UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
RIVERSIDE FURNITURE CORPORATION,	)	DOCKET NO. EPCRA-88-H-VI-406S
	)	
RESPONDENT	)	
	)	

Emergency Planning and Community Right-To-Know Act ("EPCRA") - Evidence

1. The failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.

Emergency Planning and Community Right-To-Know Act ("EPCRA")

2. Obectives sought by the enactment of EPCRA can be achieved only through voluntary, strict and comprehensive compliance by regulated industry and a lack of such compliance will weaken, if not defeat, the purposes expressed in the Act.

Emergency Planning and Community Right-To-Know Act ("EPCRA") - Civil Penalty Guidelines

3. Annual report forms filed 115 days late result in an impact on the EPCRA program much less severe than a filing which is 180 days late and the position of the Agency in promulgating guidelines providing that a maximum penalty should be assessed against a regulated industry filing 115 days after July 1, 1988, and 21 days after an EPA inspection, is arbitrary and unreasonable where the only criterion for the assessment of such maximum penalty is the fact of the inspection.

Emergency Planning and Community Right-To-Know Act ("EPCRA") - Civil Penalty

4. It is recognized by the Act and by EPA that reporting required by EPCRA must be voluntary and timely and that an increased penalty is appropriate where compliance is achieved only after an EPA inspection or other contact.

APPEARANCES

For Complainant:

Evan L. Pearson, Esquire
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VI
1445 Ross Avenue
Dallas, Texas;
Telephone: (214) 655-2115
(FTS) 255-2125

For Respondent:

John J. Little, Esquire
HUGHES & LUCE
1717 Main Street
Dallas, Texas 75201;
Telephone: (214) 939-5450

INITIAL DECISION

On March 27, 1989, an Interlocutory Order was issued herein granting the Motion for Partial Accelerated Decision of the United States Environmental Protection Agency (hereinafter "EPA", "the Agency" or "Complainant") with the finding that Riverside Furniture Corporation (hereinafter "Riverside" or "Respondent") violated Section 313 of the Emergency Planning and Community Right-to-Know Act (hereinafter "EPCRA" or "the Act"), 42 U.S.C. §11023, as charged in subject Complaint, for the reason that Riverside failed to prepare and file "Form R's" on or before July 1, 1988, providing the EPA and the Arkansas Department of Labor information showing the amounts of toxic chemicals used during calendar year 1987, when in fact six toxic chemicals were used by Riverside for said year in quantities exceeding 10,000 pounds.

On July 26, 1989, a hearing requested by Riverside was convened in Dallas, Texas, to determine the sole/remaining issue of what penalty, if any, should be assessed against Riverside for said violations. EPA proposed civil penalties totaling $126,000, calculated pursuant to the Enforcement Policy for said Section 313 (Stipulated Exhibit [hereinafter "SE"] 1). Riverside urges that said penalty amount is excessive and submits it should be reduced for the following reasons:

(1) It did not know about subject reporting requirements which, it is alleged, Congress and EPA knew would take a considerable effort to communicate to the regulated community;

(2) Upon learning of Section 313 requirements, Riverside promptly complied and filed Form R's for its facilities and acted to ensure that it would comply with all EPCRA requirements in the future, and

(3) The penalty proposed is based almost entirely upon a single fact: the inspection of the Riverside facility on September 29, 1988, 1/ prior to Respondent filing its Form R's which were prepared on October 20, 1988.

On this premise, it submits that the civil penalty imposed should not exceed $18,000 and that a more substantial reduction can be justified under the applicable law.

Section 325(c) of EPCRA, 42 U.S.C. §11045(c) provides, in pertinent part, that:

(1) Any person . . . who violates any requirement of . . . Section 313 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

* * *

1/ Enforcement Response Policy for Section 313 of the Act (Title III of the Superfund Amendments and Reauthorization Act (hereinafter "SARA"; SE 1), was issued December 2, 1988, and provides, in pertinent part, at page 3, that, to be considered a late report instead of a failure to report for those reports submitted after the deadline of July 1, the report must be submitted prior to the facility being contacted by EPA . . . in preparation for a pending inspection . . . or, in the absence of such contact, prior to the date of . . . inspection. Any report . . .submitted after such contact/inspection is to be treated the same as a non-report in assessing the penalty. Witness Phyllis Flaherty (Transcript [hereinafter "TR"] 12 et seq.), who chaired the work group that developed said Enforcement Response Policy (TR 14), testified (TR 33) that if Riverside had voluntarily filed its Form R's within the 180-day period following the July 1, 1988, deadline (assuming no contact between Riverside and EPA), they would be considered a late reporter (not non-reporter) and the Level 5 Circumstance Level would be used; that for the first three chemicals, the highest Adjustment Level (Level A) would produce a Gravity-Based Penalty [hereinafter "GBP"] of $5,000 for each and that the last three chemicals (Level B) would warrant a GBP of $3,000 for each chemical (TR 38). The record clearly reflects that the date of subject inspection of Riverside's facility was September 29, 1988, and that Form R's were filed by Riverside on October 20, 1988, and received by EPA on October 24, 1988, and corrected Form R's were dated November 1, 1988 (SE 5, 6, 7, 8, 9 and 10).

(3) Each day a violation described in paragraph (1) . . . continues shall, for purposes of this subsection, constitute a separate violation.

40 C.F.R. Section 22.27(b) provides:

> If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint (he) shall set forth in the initial decision the specific reasons for the increase or decrease.

Section 325(b)(C) of the Act adopts the criteria provided in the Toxic Substances Control Act (hereinafter "TSCA") relating to the determination of civil penalties (TR 17-18) which provides, in pertinent part, as follows:

> (C) In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation and violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability . . . and such other matters as justice may require.

It is undisputed that Riverside is charged with knowledge of the United States Statutes at Large and that publication in the Federal Register of 40 C.F.R. 372, on February 16, 1988, gave Riverside legal notice of the EPCRA regulations (Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-385 (1947)).

Complainant argues that Riverside's professed lack of actual knowledge is not here relevant for penalty mitigation. However, it further

argues that if it be assumed that lack of actual knowledge on the part of Riverside is relevant, then Riverside has the burden of going forward with evidence to rebut the presumption that it was in possession of such knowledge and that it failed to do so. It submits that knowledge was received by Riverside when, in April and May, 1987, the State of Arkansas prepared and mailed a letter which set forth pertinent requirements of EPCRA. Said letter was mailed to all companies listed in the 1987 Arkansas Manufacturers Directory, including Riverside (Transcript [hereinafter "TR"] 56-59; Complainant [hereinafter "C"] Exhibit [hereinafter "EX"] 36). Further, in March, 1988, the U.S. EPA mailed a brochure to all companies listed on the TRINET data bases. Riverside was one of the companies included in said mailing (TR 43-46; 50; 74-77; C EX 16, 17 and 18). Because these documents were properly addressed, stamped and placed in the U.S. mail (TR 44-50; 52-57), EPA submits that a presumption is created that Riverside received them, citing 29 Am. Jur. 2d, Evidence, Sec. 194. Riverside's Senior Vice-President (TR 184 et seq.) testified that if something is mailed to 1400 South Sixth Street in Fort Smith, Arkansas, it reaches Riverside, the Respondent (TR 194-195). In addition to the above outreach efforts, EPA conducted seminars and two national teleconferences all pertaining to the requirements of EPCRA and subject Section 313 (TR 48).

EPA outreach efforts were undertaken with the recognition that to achieve compliance with Section 313 of EPCRA on a broad scale would be difficult and that a lack of compliance would defeat the purposes of said Section 313 of the Act (SE 17, 27 and 29; TR 31). Its broad outreach program on the national, regional and state levels were designed to make the regulated community aware of the requirements of said Section 313 (see

also SE 18, 19, 20-25; TR 42-61; 140-144). I find that, for purposes of this case, the success of such outreach efforts must be predicated not on whether Riverside, acting through its employees, had actual knowledge of what requirements of the Act were pertinent to its continued operation but, rather, on whether Riverside should have known of such requirements as a result of such efforts. On this premise, Riverside is charged with actual knowledge. 2/

Although Evan Breedlove was in charge of environmental compliance through 1987, he was not produced as a witness, although he authored SE 12 and 14. SE 12 is a letter to Pat Humphrey, Department of Labor, and SE 14 is a letter to the Fort Smith Fire Chief, dated December 4, 1987, submitting material safety data sheets (complying with Section 311 of EPCRA) and acknowledging in response to C EX 36 (letter from State of Arkansas) that such submission was required by the "Hazardous Materials Emergency Response Commission."

Breedlove was responsible for environmental matters at Riverside (TR 164) until such duties gradually became the responsibility of

---

2/ The failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law (Mungin v. Florida East Coast Ry. Co., 318 F. Supp. 720, 737 (DMD Fla., 1970)). Where a corporation has knowledge of information which would trigger a legal duty to act, it cannot escape its responsibility to so act because the particular official charged with the responsibility was unaware of that information (USM v. SPS Technologies, Inc., 514 F.S. 213, 236 (ND IL, 1981)). The knowledge imputed to the corporation does not turn on the actual express knowledge or lack of knowledge of a particular employee. Private corporations are held to have constructive knowledge of its managers and employees; it is considered to have acquired the collective knowledge of its employees (see Camacho v. Bowling, 562 F.S. 1012, 1025 (IL, 1983) and U.S. v. Bank of England, 821 F.2d. 844, 856 (1st Cir., 1987)).

witness Gary Craig, whose job responsibilites are now described as director of safety, fire protection, environmental affairs and security (TR 160). Prior to September 29, 1988, Riverside did not belong to professional and civic organizations (TR 161), but joined American Furniture Manufacturers Association, Water and Air Users and other organizations after said date, upon learning that such memberships are a means of keeping abreast of regulatory requirements (TR 162; 171).

Riverside Furniture Corporation employs between 1300 and 1400 people (TR 176). The sole responsibility for environmental matters, over the past 18 months, has been that of Gary Craig (TR 180). He works with Evan Breedlove. Craig stated (TR 181) that he doesn't have time to read all the magazines and trade journals that come to him, because of his many duties at Riverside. He opined that if a magazine came across his desk with an article concerning subject Title III that he wouldn't consider it notice of the requirements of Title III if he hadn't read it (TR 182).

From the foregoing, I conclude that Riverside Furniture Corporation did not have actual knowledge, on July 1, 1988, and until after September 29, 1988, of the requirements set forth in the pertinent regulations and the Act; however, it is apparent that Riverside should have had such knowledge. On this record, I do not attribute the "lack of knowledge" to insufficient outreach efforts of the state and EPA but to an inefficient effort on the part of Riverside to keep abreast of requirements of subject Act and regulations, apparently due to its failure to have an adequate staff.

Such finding is not determinative, however, of the issue here considered. The basic requirement of the Act expressed in subject Section

313(a), 42 U.S.C. §11023(a), provides that " . . . a facility subject to (subject) requirements shall complete a (Form R) for (subject toxic chemicals) . . . otherwise used in quantities exceeding the . . . threshold quantity . . . during the preceding calendar year at such facility. Such form shall be submitted . . . on or before July 1, 1988 and annually thereafter . . . "

Section 325(c), 42 U.S.C. §11045(c) then provides that any person who violates said Section 313 shall be liable for a civil penalty not to exceed $25,000.

The civil penalty policy is derived from the provisions of §325(b)(C), quoted supra, page 5, whereby a gravity-based penalty (hereinafter "GBP") for each violation is ascertained from a matrix containing, on its vertical axis, six "Circumstance Levels" - Levels 1 through 6 - and, on its horizontal axis, three Adjustment Levels - A, B and C.

As explained in footnote 1, page 4, supra, the guidelines provide that, to be considered a late report instead of a failure to report, for those reports submitted after the deadline of July 1, 1988, the report must be submitted prior to the facility being contacted by EPA, and that any report submitted after such contact (or inspection) is to be "treated the same as a non-report in assessing the penalty." It is agreed that Riverside is a "large" company and that it "uses", for three of subject toxic chemicals, ten times or more chemical than the threshold limit (Adjustment level A) and, for the other three toxic chemicals, it "uses" less than then times the threshold. For the reason that on the date of the inspection, performed on September 29, 1988, Riverside had not filed Form R's for said chemicals, the remedial action (filing said Form R's) taken

thereafter is considered a non-report, although filed on October 20, 1988, and received by EPA on October 24, 1988. For the reasons hereinafter set forth, I find that the guidelines are impractical in application and produce a resultant civil penalty incommensurate with the facts presented by the record.

One of the purposes of EPCRA is to enable EPA, and state and local governments, to gather information regarding the usage of various toxic chemicals by industry. Section 313 of the Act specifically was intended to obtain information regarding releases of toxic chemicals into the environment (TR 128-129). Annual reports of such chemical releases (Form R's) are required from specified facilities where the release exceeds a specified threshold amount. Such reports were required for the first time on July 1, 1988 (for releases occurring during calendar year 1987) and annually thereafter (§313).

It needs no citation of authority to state that the filing of such reports was intended, in this as in other programs, to be timely, complete and accurate. The success of EPCRA can be attained only through voluntary, strict and comprehensive compliance with the Act and regulations which recognize that achievement of such compliance would be difficult and that a lack of compliance would weaken, if not defeat, the purposes expressed (SE 17, 27, 29; TR 31). Congress provided for "threshold amounts" that effectively increased the number of facilities required to submit Form Rs. EPA engaged in its outreach efforts as a means of making the regulated community aware of applicable requirements of the Act. In formulating its Enforcement Policy (SE 1), dated December 2, 1988, EPA required that Form R's be submitted on July 1, 1988; however, it further

provided that such reports could be submitted up to 90 days after July 1, 1988, without penalty (TR 30-31; SE 1, page 11).

I find that, on this record, the EPCRA program must require voluntary 3/ and timely compliance with the Act and regulations to succeed in attaining the objective envisioned by the Act: having available information for the government and the public reflecting the location, character and quantities of toxic chemicals released by industry into and onto air, water and land. The Act and regulations provide for a date certain for the initial filing of Form R's; however, in recognition of difficulties in making the regulated community aware of the provisions of subject regulation, the guidelines for the assessment of civil penalties provided, in the interest of assuring that such penalties are arrived at in a fair, uniform and consistent manner, that certain "late filings" would be tolerated. A 30-day delay, to August 1, 1988, is found to have minimal impact on the Agency's ability to make such information available to the public due to the "amount of time to input the data into the tracking system and data base", and requires no enforcement action. A Notice of Non-compliance is appropriate for late reports submitted with 31-90 days after July 1, 1988. The "grace period" is less in subsequent years. This provision is in deference to the start-up of a new and innovative law which requires (Form R's) from facilities which previously have not been required to report, and recognizes that reports submitted in this time frame will have less unfavorable impact on availability of said data.

3/ As stated in City of Detroit (consolidated cases), TSCA-V-C-82-87 et al., l.c. 29, citing Western Compliance Services, TSCA-1087-11-01-2615 (EPA Region X): "If no sanctions were provided for failure to prepare such document unless and until an inspection, there would exist no incentive to comply with the regulation and the public would not be protected as by the Act intended."

In the instant case, the inspection was performed by EPA on September 29, 1988, 91 days after July 1, 1988, when Riverside's Form R's should have been filed. Because of the inspection (contact), the Form R's filed by are, under the guidelines, considered a "non-filing" instead of a "late filing".

It will be noted that Circumstance Level 5 is applicable to "Late Reporting" (91-180 days after the due date for 1988 reports). (See footnote 1, page 4, supra; SE 1, page 11.)

The Act's requirement and the Agency's recognition that specified reporting be voluntary and timely must be vindicated; however, it is further clear that an evaluation of the impact on the program of any non-compliance is pertinent as demonstrated, supra. It is clear, and I find, that Riverside's prompt and voluntary filing of its Form R's, received by EPA on October 24, 1988 (115 days late), was consistent with the objective of the Act and the unfavorable impact on the EPCRA program was discernably less than had Riverside taken 180 days or more to file said reports. Under the guidelines, once the contact with Riverside was made by EPA, any report filed thereafter is considered to be a "failure to report". I find that such disposition is arbitrary and opposed to the expressed interest in arriving at civil penalties in a fair, uniform and consistent manner. I have further considered that the charge here made is a failure to report in 1988 (at the initiation of subject enforcement effort), and actually prior to promulgation of the Enforcement Response Policy on December 2, 1988.

In the premises, I adopt Circumstance Level 3 of subject matrix (SE 1, page 9) and find that penalties totaling $75,000 should be assessed against Riverside, and recommend entry of the following ORDER:

FINAL ORDER 4/

1. Pursuant to Section 325(c) of EPCRA, 42 U.S.C. §11045(c), a civil penalty in the total amount of $75,000 is assessed against Riverside Furniture Corporation for the violations of the Act as established by the evidence elicited herein.

2. Payment of $75,000, the civil penalty assessed, shall be made within 60 days after receipt of the FINAL ORDER by forwarding a Cashier's or Certified Check, made payable to the Treasurer, United States of America, to:

EPA - Region 6
(Regional Hearing Clerk)
P.O. Box 360582M
Pittsburgh, PA 15251.

DATED: September 28, 1989

Marvin E. Jones
Administrative Law Judge

4/ 40 C.F.R. §22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties, unless an appeal is taken by one of the parties or the Administrator elects to review the Initial Decision. Section 22.30(a) provides for an appeal from this Initial Decision within 20 days.

CERTIFICATE OF SERVICE

I hereby certify that the Original of the foregoing INITIAL DECISION was forwarded via Certified Mail, Return Receipt Requested, to Mrs. Carmen Lopez, Regional Hearing Clerk, Office of Regional Counsel, U.S. EPA, Region VI, 1445 Ross Avenue, Dallas, Texas 75202-2733; that a True and Correct Copy was forwarded in the same manner and to the same address to Counsel for Complainant, Evan L. Pearson, and a True and Correct Copy was forwarded in the same manner to Counsel for Respondent:

John J. Little, Esquire
HUGHES & LUCE
1717 Main Street
Dallas, Texas 75201;

all such Service effected this 28th day of September, 1989.

Mary Lou Clifton

Mary Lou Clifton
Secretary to Judge Jones