

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

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KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
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BEFORE THE ADMINISTRATOR

In the Matter of)
)
CHEMCENTRAL Midwest Corporation)
910 North Prospect)
Kansas City, Missouri)
)
Respondent.)

Docket Nos. CAA-07-2007-0045
EPCRA-07-2007-0045

**CHEMCENTRAL MIDWEST CORPORATION'S
ANSWER TO COMPLAINT AND REQUEST FOR HEARING**

Respondent CHEMCENTRAL Midwest Corporation ("CHEMCENTRAL"), by its counsel McDermott Will & Emery LLP, for its answer to U.S. Environmental Protection Agency's ("EPA") Complaint, states as follows:

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d); and Section 325 of the Emergency Planning and Community Right to Know Act of 1986 (EPCRA), 42 U.S.C. § 11045.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

2. This Complaint serves as notice that the United States Environmental Protection Agency, Region VII (EPA) has reason to believe that Respondent has violated Section 112(r)(1) of the Clean Air Act, 42 U.S.C. § 7412(r)(1). Furthermore, this Complaint serves as notice pursuant to Section 113(d)(2)(A) of the Clean Air Act, 42 U.S.C. § 7413(d)(2)(A), of EPA's intent to issue an order assessing penalties for this violation. Pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), the Administrator and the Attorney General jointly determined that this matter, where the first date of alleged violation occurred more than 12 months prior to the initiation of the administrative action, and the proposed penalty is greater than \$270,000, was appropriate for administrative penalty action.

ANSWER: CHEMCENTRAL is without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph, and therefore, denies the same.

3. This Complaint also serves as notice that EPA has reason to believe that Respondent has violated Section 312 of EPCRA, 42 U.S.C. § 11022 and the regulations promulgated thereunder and codified at 40 C.F.R. Part 370, governing the submission of emergency and hazardous chemical inventory forms by owners and operators of covered facilities.

ANSWER: CHEMCENTRAL is without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph, and therefore, denies the same.

Parties

4. The Complainant, by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region VII, is the Director of the Air, RCRA, and Toxics Division, EPA, Region VII.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

5. The Respondent is Chemcentral Midwest Corporation (Chemcentral) formerly located at 910 North Prospect, Kansas City, Missouri. Chemcentral is an active Illinois corporation that is qualified to do business in Missouri. Chemcentral is a distributor of industrial chemicals.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

Statutory and Regulatory Background

6. Section 112(r)(1) of the Clean Air Act imposes a general duty on owners and operators of stationary sources producing, processing, handling or storing substances listed pursuant to Section 112(r)(3) of the Clean Air Act, 42 U.S.C. § 7412(r)(3), or any other extremely hazardous substance, to: (1) identify hazards which may result from accidental releases of such substances using appropriate hazard assessment techniques; (2) design and maintain a safe facility, taking such steps as are necessary to prevent releases; and (3) minimize the consequences of accidental releases that do occur. Owners and operators have been subject to the general duty clause since November 15, 1990.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

7. The objective of the Clean Air Act Section 112(r) program is to have owners and operators take responsibility for chemical accident prevention and mitigation. The general duty clause reflects Congressional intent that owners and operators of stationary sources have the primary responsibility for prevention of accidents. EPA has jurisdiction to implement and enforce the general duty clause of the Clean Air Act at any facility where extremely hazardous substances are present.

ANSWER: CHEMCENTRAL is without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph, and therefore, denies the same.

8. “Owner or operator” is defined as any person who owns, leases, operates, controls, or supervises a stationary source. 42 U.S.C. § 7412(a)(9).

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

9. “Stationary source” is defined as buildings, structures, equipment, installations or substance emitting stationary activities (1) which belong to the same industrial group; (2) which are located on one or more contiguous properties[;] (3) which are under the control of the same person (or persons under common control), and (4) from which an accidental release may occur. 42 U.S.C. § 7412(r)(2)(c).

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

10. Section 112(r)(2)(A), defines “accidental release” as any unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source. 42 U.S.C. § 7412[(r)](2)(A).

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

11. The general duty requirements apply to stationary sources regardless of the quantity of substances managed at the facility. 59 Fed. Reg. 4478, 4480 (Jan. 31, 1994) (List of Regulated Substances and Thresholds for Accidental Release Prevention; Requirements for Petitions Under Section (r) of the Clean Air Act as amended). Listed substances include any substance listed under Clean Air Act Section 112(r)(3) or any other extremely hazardous substance. “Extremely hazardous substance” includes not only listed substances under the accident prevention provisions (Clean Air Act 112(r)(3)); and extremely hazardous substances listed under EPCRA Section 302; but also “other agents which may as the result of short-term exposures associated with releases to the air cause death, injury, or property damage.” 59 Fed. Reg. 4478, 4481 (Jan. 31, 1994). Extremely hazardous substances include such substances that: “The release of . . . which causes death or serious injury because of its acute toxic effect or as a result of an explosion or fire or which causes substantial property damage by blast, fire, corrosion or other reaction” 59 Fed. Reg. 4477, 4481 (Jan. 31, 1994) (quoting the Senate Committee on Environment and Public Works, Clean Air Act Amendments of 1989, Senate Report No. 228, 101st Congress, 1st Session 211 (1989)).

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

12. Section 312(a) of EPCRA and the regulations found at 40 C.F.R. Part 370, provide that the owner or operator of a facility required to prepare or have available a material

safety data sheet (MSDS) for a hazardous chemical under the Occupational Safety and Health Act (OSHA), shall submit to the Local Emergency Planning Committee (LEPC), the State Emergency Response Commission (SERC), and the local fire department with jurisdiction over the facility, by March 1, 1988, and annually thereafter, a completed emergency and hazardous chemical inventory form (Tier I or Tier II as described in 40 C.F.R. Part 370) containing the information required by those sections.

(“TPQ”) as defined in 40 C.F.R. Part 355, whichever is lower.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

Violations

14. The Complainant hereby states and alleges that Respondent has violated the Clean Air Act and EPCRA, and federal regulations as follows:

ANSWER: CHEMCENTRAL admits that EPA states and alleges in the following paragraphs that CHEMCENTRAL violated the Clean Air Act, EPCRA, and federal regulations. CHEMCENTRAL denies that it violated the Clean Air Act, EPCRA, and federal regulations.

Count 1

15. Respondent is, and at all times referred to herein, was a “person” as defined by Section 302(e) of the Clean Air Act, 42 U.S.C. § 7602(e).

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

16. Respondent’s facility formerly located at 910 North Prospect, Kansas City, Missouri, was a “stationary source” pursuant to Section 112(r)(2)(c) of the Clean Air Act, 42 U.S.C. § 7412(r)(2)(c).

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

17. Respondent’s facility was destroyed by an explosion and fire on February 7, 2007. The explosion occurred during the transfer of the substance “Indopol H-300”.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

18. Based upon inventory records from Respondent's facility, Respondent handled and stored the substance "Indopol H-300". Indopol is the trade name for polybutene (isobutylene/butene) copolymer. Indopol H-300 is an extremely hazardous substance under Section 112(r) of the Clean Air Act, 42 U.S.C. § 7412(r).

ANSWER: CHEMCENTRAL admits the averments contained in the first two sentences of this paragraph. CHEMCENTRAL denies that Indopol H-300 is an extremely hazardous substance under Section 112(r) of the Clean Air Act.

19. Information collected by EPA revealed that Respondent violated the general duty clause because it failed to identify hazards using appropriate hazard assessment techniques and failed to design and maintain a safe facility. Respondent did not identify the intrinsic hazards of Indopol, nor did it identify the hazards of the process equipment and the instrumentation, in order to minimize the risk of release. Respondent did not identify and implement appropriate equipment/vessel design and maintenance practices, relevant to the process and substance involved. Respondent did not operate the process and equipment in a safe manner. Respondent did not implement the safe handling, operating and storage information as provided in the Material Safety Data Sheet (MSDS) for Indopol nor did it implement the supplier's recommendations in the technical bulletin issued by the supplier.

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

20. Respondent is subject to the requirements of Section 112(r)(1) of the Clean Air Act, 42 U.S.C. § 7412(r)(1), because it was an owner and operator of a stationary source that stored and handled an extremely hazardous substance.

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

21. As set forth above, Respondent violated the general duty clause because it failed to identify hazards using appropriate hazard assessment techniques and failed to design and maintain a safe facility. Respondent's failure to comply with the general duty clause is a violation of Section 112(r) of the Clean Air Act, 42 U.S.C. § 7412(r).

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

WHEREFORE, CHEMCENTRAL prays that the Presiding Officer enter judgment in CHEMCENTRAL's favor and against EPA as to Count 1.

Count 2

22. An authorized EPA representative conducted an inspection of Respondent's facility located at 910 North Prospect, Kansas City, Missouri, after the February 2007, fire and collected information regarding the inventory at Respondent's facility to determine compliance with EPCRA Section 312.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

23. Respondent is a person as defined at Section 329(7) of EPCRA and is the owner or operator of a facility as defined at Section 329(4) of EPCRA.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

24. The inventory records collected from Respondent revealed that during calendar year 2006, Respondent had present at its facility, Indopol in excess of 10,000 pounds at one time.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

25. Indopol is a hazardous chemical as defined under Section 312 of EPCRA and 40 C.F.R. Part 370.2.

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

26. Respondent failed to submit an emergency and hazardous chemical inventory form for calendar year 2006 to the LEPC or to the SERC or to the fire department by March 1, 2007.

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

27. Respondent's failure to submit an emergency and hazardous chemical inventory form to the LEPC or the SERC or the fire department is a violation of EPCRA Section 312(a) and of the requirements of 40 C.F.R. Part 370, Subpart B.

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

28. Pursuant to Section 325(c) of EPCRA, and based upon the facts stated in paragraphs 22 through 27 above, it is proposed that a civil penalty of \$32,500 be assessed against Respondent.

ANSWER: CHEMCENTRAL admits that EPA is proposing a civil penalty of \$32,500 for the alleged violations contained in Count 2 of the Complaint. CHEMCENTRAL denies the alleged violations contained in Count 2 and also denies that \$32,500 is an appropriate penalty.

WHEREFORE, CHEMCENTRAL prays that the Presiding Officer enter judgment in CHEMCENTRAL's favor and against EPA as to Count 2.

Count 3

29. The facts and allegations stated in Paragraphs 22, 23 and 25 are hereby incorporated by reference.

ANSWER: CHEMCENTRAL adopts, realleges, and incorporates herein as if fully set forth, its answers to the averments of paragraphs 22, 23, and 25.

30. The inventory records collected from Respondent revealed that during calendar year 2005, Respondent had present at its facility, Indopol in excess of 10,000 pounds at one time.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

31. Respondent failed to submit an emergency and hazardous chemical inventory form for calendar year 2005 to the LEPC or to the SERC or to the fire department by March 1, 2006.

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

32. Respondent's failure to submit an emergency and hazardous chemical inventory form to the LEPC or the SERC or the fire department is a violation of EPCRA Section 312(a) and of the requirements of 40 C.F.R. Part 370, Subpart B.

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

33. Pursuant to Section 325(c) of EPCRA, and based upon the facts stated in paragraphs 29 through 32 above, it is proposed that a civil penalty of \$1,500 be assessed against Respondent.

ANSWER: CHEMCENTRAL admits that EPA is proposing a civil penalty of \$1,500 for the alleged violations contained in Count 3 of the Complaint. CHEMCENTRAL denies the alleged violations contained in Count 3 and also denies that \$1,500 is an appropriate penalty.

WHEREFORE, CHEMCENTRAL prays that the Presiding Officer enter judgment in incorporated by reference.

ANSWER: CHEMCENTRAL adopts, realleges, and incorporates herein as if fully set forth, its answers to the averments of paragraphs 22, 23, and 25.

35. The inventory records collected from Respondent revealed that during calendar year 2004, Respondent had present at its facility, Indopol in excess of 10,000 pounds at one time.

ANSWER: CHEMCENTRAL admits the averments in this paragraph.

36. Respondent failed to submit an emergency and hazardous chemical inventory form for calendar year 2004 to the LEPC or to the SERC or to the fire department by March 1, 2005.

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

37. Respondent's failure to submit an emergency and hazardous chemical inventory form to the LEPC or the SERC or the fire department is a violation of EPCRA Section 312(a) and of the requirements of 40 C.F.R. Part 370, Subpart B.

ANSWER: CHEMCENTRAL denies the averments in this paragraph.

38. Pursuant to Section 325(c) of EPCRA, and based upon the facts stated in paragraphs 34 through 37 above, it is proposed that a civil penalty of \$1,500 be assessed against Respondent.

ANSWER: CHEMCENTRAL admits that EPA is proposing a civil penalty of \$1,500 for the alleged violations contained in Count 4 of the Complaint. CHEMCENTRAL denies the alleged violations contained in Count 4 and also denies that \$1,500 is an appropriate penalty.

WHEREFORE, CHEMCENTRAL prays that the Presiding Officer enter judgment in CHEMCENTRAL's favor and against EPA as to Count 4.

Relief

39. Section 113(d)(1)(B) of the Clean Air Act, 42 U.S.C. § 7413(d)(1)(B), authorizes a civil penalty of up to \$25,000 per day for each violation of the Clean Air Act that occur prior to January 30, 1997. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, civil penalties of up to \$27,500 per day per violation may be assessed for violations occurring on or after January 30, 1997 through March 15, 2004; and \$32,500 per day for each violation that occurs after March 15, 2004. The penalty proposed below is based upon the facts stated in this Complaint, and on the nature, circumstances, extent and gravity of the above cited violations in accordance with the Clean Air Act, Section 113(e), 42 U.S.C. § 7413(e).

ANSWER: CHEMCENTRAL admits the averments contained in the first two sentences of this paragraph. CHEMCENTRAL is without knowledge or information sufficient to form a belief as to the truth of the remaining averments, and therefore, denies the same.

40. For the Clean Air Act violation stated herein, it is proposed that a penalty of \$398,760, be assessed. Pursuant to Rule 22.19(a)(3) of the Consolidated Rules of Practice, EPA will explain in its prehearing exchange how the proposed penalty was calculated in accordance with the criteria set forth in the Clean Air Act.

ANSWER: CHEMCENTRAL admits that EPA is proposing a penalty of \$398,760 for the Clean Air Act violation alleged in the Complaint and that CHEMCENTRAL received a penalty calculation from EPA. CHEMCENTRAL denies that it violated the Clean Air Act and also denies that \$398,760 is an appropriate penalty.

41. Section 325(c) of EPCRA, authorizes a civil penalty of not more than \$25,000 for each violation of Section 312 of EPCRA. Pursuant to the Federal Civil Penalties Inflation

Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, civil penalties of up to \$27,500 per day per violation may be assessed for violations occurring on or after January 30, 1997 through March 15, 2004; and \$32,500 per day for each violation that occurs after March 15, 2004. The penalty proposed in paragraphs 28, 33 and 38, above, are based upon the facts stated in this Complaint, and on the nature, circumstances, extent, and gravity of the above-cited violations, and with respect to the Respondent, ability to pay, effect on ability to continue to do business, any history of prior such violations, degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require in accordance with EPCRA and the Enforcement Response Policy for Sections 304, 311 and 312 of EPCRA. This policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors enumerated above to a particular case.

ANSWER: CHEMCENTRAL admits the averments contained in the first two sentences of this paragraph. CHEMCENTRAL is without knowledge or information sufficient to form a belief as to the truth of the remaining averments, and therefore, denies the same.

CHEMCENTRAL denies that it violated EPCRA and that the penalties proposed in paragraphs 28, 33, and 38 of the Complaint are appropriate.

42. The proposed penalty as set forth in the Complaint is based on the best information available to EPA at the time that the Complaint was issued. The penalty may be adjusted if the Respondent establishes bonafide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

ANSWER: CHEMCENTRAL is without knowledge or information sufficient to form a belief as to the truth of the averments in the first sentence of this paragraph, and therefore, denies the same. CHEMCENTRAL admits that EPA can adjust the proposed penalty downward, and except for this specific admission, CHEMCENTRAL denies the remaining averments of this paragraph.

43. Respondent may resolve this proceeding at any time by paying the full penalty proposed in the Complaint and filing a copy of the check or other instrument of payment with the Regional Hearing Clerk. Checks should reference the name and docket number of the Complaint. Payment of the total penalty – \$434,260 – may be made by certified or cashier's check payable to the "Treasurer, United States of America," and remitted to: EPA – Region 7; P.O. Box 371099M; Pittsburgh, Pennsylvania 15251.

ANSWER: CHEMCENTRAL admits the averments of this paragraph and declines the opportunity to resolve this matter by paying the full penalty proposed in the Complaint.

WHEREFORE, CHEMCENTRAL prays that the Presiding Officer deny all of EPA's requests for relief and enter judgment in CHEMCENTRAL's favor and against EPA as to all counts of EPA's Complaint.

GROUND OF DEFENSE

EPA cannot sustain the following allegations of material fact and applicable law:

1. Indopol H-300 is an extremely hazardous substance under Section 112(r) of the Clean Air Act.
2. CHEMCENTRAL Midwest Corporation violated Section 112(r) of the Clean Air Act.
3. Indopol H-300 is a hazardous chemical under Section 312 of EPCRA and 40 CFR part 370.2.
4. CHEMCENTRAL Midwest Corporation violated Section 312(a) of EPCRA and the requirements of 40 CFR part 370, subpart B.

REQUEST FOR A HEARING

CHEMCENTRAL Midwest Corporation requests a hearing upon the issues raised by EPA's Complaint and this Answer at which it will contest allegations of material fact and

applications of law in the Complaint and contest the appropriateness of the proposed penalties in the Complaint.

Dated: October 9, 2007

Respectfully submitted,

CHEMCENTRAL MIDWEST CORPORATION

By: 
One of its Attorneys

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CHI99 4887191-1.034269.0071