UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
STEWART FURNITURE MANUFACTURING CO.	)	
and THE BEVERLY-MIKE COMPANY, INC.,	)	**DKT. No. EPCRA-09-95-0010**
	)	
Respondents	)	

DEFAULT ORDER AND INITIAL DECISION

This proceeding was commenced on August 1, 1995 with the filing of a Complaint by the Complainant Environmental Protection Agency (EPA) against Respondent Stewart Furniture Manufacturing Co. The Complaint charged the Respondent with three violations of Section 313 of the Emergency Community Right-To-Know Act of 1986 (EPCRA), 40 C.F.R. §372.25 as a result of the Respondent's failure to file Toxic Chemical Release Reporting Forms (Form R) for 1,1,1-trichloroethane in 1992 and 1993 in two separate facilities and proposed a $15,000 penalty.

On August 21, 1995, the Complainant filed a First Amended Civil Complaint adding as an additional Respondent The Beverly-MIKE Company, Inc. Both Respondents are alleged to own and operate two furniture manufacturing facilities which are the subject of the Complaint.

On or about September 12, 1995, Respondent The Beverly-MIKE Co., Inc., through counsel, filed an Answer to the First Amended Civil Complaint (hereinafter "Complaint"). The Answer alleged that Respondent Stewart Furniture Company and Respondent The Beverly-MIKE Company, Inc. had merged into The Beverly-MIKE Company, Inc. on October 20, 1993.[(1)] In the Answer, Respondents denied the alleged violations, requested a hearing, set forth an affirmative defense alleging that Respondents were not required to file a Form R, and set forth defenses with regard to the proposed penalty.

Pursuant to an Order, dated November 6, 1996, of the previously designated Presiding Officer, the parties were directed to submit prehearing exchange documents by February 15, 1997. None of the parties submitted prehearing exchange documents by that date. On February 24, 1997, Complainant filed a Motion to Continue the Prehearing Exchange. The following day, Respondents' counsel submitted a letter to the undersigned stating that Respondents concurred in the Motion to Continue, that Respondents' counsel had joined a new firm, and that there was a strong possibility for settlement of the matter. Respondents' counsel stated that his failure to file the prehearing documents was "due to a personal situation that I can assure the court is impossible to repeat."

On February 26, 1997, the undersigned issued an Order Reestablishing Prehearing Exchange Schedule (the Prehearing Order) which granted the Motion to Continue, and specifically advised the parties that "the Rules [40 C.F.R. Part 22] require that motions for extensions of time be filed prior to the deadline sought to be extended therein and that motions filed after such deadline, without good cause having been shown therefor, are automatically rejected." The parties were required in the Prehearing Order to file prehearing exchanges in seriatim fashion, as follows: Complainant's Initial Prehearing Exchange was due on June 1, 1997; Respondent's Initial Prehearing Exchange was due on July 1, 1997; and Complainant's Rebuttal Prehearing Exchange was due on July 15, 1997.

In addition, the Prehearing Order stated as follows:

If the Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. **The Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of the Complainant's Witnesses, can result in the entry of a default judgment against it.** . . . THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS DOES NOT CONSTITUTE A BASIS FOR FAILING TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS.

Complainant filed timely its prehearing exchange on May 30, 1997 as well as an addendum to the prehearing exchange on June 3, 1997.

To date, Respondents have not filed any prehearing exchange nor a statement otherwise responding to the Prehearing Order.[(2)] Furthermore, to date, Respondents have not filed a motion to extend the time for filing a prehearing exchange. According to the Consolidated Rules of Practice, 40 C.F.R. section 22.07(b), such a motion had to be filed in advance of the date on which the prehearing exchange was due to be filed.

Section 22.17(a) of the Consolidated Rules of Practice provides in pertinent part that:

A party may be found in default (1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or **sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer** . . . . 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.

* * * *

Thus, for their failure to comply with the Prehearing Order requiring submission of a prehearing exchange or statement in lieu thereof on or before July 1, 1997, the Respondents are hereby found to be in default. In accordance with Rule 22.17(a), this constitutes an admission of the facts alleged in the Amended Complaint and for assessment of the penalty of $15,000 proposed within.

The following Findings of Fact and Conclusions of Law are based upon the Amended Complaint, Complainant's Prehearing Exchange, and other documents of record in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Stewart Furniture Manufacturing Company is a California corporation.

2. The Beverly-MIKE Co., Inc. is a California corporation.

3. No documents were submitted into the record in support of the statement in the Answer that Stewart Furniture Manufacturing Company merged into The Beverly-MIKE Co., Inc.

4. Respondents own and operate two furniture manufacturing facilities in California, in Pico Rivera and in the City of Commerce ("Facility One" and "Facility Two" respectively, or "Facilities").

5. Each of the Facilities has 10 or more "full time employees."

6. The Facilities are classified in Standard Industrial Classification (SIC) Code 25.

7. Subsection 313 of EPCRA provides that a facility which has 10 or more full-time employees and that is in SIC Codes 20 through 39, and which manufactured, processed or otherwise used a toxic chemical listed under subsection 313(c) of EPCRA in excess of the threshold quantity established under subsection 313(f) of EPCRA, must submit a toxic chemical release form (Form R) for each such chemical for the calendar year for which such a release form is required.

8. Pursuant to sections 313 and 328 of EPCRA, EPA promulgated the Toxic Chemical Release Reporting: Community Right-to-Know Rule, 40 C.F.R. Part 372. Chemicals which are required to be reported under section 313(c) of EPCRA are listed in 40 C.F.R. § 372.65. Thresholds for reporting releases are established in 40 C.F.R. § 372.25. For each chemical listed in section 372.65 known to be manufactured, processed, or otherwise used in excess of the applicable threshold quantity, the owner or operator of the facility must submit to EPA and to the State in which the facility is located a completed Form R by July 1 of the following year, pursuant to 40 C.F.R. § 372.30. With respect to a chemical "otherwise used" at a facility, the threshold amount for purposes of reporting under section 372.30 is 10,000 pounds, according to section 313(f) of EPCRA and 40 C.F.R. § 372.25(b).

A. Count I

9. The chemical 1,1,1-trichloroethane, Chemical Abstracts Services (CAS) No. 71-55-6, is listed in 40 C.F.R. § 372.65 as a chemical to which 40 C.F.R. Part 372 applies.

10. During calendar year 1991, 1,1,1-trichloroethane was "otherwise used" at Facility One, as that term is defined in 40 C.F.R. § 372.3, in quantities exceeding the threshold established by section 313(f) of EPCRA and 40 C.F.R. § 372.25.

11. Respondents were required to submit a Form R to EPA and to the State of California, a Form R for 1,1,1-trichloroethane at Facility One for calendar year 1992 on or before July 1, 1993.

12. Respondents failed to submit a Form R for 1,1,1-trichloroethane at Facility One for calendar year 1992 to the EPA and to the State of California on or before July 1, 1993, and thus violated section 313 of EPCRA and 40 C.F.R. Part 372.

B. Count II

13. During calendar year 1993, 1,1,1-trichloroethane was "otherwise used" at Facility One, as that term is defined in 40 C.F.R. § 372.3, in quantities exceeding the threshold established by section 313(f) of EPCRA and 40 C.F.R. § 372.25.

14. Respondents were required to submit to the EPA and to the State of California, a Form R for 1,1,1-trichloroethane at Facility One for calendar year 1993 on or before July 1, 1994.

15. Respondents failed to submit a Form R for 1,1,1-trichloroethane at Facility One for calendar year 1993 to the EPA and to the State of California on or before July 1, 1994, and thus violated section 313 of EPCRA and 40 C.F.R. Part 372.

C. Count III

16. During calendar year 1993, 1,1,1-trichloroethane was "otherwise used" at Facility Two, as that term is defined in 40 C.F.R. § 372.3, in quantities exceeding the threshold established by section 313(f) of EPCRA and 40 C.F.R. § 372.25.

17. Respondents were required to submit to the EPA and to the State of California, a Form R for 1,1,1-trichloroethane at Facility Two for calendar year 1993 on or before July 1, 1994.

18. Respondents failed to submit a Form R for calendar year 1993 to the EPA and to the State of California on or before July 1, 1994, and thus violated section 313 of EPCRA and 40 C.F.R. Part 372.

DETERMINATION OF CIVIL PENALTY AMOUNT

19. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), authorizes EPA to assess a civil administrative penalty not to exceed $25,000 for each violation of section 313 of EPCRA.

20. The Consolidated Rules of Practice provide that the dollar amount of the civil penalty proposed in an Administrative Complaint "shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.14(c).

21. Section 325(b)(1)(C) provides, with respect to violations of the emergency notification requirements of section 304 of EPCRA. 42 U.S.C. § 11004, that in determining the amount of any civil penalty assessed, the "nature, circumstances, extent and gravity of the violation or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require" shall be taken into account.

22. There are no criteria in EPCRA for determining the amount of civil penalty for violations of section 313 of EPCRA.

22. For determining penalties to be proposed in Administrative Complaints, Complainant has issued the Enforcement Response Policy for Section 313 of EPCRA (ERP), dated August 10, 1992.

23. Having found that Respondents violated 40 C.F.R. Part 372 and section 313 of EPCRA in three instances, I have determined that $15,000, the penalty proposed in the Amended Complaint, is the appropriate civil penalty to be assessed against Respondents.

24. In making this determination, I have taken into account the nature, circumstances, extent and gravity of the violations, the penalty considerations described in the ERP, and the Complainant's rationale for its proposed penalty determination stated in its prehearing exchange.

25. Complainant stated in its prehearing exchange the following: as to the circumstances of the violation, the failure to file Form R constitutes the most serious circumstance level for EPCRA 313 violations. As to the extent of the violations, The quantity of 1,1,1-trichloroethane used by Respondents was less than ten times the reporting threshold. Complainant considered also that Respondent[s] had less than $10 million in total corporate entity sales and 50 or more employees at the time the Complaint was filed. Consequently, Complainant deemed the extent of the violation to be at the lowest of the three levels described in the ERP. A "gravity-based" penalty of $5,000 for each violation

was chosen from a penalty matrix in the ERP (at p. 11), which amount corresponds to the highest circumstance level and the lowest extent level shown in the matrix. Thus, the total "gravity-based" penalty for the three violations is $15,000 according to the ERP.

26. Complainant stated in its prehearing exchange that no adjustment to the "gravity-based" penalty of $15,000 was warranted, based on the factors stated in the ERP, namely, voluntary disclosure, history of prior violations, delisted chemicals, attitude, ability to pay and other factors as justice may require.

27. Respondents stated in their opposition to the proposed civil penalty that the penalty should be reduced because, *inter alia*, they voluntarily provided information with regard to Facility Two, they were diligent in providing information requested from EPA and cooperating with ascertaining and complying with reporting requirements, and that they will suffer financial hardship should the requested penalty be imposed. However, without evidence or documentation in the record to support these assertions, the penalty cannot be reduced.

28. The ERP provides that reductions to the penalty for voluntary disclosure are not warranted if the facility has been contacted by EPA for the purpose of determining compliance with EPCRA § 313. The ERP further provides that reduction of a penalty for "other factors as justice may require . . . [is] expected to be rare and the circumstances justifying its use must be thoroughly documented in the case file." (ERP p. 18).

29. The Consolidated Rules of Practice provide, with respect to penalty assessment where a Respondent is found in default, that "the penalty proposed in the complaint shall become due and payable by respondent without further proceedings" sixty (60) days after a default order becomes final. 40 C.F.R. § 22.17(a).

ORDER[(3)]

Pursuant to 40 C.F.R. § 22.17, and based on the record in this matter and the preceding Findings of Fact, I hereby find, *sua sponte*, that Respondents are in default. In accordance with 40 C.F.R. § 22.17(a), Stewart Furniture Manufacturing Co. and The Beverly-MIKE Company, Inc., are jointly and severally liable for a penalty of $15,000.

IT IS THEREFORE ORDERED that Stewart Furniture Manufacturing Co. and/or The Beverly-MIKE Company, Inc., shall, within sixty (60) days from the date of this Order, submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of FIFTEEN THOUSAND DOLLARS ($15,000). Such payment shall be sent to:

U.S. Environmental Protection Agency

Region IX Hearing Clerk

P.O. Box 360863

Pittsburgh, PA 15251-6863

A transmittal letter, containing Respondents' names, complete addresses, and this case number, shall accompany such payment, A copy of the check and transmittal letter shall be delivered or mailed to the Regional Hearing Clerk at the following address:

U.S. Environmental Protection Agency

Region IX Hearing Clerk

75 Hawthorne Street

San Francisco, CA 94105

_____

Susan L. Biro

Chief Administrative Law Judge

Dated: _____

1. [1] However, no documents have been submitted to demonstrate that Stewart Furniture Manufacturing Co. and The Beverly-MIKE Co., Inc. were, in fact, merged and that Stewart Furniture does not currently exist as a lawful corporate entity. Consequently, Respondents Stewart Furniture Manufacturing Co. and The Beverly-MIKE Co., Inc. will be referred to in the plural, as Respondents.

2. The Regional Hearing Clerk for Region IX, Steven Armsey, reported by telephone on July 10, 1997 to the undersigned's

staff attorney that no prehearing documents were filed by either Respondent as of that date.

3. [3] Pursuant to 40 C.F.R. § 22.17(d), Respondents may move to set aside the default order for good cause and such a motion may be filed with the undersigned in a timely manner. Furthermore, the Respondents are hereby advised that a default order constitutes an initial decision. An appeal of an initial decision must be filed with the Environmental Appeals Board (EAB) within **twenty** (**20**) **days** of service of the initial decision, as provided in 40 C.F.R. § 22.30. An initial decision becomes the final order of the EAB forty-five (45) days after service of the initial decision unless it is appealed to or reviewed *sua sponte* by the EAB. 40 C.F.R. §§ 22.17(b) and 22.27.