

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

**IN THE MATTER OF:**

**Hutson Enterprises, Inc.  
d/b/a Sparkle Pool Service &  
Supply of Indiana,  
Indianapolis, Indiana**

**Respondent.**

( Docket No. EPCRA-05-2007-0027  
(  
( Proceeding to Assess a Civil Penalty  
( Under Section 325(c) of the Emergency  
( Planning and Community Right-to-  
( Know Act of 1986.  
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**RESPONDENT'S PREHEARING EXCHANGE**

Respondent, HUTSON ENTERPRISES, INC. d/b/a SPARKLE POOL SERVICE & SUPPLY OF INDIANA ("SPARKLE POOLS"), hereby files its Pretrial Exchange in accordance with Judge Moran's Prehearing Order dated December 12, 2007.

At this time, Respondent respectfully notifies this Court that the parties appear to have reached a tentative settlement agreement in this matter. Both parties agreed that the settlement terms could not possibly be finalized by the due date of this Exchange and accordingly, both parties are filing this Exchange at this time, but are hopeful that this case will reach final settlement next week and a Consent Order will be prepared for the Court.

Prehearing Exchange:

1. **LIST OF EXPERTS**

Robert H. Fuhrman, Seneca Economics and Environment, LLC

Vance S. Maxwell, CPA, OneSource Financial Services

2. **LIST OF WITNESSES**

Timothy Hutson, President of Hutson Enterprises, Inc. dba Sparkle Pool Service & Supply of Indiana - it is expected that Mr. Hutson will testify as to the size of the company, inability to pay, history of compliance, impeccable safety record, minimal level III culpability (state and other agencies were already provided inventory reporting information), communications and inspection by the Fire Department prior to this violation, cooperation and quick response in this matter, two (2) years of time, money and effort already spent working with EPA in this matter and its effect on the business, no economic benefit derived from failure to file the Tier II, other extensive regulatory requirements and compliance, communications with EPA prior to the filing of the Complaint and the business of SPARKLE POOLS generally.

3. **BRIEF NARRATIVE SUMMARY OF EXPECTED TESTIMONY OF EACH EXPERT**

**ROBERT H. FUHRMAN** - earned an MBA from Harvard Business School, and was employed for seven (7) years by the U.S. Environmental Protection Agency, where he served, among other positions, as an economist (see resume). Mr. Fuhrman has worked as an economic consultant for over twenty (20) years, has consulted in over 150 environmental civil penalty cases and has authored over 30 articles on issues related to environmental enforcement. His experience includes knowledge of the financial methods used by the U.S. EPA to calculate a corporation's ability to pay civil penalties, including the "ABEL" model.

EPA claims that Respondent has the ability to pay the amount of penalty sought in its Complaint based upon two (2) separate financial analyses: (1) EPA's in-house Analysis (presumably using the ABEL model), and (2) a private consulting firm's analysis. However, to date, Complainant has not provided complete financial reports and calculations supporting their

position in order to allow Respondent the opportunity to fully challenge their conclusions. Once produced, Respondent anticipates filing a more detailed Financial Analysis for trial.

Robert Fuhrman's expert testimony will directly challenge the financial analyses of the U.S. EPA in assessing this excessive penalty against such a small business. Specifically, Mr. Fuhrman's expected testimony will offer a financial profile of Hutson Enterprises indicating that the proposed penalty would jeopardize the continued existence of this small company, and that EPA's own guidance policy and ABEL model do not support such a penalty.

Mr. Fuhrman will also testify to a reasonable penalty in this action.

**VANCE S. MAXWELL, MANAGING PARTNER, ONESOURCE FINANCIAL SERVICES, LLC**

Vance Maxwell is expected to testify as to SPARKLE POOL's inability to pay the proposed fine based upon his knowledge of their business generally, and of their financial records, size of the company, the penalty as a percent of profit margins and capital requirements.

Mr. Maxwell will use cash flow data from 2003 through 2006 to demonstrate SPARKLE POOL's precarious cash situation (without a penalty), testifying as to off-season revenues (if any), ongoing fixed costs and the expenses needed to prepare for the next season each year. Also, SPARKLE POOLS is highly leveraged and inability to make its loan payment will force this small company into bankruptcy.

Mr. Maxwell will also testify to a reasonable penalty in this action.

4. **COPIES OF ALL DOCUMENTS AND EXHIBITS INTENDED TO BE USED AS EVIDENCE**

Below is a list of documents and exhibits intended to be used as evidence at trial which have already been produced to Complainant US EPA and/or its counsel of record (or will be if notified otherwise):

Resume of Robert Fuhrman

ABEL Model Runs

Resume of Vance S. Maxwell

Tier II Reporting Forms for Sparkle Pools 2004 to the present

EPA's Risk Management Plan (RMP) filed for Sparkle Pools

Income Statements: 2003 through 2005 and YTD January through September 2006

Summary Balance Sheets:

May 31, 2003 through 2006

April 30, 2003, March 31, 2003, February 28, 2003, January 31, 2003

December 31, 2005, January 31, 2006, February 28, 2006, March 31, 2006

April 30, 2006, December 31, 2004, January 31, 2005, February 28, 2005

March 31, 2005, April 30, 2005, December 31, 2003, January 31, 2004,

February 28, 2004, March 31, 2004, April 30, 2004,

Statement of Cash Flows

January through May of 2003 through 2006

Corporate Tax Returns

Fiscal years 2003, 2004 & 2005

Stated Goals of EPA's Penalty Assessment Rules

All of Complainant's Exhibits

Caselaw - Inconsistent Enforcement of Tier II Violations

*In the Matter of Newman Construction Inc.*, EPCRA-08-2004-0005 (failed to file Tier II only after repeated attempts by the LEPC to help them comply [sent a compliance

package, reminder notice, and phone call]. No cumulative penalties assessed for failure to file to each of 3 agencies as 3 separate counts - total penalty \$5,845).

*In the Matter of Wasatch Propane*, EPCRA-08-2004-0004 (failed to file Tier II after written notice of violation and 3 months to comply with notice - penalty \$13,751).

5. Respondent SPARKLE POOLS admits liability, but emphatically challenges the appropriateness of the penalty sought based upon EPA's own penalty policy, including inability to pay, cooperation, no economic benefit by not filing its Tier II, no prior violations, and no environmental incidents, injuries or releases.
6. Pursuant to §§ 22.21(d) and 22.19(d) of the Rules, Respondent requests that the Hearing take place in Indiana where Respondent's business is located. Respondent and counsel will be available for the hearing after April 15, 2008 (excluding May 1-15 and 28, 2008 and June 26-July 4, 2008). It is estimated that Respondent will require approximately four (4) hours to present its direct case.

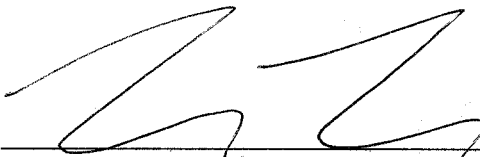
Respectfully submitted this 13th day of March, 2008.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the a true and correct copy of this Prehearing Exchanges has been furnished via Federal Express Overnight Delivery to: Honorable William B. Moran, Administrative Law Judge, U.S. EPA Office of Administrative Law Judges, Franklin Court Building, 1099 14<sup>th</sup> Street N.W., Suite 350, Washington D.C. 20460; an Original and one copy to: Sonja Brooks - Woodard, Regional Hearing Clerk, US EPA - Region 5, 77 West Jackson Blvd., 13<sup>th</sup> Floor, Chicago, IL 60604; and a true and correct copy to: Robert Guenther, Esquire, Assistant Regional Counsel, US EPA Region 5, 77 West Jackson Blvd, 13<sup>th</sup> Floor, Chicago, IL 60604, on this 13<sup>th</sup> day of March, 2008.

By:   
KAREN LOWELL, ESQUIRE

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