this Default Order is directed at only one of them: Georgio Neofytides, a licensed representative authorized to file notifications with EPA for asbestos-abatement activities.

Respondent Neofytides is declared by this Default Order to have violated 40 C.F.R § 61.145(b), a regulation promulgated pursuant to Sections 112 and 114 of the Act. The violation was a failure to submit written notification to EPA, as required by this regulation, prior to the commencement of a renovation operation involving the removal of asbestos-containing material. For this violation, Respondent Neofytides is assessed a civil penalty of $8,700. This issuance of a Default Order grants Complainant's Motion for Default Order filed April 26, 1996.

Procedural Background

The original Complaint, filed April 11, 1994, charged that the failure to notify occurred prior to renovation activity in July 1993 at an office building in New York City. The renovation dismantled more than 200 linear feet of regulated asbestos material from pipes and tanks in the building.

The Complaint sought $25,000 from Respondents 501 Madison Associates ("501 Madison") and Temmon & Associates, Inc. ("Temmon"). Respondent Temmon was never served; and Complainant's June 29, 1994 motion to delete Temmon from the Complaint, on the ground that it no longer existed, was granted July 7, 1994. Respondent 501 Madison turned out to be the owner of the office building; and the charge against it was settled by a $1,300 civil penalty in a Consent Agreement and Consent Order filed November 30, 1994.

The same motion by Complainant, and the order granting it, that deleted Respondent Temmon from the case also added a new Respondent, J.M.J. Cross Enterprises ("J.M.J. Cross"). It developed that Respondent 501 Madison, the building owner, had contracted with Respondent J.M.J. Cross for the renovation work, and that J.M.J. Cross had in turn contracted with Respondent Temmon.

Respondent J.M.J. Cross moved August 22, 1994 requesting that Temmon be added again to the case and that Armtek Corp. and Georgio Neofytides also be added as successors in interest to Temmon. Complainant moved September 15, 1995 to amend the Complaint to add Georgio Neofytides as a Respondent, and to reduce the proposed civil penalty from $25,000 to $10,000. Complainant's motion was granted October 13, 1995, and the same order also denied J.M.J. Cross's request to add Temmon, ruled the request to add Neofytides moot in view of the granting of Complainant's motion, and reserved judgement as to Armtek Corp.

Complainant issued a November 2, 1995 Amended Complaint against Respondent Neofytides charging him with a failure to give EPA the required notice regarding the renovation at 501 Madison Avenue. When Respondent Neofytides did not answer the Amended Complaint, Complainant moved April 19, 1996 for a Default Order against him. It is this Motion that is granted by this Order.

Respondent's Violation

Procedure for this case is governed by EPA's Consolidated Rules of Practice ("Consolidated Rules"), 40 C.F.R. Part 22. Section 22.17(a) of the Consolidated Rules (40 C.F.R. § 22.17(a)), applying to motions for default, provides in pertinent part as follows.

§ 22.17 Default Order.

> (a) Default. A party may be found to be in default ... (1) after motion, upon failure to file a timely answer to the complaint ... Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have twenty (20) days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

Complainant has moved for a default in the manner prescribed by Section 22.17(a). Respondent Neofytides has failed to make any

response to the Amended Complaint.[1] Complainant submitted a photocopy of a receipt for certified mail showing service on Respondent Neofytides of the Amended Complaint.[2] Complainant submitted also an affidavit of an EPA authorized agent certifying personal service of a copy of the Motion for Default Order on a woman at Respondent Neofytides' place of business who represented herself as his secretary.[3] In addition, Complainant submitted an affidavit of Complainant's counsel declaring that she had received a telephone call from a man identifying himself as Georgio Neofytides who said he had received a copy of the Motion.[4]

Accordingly, Respondent is declared to be in Default. Such default, per Section 22.17(a), "constitutes ... an admission of all facts alleged in the Complaint and a waiver of respondent's right to a hearing on such factual allegations."

Furthermore, the record compiled to date in this case is consistent with the charge against Respondent Neofytides. An affidavit of the president of Respondent J.M.J. Cross stated that J.M.J. Cross "sub-contracted the asbestos removal project at 501 Madison Avenue ... to Temmon ... [that] [t]he required Notifications ... to the US EPA, New York State, and New York City were a part of the subcontracted work ... [and that] Georgio Neofytides who was the head of Temmon ... told me that [the US EPA Notice] was mailed."[5] Moreover, an affirmation by Georgio Neofytides himself declared that "[i]n June 1993, I was the authorized licenced representative of Temmon ... to file Notifications for asbestos-abatement jobs with the US EPA, New York State, and New York City ... [and] [a]ll three of the required Notifications for the work Temmon did at 501 Madison Avenue ... were made by me"(emphasis in original).[6]

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[1] Affidavit of Karen Maples (May 31, 1996), transmitted by a May 31, 1996 letter from Complainant to this Tribunal.

[2] Complainant's Motion for Default Order (April 19, 1996), Exhibit 1.

[3] Affidavit of Reginald Blue (April 24, 1996), transmitted by an April 24, 1996 letter from Complainant to this Tribunal.

[4] Affidavit of Kate Donnelly (April 26, 1996).

[5] Affidavit of Paul K. Hinkley 1-2 (September 1, 1995), transmitted by a September 5, 1995 letter from Respondent J.M.J. Cross to this Tribunal.

[6] Affirmation of Georgio Neofytides 1 (August 30, 1995), transmitted by a September 5, 1995 letter from Respondent J.M.J.

In sum, the record supports the default conclusion that Respondent Neofytides was served with the Amended Complaint and failed to answer it. The record supports the further conclusion that he was responsible for giving EPA the required notice regarding the renovation activity at 501 Madison Avenue, and that EPA did not receive such notice. Accordingly, in view of Respondent Neofytides' failure to answer the Amended Complaint, and in view of the record in this case, he is declared in default and declared to have violated the Act as charged in the Amended Complaint.

Civil Penalty

The remaining issue is the appropriate civil penalty. The last sentence of the quotation above from Section 22.17(a) of EPA's Consolidated Rules states that "the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default" (40 C.F.R. 22.17(a)). On the other hand, Section 22.27(b), regarding penalties in initial decisions, states that "The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted" (40 C.F.R. § 22.27(b). This sentence suggests a responsibility of the Presiding Officer to review the amount of the civil penalty in a default case. Hence it will be reviewed.[7]

The Amended Complaint served on Respondent Neofytides proposed a civil penalty of $8,700, and Complainant's Motion for Default Order justified it chiefly under EPA's Clean Air Act Stationary Source Civil Penalty Policy. Section 22.27(b) of the Consolidated Rules requires the Presiding Officer to "consider" this Penalty Policy.

The Penalty Policy contains two parts that address respectively the gravity of the violation, and the economic benefit of noncompliance. (Appendix III, revised May 5, 1992, covers the economic benefit and gravity components for asbestos renovation violations of the type at issue here). The gravity component accounts for statutory criteria, such as the environmental harm resulting from the violation, the importance of the requirement to the regulatory scheme, the duration of the violation, and the size of

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Cross to this Tribunal.

[7] This responsibility to review the amount of the civil penalty is suggested also by Katzson Bros., Inc. v. U.S. E.P.A., 839 F.2d 1396 (10th Cir. 1988).

the violator.[8] The Penalty Policy guidelines indicate that, for a failure of notice violation, where apparently other regulations were substantially complied with, a penalty of $5,000 is warranted for a first-time violator.[9] Complainant concluded that these factors apply in this case.

Complainant found no economic benefit to Respondents to adjust the penalty upwards, but did increase it on the basis of the size of Respondents. Complainant estimated that the combined net worth of Respondents 501 Madison, J.M.J. Cross, and Georgio Neofytides is between $100,001 and $1,000,000, which results in a $5,000 increase under the Penalty Policy,[10] for a total penalty for all Respondents of $10,000. For Respondent Neofytides, Complainant's last adjustment was to reduce this $10,000 by the $1,300 received in the settlement with Respondent 501 Madison, producing the $8,700 final figure.

This $8,700 calculation by Complainant does represent a reasonable application to this case of EPA's relevant Penalty Policy. It is useful also to check the $8,700 figure against the penalty criteria in the Clean Air Act itself, which underlie EPA's Penalty Policy. Section 113(e) of the Act, 42 U.S.C. § 7431, provides in pertinent part as follows.

> "[I]n determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation."

Furthermore, the Section 113 civil penalty assessment provision of the Act authorizes a civil penalty of up to $25,000 per day. Measured against a statutory maximum of $25,000, Complainant's overall $10,000 proposed civil penalty is fair. The notice requirement is an important element of the regulatory program, but

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[8] Clean Air Act, Stationary Source Civil Penalty Policy, Appendix III, 1-2 (revised May 5, 1992)..

[9] Id. at 15.

[10] See supra, note 5 at 6.

Respondents' violation--their first environmental transgression--was negligent rather than deliberate, no harm was done the environment, and no economic benefit accrued to Respondents from the violation. In this situation, forty percent of the maximum is a sensible civil penalty. Finally, Respondent Neofytides' culpability exceeds that of the other Respondents, since among them it was he who was responsible for notification. Thus it is just that he bear the largest share of the penalty.

ORDER

Respondent Neofytides is declared to be in default with respect to the November 2, 1995 Complaint and, as charged therein, is declared to have violated 40 C.F.R. § 61.145(b). A penalty of $8,700 is assessed against Respondent Neofytides in accordance with Section 113(d) of the Act.

Therefore, pursuant to 40 C.F.R. § 22.17, Respondent is ordered to pay a civil penalty of eight thousand seven hundred dollars ($8,700). Payment of the full amount of the penalty shall be made by submitting a cashier's or certified check payable to the Treasurer of the United States within 60 days of receipt of this order to the following address:

EPA-Region II
(Regional Hearing Clerk)
290 Broadway, 17th Floor
New York, NY 10007-1866

Failure to pay the civil penalty imposed by this Default Order[11]

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[11]This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.27(b). Pursuant to Section 22.27(c) of the Consolidated Rules, 40 C.F.R. § 22.27(c), an Initial Decision "shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision." Under Section 22.30(a) of the Consolidated Rules, 40 C.F.R. § 22.30(a), the parties have twenty (20) days after service upon them of an Initial Decision to appeal it. The address for filing an appeal is as follows:

shall subject Respondent to the assessment of interest and penalty charges on the debt pursuant to 4 C.F.R. §§ 102.13(b),(e).

Dated: September 27, 1996

Thomas W. Hoya
Administrative Law Judge

Environmental Appeals Board
U.S. EPA
Weststory Building (WSB)
607 14th Street, N.W., 5th Floor
Washington, D.C. 20005