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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:)
)
FIRESTONE PACIFIC FOODS, INC.,) Docket No. EPCRA-10-2007-0204
)
Vancouver, Washington) COMPLAINANT'S REBUTTAL
) PREHEARING EXCHANGE
Respondent.)
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Pursuant to the Presiding Officer's Prehearing Order issued on November 8, 2007 and Section 22.19(a) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, the United States Environmental Protection Agency, Region 10 ("Complainant" or "EPA") hereby submits the following Rebuttal to Respondent's Prehearing Exchange.

I. REBUTTAL TO RESPONDENT'S PREHEARING EXCHANGE

a. Respondent's denial that Ammonia was present at its facility in an amount equal to or greater than 500 pounds during the years 2001-2004.

In its Initial Prehearing Exchange, Complainant described the evidence it would produce at hearing in support of the allegation that ammonia was present at Respondent's facility in an amount equal to or greater than 500 pounds during some period during the years 2001 through

COMPLAINANT'S REBUTTAL
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U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101
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2004. In response to Respondent's Prehearing Exchange, Complainant hereby supplements the description of the expected testimony of its previously named witnesses as follows.

Theodore J. Mix

In addition to the testimony described in Complainant's Initial Prehearing Exchange, Mr. Mix will also testify that on January 14, 2008, he called the Washington Department of Labor & Industries (WDLI) and spoke to Ms. Linda Williamson in Olympia, Washington about Respondent's facility. Ms. Williamson supervises the Pressure Vessel Inspectors. Mr. Mix's record of his telephone call with Ms. Williamson is attached as Complainant's Exhibit 25. Mr. Mix will testify that while on the phone Ms. Williamson accessed the records of Respondent's facility, and that according to those records, when WDLI first inspected the facility in 1993, it certified one ammonia vessel. WDLI observed additional high pressure ammonia vessels in subsequent inspections beginning in August 2001. Mr. Mix will testify that Ms. Williamson faxed him the records she was viewing later that day. The records faxed from WDLI are attached as Complainant's Exhibit 26. Mr. Mix will also testify that, based on his review of the records, the high pressure ammonia receiver built by Morfab Manufacturing that was inspected by the WDLI on August 27, 2001, August 6, 2003, August 23, 2005 and August 8, 2007, appears to be the same high pressure ammonia receiver he observed during his April 28, 2006 inspection.

Suzanne Powers

In addition to the testimony described in Complainant's Initial Prehearing Exchange, Ms. Powers is expected to testify that on January 28, 2006, she called Mr. Bob Pederson of Seattle

Refrigeration Company. Ms. Powers's record of her telephone call with Mr. Pederson is attached as Complainant's Exhibit 27. Ms. Powers will testify that Mr. Pederson stated that Seattle Refrigeration installed a 24'x 12' high pressure ammonia receiver at the Respondent's facility in 1993. Ms. Powers will also testify that according to Mr. Pederson this vessel held approximately 1,100 pounds of ammonia at 80% full, and that he recalls there being more than 500 pounds of ammonia in the system when Seattle Refrigeration Company changed out a compressor later the same year.

Zachary Schmitz

Mr. Schmitz was identified by Respondent as a witness in its Prehearing Exchange for the purpose of testifying that he (prepared and sent the necessary statements) complied with EPCRA in June of 2006. Complainant intends to call Mr. Schmitz at hearing as well, and question him concerning the statements he made to the EPA inspectors regarding the ammonia refrigeration systems at Respondent's facility and the amount of ammonia present at Respondent's facility on the date of the inspection. Complainant also intends to question Mr. Schmitz regarding his knowledge of the operation of the ammonia refrigeration systems and the amount of ammonia present at Respondent's facility for the years 2001 through 2004.

Conclusion

Based on the letter dated March 23, 2007, from PermaCold Engineering to Mr. Stan Firestone (Complainant's Exhibit 8), Respondent's high pressure ammonia receiver has an ammonia charge of approximately 1,820 pounds. It appears Respondent has had the same high

pressure ammonia receiver since 2001, as indicated by WDLI inspection records. Respondent has not provided any evidence to support the statement that it used less than 500 pounds of ammonia in the high pressure ammonia receiver during the years 2001 through 2004, which is less than a third of the 1,820 pounds of ammonia that is now used in the same high pressure ammonia receiver. Based on the information Complainant submitted in its Initial Prehearing Exchange and the additional evidence described herein, Complainant concludes that the Respondent had ammonia present at its facility in an amount equal to or greater than 500 pounds during the years 2001-2004.

b. Respondent's statement that in the absence of proof no penalty is warranted for the years 2001 through 2004

As stated above, based on the information submitted in the Initial Prehearing Exchange and the additional evidence described herein, Complainant has concluded that Respondent had ammonia present at its facility in an amount equal to or greater than 500 pounds during the years 2001 through 2004. Therefore, Complainant believes the proposed penalty for the years 2001 through 2004 is warranted.

c. Respondent's statement that there should be a "minimal" penalty for its failure to submit a completed Emergency and Hazardous Chemical Inventory Form to the State Emergency Response Commission ("SERC"), Local Emergency Planning Committee ("LEPC"), and the Vancouver Fire Department for the calendar year 2005 by March 1, 2006.

There is no dispute that Respondent failed to submit a completed Emergency and Hazardous Chemical Inventory Form to the SERC, LEPC, and the Vancouver Fire Department for the calendar year 2005 by March 1, 2006. In its Prehearing Exchange, Respondent states that

in did not have actual knowledge of the requirement to file an Emergency and Hazardous Chemical Inventory Form until April 28, 2006, the date of the inspection. As an owner or operator of a facility which handles hazardous chemicals, Respondent is responsible for knowing and complying with the law. Section 312 of EPCRA, 42 U.S.C. § 11022, and its implementing regulations at 40 C.F.R. Part 370 require the owner or operator of a facility which is required by the Occupational Safety and Health Administration (OSHA) to prepare or have available a material safety data sheet (MSDS) for a hazardous chemical to submit a completed Emergency and Hazardous Chemical Inventory Form to the SERC, LEPC, and the fire department with jurisdiction over the facility by March 1, 1988, and annually thereafter. This requirement has been in place for nearly 20 years. Respondent states that "it took steps to complete the form in question and submitted the form to the required agencies. At least one of the agencies reports recollection of seeing the report during the summer of 2006." However, as stated in Complainant's Initial Prehearing Exchange, the SERC, LEPC, and Vancouver Fire Department have no record of having received any forms from Respondent prior to December 2006. See Complainant's Exhibits 16, 17, 18, and 21. Respondent further states that there were no releases from the facility, and no one was harmed; however, under EPA's penalty policy these are not mitigating factors. Respondent has not provided any new evidence or other information in support of its statement that only a "minimal" penalty should be assessed; Complainant has already considered the facts Respondent identified above in its calculation of the proposed penalty, and provided in its Initial Prehearing Exchange the documents it relied on in calculating

the proposed penalty. See Section IV., Paragraph 4.1.F and G. of Complainant's Initial Prehearing Exchange.

d. Respondent's statement that there can be no economic benefit for failure to complete a form that can reasonably completed in 10 minutes.

In its Prehearing Exchange, Respondent makes the statement that there can be no economic benefit as result of a failure to complete and submit an Emergency and Hazardous Chemical Inventory Form. Respondent has not provided information or any evidence to support that statement. As stated in its EPCRA/CERCLA Enforcement Response Policy ("ERP"), see Complainant's Exhibit 5, EPA considers any economic benefit from noncompliance that accrues to the violator when proposing penalties. Complainant addressed the issue of economic benefit in its calculation of the proposed penalty and provided in its Initial Prehearing Exchange the documents it relied on in calculating the penalty. See Section IV., Paragraphs 4.1.F and G of Complainant's Initial Prehearing Exchange.

II. DOCUMENTS AND EXHIBITS

Copies of the additional documents Complainant intends to introduce into evidence are numbered and attached hereto as follows:

Complainant's Ex. 25: Record of Ted Mix's Telephone Conversation with Ms. Williamson on January 14, 2006

Complainant's Ex. 26: The Inspection Records faxed from Ms. Williamson, of the Washington Department of Labor & Industries to Ted Mix's on January 14, 2006

Complainant's Ex. 27: Record of Suzanne Powers's Telephone Conversation with Mr. Bob Pederson of Seattle Refrigeration on January 28, 2006

Respectfully submitted on this 31st day of January, 2008.



Robert Hartman
Assistant Regional Counsel
U.S. EPA Region 10

In the Matter of: Firestone Pacific Foods, Inc.
Docket No. EPCRA 10-2007-0204

CERTIFICATE OF SERVICE

I hereby certify that a copy of **COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE**, with copies of exhibits was sent to the followings persons in the manner specified on the date below:

Original with exhibits, and one true and correct copy, by hand delivery:

*Carol Kennedy, Regional Hearing Clerk
US Environmental Protection Agency, Region 10
Mail Stop ORC-158
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101*

One true and correct copy with exhibits by hand delivered to:

*Robert Hartman, Assistant Regional Counsel
US Environmental Protection Agency, Region 10
Mail Stop ORC-158
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101*

One true and correct copy with exhibits by pouch mail delivered to:

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

One true and correct copy with exhibits by Certified Mail Return Receipt Requested delivered to

*Ben Shafton, Esquire
Caron, Colven, Robinson & Shafton, P.S.
900 Washington Street, Suite 1000
Vancouver, Washington 98660*

Dated: 1-31-08

Debra Egger

COMPLAINANT'S REBUTTAL
PREHEARING EXCHANGE - 9

U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101
(206) 553-1037



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10
1200 Sixth Avenue
Seattle, WA 98101

January 31, 2008

Reply To
Attn Of: ORC-158

Carol Kennedy
Regional Hearing Clerk
US Environmental Protection Agency, Region 10
Mail Stop ORC-158
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Re: In the Matter of: Firestone Pacific Foods, Inc., Docket No. EPCRA 10-2007-0204

Dear Regional Hearing Clerk:

Please find enclosed the original Complainant's Rebuttal Prehearing Exchange, with copies of exhibits, and one true and correct copy. A copy was sent to the Honorable Susan L. Biro, Chief Administrative Law Judge via pouch mail and to Respondent's counsel Ben Shafton by Certified Mail Return Receipt Requested. (see certificate of service for details).

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Robert Hartman".

Robert Hartman
Assistant Regional Counsel

cc: Honorable Susan L. Biro
Ben Shafton, Esquire