

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of:

Wisconsin Plating Works of Racine, Inc.
Racine, Wisconsin

Respondent.

) Docket No. CAA-05-2008-0037
)
) Proceeding to Assess a Civil
) Penalty Under Section 113(d) of
) the Clean Air Act, 42 U.S.C. §
) 7413(d)
)
)

RESPONDENT'S INITIAL PREHEARING EXCHANGE

Respondent, Wisconsin Plating Works of Racine, Inc., a Wisconsin corporation ("Wisconsin Plating"), by and through its attorneys, Stone Pogrand & Korey LLC, in accordance with this Court's Prehearing Order of December 4, 2008 submits the following Initial Prehearing Exchange pursuant to Section 22.19(a) of the Rules of Practice, 40 C.F.R. Part 22. Respondent's Prehearing Exchange is set forth in the sequence outlined by this Court's aforementioned Prehearing Order.

By Complainant and Respondent

1. The names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called.

A. **Jeffrey J. Toeppe, CEF, (Fact Witness)**

- (1) Mr. Toeppe is Vice President of Respondent.
- (2) Mr. Toeppe will testify regarding all relevant aspects of Respondent's business and operations; Respondent's financial state; the manner and frequency of operation of Respondent's vapor degreaser at times relevant hereto; Respondent's methods and practices for recording/monitoring freeboard refrigeration temperatures for its vapor degreaser; Respondent's recordkeeping gap; Respondent's corrective actions taken (revision of training program, re-training of operators and maintenance employees, internal auditing of logsheets, periodic reviews); and Respondent's interaction with the EPA, both historically and with regard to the alleged violation.

B. Jeffrey Zak, CEF, P.E., (Expert Witness) [Professional Resume is attached hereto as Respondent's Exhibit 1]

- (1) Mr. Zak is President of Scientific Control Laboratories, which performs environmental testing and consulting for Respondent.
- (2) Mr. Zak will testify regarding Respondent's submission of the Semi-Annual Exceedance Report, which gave rise to the instant matter, as well as how such Exceedance Report resulted from a recordkeeping gap, and not an equipment malfunction or exceedance of emissions. Mr. Zak will also testify regarding the overall TCE emission levels in 2007, which were well below permit levels and had decreased over the prior year's TCE emission. Mr. Zak will testify regarding no historical indication of problems with SPV operation, and the potential harm to the environment caused by the alleged paperwork violations in the instant matter.

C. Joelle Zak, (Expert Witness) [Professional Resume is attached hereto as Respondent's Exhibit 2]

- (1) Mrs. Zak is Vice-President Scientific Control Laboratories, which performs environmental testing and consulting for Respondent.
- (2) Mrs. Zak will testify regarding Respondent's submission of a Semi-Annual Exceedance Report, which gave rise to the instant matter, as well as how such Exceedance Report resulted from a recordkeeping gap, and not an equipment malfunction or exceedance of emissions. Mrs. Zak will also testify regarding the overall TCE emission levels in 2007, which were well below permit levels and had decreased over the prior year's TCE emission. Mrs. Zak will testify regarding no historical indication of problems with SPV operation, and the potential harm to the environment caused by the alleged paperwork violations in the instant matter.

D. Deanna M. Heffron, (Expert Witness) [Professional Resume is attached hereto as Respondent's Exhibit 3]

- (1) Ms. Heffron is an employee of Scientific Control Laboratories, which performs environmental testing and consulting for Respondent.
- (2) Ms. Heffron will testify regarding Respondent's Semi-Annual Monitoring Compliance Certification and Halogenated Solvent Cleaner NESHAP's Semi-Annual Exceedance Report. Ms. Heffron will also testify regarding the vapor degreaser used by Respondent, and the potential harm to the environment caused by the alleged paperwork violations in the instant matter.

E. Karl Loepke, (Expert Witness) [Professional Resume to follow at later date]

- (1) Mr. Loepke is Business Manager, Enviro Tech International, Inc - Baron Blakeslee Division, the manufacturer of Respondent's vapor degreaser.
- (2) Mr. Loepke will testify regarding the functionality of the freeboard chiller system for Blakeslee 2LLV vapor degreasing machines, and to his expert opinion about refrigeration system failures, and the improbability of Respondent's refrigeration system failing during the timespan of the recordkeeping gaps.

Respondent respectfully reserves the right to not call any of the above-listed witnesses at hearing. Respondent further respectfully reserves the right to amend, supplement, and modify its witness list and to call additional witnesses on its behalf. In addition, Respondent respectfully reserves its right to expand or otherwise modify the scope, extent, and areas of testimony of any of these witnesses where appropriate.

Should Respondent make any of the modifications described in the preceding paragraph, Respondent shall, by filing an Amendment to this Prehearing Exchange, provide the Presiding Officer and the Complainant a reasonable opportunity to review the new or revised witness list. Such changes may be occasioned by the discovery of new evidence or witnesses, the unavailability of one or more witnesses, prehearing stipulations of fact between the parties, rulings on motions, or for any other legitimate purpose.

2. Copies of all documents and exhibits intended to be introduced into evidence. Included among the documents produced shall be a curriculum vita or resume for each identified expert witness. The documents and exhibits shall be identified as Complainant's or Respondent's exhibit, as appropriate, and numbered with Arabic numerals (e.g., CX 1 or RX 2).

Respondent expects to utilize any and all of Complainant's Exhibits 1 through 14 at trial, and also offers the following documents into evidence:

- A. RESPONDENT'S EXHIBIT 1: Professional Resume of Jeffrey Zak, P.E., CEF
- B. RESPONDENT'S EXHIBIT 2: Professional Resume of Joeline Zak, CEF-4

- C. RESPONDENT'S EXHIBIT 3: Professional Resume of Deanna Heffron, P.E., CEF-2
- D. RESPONDENT'S EXHIBIT 4: November 14, 2008 email from Karl Loepke to Jeffrey Toeppe regarding the functionality of the freeboard chiller system of Respondent's vapor degreasing machine.
- E. RESPONDENT'S GROUP EXHIBIT 5: Respondent's July 18, 2007 Semi-Annual Monitoring Compliance Certification and Halogenated Solvent Cleaner NESHAP's Semi-Annual Exceedance Report submitted by Scientific Control Laboratories to Wisconsin Department of Natural Resources and USEPA.
- F. RESPONDENT'S GROUP EXHIBIT 6: Respondent's talking points and slides from March 26, 2008 meeting between Respondent and Complainant.
- G. RESPONDENT'S GROUP EXHIBIT 7: Respondent's Tax Returns for 2005, 2006 and 2007.
- H. RESPONDENT'S EXHIBIT 8: Respondent's 4th Quarter 2008 Financial Statement.
- I. RESPONDENT'S EXHIBIT 9: *United States v. Anthony Dell'Aquila, Enterprises and Subsidiaries, et al.*, 150 F.3d 329 (3rd Circuit, 1998).
- J. RESPONDENT'S EXHIBIT 10: *In Re Lake County, Montana*, 2001 EPA ALJ LEXIS 132
- K. RESPONDENT'S EXHIBIT 111: *In Re City of Wilkes-Barre, et al.*, 2006 EPA ALJ LEXIS 35

Copies of these exhibits are attached to this Prehearing Exchange.

Respondent respectfully reserves the right to elect to not introduce any of the foregoing exhibits at the hearing and/or, to supplement its prehearing exchange with additional exhibits not

listed above and will provide reasonable notice to the Presiding Officer and Respondent concerning any modifications to the above exhibit list.

3. A statement as to its views as to the appropriate place of hearing and estimate of the time needed to present its direct case. Also state if translation services are necessary in regard to the testimony of any anticipated witnesses, and, if so, state the language to be translated.

Respondent requests that the hearing in this matter be held at a suitable location in Chicago, Illinois, as Respondent's attorneys and expert witnesses have their principal places of business in or near Chicago, Illinois. Respondent estimates only one day is needed to present its case.

By Respondent:

1. A copy of any documents in support of Respondent's assertion in response to Paragraph 17 of the Complaint that "during the weeks in question Respondent does not believe that it was using the FRD."

Mr. Toeppe will testify as to Paragraph 17 based on his recollection.

2. A statement of the factual and/or legal bases for denying the allegations in Paragraphs 17 and 18 of the Complaint.

If the FRD was not in use during the weeks in question, it would be fundamentally unfair to penalize Respondent, as no emissions could have occurred during those times.

3. If Respondent takes the position that it is unable to pay the proposed penalty, a copy of any and all document it intends to rely upon in support of such position.

(a) Respondent has attached copies of its tax returns for years 2005, 2006 and 2007 as Respondent's Group Exhibit 7.

(b) Further, Respondent will provide further documentation when available showing the 4th Quarter 2008 losses suffered by Respondent (See Exhibit 8), the approximately \$20,000 loss for January 2009, and the fact that Respondent has recently laid off 40% of its employees.

4. If Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a copy of any and all documents it intends to rely upon in support of such position.

(a) Respondent takes the position that the proposed penalty should be reduced based on the dire financial condition of the company due to the current worldwide economic downturn, and also because the proposed penalty must have some reasonable, and proportionate nexus to the violations and the violators. In support of Respondent's argument that the proposed penalty should bear a reasonable relationship to the environmental harm caused by the alleged violation, Respondent has attached copies of Federal Appellate Court decisions and EPA Administrative decisions as Respondent's Exhibits 9 through 11 as follows:

Exhibit 9: *United States v. Anthony Dell'Aquila, Enterprises and Subsidiaries, et al.*, 150 F.3d 329 (3rd Circuit, 1998).

Exhibit 10: *In Re Lake County, Montana*, 2001 EPA ALJ LEXIS 132


Exhibit 11: *In Re City of Wilkes-Barre, et al.*, 2006 EPA ALJ LEXIS 35

Reservation of Rights.

Respondent respectfully reserves the right to supplement its list of witnesses, its list of exhibits, and/or its responses to the Prehearing Order Requests, upon reasonable notice to the U.S. Environmental Protection Agency, Region 5, and to this Honorable Court.

Respectfully Submitted,

Wisconsin Plating Works of Racine, Inc.

By: 
One of its attorneys

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CERTIFICATE OF SERVICE

REGIONAL HEARING CLERK

I hereby certify that today I caused to be filed with the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (E-13J), Chicago, Illinois, 60604-3590, the original document entitled Respondent's Initial Prehearing Exchange for this civil administrative action, and that I issued to the Court and Complainant's Counsel by first class mail a copy of the original document:

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Padmavati G. Bending
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604-3590


Stuart M. Sheldon

2/20/09
Dated

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