

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. 2
2009 JAN 15 AM 10:12
REGIONAL HEARING
CLERK

IN THE MATTER OF:)

Docket No. CAA-02-2008-1215

Ronson Consumer Products Corporation)
3 Ronson Road)
Woodbridge, New Jersey,)

COMPLAINANT'S INITIAL
PREHEARING EXCHANGE

Respondent.)

INITIAL PREHEARING EXCHANGE SUBMITTAL FROM COMPLAINANT

Attached is the information and documentation ordered to be submitted on behalf of the Complainant in the Prehearing Order issued by the Honorable Susan L. Biro, Chief Administrative Law Judge, on December 2, 2008 (the "Prehearing Order"). For ease of review, this response is divided in a manner which corresponds to the Prehearing Order.

1. Pursuant to the Prehearing Order and to Section 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, Complainant submits the following list of all expert and other witnesses Complainant intends to call, with a brief narrative summary of their expected testimony, and a resume for each proposed expert witness:

(A) Complainant's Witnesses

1. Ellen Banner
Environmental Scientist/On-Scene-Coordinator
Response and Prevention Branch
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
Edison, New Jersey.

Ms. Banner has been working with the Environmental Protection Agency ("EPA") since March 1988. Prior to this, Ms. Banner occupied a position as a Chemist at the Boston Edison Company laboratories in Watertown, Massachusetts. She holds a Bachelors Degree in Science (B.S. in Biology) from the University of Massachusetts, 1980, Boston, Massachusetts, and a Master's Degree in Science (M.S. in Environmental Science) from Cook College, Rutgers University, 1988, New Brunswick, New Jersey.

Ms. Banner joined the Response and Prevention Branch of the Emergency and Remedial Response Division, EPA, on November 5, 1990. Her current responsibilities include overseeing

inspection methodologies regarding the Clean Air Act (“CAA”) Section 112 matters, the review of cases for possible enforcement action, developing penalty calculations, and providing technical expertise during settlement negotiations.

Complainant will establish Ms. Banner as an expert with regard to the statutory requirements of the CAA Section 112, related regulations, and all relevant EPA guidance. Ms. Banner will testify as to EPA’s application in this case of (1) Section 112 of CAA and the associated regulations and (2) EPA’s the “Combined Enforcement Policy for CAA Section 112(r) Risk Management Program,” dated August 15, 2001 (the “Penalty Policy”), including the manner in which the proposed civil penalties in this case were calculated.

Ms. Banner will testify as to the statutory penalty factors prescribed by Section 112 of the CAA, 42 U.S.C. § 7412. She will discuss how the Penalty Policy provides the framework for calculating a CAA penalty according to the statutory factors of “nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any history of prior such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.” Ms. Banner will describe how the statutory factors are reflected by the penalty matrix described within the Penalty Policy. In addition, she will discuss her review of the proposed penalty in this matter and how that recommended penalty is consistent with and supported by the above-noted statutory and policy factors and guidance.

Ms. Banner will testify how the Penalty Policy is used in calculating a proposed penalty. She will discuss the reasoning behind and elaborate upon the matrix used in calculating the proposed penalty. Within this context, Ms. Banner will provide the basis for concluding that the penalty proposed in the Complaint and Notice of Opportunity for Hearing issued on September 30, 2008 to Respondent (the “Complaint”) for this Respondent is the appropriate penalty for these violations. Ms. Banner will testify that Complainant believed that Respondent had the ability to pay the proposed penalty.

Ms. Banner will describe her review of the inspection reports and the correspondence submitted by Respondent regarding the alleged violations concerning Respondent’s Woodbridge, NJ facility. She will testify as to the assessment made of the facts of the case. Finally, she will testify as to the alleged violations that were cited in the Complaint, and she will detail the pertinent parts of Section 112 of the CAA, 42 U.S.C. § 7412. Ms. Banner will testify as to the alleged violations cited in the Complaint, and she will detail the pertinent parts of the regulations in 40 C.F.R. Part 68 to implement Section 112 of the CAA, which set forth the requirements of risk management programs that must be established and implemented at affected stationary sources.

Ms. Banner may testify as to CAA regulatory issues, including, but not limited to, the basis upon which CAA penalties are calculated and the implementation of the Penalty Policy in Region 2.

2. John Higgins
Chief, Technical Support Section
Response and Prevention Branch

Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
Edison, New Jersey.

Mr. Higgins has been working with EPA since February 1976. Prior to this, Mr. Higgins occupied a position as civil engineer with the New York City Transit Authority in Brooklyn, New York. He holds a Bachelors Degree in Civil Engineering from Manhattan College, 1973, Bronx, New York, and a Master's Degree in Science (M.S. in Civil Engineering) from New York Polytechnic Institute, 1981, Brooklyn, New York. Mr. Higgins was awarded a registration certificate as a Professional Engineer by the State of New York in 1985.

Mr. Higgins joined the Response and Prevention Branch of the Emergency and Remedial Response Division, EPA Region 2, in May 1989. He now serves as the Chief of the Technical Services Section, which includes CAA enforcement responsibilities. His CAA responsibilities include developing program goals, managing resources, including staff supervision, overseeing inspection methodologies regarding CAA Section 112 matters, the review of cases for possible enforcement action, and technical expertise during settlement.

Complainant reserves the right to also establish Mr. Higgins as an expert to testify in lieu of or in addition to Ms. Banner with regard to the CAA section 112 statutory requirements, related regulations, and all relevant EPA guidance. Mr. Higgins may testify as to EPA's application in this case of (1) Section 112 of the CAA, and the associated regulations, and (2) the Penalty Policy, including the manner in which the proposed civil penalties in this case were calculated.

Mr. Higgins may testify as to the statutory penalty factors prescribed by 42 U.S.C. § 7412. Mr. Higgins may discuss how the Penalty Policy provides the framework for calculating a CAA penalty according to the statutory factors of "nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any history of prior such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." Mr. Higgins may describe how the statutory factors are reflected by the penalty matrix described within the Penalty Policy. In addition, Mr. Higgins may discuss his review of the proposed penalty and how the recommended penalty is consistent with and supported by the above-noted statutory and policy factors and guidance.

Mr. Higgins may testify how the Penalty Policy is used in calculating a proposed penalty. Mr. Higgins may discuss the reasoning behind and elaborate upon the matrix used in calculating the proposed penalty. Within this context, Mr. Higgins may provide the basis for concluding that the penalty proposed in the Complaint for this Respondent is the appropriate penalty for these violations. Mr. Higgins will testify that Complainant believed that Respondent had the ability to pay the proposed penalty.

Mr. Higgins will testify about the inspection of Respondent's Woodbridge, NJ facility and his review of the inspection reports and the correspondence submitted by Respondent regarding the alleged violations concerning Respondent's Woodbridge, NJ facility. Mr. Higgins will testify about the risk management program and its requirements. He will testify as to the

assessment made of the facts of the case. Finally, he will testify as to the alleged violations that were cited in the Complaint, and he will detail the pertinent parts of Section 112 of the CAA, 42 U.S.C. § 7412. Mr. Higgins will testify as to the alleged violations cited in the Complaint, and he will detail the pertinent parts of the regulations in 40 C.F.R. Part 68 to implement Section 112 of the Act, which set forth the requirements of risk management programs that must be established and implemented at affected stationary sources.

Mr. Higgins may testify as to CAA regulatory issues, including, but not limited to, the basis upon which CAA penalties are calculated and the implementation of the Penalty Policy in Region 2.

3. Dwayne Harrington
Environmental Scientist/On-Scene-Coordinator
Response and Prevention Branch
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
Edison, New Jersey.

Mr. Harrington has been working with the Environmental Protection Agency since May 1987. Prior to this, Mr. Harrington occupied a position as an Environmental Health Officer at the Middlesex County (NJ) Health Department. He holds a Bachelors Degree in Science (B.S. in Biology) from the Stockton College, Pomona, New Jersey, 1980, and a Master's Degree in Science (M.S. in Environmental Science) from Cook College, Rutgers University, 1990, New Brunswick, New Jersey.

Mr. Harrington joined the Response and Prevention Branch of the Emergency and Remedial Response Division, USEPA, in May, 1987. His responsibilities include performing facility inspections for compliance with the requirements CAA Section 112, the review of cases for possible enforcement action, developing penalty calculations, and providing technical expertise during settlement negotiations.

Mr. Harrington will testify about his inspection of the facility and any follow-up discussions or correspondence he had with representatives of Respondent's Woodbridge, NJ facility. Mr. Harrington may testify as to how the Penalty Policy is used in calculating a proposed penalty. He will discuss the reasoning behind and elaborate upon the matrix used in calculating the proposed penalty. Within this context, Mr. Harrington will provide the basis for concluding that the penalty proposed in the Complaint for this Respondent is the appropriate penalty for these violations. Mr. Harrington will testify that Complainant believed that Respondent had the ability to pay the proposed penalty.

Mr. Harrington will describe his preparation of the inspection reports and the correspondence submitted by Respondent regarding the alleged violations concerning Respondent's Woodbridge, NJ facility. Mr. Harrington will testify about the risk management program and its requirements. He will testify as to the assessment made of the facts of the case. Finally, he will testify as to the alleged violations that were cited in the Complaint, and he will detail the pertinent parts of Section 112 of the CAA, 42 U.S.C. § 7412(r). Mr. Harrington will testify as to the alleged violations cited in the Complaint, and he will detail the pertinent parts of

the regulations in 40 C.F.R. Part 68 to implement Section 112 of the Act, which set forth the requirements of risk management programs that must be established and implemented at affected stationary sources.

Mr. Harrington may testify as to CAA regulatory issues, including, but not limited to, the basis upon which CAA penalties are calculated and the implementation of the Penalty Policy in Region 2.

Complainant respectfully reserves the right to call or not to call any of the aforementioned potential witnesses, and to expand or otherwise modify the scope, extent, or areas of the testimony of any of the above-named potential witnesses, where appropriate. In addition, Complainant respectfully reserves the right to call additional witnesses to address issues or materials which may be raised or placed by Respondent in its prehearing exchange. Complainant also respectfully reserves the right to supplement its witness list and to call additional witnesses on its behalf upon adequate notice to Respondent and to the Court.

(B) Complainant's Documents and Exhibits

In addition to the Complaint and Respondent's Answer (copies of which have already been filed with the Court and which all parties presently possess), incorporated herein by reference, Complainant intends to offer into evidence the following documents, copies of which are attached:

- CX 1: Curriculum vitae for Ms. Ellen Banner
- CX 2: Curriculum vitae for Mr. John Higgins
- CX 3: Curriculum vitae for Mr. Dwayne Harrington
- CX 4: A copy of the determination of EPA and U.S. Department of Justice
- CX 5: Inspection Report/RMP Program Level 3 Process Checklist.
- CX 6: June 16, 2008 Letter
- CX 7: July 8, 2008 Letter
- CX 8: Penalty Calculation Worksheet
- CX 9: September 21, 2004 memorandum from Thomas V. Skinner
- CX 10: Penalty Policy
- CX 11: Appendix B Wage Rates and Unit Cost Table

Complainant anticipates the possibility that it may need to introduce further evidence in response to issues which may be raised in Respondent's prehearing exchange. Complainant therefore respectfully reserves the right to supplement his exhibit list upon adequate notice to Respondent and to this Court. In addition, Complainant may request this Court to take official notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f).

In the event that EPA's continuing review of Respondent's documents, in preparation for this case, reveals additional violations, Complainant respectfully reserves the right, upon adequate notice to Respondent and this Court, to move for Amendment of the Complaint and for: (1) presentation of additional testimony substantiating such additional violations; and (2)

introduction of additional documentary and testimonial evidence substantiating such additional violations.

(C) A statement as to Complainant's view on the place for the hearing, pursuant to §§ 22.21(d) and 22.19(d) of the Rules, Complainant's availability for the hearing, and an estimate of the time needed to present Complainant's direct case.

Pursuant to 40 C.F.R. §§ 22.21(d) and 22.19(d), the hearing should be held in the county where the Respondent conducts business which the hearing concerns, in the city in which the relevant EPA Regional office is located, or in Washington, D.C.

Complainant respectfully requests that the Hearing in this matter be held in New York City, within the building which houses Complainant's offices, the Ted Weiss Federal Building located at 290 Broadway. Staff from the 290 Broadway office will be able to provide appropriate space and resources to resemble a courtroom setting. Holding the hearing at the Ted Weiss Federal Building will also facilitate attendance by other EPA officials as well as representatives of the Respondent.

It is the Complainant's view that a length of time of no more than one day is needed to present its case in chief. Translation services are not needed.

2. In addition, Complainant provides the following:

(A) a copy of the determination of the Administrator and U.S. department of Justice referenced in Paragraph 2 of the Complaint:

See CX 4.

(B) a copy of any report(s) of the inspection of the Facility referenced in Paragraph 23 of the Complaint, along with any photographs, videos, site maps, illustration, diagrams, and/or field notes taken or created during the inspection which are relevant to allegations in the Complaint:

See CX 5.

(C) a copy of EPA's letter to Respondent, and Respondent's response thereto, referenced in Paragraph 24 of the Complaint:

See CX 6 and CX 7.

(D) a copy of any documents in support of the allegations in Paragraph 26, 29, 32, 33, 37, 40 and 41 of the Complaint:

See CX 5, CX6 and CX7. In addition, Respondent admitted the allegations in Paragraph 41 in its Answer to the Complaint. Respondent admitted in part the allegations in Paragraph 26, 32, 33, 37, and 40 in its Answer to the Complaint.

(E) a copy of any documents in support of the penalty calculation explained on the Penalty Calculation Worksheet:

See CX 5 through CX 11.

(F) a copy of any “penalty policy” or any amendment, appendix or clarification thereto, and the September 21, 2004 memorandum from Thomas V. Skinner, upon which Complainant has relied upon in consideration of a proposed penalty assessment but not the Section 112(r) Penalty Policy or the Modification to EPA Policies to Implement the Civil Monetary Penalty Policy or the Modification to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rules:

The September 21, 2004 memorandum from Thomas V. Skinner and the Modification to EPA Policies to Implement the Civil Monetary Penalty Policy or the Modification to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rules are one in the same. *See* CX 9.

(G) A statement on the applicability of the Paperwork Reduction Act (“PRA”), 44 U.S.C. §3501 et seq., to this proceeding, including whether there is a current Office of Management and Budget Control number involved and whether the provisions of Section 3512 of the PRA may apply to this case.

Section 3512 of the PRA is not applicable in this case because information required by statute is not subject to the requirements of the PRA. *See Gossner Foods v. EPA*, 918 F. Supp. 359 (D. Utah 1996). The disclosures required from Respondent in this case must be made pursuant to Section 112 of the CAA, a Congressional mandate. Section 3512 does not operate to preclude penalties when a reporting obligation is required by statute rather than by regulation. *Id.* at 365-66. The current Office of Management and Budget (“OMB”) control number for the forms involved herein is 2050-0144, which authorizes EPA to conduct or sponsor the collection of information. *See* 40 C.F.R. Part 9.

Dated: 1/13/09

Respectfully submitted,



Damaris Urdaz Cristiano
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U.S. Environmental Protection Agency Region 2
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Fax (212) 637-3096

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
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REGIONAL HEARING
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_____))
IN THE MATTER OF:)) Docket No. CAA-02-2008-1215
))
Ronson Consumer Products Corporation)) COMPLAINANT'S INITIAL
3 Ronson Road)) PREHEARING EXCHANGE
Woodbridge, New Jersey,))
))
Respondent.))
_____)

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Initial Prehearing Exchange has been sent this day in the following manner to the respective addressees below:

Original and One Copy by hand delivery to:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 2
290 Broadway, 17th Floor
New York, NY 10007

Copy by overnight 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 Avenue, N.W.
Washington, DC 20460
(202) 564-6291 (Fax)

Copy by overnight mail to:

Attorney for Respondent:
Janine Bauer, Esq.
Saferman, Lakind, Blumstein & Balder, P.C.
101 Grovers Mill Road
Suite 200
Lawrenceville, New Jersey 08648

Date: 1/15/09
Name: Daniel F. Rivera
Title: Legal Clerk
Address: 990 Broadway - 17 floor
New York, N.Y. 10007