



**1. Pursuant to the Prehearing Order and 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, Complainant submits the following:**

**(A) A 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**

Complainant anticipates that it may call the following 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 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, USEPA, on November 5, 1990. She now serves as the Regional Emergency Planning and Community Right-To-Know Act ("EPCRA") Enforcement Coordinator in the EPCRA Section 312 area, among others. Her responsibilities include overseeing targeting and inspection methodologies regarding EPCRA Section 312 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 EPCRA section 312 statutory requirements, related regulations, and all relevant EPA guidance. Ms. Banner will testify as to EPA's application in this case of (1) Section 312 of EPCRA and the associated regulations and (2) EPA's Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-To-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act, September 30, 1999 ("EPCRA 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 EPCRA Section 325(b)(1)(C), 42 U.S.C. § 11045(b)(1)(C). She will discuss how the EPCRA Penalty Policy provides the framework for calculating an EPCRA 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 EPCRA 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 EPCRA 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 26, 2007 to Respondent (the "Complaint") for this Respondent is the appropriate penalty for these violations. Ms. Banner will testify that, based on the information reviewed by EPA, including information provided by Respondent in the Letter from Joseph P. Carey, Attorney for Zierick Manufacturing Corp., to Jean Regna, Assistant Regional Counsel, Office of Regional Counsel, U.S. EPA Region 2, dated December 16, 2005 regarding Zierick's "Response to Agency's Show Cause Notice," Complainant believed that Respondent had the ability to pay the proposed penalty. (See Complainant's Exhibits 8 and 9).

Ms. Banner will describe her review of the inspection reports and the correspondence submitted by Respondent regarding the alleged violations concerning Respondent's Mt. Kisco, New York 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 the EPCRA regulations found at 40 C.F.R. Part 370.

Ms. Banner may testify as to EPCRA regulatory issues, including, but not limited to, the basis upon which EPCRA penalties are calculated and the implementation of the EPCRA 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 the Environmental Protection Agency 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 EPCRA enforcement responsibilities in the Section 312 area. His EPCRA responsibilities include developing program goals, managing resources, including staff supervision, overseeing targeting and inspection methodologies regarding Section 312 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 EPCRA section 312 statutory requirements, related regulations, and all relevant EPA guidance. Mr. Higgins may testify as to EPA's application in this case of (1) Section 312 of EPCRA, and the associated regulations, and (2) the EPCRA 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. § 11045(b)(1)(C). Mr. Higgins may discuss how the EPCRA Penalty Policy provides the framework for calculating an EPCRA 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 EPCRA 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 EPCRA 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 may testify that, based on the information provided by Respondent in the Letter from Joseph P. Carey, Attorney for Zierick Manufacturing Corp., to Jean Regna, Assistant Regional Counsel, Office of Regional Counsel, U.S. EPA Region 2, dated December 16, 2005 regarding Zierick's Response to Agency's Show Cause Notice, Complainant believed that Respondent had the ability to pay the proposed penalty. (See Complainant's Exhibits 8 and 9.)

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

3. Angelo Diana  
Senior Environmental Chemist  
Technical Support Section  
Response and Prevention Branch  
Emergency and Remedial Response Division  
U.S. Environmental Protection Agency, Region 2  
Edison, New Jersey.

Mr. Diana has been working with the Environmental Protection Agency ("EPA") since July 1999 under a grant with the National Council of Senior Citizens. Prior to this, Mr. Diana occupied a position as a Production Manager at Frutarom Meer Corporation in North Bergen, New Jersey. He holds a Bachelor of Arts Degree (B.A.) from Jersey City State College, 1971, Jersey City, New Jersey and a Master of Business Administration Degree (M.B.A. in Industrial Management) from Fairleigh Dickinson University, 1974, Rutherford, New Jersey.

Mr. Diana's responsibilities include working with local emergency planning committees ("LEPCs") to determine which regulated facilities filed documents required under Section 312 of EPCRA (Tier I/Tier II forms), conducting EPCRA Section 312 inspections, and assisting the enforcement case team when enforcement actions are being developed. As part of his inspection responsibilities, Mr. Diana gathers information about facility operations and the quantity of chemical inventory stored at facilities. Finally, as part of his inspection responsibilities, Mr. Diana provides information about coming into compliance to facility personnel.

Mr. Diana's testimony will include a discussion as to his investigation regarding the alleged violations concerning Respondent's Mt. Kisco, New York facility. He will describe his inspection of Respondent's facility, his discussions with Respondent representatives, and his review of documents and correspondence submitted by Respondent. He will testify as to the assessment he made of the facts of the case. Finally, he will detail the pertinent parts of the EPCRA regulations found at 40 C.F.R. Part 370 and he will testify as to the alleged violations that were cited in the Complaint.

4. Mary Ann Kowalski  
Toxic Release Inventory Enforcement Coordinator  
Pesticides and Toxic Substances Branch  
U.S. Environmental Protection Agency  
2890 Woodbridge Avenue, Bldg: 10, MS-105  
Edison, New Jersey 08837.

Ms. Kowalski has been working with the Environmental Protection Agency since November 1991. Ms. Kowalski received her B.S. from the University of Connecticut in 1976, a M.S. from the University of Pennsylvania School of Education in 1990, and an M.P.H. from the State University of New Jersey Edward J. Bloustein School of Planning and Public Policy in 2000. Prior to working at EPA, Ms. Kowalski was a research specialist at the University of

Connecticut School of Medicine and a research specialist/laboratory manager at the University of Pennsylvania School of Medicine.

Ms. Kowalski's responsibilities include performing EPCRA Section 313 inspections, reviewing and developing enforcement cases for issuance, arranging and leading settlement negotiations, preparing consent agreements and final orders for EPCRA violations, and tracking progress and compliance with negotiated settlement agreements.

If necessary, Ms. Kowalski will testify that the Consent Agreement and Final Order in a separate administrative proceeding, *In the Matter of Zierick Manufacturing Corporation*, Docket No. EPCRA-02-2006-4202 ("Section 313 CA/FO"), did not serve to resolve Respondent's liability for EPCRA Section 312 violations. She also will testify that at no point during the negotiations of the Section 313 CA/FO did EPA make any representation that the Section 313 CA/FO would serve to resolve Respondent's liability for violations of EPCRA Section 312.\*

5. Karen L. Taylor  
Assistant Regional Counsel  
USEPA Region 2, Office of Regional Counsel  
290 Broadway  
New York, NY 10007-1866

Ms. Taylor has worked at the Office of Regional Counsel, EPA Region 2 since 1999. She received her J.D. from Rutgers University in 1998. If necessary, Ms. Taylor may be used as a witness to rebut testimony concerning drafting of the Section 313 CA/FO.\*

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) Copies of all documents and exhibits intended to be introduced into evidence.**

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, EPA intends to offer into evidence the following documents, copies of which are attached:

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\* Any such testimony would be presented to respond to Respondent's affirmative defense. Notice herein of such possible testimony is not intended to waive or prejudice EPA's right, at some appropriate time, to demonstrate that such affirmative defense is, as a matter of law, without merit. *See, e.g., 40 CFR 22.18(c)* (stating, in part, that "settlement pursuant to [40 CFR 22.18(b)] shall *only* resolve respondent's liability for Federal civil penalties for the violations...alleged in the complaint." (emphases added)).

1. Complainant's Exhibit 1: Curriculum vitae for Ms. Ellen Banner.
2. Complainant's Exhibit 2: Curriculum vitae for Mr. Angelo Diana.
3. Complainant's Exhibit 3: Curriculum vitae for Mr. John Higgins.
4. Complainant's Exhibit 4: Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-To-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act, September 30, 1999.
5. Complainant's Exhibit 5: Penalty calculation worksheets prepared by Ellen Banner.
6. Complainant's Exhibit 6: EPA Inspection Forms dated September 26, 2005 and December 27, 2006 prepared by Angelo Diana.
7. Complainant's Exhibit 7: Letter from John S. Kushwara, Chief, Monitoring & Assessment Branch, Division of Environmental Science and Assessment, U.S. EPA, Region 2 to Frank Lynster, Vice President of Engineering, Zierick Manufacturing Corp., dated October 31, 2005, regarding Consolidated Multi-Media Compliance Evaluation Inspection.
8. Complainant's Exhibit 8: Letter from John Higgins, Chief, Technical Support Section, Response and Prevention Branch, Emergency and Remedial Response Division, EPA Region 2 to Kenneth Field, Plant Engineer, Zierick Manufacturing Corp., dated November 29, 2005, regarding Opportunity to Show Cause in regard to Potential EPCRA Section 311 and 312 Violations at Zierick Manufacturing Corp.
9. Complainant's Exhibit 9: Letter from Dore LaPosta, Director, Division of Enforcement and Compliance Assistance, U.S. EPA, Region 2, to Gretchen Zierick, dated December 27, 2005 regarding Notice of Opportunity for Hearing in *In the Matter of Zierick Manufacturing Corp.*, EPA Docket No. EPCRA-02-2006-4202
10. Complainant's Exhibit 10: Letter from Joseph P. Carey, Attorney for Zierick Manufacturing Corp., to Jean Regna, Assistant Regional Counsel, Office of Regional Counsel, U.S. EPA Region 2, dated December 16, 2005 regarding Zierick's Response to Agency's Show Cause Notice.
11. Complainant's Exhibit 11: Consent Agreement and Final Order, *In the Matter of Zierick Manufacturing Corp.*, EPA Docket No. EPCRA-02-2006-4202, dated December 22, 2006, resolving an EPCRA Section 313 Complaint.
12. Complainant's Exhibit 12: Letter from Andrew L. Praschak, EPA Region 2 Associate Regional Counsel, to Karen Maples, EPA Region 2 Regional Hearing Clerk, dated February 8, 2008.
13. Complainant's Exhibit 13: Letter from Karen Maples to Andrew L. Praschak dated February 15, 2008.
14. Complainant's Exhibit 14: Section 313 Complaint, *In the Matter of Zierick Manufacturing Corporation*, EPA Docket No. EPCRA-20-2006-2302, dated December 27, 2005.
15. Complainant's Exhibit 15: Complainant's Penalty Calculation Narrative developed for this Prehearing Exchange.

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 Environmental Protection Agency 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.

## **(2) Additional Information**

**(A) A statement explaining in detail how the proposed penalty amount was determined, including a description of how the specific provisions of any EPA penalty or enforcement policies or guidelines were applied in calculating the penalty and explaining the discrepancy between the penalty proposal of \$22,950 on page 4 of the Complaint and \$27,000 on page 5 of the Complaint.**

The number on page 4 of the Complaint is a typographical error. The correct number is \$27,000 as indicated on page 5 of the Complaint.

The proposed penalty was calculated in accordance with the guidelines of the EPCRA Penalty Policy.

Based on the results of EPA's September 26, 2005 inspection of Respondent's facility, and as detailed in Section II of the Complaint ("Findings of Violations"), beginning in 1967, Respondent stored sulfuric acid at its facility in amounts over 500 pounds. The "threshold planning quantity" ("TPQ"), as used in 40 C.F.R. Parts 355 and 370, for reporting this chemical is 500 pounds, pursuant to 40 C.F.R. § 370.20(b)(1) and as set forth in 40 C.F.R. Part 355, Appendices A and B.

Respondent is obligated, in accordance with Section 312 of EPCRA, to submit chemical inventory forms ("Tier I /Tier II forms") by March 1st of each year for which a regulated chemical is stored on site above the establish threshold during the previous calendar year. These forms are to be submitted to the state emergency response commission ("SERC"), LEPC and local fire department. Respondent failed to provide Tier I or Tier II forms to these entities within the reporting deadlines.

The EPCRA Penalty Policy on page 20 contains base penalty matrices which EPA applies when calculating proposed civil penalties for EPCRA § 312 violations which occur after January 30, 1997. The proposed penalty is derived from the appropriate matrix by determining the Extent and Gravity of a given violation. This will place the proposed penalty in a given cell on the matrix. Once the cell has been determined, the circumstances of the violation are evaluated to arrive at a specific penalty within the range for that cell. Under the EPCRA Penalty Policy, the selection of the exact penalty amount within each range is left to the discretion of the enforcement personnel in any given case.

After the base penalty amount is determined, EPA considers additional adjustment factors and may make adjustments, as appropriate, based on factors including the ability to pay of the violator, any prior history of violations, the violator's degree of culpability, the economic benefit accruing to the violator as a result of its noncompliance, and other matters as justice may require.

#### Counts 1, 2, 3, and 4 - EPCRA Section 312

Section VI of the EPCRA Penalty Policy ("Past Year Violations of EPCRA § 312") states that, if at the time of the initial investigation, an EPCRA Section 312 violation is detected for the most recent reporting period, the base penalty matrices shall be used to determine the penalty. If during the time between the initial investigation and issuance of the complaint another reporting deadline passes and the facility again fails to submit the required report, that subsequent violation shall also be calculated pursuant to the penalty matrices (*i.e.*, both violations shall be calculated using the penalty matrices). Section VI of the EPCRA Penalty policy also states that for EPCRA Section 312 violations detected for previous years of non-compliance, a flat penalty of \$1,500 per year shall be proposed, except where the facts and circumstances warrant the imposition of the full gravity-based penalty.

At the time of EPA's initial investigation (EPA's September 26, 2005 inspection of Respondent's facility), Respondent had failed to submit Tier I or Tier II forms to the SERC, LEPC, and fire department for reporting years 2002, 2003, and 2004, and had therefore violated the requirements of Section 312 for those reporting years. Subsequently, EPA discovered that Respondent did not submit Tier I or Tier II forms to the SERC, LEPC, and fire department by March 1, 2006 for reporting year 2005.

Therefore, for the violations of Section 312, the base penalty matrix was used to calculate the penalty for the most recent Section 312 violation at the time of EPA's September 26, 2005 inspection, regarding Respondent's failure to submit Tier I or Tier II forms to the SERC, LEPC, and fire department by March 1, 2005 for reporting year 2004. (Count 3). The base penalty matrix was also used to calculate the penalty for the subsequent Section 312 violations, regarding Respondent's failure to submit Tier I or Tier II forms to the SERC, LEPC, and fire department by March 1, 2006 for reporting year 2005. (Count 4).

EPA proposed a "flat penalty" of \$1,500 for the Section 312 violation for failure to submit Tier I or Tier II forms to the SERC, LEPC, and fire department by March 1, 2003 for reporting year 2002. (Count 1). EPA proposed a "flat penalty" of \$1,500 for the Section 312 violation for failure to submit Tier I or Tier II forms to the SERC, LEPC, and fire department by March 1, 2004 for reporting year 2003. (Count 2).

Additional penalties for Counts 3 and 4 were calculated as described below.

#### Counts 3 and 4 - EPCRA Section 312

##### Extent

The extent factor, described on pages 11-15 of the EPCRA Penalty Policy, is used to reflect the amount of Respondent's deviation from the EPCRA requirements. As set forth on page 13 of the EPCRA Penalty Policy, this factor reflects the potential deleterious effect the noncompliance has on the Agency's, the SERC's, or the LEPC's ability to implement EPCRA or the public's ability to access the information. There are three "extent" levels, Levels 1-3, with Level 1 being the highest.

Under the EPCRA Penalty Policy, Level 1 applies where the violator failed to submit the Tier I or Tier II forms within 30 calendar days of the reporting deadline. In this case, Respondent did not submit the forms to the SERC, LEPC, or local fire department within thirty days of the reporting deadline. Thus "extent" Level 1 applies.

### Gravity

For the gravity factor, as set forth on pages 15-16 of the EPCRA Penalty Policy, the amount of the chemical involved, which was present at the facility in excess of the reporting threshold forms the basis for determining the "gravity" of the violation. There are three levels for Gravity as well, Levels A-C, Level A being the highest. Under the EPCRA Penalty Policy, Respondent's storage of sulfuric acid in amounts greater than 2.8 times the reporting threshold of 500 pounds constitutes a Level C violation.

Because the "extent" of Respondent's violations was Level 1, and the gravity of the violations was Level C, the applicable cell of the EPCRA Penalty Policy matrix for violations of Section 312 of EPCRA which occur after January 30, 1997 was the cell with a penalty range of \$8,061 to \$16,119 per violation.

### Circumstances

Once EPA determined the particular cell for the violation, EPA, in compliance with the EPCRA Penalty Policy, page 17, considered the circumstances of the violations. The circumstance factor is used to arrive at a specific penalty within the range for that cell. "Circumstances" refers to the actual or potential consequences of the violation, i.e., the potential for harm to human health and the environment as a result of inadequate notice of the surrounding hazards. The potential for harm includes: the potential for emergency personnel, the community, and the environment to be exposed to hazards posed by noncompliance; the adverse impact noncompliance has on the integrity of the EPCRA program; the relative proximity of the surrounding population; and the effect noncompliance has on the LEPC's ability to plan for chemical emergencies.

In this case, factors considered included the fact that the chemical involved (sulfuric acid) is an "extremely hazardous substance" as defined under Section 329(3) of EPCRA and a large amount of sulfuric acid was present at Respondent's facility (2.8 times the TPQ). Respondent's non-compliance affected the LEPC's ability to plan for a chemical emergency. Based on these factors, EPA determined that the middle of the penalty range was appropriate.

As stated on page 9 of the EPCRA Penalty Policy, Respondent's failure to provide notification to each point of compliance or submit required reports to each point of compliance is a separate violation. The term "points of compliance" refers to the specific entities designated to receive submissions and notices (i.e., the SERC, LEPC, and fire department). Therefore, EPA could have assessed three separate penalties pursuant to the EPCRA Penalty Policy for Respondent's alleged violations of Section 312 for each of the reporting years cited in the complaint, one each for failure to provide the Tier I or Tier II forms to the SERC, the LEPC, and the fire department for each year.

EPA considered the various factors present in this case, some of which are listed in the Adjustment Factors Section of the EPCRA Penalty Policy, such as Respondent's lack of prior EPCRA Section 312 violations, size of business, other factors as justice may require, and attitude, and consolidated the three violations of Section 312 for each year into one count for each year, and sought only one penalty for the three violations for each year. In addition, although Section VII of the EPCRA Penalty Policy provides for per day penalties, EPA did not seek per day penalties for these violations.

After calculating the gravity-based penalties for Counts 1 through 4 as described above, EPA also considered Respondent's ability to pay. EPA's November 29, 2005 letter to Respondent (Complainant's Exhibit 7) requested that Respondent submit any information which Respondent wanted EPA to consider prior to determining whether to issue an administrative complaint to Respondent. This letter stated that if Respondent wished to raise their ability to pay as an issue for EPA to consider, Respondent should reply and submit copies of the last three years of the company's filed tax returns. Respondent failed to raise ability to pay issues or submit its tax returns for the previous three years. (Complainant's Exhibit 9).

Because the violations were discovered as a result of an inspection of Respondent's facility by EPA, no adjustment was made for voluntary disclosure.

To summarize, the Complaint included one count for the violations of Section 312 (Count 1) for reporting year 2002, which proposed a penalty of \$1,500; one count for the violations of Section 312 for reporting year 2003 (Count 2), which proposed a penalty of \$1,500; one count for the violations of Section 312 for reporting year 2004 (Count 3), which proposed a penalty of \$12,000; and one count for the violations of Section 312 for reporting year 2005 (Count 4), which proposed a penalty of \$12,000. The total penalty proposed in the Complaint was \$27,000.

**(B) Copy of any penalty policy which Complainant has relied upon, or intends to rely upon, in consideration of the proposed penalty.**

See Complainant's Exhibit 3.

**(C) Copy of any other documents which Complainant has used or intends to use in consideration of the proposed penalty in this case.**

See Complainant's Exhibits 4, 5, 7, and 9.

**(D) 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 number involved and whether the provisions of Section 3512 of the PRA may apply to this case.**

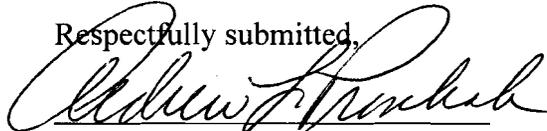
Complainant submits the following statement regarding the PRA.

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 EPCRA Section 312, 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 2050-0072, which authorizes EPA to conduct or sponsor the collection of information. *See* 40 C.F.R. Part 9. EPA submitted an Information Collection Request (ICR) to OMB to renew approval for information collection under this control number. 73 Fed. Reg. 16 (Jan. 24, 2008). This ICR was scheduled to expire on January 31, 2008, but under OMB regulations, EPA may continue to collect information with valid control numbers while an ICR submission is pending at OMB. *Id.*

Dated: Feb. 21, 2008

Respectfully submitted,



Andrew L. Praschak  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency Region 2  
(212) 637-3172  
Fax (212) 637-3104

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ENVIRONMENTAL  
REGION 2 PROTECTION AGENCY-REG.II

2009 FEB 22 PM 12:06

REGIONAL HEARING  
CLERK

IN THE MATTER OF:	)	
	)	DOCKET NO. EPCRA-02-2007-4006
Zierick Manufacturing Corporation	)	
Mount Kisco, New York	)	COMPLAINANT'S INITIAL
	)	PREHEARING EXCHANGE
	)	
	)	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 II  
290 Broadway, 17<sup>th</sup> Floor  
New York, NY 10007

Copy (with exhibits) by overnight mail and copy by facsimile (without exhibits) 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) 565-0044 (Fax)

Copy (with exhibits) by overnight mail and copy by facsimile (without exhibits) to:

Attorney for Respondent:  
Joseph P. Carey  
1081 Main Street, Suite E  
Fishkill, NY 12524  
(845)896-0602 (Fax)

Date:

2/22/08

Name:

Bruna Flaxey

Title:

Branch Secretary

Address:

U.S. EPA

290 Broadway - 17th fl.

New York, NY 10007