

3/27/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

COMM 28  
APR 13

IN THE MATTER OF:  
RIVERSIDE FURNITURE CORPORATION,  
RESPONDENT

DOCKET NO. EPCRA-88-H-VI-406S

INTERLOCUTORY ORDER GRANTING COMPLAINANT'S MOTION FOR  
PARTIAL ACCELERATED DECISION

Comes now U.S. Environmental Protection Agency, Region VI (hereinafter "EPA" or "Complainant") and files, with supporting Memorandum, its Motion for Partial Accelerated Decision, pursuant to 40 C.F.R. 22.20 1/, praying for a determination that Respondent, Riverside Furniture Corporation (hereinafter "Respondent" or "Riverside"), has violated Section 313 of the Emergency Planning and Community Right-To-Know Act (hereinafter "EPCRA" or "the Act"), 42 U.S.C. §11023, in that Riverside failed to prepare and file an annual report, on or before July 1, 1988, providing to 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 that year in quantities exceeding 10,000 pounds.

Riverside timely filed its Response to said Motion for Accelerated Decision.

1/ Said section further provides, §22.20(b)(2), that if an accelerated decision is rendered on less than all issues . . . in the proceeding, an interlocutory order shall reflect such determination and specify the facts which appear substantially uncontroverted and the remaining issues upon which the hearing will proceed.

Upon consideration of the pleadings, the memoranda filed by the parties along with said Motion and Riverside's Response thereto, and other submissions to the record, I find that said Motion should be and it is hereby granted as prayed.

Said Section 313 of EPCRA, 42 U.S.C. §11023, provides:

The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official . . . of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.  
(Emphasis supplied.)

Pursuant to said subsection (g), EPA has published a uniform toxic chemical release form, known as "Form R" (40 C.F.R. 372.85), along with instructions for completing same. A toxic chemicals list, 40 C.F.R. 372.65, was published by the Administrator, pursuant to said subsection (c), which includes the six chemicals used by Respondent as stated in subject Complaint. The threshold amount provided in said subsection (f) with respect to a toxic chemical "otherwise used" at a facility, i.e., 10,000 pounds of the toxic chemical per year, is likewise provided by 40 C.F.R. 372.25.

Complainant aptly points out that Respondent has admitted each of the necessary elements of a violation of said Section 313(b) of the Act and 40 C.F.R. §372.22, viz :

- (1) Respondent is a person as defined by Section 329(7) of EPCRA, 42 U.S.C. §11049(7) (Answer, page 2, Paragraphs 6 and 7);
- (2) Respondent is the owner or operator (Answer, Paragraph 8);

- (3) of a "facility" (as defined by Section 329(4) of EPCRA, 42 U.S.C. §11049(4) and 40 C.F.R. §372.3 (Answer, Paragraph 8));
- (4) that has ten (10) or more "full time employees" (as defined by 40 C.F.R. 372.3);
- (5) that is in Standard Industrial Classification ("SIC") Codes 20 through 39 (as in effect on July 1, 1985);
- (6) Respondent "manufactures" or "processes" in excess of 75,000 pounds (threshold amounts for calendar year 1987), or "otherwise uses" in excess of 10,000 pounds, toxic chemicals set forth under §313(c) of EPCRA, 42 U.S.C. 11023(c), and 40 C.F.R. 372.65, during calendar year 1987 (Answer, Paragraph 13; see also Complainant (hereinafter "C") Exhibit (hereinafter "EX") 2, Respondent's letter to EPA, dated October 19, 1988).
- (7) Respondent failed to file a "Form R" (for each toxic chemical manufactured, processed or otherwise used during calendar year 1987 in excess of the threshold amounts) with EPA and the State of Arkansas by July 1, 1988, as required by 42 U.S.C. §11023(b) and 40 C.F.R. 372.22 (Answer, Paragraph 17).

As to the alleged admission pertaining to Element (6), above, Respondent, in its Answer, page 3, Paragraph 13, admits that it "otherwise used" at its facility in excess of 10,000 pounds of methyl isobutyl ketone, xylene, toluene, methanol, acetone and methyl ethyl ketone, as alleged in subject Complaint. It there further adds, as stated in its Response to subject Motion, that its said use of said chemicals was through the paints, lacquers and thinners it employs to manufacture furniture.

I find that said Paragraph 13 of Respondent's Answer clearly admits that during the calendar year 1987 it "otherwise used" . . . at its facility

in excess of 10,000 pounds of methyl isobutyl ketone, xylene, toluene, methanol, acetone and methyl ethyl ketone and concludes with the sentence: "RFC denies the remaining allegations of Paragraph 13". The concluding sentence is explained in its "Response" to subject Motion, page 4: "River-side denied that it manufactured or processed any of the chemicals in amounts exceeding 75,000 pounds". (Emphasis supplied.) The admission of said element of violation is then again admitted as alleged in subject Complaint, Paragraph 13, page 3.

As to the admission of Element (7), above, Respondent admits (Answer, Paragraph 17, page 4) "that it did not submit Form R's" (for each of subject six chemicals) to the EPA or the State of Arkansas "on or before July 1, 1988." Said Answer further states that (Respondent) was "unaware of the need to so submit Form R's at any time prior to July 1, 1988, and did not become aware of said requirement until September 29, 1988". (September 29, 1988, is the date Respondent's facility was inspected by EPA for the purpose of determining compliance with said Section 313 of EPCRA - see Complaint Paragraph 14; admitted, Answer, Paragraph 14.)

I find that said Element (7) and, therefore, all of the necessary elements of a violation of said §313(b) is admitted by Respondent.

Respondent's discussion of the use of said toxic chemicals (through the paints, lacquers and thinners it employs to manufacture furniture) is not relevant to the question of whether it violated the subject statute and regulations, as alleged. It is not here considered or determined if such fact could or will be argued as a mitigating circumstance in determining the amount of a civil penalty, if any, appropriate.

The further statement that Respondent was "unaware" of its legal duty

to file subject Form R's is likewise irrelevant and immaterial to the issue of whether subject violation occurred. A showing by Respondent in support of said statement may be relevant to the issue of the amount of the civil penalty, if any, to be assessed for said violation. While intent is not an element 2/ of the violation found, intent or lack of intent may be relevant in determining the amount of the civil penalty appropriately to be assessed, as such determination must take into account the nature, circumstances, extent and gravity of the violation or violations (Section 325, 42 U.S.C. 11045(b)(1)(C)). Such evidence will be considered at the hearing scheduled to determine the amount of the civil penalty, if any, to be assessed for subject violations.

Further, while Respondent, in its brief, recognizes the axiom that "ignorance of the law is no excuse", it submits that such disposition of its contention is too glib. Respondent's argument is rejected. The United States Supreme Court has stated that "everyone is charged with knowledge of the United States Statutes at Large." (Federal Corp Insurance Corp. v. Merrill, 44 U.S. 380, 384 (1947)). The statutory provisions here pertinent, 42 U.S.C. 11001 et seq., were effective October 17, 1986. In addition, publication on February 16, 1988, of 40 C.F.R. Part 372, which sets out the regulations here pertinent and subject Form R, gave legal notice of their contents to all who may be affected thereby (Wolfson v. U.S., 492 F.2d 1386 (1974); see also 44 U.S.C. §1507 and Federal Crop Insurance Corp. v. Merrill, supra).

---

2/ The fact that "intent" is not an element to be considered in the assessment of civil or administrative penalty is demonstrated upon comparison of §325(b)(1) and (2) with §325(b)(4) - Criminal Penalties - (42 U.S.C. 11045 (b)(4). Whereas criminal penalties assessment requires a finding that a person's failure to comply is "knowingly and willingly", no such provision is present in that part of said subsection applying to civil penalties.

In the premises, it is here concluded that Respondent is subject to EPCRA and, in failing to comply with the provisions of §313 of EPCRA, has by such failure violated the Act.

I find that Complainant's Motion for Partial Accelerated Decision should be and it is hereby granted and it is here determined and ORDERED that no genuine issue of material fact exists on the issue of the violation charged in subject Complaint.

It is further ORDERED that the issue of the amount, if any, of the civil penalties, which appropriately should be assessed in accordance with 40 C.F.R. 22.27(c), remains controverted and the hearing requested herein shall proceed for the purpose of determining proper disposition of said issue in Dallas, Texas, on Wednesday, July 26, 1989, beginning at 9:30 a.m. and continuing until said issue is fully submitted. The precise location of the courtroom in which said hearing will be convened will be announced in advance of the hearing date.

It is further ORDERED that the final date for filing the prehearing exchange, or amendments thereto, in conformity with 40 C.F.R. 22.19, is June 30, 1989.

SO ORDERED.

DATED: March 27, 1989

---

Marvin E. Jones  
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the Original of the foregoing INTERLOCUTORY ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED 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  
2800 Momentum Place  
1717 Main Street  
Dallas, Texas 75201;

all such Service effected this 27th day of March, 1989.

---

Mary Lou Clifton  
Secretary to Judge Jones