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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	
LAKE'S FARM SERVICE LLC	)	
	)	**DOCKET NO. CAA-05-2010-0058**
RESPONDENT	)	
	)	**Hon. Barbara A. Gunning**
	)	
	)	
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	)	

COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE

In accordance with the Prehearing Order issued by the Presiding Officer on April 6, 2011, Complainant, the Director of the Superfund Division, Region 5, United States Environmental Protection Agency (U.S. EPA), through his undersigned attorney, hereby files Complainant's Rebuttal Prehearing Exchange, pursuant to Section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.

In Respondent's Prehearing Exchange, it asserts that the $76,000 proposed penalty should be reduced or eliminated. This position is without merit for the reasons discussed below.

I. The Violations Are "Major" Under the EPA's Civil Penalty Policy

Respondent first claims in its Prehearing Exchange that "there are *no* facts which support EPA's determination that a 'Major' violation occurred" (*emphasis in original*) Respondent's Prehearing Exchange at 2. This appears to be based on its assertion that "the safe operation of the facility or the safe management of anhydrous ammonia was [not] jeopardized by Lake's lack of documentation." *Id.* This statement is simply untrue. That is precisely what the lack of appropriate action (including documentation) does. This, in turn, puts at risk the safety of the surrounding community.

As discussed in Complainant's Risk Management Program Inspection Findings Sheet (Inspection Findings Sheet), Complainant's Exhibit 1, and as will be further established at hearing by testimony from Complainant's inspector Ed Bordy and case engineer Greg Chomycia, Respondent failed to comply with the Risk Management Program regulations at 40 C.F.R. Part 68 in at least 10 different ways. These separate regulatory violations are described in the Complaint, particularly Paragraphs 46 through 55. They include Respondent's failures to assign a qualified person for overall responsibility of the Risk Management Program, conduct a hazard review, put together a maintenance program, ensure the integrity of the process, and develop operating procedures. In addition, Respondent made serious errors in its estimation of the effect that a chemical accident could have on the surrounding community. When Respondent was required by the Part 68 rules to make sure that the necessary regulatory elements were in place, it did not do so.

Any one of these violations would independently provide a basis for the issuance of a Complaint. The fact that there are 10—and these 10—reveals a pattern and practice of disregard for the regulations' mandates. Together, they are the very type of violations that "cumulatively...essentially undermine the ability of the facility to prevent or respond to releases..." U.S. EPA Combined Enforcement Policy for CAA Section 112(r) Risk Management Program (Enforcement Policy), Complainant's Exhibit 17, at 8.

Respondent cites a notation from the Inspection Findings Sheet (Complainant's Exhibit 1) that Lake had "mechanisms in place to notify emergency responders if and when the need should arise." Respondent's Prehearing Exchange at 2. The portion of the Inspection Findings Sheet to which Respondent is apparently referring is on page 8 of that document,

and addresses compliance with the "Emergency Response" provisions of the Risk Management Program regulations at 40 C.F.R. Part 68, Subpart E. Complainant is not alleging violations of any of the provisions of the Subpart E regulations.[1]

The Emergency Response section of the regulations require a facility such as the Respondent's that will not itself be responding to a release at its facility to, among other things, "have appropriate mechanisms in place to notify emergency responders when there is a need for a response[2]" In other words, when the facility judges that a release is serious, it will contact the people who have the training and equipment to respond. These responders will: notify endangered public, including moving them to safe locations; respond to any injuries; and attempt to mitigate the release.

Respondent's statement as to the lack of apparent "jeopardy" caused by its omissions suggests Respondent's belief that the absence of actual harm in this case means that these violations are negligible. This ignores the fundamental premise of the Risk Management Program—the importance of accident *prevention*. Had any of Respondent's omissions, in fact, resulted in a chemical release, thousands of lives could have been at risk.[3] And the penalties that Complainant would have sought would undoubtedly have been higher by

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[1] Those regulations require a facility such as the Respondent's--whose employees are not able to handle an emergency--to contact the people who have the training and equipment to respond. These responders will, among other things: notify the endangered public, including moving them to safe locations; respond to any injuries; and attempt to mitigate the events of the release of toxic chemicals. Complainant is alleging violations of three other Subparts of Part 68: A, B and C. See discussion in Section II, below.

[2] 40 C.F.R. Section 68.90(b)(3)

[3] The population figures come from the worst-case scenarios in the Risk Management Plans submitted by the facility (Respondent Exhibits 7 and 8).

many orders of magnitude.[4]

Respondent suggests that, "[a]t worse, Lake's 'violation' should be considered 'Minor.' " Respondent's Prehearing Exchange at 2. Given the scope and magnitude of these violations, classifying them as "minor" would be in consistent with the Enforcement Policy's Factors for Determining the Gravity Component. See Enforcement Policy, Complainant's Exhibit 17, at 8. The length of time the violation occurred and the size of the company are also significant factors in evaluating the seriousness of the violations.

II. Respondent's Risk Management Program Was Deficient in Numerous Ways

Respondent states that "there is not one allegation which suggests Lake did not develop or implement a RMP or that Lake was not in a position to respond to an emergency situation." (Respondent's Prehearing Exchange at 3). Respondent is correct in its statement concerning the development of a Risk Management Plan; Complainant did not allege violations of the Risk Management Plan regulations at 40 C.F.R. Part 68, Subpart G. But Complainant's concern comes from the facility's failure to develop and implement a Risk Management *Program* as required by the regulations. Complainant cited regulatory violations at 40 C.F.R. Part 68, Subparts A (Management), B (Hazard Assessment), and C (Program 2 Prevention Program). All of these Subparts form a prevention standard necessary to decrease the likelihood that an accident involving a highly hazardous chemical will occur. The Risk

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[4] Where there has been environmental damage, the Enforcement Policy authorizes increasing the gravity component beyond the amounts listed in the matrix (at 14). *See also U.S. v. E.I. du Pont de Nemours,* No. 97-191 (E.D.Ky. 2000), a case involving the release of more than 23,8000 gallons of sulfuric acid solution into the air. Section 112(r) of the Clean Air Act was one of the several statutory bases for this judicial settlement which resulted in, among other things, a civil penalty of $850,000.

Management Program rules were promulgated to ensure that the facility takes the responsibility to understand the hazards that are present at the facility and how these hazards can be minimized.

III. Complainant Properly Considered All Relevant Factors in Developing Its Proposed Penalty.

Respondent correctly notes in its Prehearing Exchange that EPA's Penalty Policy provides flexibility, while seeking to ensure that "similarly-situated violators are treated similarly." Respondent's Prehearing Exchange at 2-3, citing the EPA Penalty Policy at 8. Respondent then asserts that another EPA Region has "settled allegations nearly identical to those here for $7,550." This, according to Respondent, translates into a "litigation risk" warranting a downward adjustment of the proposed penalty.

Complainant is not familiar with the nature of the violations at issue in the case cited by Respondent. When Respondent raised this matter in earlier discussions, however, Complainant contacted EPA's Region 7 office and was informed that the sole basis for the relatively low penalty in that matter case was that respondent's inability to pay. This explanation has been communicated to Respondent on more than one occasion. Complainant certainly recognizes financial hardship as a legitimate basis for penalty reduction, and has repeatedly invited Respondent to provide documentation supporting such an inability. The Presiding Officer has done so, as well. See Prehearing Order at 2. Nonetheless, Respondent has not availed itself of this mitigation basis.[5]

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[5] Evidence of other settlements is not admissible at hearing. *See* Chief Judge Biro's June 6, 2011 Order on Complainant's Motion in Limine to Exclude Testimony and Evidence *In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, at 15.

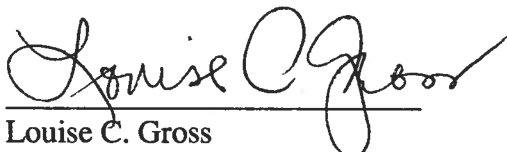
In its description of the testimony of Allen Lake, Respondent refers to its "lack of willfulness and other mitigating factors that support a waiver or significant reduction of the assessed penalty." Prehearing Exchange at 5. Complainant is not sure what these "other mitigating factors" might be.

In addition, while the Penalty Policy recognizes Complainant's discretion to consider cooperation as a mitigating factor, Complainant intends to establish at the hearing that Respondent's actions prior to the filing of the Complaint cannot be characterized as cooperative. Instead, Respondent failed to timely provide information that Complainant had requested under its November 25, 2009, Request for Information under Section 114 of the Clean Air Act (Complainant's Exhibit 2), as well as a response to Complainant's February 17, 2010, Notice of Intent (Complainant's Exhibit 4).

In its Prehearing Exchange, Respondent has taken the twin paths of insisting that it was performing the required actions to keep the community safe while upgrading its program into a more considered program. See, e.g., May 26, 2010, "Operating Procedures," Respondent's Exhibit 18. Since the beginning of the Risk Management Program, Respondent has assigned overall responsibility for its development, implementation and integration to an individual who was not qualified or empowered make the decisions necessary to keep its operations safe. It also failed to take responsibility for the integrity of its equipment, the safety of its operations, and the design of its facility. Until it does so, it will not be able to maintain operations to the level of risk that the community reasonably should expect from Lake's Farm Service.

Complainant's Rebuttal Prehearing Exchange for In the Matter of Lake's Farm Service LLC is hereby respectfully submitted.

Respectfully submitted,



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In re Lake's Farm Service LLC
Docket No. CAA-05-2010-0058

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of June, 2011, I filed the original and one copy of Complainant's Rebuttal Prehearing Exchange with the Regional Hearing Clerk, U.S. EPA, Region 5, and placed for pickup to be delivered by UPS a copy of Complainant's Rebuttal Prehearing Exchange to:

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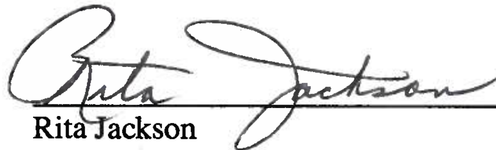

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