

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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In the Matter of:

SuperClean Brands, Inc.
St. Paul, Minnesota

Respondent.

Docket No. EPCRA-05-2009-0016

**COMPLAINANT'S MOTION IN LIMINE TO ADMIT WRITTEN
TESTIMONY INTO THE RECORD AS EVIDENCE**

Pursuant to Section 22.22(c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, codified at 40 C.F.R. § 22.22(c), Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency (U.S. EPA or Agency), Region 5, by and through the undersigned attorneys, files the instant Complainant's Motion In Limine to Admit Written Testimony into the Record as Evidence. By this motion, Complainant seeks to have portions of the direct examination testimony of witness Terence Bonace admitted into evidence in written form. Mr. Bonace, a Life Scientist working in the Land and Chemicals Division of the U.S. EPA, Region 5, calculated the civil penalty proposed in the Complaint.

Respondent has not concurred with this motion.

I. Governing Legal Standard for Admission of Written Testimony

The legal standard governing the admissibility of written testimony into the record as evidence in lieu of oral testimony is found at 40 C.F.R. § 22.22(c), which provides as follows:

Written testimony. The Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness. The admissibility of any part of the testimony shall be subject to the same rules as if the testimony were produced under oral examination. Before any such testimony is read or admitted into evidence, the

party who has called the witness shall deliver a copy of the testimony to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the testimony shall swear to or affirm the testimony and shall be subject to appropriate cross examination.

The written testimony proffered with this motion meets all the requirements of 40 C.F.R. § 22.22(c). The testimony of witness Terence Bonace is in the form of a sworn declaration. See Complainant's Exhibit No. 26 (attached). Mr. Bonace will testify at the administrative hearing scheduled for November 17, 2009; will swear to or affirm his written testimony; shall testify to additional matters on direct examination; and shall be subject to appropriate cross examination.

The written testimony described above is admissible under the evidentiary standard established by 40 C.F.R. § 22.22(a), which states, in pertinent part, that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." Mr. Bonace's written testimony clearly satisfies this standard of admissibility as his declaration authenticates some of the documentary evidence included in Complainant's Initial Prehearing Exchange. The written testimony identifies the two penalty policies used to calculate the penalty proposed in the Complaint: (1) the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990)"(amended, April 12, 2001), (CX-18); and (2) the "Memorandum - Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule." (U.S. EPA, June 5, 2006). CX-19. Therefore, this testimony is relevant for authentication purposes.

This testimony also explains the mechanics of how the application of these policies as related to the evidence resulted in the penalty proposed in the Complaint. To the extent that a witness is needed to explain the penalty calculation, this evidence is relevant and material to the issue of penalties. The testimony is also reliable, as it has been made under oath.


Respondent will not suffer any prejudice from the inclusion of Mr. Bonace's written testimony in the record in that Mr. Bonace shall appear to testify orally at the hearing and Respondent will have the opportunity to cross examine him as to all matters to which he testifies, whether that testimony is provided in written form or orally at the hearing.

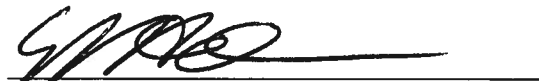
Also, Presiding Officers have previously allowed the substitution of written testimony in lieu of oral testimony in administrative hearings. For example, written testimony was permitted in: Ronald H. Hunt, 2005 EPA ALJ LEXIS 9 (March 8, 2005); and Titan Wheel Corporation of Iowa, 2001 EPA ALJ LEXIS 139 (May 4, 2001). See also Mary J. Metallo, 2008 MSPB LEXIS 4916 (October 23, 2008); and J.V. Peters and Company, A Partnership, David B. Shillman, and Dorothy L. Brueggemeyer, 1997 EPA App. LEXIS 9, 7 E.A.D. 77, (April 14, 1997).

Moreover, allowing portions of the direct examination of a witness to be submitted in written form rather than conveyed orally during the hearing will reduce the time needed to conduct the hearing, thereby conserving the resources of this Court, Respondent and Complainant. The testimony contained in the declaration consists solely of authentication testimony and a basic recitation of the mathematical calculations used to determine the gravity-based component of the penalty proposed in the Complaint. This type of testimony has already been explained in Complainant's Initial Prehearing Exchange and could consume a lot of time to convey orally at the hearing. The substitution of this written testimony for its oral counterpart therefore, also has a practical benefit.

For the reasons set forth above, Complainant respectfully requests that Complainant's Motion to Admit Written Testimony into the Record as Evidence be GRANTED, and that the declaration of written testimony, Complainant's Exhibit No. 26 be admitted into evidence.¹

Respectfully Submitted,


Terence Stanuch
Associate Regional Counsel


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Associate Regional Counsel

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¹ Copies of the written testimony being proffered with this motion have been delivered to this Court and to Respondent's legal counsel. On November 17, 2009, before commencement of the administrative hearing, Complainant's counsel will also provide a copy of the written testimony to the court reporter.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:

SuperClean Brands, Inc.
St. Paul, Minnesota

Respondent.

Docket No. EPCRA-05-2009-0016

DECLARATION OF WRITTEN TESTIMONY

State of Illinois
County of Cook

I, Terence Bonace, declare and state as follows:

1. I am currently employed as a Life Scientist in the Pesticides and Toxics Compliance Section, in the Chemicals Management Branch, of the Land and Chemicals Division, of the United States Environmental Protection Agency, Region 5. I have been employed with U.S. EPA for the past 23 years, and have been with the Pesticides and Toxics Compliance Section for approximately 14 years.
2. The statements made in this Declaration of Written Testimony (Declaration) are based on my personal knowledge.
3. As a Life Scientist in the Pesticides and Toxics Compliance Section, my duties include various investigatory and enforcement activities. Among these duties is the calculation of civil penalties proposed in civil administrative complaints for violations of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11001 *et seq.*, and regulations promulgated under the authority of EPCRA.
4. As part of my duties as a Life Scientist in the Pesticides and Toxics Compliance Section, I calculated the penalty of \$57,870 that is proposed in the administrative Complaint filed against SuperClean Brands, Inc., Docket No. EPCRA-05-2009-0016.
5. The document entitled, "Explanation of the Gravity-Based Component of the Proposed Penalty," which is attached hereto, accurately explains the manner in which I calculated the gravity-based component of the \$57,870 penalty proposed in the Complaint filed against SuperClean Brands, Inc., Docket No. EPCRA-05-2009-0016.
6. The assertions I make in this Declaration are truthful, and if called to testify as a witness, I am prepared to testify under oath to the accuracy of the observations and statements contained in this Declaration based on my personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 11, 2009

By: Terence Bonace
Terence Bonace
Life Scientist

Pesticides and Toxics Compliance Section (LC-8J)
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Explanation of the Gravity-Based Component of the Proposed Penalty

Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), states:

- (1) Any person (other than a governmental entity) who violates any requirement of section 11022 or 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation.
- (3) Each day a violation described in paragraph (1) or (2) continues shall, for purposes of this subsection, constitute a separate violation.
- (4) The Administrator may assess any civil penalty for which a person is liable under this subsection by administrative order or may bring an action to assess and collect the penalty in the United States district court for the district in which the person from whom the penalty is sought resides or in which such person's principal place of business is located.

To provide guidance and ensure that penalties assessed for violations of EPCRA are calculated in a fair and consistent manner, the U.S. EPA developed the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990)"(amended)(April 12, 2001), ("the ERP"). The ERP states that:

[t]he purpose of the Enforcement Response Policy is to ensure that enforcement actions for violations of EPCRA § 313 and the PPA (*Pollution Prevention Act, explanation added*) are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA § 313 violations and the PPA (*sic*). ERP at 1.

The ERP also states that "[e]ach day a violation continues may constitute a separate violation. Id.

Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule, the U.S. EPA issued the June 5, 2006 "Memorandum - Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule." This memorandum adjusted all penalties for inflation, for several environmental statutes including EPCRA, for all violations occurring on or after March 15, 2004.

The ERP applies a multiple-step process to determine, on a case-by-case basis, the amount of civil penalty that is appropriate for each case. A gravity-based penalty amount is selected from a penalty matrix based upon the intersection of the “extent” and “circumstance” levels of the alleged violations. The penalty matrix used for this case may be found on page 11-B of the June 5, 2006 Penalty Policy Supplements memorandum. Extent and circumstance levels are determined based upon the gross sales of the business, the number of employees, the amount of chemical usage over the threshold amount, and the number of days that the Form R submittal was late. After the gravity-based penalty is determined, adjustments are made to the gravity-based penalty based upon an analysis of the evidence of the case in consideration of specifically identified criteria.

Determination of the Gravity-Based Penalty

To determine a gravity-based penalty, the ERP requires an analysis of the evidence in a particular case in consideration of the “extent” of the violation, and in consideration of the “circumstances” of the violation. ERP at 8.

A. Extent Level

To determine which of three “extent” levels, A, B or C is appropriate, Complainant first had to consider the following:

1. the quantity of each EPCRA § 313 chemical manufactured, processed, or otherwise used by the violating facility;
2. the number of employees at the violating facility; and
3. the gross sales of the violating facility’s total corporate entity. ERP at 8.

For purposes of selecting an extent level, Complainant determined that in 2003, Respondent had gross sales of \$17,295,000 and 37 employees; in 2004, Respondent had gross sales of \$16,182,585 and 39 employees and; in 2005, Respondent had gross sales of \$25,000,000

and 23 employees. Also, during 2003, 2004 and 2005, Respondent used more than 10 times the threshold amount of methanol, but used less than 10 times the threshold amount of ethylene glycol during 2004 and 2005. Therefore, Respondent's extent level during 2003, 2004 and 2005 with regard to methanol is "B," but Respondent's extent level during 2004 and 2005 with regard to ethylene glycol is "C."

B. Circumstance Level

The ERP also separates a violator's failure to submit a Form R in a timely manner into two categories. Category I is designated for Form R reports that are submitted one year or more after the July 1 due date, and Category II is designated for Form R reports that are submitted after the July 1 due date but before July 1 of the following year. ERP at 4. Page 12 of the ERP specifies that Category I violations are considered "Level 1," and Category II violations are considered "Level 4" and that the "per day formula" applies.

Respondent's Forms R for methanol for reporting year 2003, and for ethylene glycol for reporting years 2004 and 2005 were all submitted more than one year after they were due. Therefore, these three violations are all designated as Category I violations. However, Respondent's Forms R for methanol for reporting years 2004 and 2005 were submitted less than one year after they were due. Therefore, these two violations are both designated as Category II violations and Complainant had to apply the following "per day formula" specified at page 13 of the ERP:

(Level 4 penalty) plus
$$\frac{(\text{number of days late minus 1}) \times (\text{Level 1 penalty} - \text{Level 4 penalty})}{\text{divided by 365}}$$

Calculation of the Gravity-Based Penalty

Methanol for the 2003 Reporting Year

Pounds of methanol used during 2003:	34,000,000
Threshold:	25,000
Form R due date:	July 1, 2004
Form R received date:	October 9, 2005
Days late:	more than 365
Circumstance level:	1
Extent Level:	B
Penalty:	\$21,922 - with no adjustment because the Form R was submitted more than one year late.

Methanol for the 2004 Reporting Year

Pounds of methanol used during 2004:	29,000,000
Threshold:	25,000
Form R due date:	July 1, 2005
Form R received date:	September 30, 2005
Days late:	90
Circumstance level:	4
Extent Level:	B
Penalty:	\$11,196 - based upon the following calculation:

$\$7,737 \text{ plus } \frac{(90 \text{ minus } 1) \text{ times } (\$21,922 - \$7,737)}{\text{divided by } 365} \text{ equals } \$11,196$

Methanol for the 2005 Reporting Year

Pounds of methanol used
during 2005: 31,400,000

Threshold: 25,000

Form R due date: July 1, 2006

Form R received date: October 17, 2006

Days late: 107

Circumstance level: 4

Extent Level: B

Penalty: \$11,856 - based upon the following calculation:

$\$7,737 \text{ plus } \frac{(107 \text{ minus } 1) \text{ times } (\$21,922 - \$7,737)}{\text{divided by } 365} \text{ equals } \$11,856$

Ethylene Glycol for the 2004 Reporting Year

Pounds of ethylene glycol used
during 2004: 43,000

Threshold: 25,000

Form R due date: July 1, 2005

Form R received date: June 10, 2008

Days late: more than 365

Circumstance level: 1

Extent Level: C

Penalty: \$6,448 - with no adjustment because the Form R was
submitted more than one year late.

Ethylene Glycol for the 2005 Reporting Year

Pounds of ethylene glycol used during 2005:	86,000
Threshold:	25,000
Form R due date:	July 1, 2006
Form R received date:	June 10, 2008
Days late:	more than 365
Circumstance level:	1
Extent Level:	C
Penalty:	\$6,448 - with no adjustment because the Form R was submitted more than one year late.

In sum, these five penalty gravity-based calculations total \$57,870.

In the Matter of: SuperClean Brands, Inc., Respondent
Docket No. EPCRA-05-2009-016

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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of Complainant's Motion in Limine to Admit Written Testimony into the Record as Evidence, regarding: In the Matter of: SuperClean Brands, Inc., Docket No. EPCRA-05-2009-016, was filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on September 11, 2009, and that copies were sent this day in the following manner to the addressees listed below:

Copy by government pouch mail to:

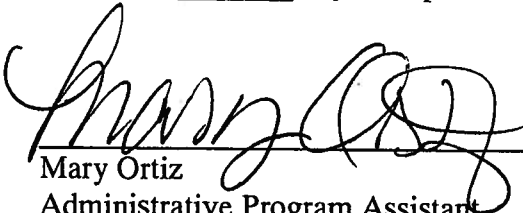
The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave. NW
Washington, DC 20460

Copy by the U.S. Postal Service, Certified Mail, Return Receipt Requested:

Attorney for Respondent:

Sherry L. Stenerson, Esq.
General Counsel
SuperClean Brands, Inc.
1380 Corporate Center Curve, Suite 200
Eagan, MN 55121

Dated this 11 day of September 2009.



Mary Ortiz
Administrative Program Assistant
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
Chicago, Illinois