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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

IN THE MATTER OF Valimet, Inc., Respondent.	Docket No. EPCRA-09-2007-0021. **VALIMET'S PREHEARING INFORMATION EXCHANGE [40 C.F.R. §22.19(a)]**

Respondent Valimet, Inc. ("Valimet"), by and through its attorneys Downey Brand LLP, hereby provides its Prehearing Information Exchange pursuant to the Prehearing Order, served on or about May 30, 2008, as follows:

I. NAMES OF EXPECTED WITNESSES AND BRIEF NARRATIVE OF EXPECTED TESTIMONY

Respondent ("Valimet") intends to call David Oberholtzer and Sandy Young as fact witnesses and James Strock and James Embree as expert witnesses.

Mr. David Oberholtzer is Valimet's Director of Corporate Services. His address and phone number are: Valimet, Inc., 431 Sperry Rd., Stockton, CA 95206, (209) 982-4870. He will testify as to his position at Valimet and his corresponding job duties and responsibilities; Valimet's company background; Valimet's products and the properties of those products;

Valimet's environmental program; Valimet's quality control and safety activities; circumstances surrounding the failure to timely file Emergency Planning Community Right-to-Know Act ("EPCRA") Form Rs for 2001-2005; Valimet's subsequent filing of these Form Rs; and corrective measures Valimet has taken to rectify the oversight and to ensure that it will not recur.

Ms. Sandy Young is Valimet's Accounting Manager. Her address and phone number are: Valimet, Inc., 431 Sperry Rd., Stockton, CA 95206, (209) 982-4870. Ms. Young will testify as to her position at Valimet; the number of Valimet's employees; and Valimet's annual sales.

Mr. James Strock's address and phone number are: James Strock & Co., 15029 North Thompson Peak Parkway, Suite B-111-601, Scottsdale, AZ 85260, (480) 551-5108. Mr. Strock will testify as to his background and experience; the Form Rs submitted by Valimet for years 2000 to 2006; EPA Toxic Release Inventory ("TRI") data; the history of EPA's policy and enforcement of EPCRA section 313; and EPA policy regarding deterrence and enforcement.

Dr. James Embree's address and phone number are: AMEC Geomatrix Consultants, Inc., 620 Coolidge Drive, Suite 185, Folsom, CA 95630, (916) 353-2151. Dr. Embree will testify as to his background and experience; the toxicity of aluminum to humans and the environment; and the criteria and standards for listing hazardous substances under EPCRA.

Valimet respectfully reserves the right to supplement its witness list upon adequate notice to Complainant and the Presiding Administrative Law Judge.

II. DOCUMENTS AND EXHIBITS TO BE INTRODUCED AT THE HEARING

Attached hereto are copies of all documents and exhibits intended to be introduced into evidence:

- Resume for Mr. James Strock, marked as RX 1.
- Resume for Dr. James W. Embree, marked as RX 2.
- EPCRA penalties assessed by EPA in California over the last five years involving between 5 and 15 penalty counts, and Enforcement Compliance History Online case summaries in support thereof marked as RX 3.
- EPCRA penalties assessed by EPA nationwide over the last three years involving between five and fifteen penalty counts, and Enforcement Compliance History Online case

summaries in support thereof, marked as RX 4.

- Job Description of Health and Safety Analyst hired to assist in regulatory compliance, marked as RX 5.

- In-house compliance calendar to provide advance notice of upcoming compliance and reporting deadlines, and ISO 9000 system updates which now include compliance and reporting requirements with semi-annual internal audits to ensure timely reporting and identification of additional resources to maintain compliance, marked as RX 6.

- Documents regarding General Background of Valimet, marked as RX 7.

- EPCRA Nationwide List of emissions of listed substances by companies in NAICS Code 331 (Primary Metals) category for year 2006, marked as RX 8.

- Documentation of the Threshold Limit Values For Chemical Substances in the Work Environment, pp. 46-49 (Sixth ed. 1991-92) issued by the American Conference of Governmental Industrial Hygenists, marked as RX 9.

- Table Summary of Valimet year end sales from 2001-2005, marked as RX 10.

- Valimet number of employees, marked as RX 11.

- Enforcement Response Policy for Section 313 of the Emergency Planning Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990), marked as RX 12.

- Copies of EPCRA Form Rs which Valimet filed for aluminum and copper compounds for the years 2000 through 2006, marked as RX 13.

- Joint Statement of Granta Y. Nakayama, Assistant Administrator of the Office of Enforcement and Compliance Assurance, and Donald Welsh, Regional Administrator for Region III of the U.S. Environmental Protection Agency, Before the Committee on Environment and Public Works, United States Senate (June 28, 2006), marked as RX 14.

- Material Safety Data Sheets for Aluminum Powder (Dec. 2006), marked as RX 15.

- Material Safety Data Sheet for Aluminum Bronze Powder (atomized) (Jan. 2007), marked as RX 16.

- 42 U.S.C. section 11023, marked as RX 17.

- New Jersey Department of Health and Senior Services, Hazardous Substance Fact Sheet – Aluminum (2000) (last rev. Feb. 2007), marked as RX 18.

- 52 Fed. Reg. 21152 (1987), marked as RX 19.

- Excerpt from U.S. E.P.A., Pesticides and Toxic Substances, Toxics in the Community

National and Local Perspectives: the 1989 Toxics Release Inventory National Report, (Sept. 1991), marked as RX 20.

- New Jersey Statutes Annotated § 34:5A-4, marked as RX 21.
- New Jersey Statutes Annotated § 34:5A-5., marked as RX 22.
- Maryland Code, Labor and Employment, § 5-403, marked as RX 23.
- 29 Code of Federal Regulations § 1910.1200, marked as RX 24.

In addition, to the extent Complainant does not introduce them, Respondent intends to introduce into evidence the following documents submitted by Complainant:

Agency for Toxic Substances and Disease Registry (ATSDR) Fact Sheet on Aluminum, marked at CX 8.

Aluminum Health Guidelines, Occupational Safety and Health Administration, U.S. Department of Labor, marked as CX 18.

Draft Toxicological Profile for Aluminum, ATSDR, U.S. Department of Health and Human Services, dated September 2006, marked as CX 19.

Respondent has not attached these documents to its Prehearing Information Exchange, but can provide such documents upon request.

Respondent respectfully reserves the right to supplement its exhibit list upon adequate notice to Complainant and the Presiding Administrative Law Judge, if the need arises. In addition, Respondent may request the Presiding Administrative Law Judge to take official notice of appropriate matters within 40 C.F.R. § 22.22(f).

III. LOCATION AND ESTIMATE OF TIME FOR THE HEARING

Respondent respectfully suggests that the hearing be held in the city of Stockton, California, as this is the location of Valimet's facility which the hearing concerns. In the alternative, Valimet suggests that the Hearing be held in the city of Sacramento, California, as Sacramento is the location of the closest major airport to Stockton. Valimet estimates that it will need approximately six to eight hours to present its direct case. No translation services are necessary.

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IV. STATEMENTS OF ADMISSIONS

3.(A) Valimet admits that it did not file on or before July 1, 2002 a Form R for aluminum to EPA and to the State of California for aluminum processed in calendar year 2001.

3.(B) Valimet admits that it did not file on or before July 1, 2003 a Form R for aluminum to EPA and to the State of California for aluminum processed in calendar year 2002.

3.(C) Valimet admits that it did not file on or before July 1, 2004 a Form R for aluminum to EPA and to the State of California for aluminum processed in calendar year 2003.

3.(D) Valimet admits that it did not file on or before July 1, 2005 a Form R for aluminum to EPA and to the State of California for aluminum processed in calendar year 2004.

3.(E) Valimet admits that it did not file on or before July 1, 2006 a Form R for aluminum to EPA and to the State of California for aluminum processed in calendar year 2005.

3.(F) Valimet admits that it did not file on or before July 1, 2002 a Form R for copper compounds to EPA and to the State of California for copper compounds processed in calendar year 2001.

3.(G) Valimet admits that it did not file on or before July 1, 2003 a Form R for copper compounds to EPA and to the State of California for copper compounds processed in calendar year 2002.

3.(H) Valimet admits that it did not file on or before July 1, 2004 a Form R for copper compounds to EPA and to the State of California for copper compounds processed in calendar year 2003.

3.(I) Valimet admits that it did not file on or before July 1, 2005 a Form R for copper compounds to EPA and to the State of California for copper compounds processed in calendar year 2004.

3.(J) Valimet admits that it did not file on or before July 1, 2006 a Form R for copper compounds to EPA and to the State of California for copper compounds processed in calendar year 2005.

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V. STATEMENT REGARDING EPCRA FORM R SUBMISSIONS

Attached hereto are copies of any and all EPCRA Form R forms which Valimet filed for aluminum and copper compounds for the years 2001 through 2005, marked as Exhibit RX 13.

- On April 26, 2007, Valimet submitted the Form R for reporting year 2001 to EPA on paper via certified mail, return receipt requested to:

  TRI Data Processing Center
  c/o Computer Sciences Corp.
  Suite 150
  8400 Corporate Drive
  Landover, MD 20785-2294

- On April 26, 2007, Valimet submitted the same Form R for the 2001 reporting year on paper to the Department of Toxic Substances Control ("DTSC") via certified mail, return receipt requested to:

  Department of Toxic Substances Control
  Office of Environmental Management
  1001 I Street, 8th Floor
  Sacramento, CA 95812

- On April 27, 2007, Valimet submitted the Form R for reporting year 2002 electronically to EPA, via EPA's Central Data Exchange ("CDX"). Valimet also submitted the report to the DTSC on paper via certified mail, return receipt requested, to the same address as the 2001 report listed above.

- On April 27, 2007, Valimet submitted the Form R for reporting year 2003 electronically to EPA, via CDX. Valimet also submitted the report to the DTSC on paper via certified mail, return receipt requested, to the same address as the 2001 report listed above.

- On April 27, 2007, Valimet submitted the Form R for reporting year 2004 electronically to EPA, via CDX. Valimet also submitted the report to the DTSC on paper via certified mail, return receipt requested, to the same address as the 2001 report listed above.

- On April 25, 2007, Valimet submitted the Form R for reporting year 2005 electronically to EPA, via CDX. Valimet also submitted the report to the DTSC on disc via the same address as the 2001 report.

VI. NARRATIVE STATEMENT IN SUPPORT OF AFFIRMATIVE DEFENSES

The Prehearing Order requires a narrative statement explaining in detail the factual and/or legal bases for each of Valimet's Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Twelfth, Thirteenth, and Fourteenth Affirmative Defenses, with citations to authorities and a copy of any documents in support.

Valimet hereby waives the following affirmative defenses: Third Affirmative Defense (Laches), Fourth Affirmative Defense (Statute of Limitations), Fifth Affirmative Defense (Causation), Sixth Affirmative Defense (Independent, Intervening and/or Superseding Cause), Seventh Affirmative Defense (Failure to State a Claim), Eighth Affirmative Defense (Failure to Follow Own Policies), Ninth Affirmative Defense (Void for Vagueness as Applied), Tenth Affirmative Defense (Equal Protection), Twelfth Affirmative Defense (Offset), Thirteenth Affirmative Defense (Due Process) and Fourteenth Affirmative Defense (Mistake).

Valimet hereby provides a narrative statement explaining in detail the factual and/or legal bases for Valimet's Second Affirmative Defense (Unlawful Listing).

Second Affirmative Defense

(Unlawful Listing)

The EPCRA statute states that the initial list of chemicals subject to Section 313 are those chemicals listed in a document entitled, "Toxic Chemicals Subject to Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986." 42 U.S.C. § 11023(c); 52 Fed. Reg. 21153 (1987). In its notice of proposed rulemaking regarding creation of the initial list, EPA stated that the initial list was compiled from lists created by the states of Maryland and New Jersey under their right-to-know laws. 52 Fed. Reg. 21152 (1987). New Jersey and Maryland based their lists "partly on toxicity information, but also on considerations of the amount produced or used in the state, the regulatory status, the presence in the environment, and professional judgment about potential hazards." EPA, Toxics in the Community National and Local Perspectives: The 1989 Toxics Release Inventory National Report 80 (1991).

EPA took public comment on its proposed rulemaking and issued a final rule in 1988. 53 Fed. Reg. 4500 (1988). EPA acknowledged that it had received "many" comments suggesting specific deletions from the original list of Section 313 chemicals but did not specify which chemicals had been suggested for deletion by commentors. 53 Fed. Reg. 4518 (1988). EPA stated that it chose not to modify the initial list at the time, but would use the comments to develop its methodology for review of the list. These comments indicate that the initial Section 313 list was adopted without independent evaluation of the toxic properties of each of the listed

chemicals.

Section 313 contains standards for adding and removing chemicals from the list. 42 U.S.C. §11023(d)(2). A chemical may be added if there is sufficient evidence to establish that:

(1) The chemical is known to cause or can reasonably be anticipated to cause significant adverse acute human health effects at concentration levels reasonably likely to exist beyond facility boundaries as a result of continuous or recurring releases, *or*

(2) the chemical is known to cause or can be reasonably anticipated to cause cancer, birth defects, serious reproductive, neurological, or genetic defects, or other serious or irreversible chronic health effects in humans, *or*

(3) the chemical's toxic properties create a threat of a significant adverse effect on the environment.

Aluminum fume and dust does not meet any of these criteria and if an evaluation against these criteria had been conducted, aluminum fume and dust would not have been listed on the Section 313 list. It is important to note that aluminum is non-toxic in common usage. Aluminum is absorbed by the body only to a limited degree and is rapidly excreted. It is relied upon as a safe and ubiquitous component of cans, cookware and water treatment. The FDA lists aluminum as "GRAS" (generally regarded as safe) as a food additive. There is no LC50 or LD50 for aluminum. There is no evidence that aluminum is carcinogenic, mutagenic or teratogenic. Aluminum is not subject to SARA Title III emergency planning requirements. There is no reportable quantity for aluminum releases. Aluminum powders are not subject to DOT regulations. In sum, aluminum is one of the least toxic materials on the list of materials subject to Form R reporting. Aluminum is the most common metal, and the third most common element, in the earth's crust. For example, Central Valley soils are about 7.5% aluminum.

Documents that support this defense: RX 9, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24, and CX 8, 18, 19.

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VII. STATEMENT REGARDING ABILITY TO PAY

Not Applicable.

VIII. STATEMENT REGARDING PENALTY REDUCTION

Respondent takes the position that the proposed penalty should be reduced. The Presiding Officer or Administrative Law Judge ("ALJ") is required to consider the EPCRA Enforcement Response Policy ("ERP") pursuant to 40 C.F.R. § 22.27(b) (stating that the presiding officer must consider any civil penalty guidelines or policies issued by EPA under the applicable statute.) But, the ALJ is nonetheless free not to apply the guideline to the case at hand. "Administrative Law Judges have 'the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant.'" *In re Clarksburg Casket Co.,* 1998 EPA ALJ Lexis 39, p. 27, citing *DIC Americas*, 6 E.A.D. 184, 189 (E.A.B. 1995).

In addition, decisions on penalties for violations of EPCRA Section 313 have looked at the other EPCRA enforcement subsections, EPCRA Sections 325(b)(1)(C) and 325(b), for guidance. *In re Troy Chemical Corp.*, 1999 EPA ALJ Lexis 7 p.12 citing *In re TRA Industries, Inc.* 1996 EPCRA Lexis 1, p.6. Section 325(b)(1)(C) requires consideration of: "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." Section 325(b)(2) is similar, except that "effect on the ability to continue to do business" is substituted for "economic benefit or savings."

Valimet anticipates relying on the following documents in support of its position that the proposed penalty should be reduced:

1. Cooperation and compliance. Cooperation will largely be addressed through testimony. Valimet came into compliance with EPRCA before a complaint was filed in this matter. Documents that will be relied on are: RX 13.

2. Valimet's number of employees and annual sales are only slightly above the thresholds set forth in the EPRCA ERP and, as a result, Valimet should be treated as a small company and not a large company for penalty calculation purposes. RX 10, 11, 12.

3. Valimet has retained additional staff and adopted procedures to ensure that future EPCRA violations do not occur. RX 5, 6.

4. The nature, circumstances, extent and gravity of the violations will largely be addressed through testimony. However, the following documents will be relied upon: RX 8, 9, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24.

5. No prior history of violations, lack of culpability, and lack of economic benefit resulting from the violation will be addressed through testimony.

6. Other matters as justice may require. RX 3, 4, 12, 14. Depending on the amount of the proposed penalty sought by EPA, Respondent may argue that the Eighth Amendment prohibits the imposition of disproportionate penalties. See, *United States v. Bajakajian*, 524 U.S. 321 (1998); U.S. Const., Amdt. 8 ("Excessive bail shall not be required, nor excessive fines imposed. . . .")

IX. STATEMENT REGARDING MOTION TO DISMISS

Respondent will not be filing a Motion to Dismiss the Complaint.

Valimet hereby states that it shall defend itself against the Complainant's charges by way of direct evidence, rebuttal evidence, and cross-examination of the Complainant's witnesses.

DATED: August 1, 2008

DOWNEY BRAND LLP

By: _____
CLIFTON J. MCFARLAND
Attorneys for Respondent
VALIMET, INC.

CERTIFICATE OF SERVICE

I hereby certify that the original and a copy of the foregoing Prehearing Exchange were filed with the Regional Hearing Clerk, U.S. EPA, Region IX, on this date, with one complete set of exhibits, and that a copy with a complete set of exhibits was sent by FedEx, respectively to:

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, D.C. 20460

Ivan Lieben
Assistant Regional Counsel
Office of Regional Counsel (ORC-2)
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

August 1, 2008

Cynthia Biscarra