

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Keller Industries, Inc. d/b/a
Keller Extrusions of
Virginia, Inc.; Keller
Aluminum Products of
Virginia, Inc.; and Keller
Ladders of Virginia, Inc.,

Docket No. RCRA-III-249

Respondent

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT AND SETTING PROCEDURAL DATES

The complaint, compliance order, and notice of opportunity for hearing in this proceeding, filed, September 16, 1993, pursuant to Section 3008(a)(1) of the Resource Conservation and Recovery Act (RCRA), alleged eleven violations of RCRA, Subtitle C and Virginia Hazardous Waste Management Program

(VHWM) during 1989 - 1991.¹ Complainant proposes a total penalty of \$599,823.00. Respondent, Keller Industries, Inc. (Keller) , filed a timely answer on November 29, 1993, wherein it denied the alleged violations, challenged the proposed penalty and compliance order, raised six defenses, and requested a hearing. The undersigned was redesignated to preside in this matter by order dated February 13, 1997.

By order dated January 23, 1996, the previous Administrative Law Judge (AT-J) assigned to this case directed the parties to submit prehearing exchange documents by March 31, 1996.² Complainant timely filed prehearing exchange documents on April 1, 1996.³ Respondent did not file a prehearing exchange. Instead, Respondent filed a letter, dated May 1, 1996, stating that Keller filed for reorganization under Chapter 11 of the Bankruptcy Code and asserting that this proceeding is automatically stayed, pursuant to Section 362 of the Bankruptcy Code.

On August 1, 1996, Complainant filed a motion for default for Respondent's failure to file a prehearing exchange. A party may be found to be in default "after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer [ALJ]." 40 CFR § 22.17(a)(2). Complainant asserted that it will be prejudiced if this motion is not granted because "Respondent's counsel has had an opportunity to review, evaluate and respond to Complainant's prehearing exchange rather than making a submission simultaneously with Complainant's, as required by the order of January 23, 1996."

For the reasons stated below, this administrative proceeding is not stayed by Respondent's bankruptcy filing and Complainant's motion for default will be denied.

DISCUSSION

Section 362 (a) of the Bankruptcy Code generally stays the commencement or continuation of a proceeding against the debtor that could have been commenced prior to filing of the bankruptcy petition. Section 362(b)(4), however, excepts from the stay "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." It is well established that a proceeding seeking entry of judgment in an administrative penalty proceeding is within EPA's authority to enforce environmental laws and is therefore not stayed by Respondent's filing of a bankruptcy petition. See, e.g., In re Automotive Finishes, Inc., 5-EPCRA-96-013 (ALJ order, Feb. 11, 1997); In re Hanlin Chemicals-West Virginia Inc., IF&R-III-425-C; TSCA-III-651; EPCRA-III-091 (Initial Decision, Nov. 9, 1995); In re James H. Crockett, 204 Bankr. 705, 1997 Bankr. Lexus 99 (Bankr. W.D. Tex., Jan. 27, 1997). It is the enforcement of any penalty assessment resulting from this proceeding, which is a money judgment, that is subject to the stay provisions of the bankruptcy code. Kovacs v. Ohio, 717 F.2d 984, 988 (6th Cir. 1983), aff'd 469 U.S. 274 (1985).

Respondent's belief that bankruptcy filing stayed this proceeding may explain why Respondent failed to file a prehearing exchange. Under these circumstances, it would be inappropriate to order default, assess a substantial penalty, and preclude Respondent the opportunity to present its defense. Complainant's assertion that it is prejudiced by seriatim filing of prehearing exchange is without merit. Respondent may defend itself through rebuttal evidence and/or cross examination at hearing. ⁴ Although prejudice may occur if documents are submitted on the eve of hearing and the opposing side is not afforded a

reasonable amount of time to respond, this is not the case here, where a hearing date has not yet been determined. EPA will have ample opportunity to challenge any documents or other evidence presented by Respondent.

Because this proceeding is not stayed and the parties appear unable to achieve settlement at this time, the case should proceed toward hearing. Respondent will be provided another opportunity to file prehearing exchange documents, and Complainant will be afforded the opportunity to reply. If Respondent elects not to file any prehearing exchange, but to challenge EPA's evidence through cross-examination at hearing, Respondent will be ordered to serve a statement to that effect. A hearing date will be set once all documents are received. However, should Respondent not file either a prehearing exchange or a statement that it will rely on cross-examination at the hearing, the issue of whether or not Respondent is then in default will be revisited.

ORDER

1. This administrative proceeding is not stayed by Section 362 of the Bankruptcy Code.
2. Complainant's motion for default is denied.
3. Respondent shall submit, no later than **July 15, 1997**, either a prehearing exchange (direct and rebuttal), or a statement, in lieu thereof, indicating that no prehearing exchange will be submitted and that Respondent will rely on cross-examination at the hearing. Prehearing exchange should include: a statement of Respondent's desired location of the hearing; a list of witnesses that Respondent intends to introduce at hearing, together with a brief narrative of expected testimony; and copies of all documents and exhibits intended to be introduced into evidence. In addition, Respondent shall set forth any factual allegation in the complaint that it disputes and the factual and legal justification for such dispute, and shall set forth the factual and legal justification for the six defenses stated in the answer under the heading "Defenses."
4. Complainant shall submit, no later than **August 15, 1997**, its rebuttal prehearing exchange, or a statement in lieu thereof, indicating that no rebuttal prehearing exchange will be submitted.

Charles E. Bullock

Administrative Law Judge

Issued: April 9, 1997

¹ Pursuant to RCRA § 3006(b), 42 U.S.C. § 6929(b), and 40 CFR Part 271, Subpart A, the Commonwealth of Virginia was granted final authorization to administer a state hazardous waste management program in lieu of the RCRA Subtitle C federal program, on December 18, 1984. The provisions of the VHWM became requirements of RCRA, Subtitle C, and, therefore, enforceable by EPA pursuant to RCRA § 3008(a), 42 U.S.C. § 6928(a). Provisions of the Hazardous and Solid Waste Amendments enacted on November 8, 1984, Pub. Law No. 98-616, are enforceable in Virginia exclusively by EPA.

² The ALJ stated, "absent unusual circumstances, extensions to this March 31, 1996 prehearing exchange date will not be granted."

³ Because March 31, 1996 was a Sunday, the requisite time period for filing was extended to include the next business day, April 1, 1996. 40 CFR § 22.07(a).

⁴ "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Administrative Procedure Act (APA) § 556, 15 U.S.C. § 556(d).

IN THE MATTER OF KELLER INDUSTRIES, INC. d/b/a KELLER EXTRUSIONS OF VIRGINIA, INC.; KELLER ALUMINUM PRODUCTS OF VIRGINIA, INC.; and KELLER LADDERS OF VIRGINIA, INC., Respondent

Docket No. RCRA-III-249

CERTIFICATE OF SERVICE

I certify that the foregoing Order, dated April 9, 1997, was sent in the following manner to the addressees listed below:

Original by Regular Mail to: Ms. Lydia Guy

Regional Hearing Clerk

U.S. Environmental Protection

Agency, Region III

841 Chestnut Building

Philadelphia, PA 19107-4431

Copies by Regular mail to:

Counsel for Complainant: Jean Heflin Kane, Esquire

Senior Assistant Regional Counsel

U.S. Environmental Protection

Agency, Region III (3RC32)

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Counsel for Respondent: Alan Schutzman, Esquire

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3499 N.W. 53rd Street

Ft. Lauderdale, FL 33309

Marion Walzel

Legal Assistant

Dated: April 9, 1997

Washington, D.C.