UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	**Docket No. CAA-05-2020-0026**
	)	
Cardinal FG Company	)	**Proceeding to Assess a Civil Penalty under**
Menomonie, Wisconsin	)	**Section 113(d) of the Clean Air Act**
	)	**42 U.S.C. § 7413(d)**
Respondent.	)	
	)	

CARDINAL FG COMPANY'S ANSWER
TO ADMINISRATIVE COMPLAINT
(Hearing Requested)

Respondent Cardinal FG Company (Cardinal) responds to the allegations in the Administrative Complaint (Complaint) as follows:

Administrative Complaint

1. The allegations in Paragraph 1 of the Complaint concern assertions of law that do not require a response.

2. Cardinal has no knowledge of the truth of the allegations made in Paragraph 2 of the Complaint.

3. Cardinal admits the truth of the allegations made in Paragraph 3 of the Complaint.

Statutory and Regulatory Background

4. The allegations in Paragraph 4 of the Complaint concern assertions of law that do not require a response.

5. The allegations in Paragraph 5 of the Complaint concern assertions of law that do not require a response.

6. The allegations in Paragraph 6 of the Complaint concern assertions of law that do not require a response.

7. The allegations in Paragraph 7 of the Complaint concern assertions of law that do not require a response.

8. The allegations in Paragraph 8 of the Complaint concern assertions of law that do not require a response.

9. The allegations in Paragraph 9 of the Complaint concern assertions of law that do not require a response.

10. The allegations in Paragraph 10 of the Complaint concern assertions of law that do not require a response.

11. The allegations in Paragraph 11 of the Complaint concern assertions of law that do not require a response.

12. The allegations in Paragraph 12 of the Complaint concern assertions of law that do not require a response.

13. The allegations in Paragraph 13 of the Complaint concern assertions of law that do not require a response.

14. The allegations in Paragraph 14 of the Complaint concern assertions of law that do not require a response.

15. The allegations in Paragraph 15 of the Complaint concern assertions of law that do not require a response.

16. The allegations in Paragraph 16 of the Complaint concern assertions of law that do not require a response.

17. The allegations in Paragraph 17 of the Complaint concern assertions of law that do not require a response.

18. The allegations in Paragraph 18 of the Complaint concern assertions of law that do not require a response.

19. The allegations in Paragraph 19 of the Complaint concern assertions of law that do not require a response.

20. The allegations in Paragraph 20 of the Complaint concern assertions of law that do not require a response.

21. The allegations in Paragraph 21 of the Complaint concern assertions of law that do not require a response.

22. The allegations in Paragraph 22 of the Complaint concern assertions of law that do not require a response.

Waiver

23. The allegations in Paragraph 23 of the Complaint concern assertions of law that do not require a response.

24. Cardinal has no knowledge of the truth of the allegations made in Paragraph 24 of the Complaint.

General Allegations

25. In response to the allegations made in Paragraph 25 of the Complaint, Cardinal admits that it owns a float glass plant (the Facility) at the stated address and admits that the Facility includes one glass furnace, but denies the remaining allegations. Cardinal states that no permit condition, regulation, or physical limitation existed to 2015, or at any other relevant time, that restricted the production of glass at the Facility to 600 tons or less of glass pulled per day (tpd). In correspondence dated May 29, 2015, the State of Wisconsin Department of Natural Resources (WDNR) confirmed to Cardinal that "[p]roposed increases in production capacity [above 600 tpd]

are not prohibited by Permit #617049840-P20." WDNR also confirmed that a "proposed glass production increase" that "does not require physical changes to the glass furnace" "would not constitute a modification" of the Facility. The furnace, throughout its operational history, always has had capacity to produce more than 600 tpd without requiring physical changes.

26. Cardinal admits the truth of the allegations made in Paragraph 26 of the Complaint for the time relevant to the Complaint.

27. Cardinal admits the truth of the allegations made in Paragraph 27 of the Complaint.

Count I

28. Cardinal incorporates its responses to Paragraphs 1 through 27 of the Complaint.

29. In response to the allegations made in Paragraph 29 of the Complaint, Cardinal admits that it placed a canal cooler into service at the Facility on or about July 22, 2015, denies that the canal cooler was placed into service to achieve production rates above 600 tpd, states that production rates already exceeded 600 tpd of glass prior to July 22, 2015, and alleges that this purported violation is barred by the applicable limitations period.

30. In response to the allegations made in Paragraph 30 of the Complaint, Cardinal admits that it replaced existing gas orifice plates at the Facility on or about October 19, 2015, and denies that the gas orifice plates were replaced in order to continue achieving production rates above 600 tpd.

31. In response to the allegations made in Paragraph 31 of the Complaint, Cardinal admits that it placed a rail cooler into service at the Facility on or about January 1, 2016, and denies that the rail cooler was placed into service in order to continue achieving production rates above 600 tpd.

32. Cardinal denies the truth of the allegations made in Paragraph 32 of the Complaint.

33. Cardinal denies the truth of the allegations made in Paragraph 33 of the Complaint.

34. Cardinal denies the truth of the allegations made in Paragraph 34 of the Complaint.

35. In response to the allegations made in Paragraph 35 of the Complaint, Cardinal admits that NO_x is a precursor to ozone and $PM_{2.5}$ and denies the truth of the remaining allegations.

36. Cardinal denies the truth of the allegations made in Paragraph 36 of the Complaint.

37. In response to the allegations made in Paragraph 37 of the Complaint, Cardinal admits that U.S. EPA issued a Notice of Violation (NOV) to Cardinal dated March 18, 2019, states that allegations in the NOV speak for themselves, and denies that it violated the PSD requirements of the Wisconsin SIP as alleged in the NOV. Cardinal further states that U.S. EPA issued the NOV without the benefit of having first inspected the Facility while it was in operation. Therefore, at the time it issued the NOV, U.S. EPA had never observed the devices identified in paragraphs 29-31 of the Complaint and lacked knowledge of the operation of those devices.

38. Cardinal admits the truth of the allegations made in Paragraph 38 of the Complaint.

Count II

39. Cardinal incorporates its responses to Paragraphs 1 through 38 of the Complaint.

40. Cardinal denies the truth of the allegations made in Paragraph 40 of the Complaint.

Proposed Civil Penalty

41. The allegations in Paragraph 41 of the Complaint concern assertions of law that do not require a response.

42. The allegations in Paragraph 42 of the Complaint concern assertions of law that do not require a response.

43. In response to the allegations made in Paragraph 43 of the Complaint, Cardinal denies that a penalty is appropriate because the violations alleged in the Complaint did not occur. Cardinal further states that even if violations are established to have occurred, the proposed penalty

exceeds the statutory maximum penalty under 42 U.S.C. § 7413(d)(1). The alleged violations constitute a single event, not a continuing violation. *See United States v. Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013) ("The violation is complete when construction commences without a permit in hand. Nothing in the text of § 7475 even hints at the possibility that a fresh violation occurs every day until the end of the universe if an owner that lacks a construction permit operates a completed facility."). Thus, even if the violations alleged in the Complaint were established, the penalty would be limited to a single per-day amount, not a sum based on a continuing violation, as is alleged in the Complaint. Further, the proposed penalty is not consistent with U.S. EPA's Clean Air Act Stationary Source Penalty Policy or with applicable law. Cardinal has voluntarily expended millions of dollars to add pollution controls to all its float glass plants, including the Facility, and those expenditures were planned well before the present enforcement proceeding began, and were taken independently of the present enforcement action. Cardinal further states that U.S. EPA has not articulated in its Complaint the basis on which it concluded that the specified penalty amount is consistent with U.S. EPA's Clean Air Act Stationary Source Penalty Policy or with applicable law, making it impossible for Cardinal to state the full reasons why the proposed penalty is inappropriate.

44. Cardinal denies the truth of the factual allegations made in Paragraph 44 of the Complaint, and states that the remaining allegations concern assertions of law that do not require a response.

Rules Governing This Proceeding

45. The allegations in Paragraph 45 of the Complaint concern assertions of law that do not require a response.

Filing and Service of Documents

46. The allegations in Paragraph 46 of the Complaint do not require a response.

47. The allegations in Paragraph 47 of the Complaint do not require a response

Penalty Payment

48. The allegations in Paragraph 48 of the Complaint do not require a response.

Opportunity to Request a Hearing

49. Cardinal requests a hearing on the claims and allegations made in the Complaint and the appropriateness of the proposed penalty.

Answer

50. The allegations in Paragraph 50 of the Complaint do not require a response.

51. The allegations in Paragraph 51 of the Complaint do not require a response.

52. The allegations in Paragraph 52 of the Complaint do not require a response.

53. The allegations in Paragraph 53 of the Complaint do not require a response.

54. The allegations in Paragraph 54 of the Complaint do not require a response.

55. The allegations in Paragraph 55 of the Complaint do not require a response.

Settlement Conference

56. The allegations in Paragraph 56 of the Complaint do not require a response.

57. The allegations in Paragraph 57 of the Complaint do not require a response.

Continuing Obligation to Comply

58. The allegations in Paragraph 58 of the Complaint do not require a response.

Defenses

59. The Complaint fails to state a claim on which relief may be granted and should be dismissed. Cardinal is entitled to judgment as a matter of law.

60. The alleged violation concerning the Facility's use of a canal cooler is time-barred because the Complaint was commenced more than five years after the canal cooler was placed into service. *See United States v. Midwest Generation, LLC,* 720 F.3d 644, 647 (7th Cir. 2013) ("The violation is complete when construction commences without a permit in hand.").

61. The temporary use of supplemental cooling devices, such as the rail cooler and canal cooler identified in Paragraphs 29 and 31 of the Complaint, does not constitute a major modification of an emissions unit. The rail and canal coolers are inexpensive tools commonly used by float glass plants for purposes of glass quality maintenance. They are portable devices and are inserted and removed from the production process as needed. In the past, Cardinal has made temporary use of rail coolers when it has produced glass with different thicknesses or constituents. It also has made temporary use of coolers to correct defects in glass that result from temperature differentials. These coolers are removable tools, not permanent changes or modifications to the Facility's furnace or tin bath. Rail and canal coolers are not used to increase production, and their use does not result in increased emissions of any pollutants.

62. At all relevant times, NO_x emissions from the Facility have met applicable limits stated in the Air Pollution Control Operation Permit issued by the WDNR. At all relevant times, NO_x emissions from the Facility have been no greater than historic NO_x emissions. The use of the devices identified in paragraphs 29-31 of the Complaint did not result in increased NO_x emissions.

63. Wisconsin Administrative Code NR 405.07(1) provides "No . . . major modification may begin actual construction unless the requirements of ss. NR 405.08 to 405.16 have been met." The definition of "begin actual construction" limits the type of construction activities that trigger the control technology review procedures in NR 405.8 to 405.16 to construction activities that are "of a permanent nature":

> "Begin actual construction" means, in general, initiation of physical on−site construction activities on an emissions unit which are of a permanent nature.

NR 405.02(6); *see also* 40 C.F.R. § 52.21(b)(11). Rail coolers and canal coolers are not permanent physical modifications of an emissions unit. They are temporary, removable tools used, as needed, at different points in the glass-making process to maintain glass quality. Rail coolers are mounted on carts to facilitate easy insertion and removal at different locations in the production process. They are stored at the Facility when not in use and have been loaned to other Cardinal facilities from time to time. The Facility was equipped with rail coolers as standard, original operating equipment when it was commissioned in 1992; they are not new additions to the Facility. Canal coolers similarly are temporary, removable cooling devices used, when needed, to maintain glass quality. They are one of several cooling options in common use universally at float glass plants. Gas orifice plates are measuring tools, not permanent additions to an emission unit. They do not control the volume of gas flow to the furnace; rather, they allow more precise measurements of existing gas flows. The Complaint fails to allege facts necessary to establish that the use of the devices described in Paragraphs 29-31 of the Complaint constitutes construction of permanent physical modifications to an emissions unit; therefore, the Complaint fails to state a claim on which relief may be granted. Cardinal is entitled to judgment as a matter of law.

64. The definition of "construction" contains a causation requirement limiting the application of NR 405.07(1) and CAA Section 165(a) to physical changes that "would result in a change in emissions":

> "Construction" means any physical change or change in the method of operation, including fabrication, erection, installation, demolition, or modification of an emissions unit, which would result in a change in emissions.

NR 405.02(11); *see also*, 40 C.F.R. § 52.21(b)(8). The same causation requirement appears in the definition of "major modification," which means "any physical change in . . . a major stationary source that would result in a significant emissions increase of a regulated NSR air contaminant and a significant net emissions increase of that air contaminant from the major stationary source." NR 405.02(21); *see also*, 40 C.F.R. § 52.21(b)(2)(i). The use of rail and canal coolers and the replacement of gas orifice plates did not increase emissions within the meaning of those regulations. Nor were the devices required to increase production levels. The Facility has always had capacity for increasing glass production tonnage beyond 600 tpd, and no physical changes were needed to achieve such higher production. The best evidence of a lack of any causal connection between the use of the coolers and increased production is the fact that the Facility is currently producing higher daily tonnage long after the use of the rail and canal coolers was discontinued. The Complaint fails to allege facts to establish the required causal connection between the devices described in Paragraphs 29-31 and an increase in emissions, and therefore fails to state a claim on which relief may be granted. No such causal connection, in fact, exists. Cardinal is entitled to judgment as a matter of law.

65. Cardinal is exempt from the operation of the PSD regulations and Wisconsin's SIP provisions by the exemption for routine maintenance, repair and replacement found in NR 405.02(21)(b)(1) and 40 C.F.R. §§ 52.21(b)(2)(iii)(a). Courts have established factors to distinguish between, on one hand, physical modifications sufficient to trigger control technology review requirements and, on the other, routine maintenance, repair and replacement activities:

> Routine maintenance, repair and replacement occurs regularly, involves no permanent improvements, is typically limited in expense, is usually performed in large plants by in-house employees, and is treated for accounting purposes as an expense. In contrast to routine maintenance stand capital improvements which generally involve more expense, are large in scope, often involve

> outside contractors, involve an increase in value of the unit, are usually not undertaken with regular frequency, and are treated for accounting purposes as capital expenditures on the balance sheet.

U.S. v. Ohio Edison Co., 276 F. Supp. 2d 829, 834 (S.D. Ohio 2003). Here, the devices identified in paragraphs 29-31 of the Complaint are exempt maintenance and repair items, not large, permanent capital improvements. The use of coolers is an ordinary and frequent occurrence in the production of quality glass, at the Facility and other float glass plants, both in North America and throughout the world. The coolers are temporary and removable, not permanent modifications. The devices identified in paragraphs 29-31 of the Complaint do not constitute capital additions to the Facility. Their cost is insignificant: the rail cooler cost nothing – it was part of the plant's original equipment; the canal cooler cost less than $4,000; the cost to replace the gas orifice plates was under $500. These costs were treated for accounting purposes as ordinary expenses, not capital expenditures. All the devices were placed in service by in-house employees. The Complaint fails to allege facts to establish that devices described in Paragraphs 29-31 are not routine maintenance, repair and replacement items exempt under NR 405.02(21)(b)(1) and 40 C.F.R. §§ 52.21(b)(2)(iii)(a), and, therefore fails to state a claim on which relief may be granted. In fact, the devices constitute exempt routine maintenance, repair and replacement items. Cardinal is entitled to judgment as a matter of law.

66. Cardinal is exempt from the operation of the PSD regulations and Wisconsin's SIP provisions by the exemptions in NR 405.02(21)(6) and 40 C.F.R. §§ 52.21(b)(2)(iii)(f) for "an increase in the hours of operation or in the production rate." *See U.S. v. Cinergy Corp*., 458 F.3d 705, 708 (7th Cir. 2006) (explaining that "merely running the plant closer to its maximum capacity is not a major modification because it does not involve either a physical change or a change in the *method* of operation.") (emphasis in original). The Facility has always had the capacity to produce higher daily glass tonnage without the need to make physical changes to the furnace. Increasing

the production rate to achieve higher tonnage falls within this exemption. Cardinal is entitled to judgment as a matter of law.

67. U.S. EPA is precluded from pursuing penalties in this proceeding for any alleged violations that were not identified in the March 18, 2019 NOV, including new and unsubstantiated allegations contained in paragraph 32 of the Complaint.

68. Cardinal reserves the right to supplement its defenses in this matter during the course of proceedings, and does not intend, by any statement or omission contained herein, to waive any defenses to the Complaint.

Request for Hearing

Respondent hereby requests a hearing on this matter.

Richard D. Snyder

Digitally signed by Richard D. Snyder
Date: 2020.09.02 14:57:36 -05'00'

Dated: September 2, 2020

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that the foregoing **CARDINAL FG COMPANY's ANSWER TO ADMINISTRATIVE COMPLAINT**, dated September 2, 2020, was sent this day in the following manner to the addressees listed below:

Electronically filed using EPA's Region 5's Outlook email-based electronic filing system to:

Regional Hearing Clerk (E-19J)
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3511
Whitehead.ladawn@epa.gov

Copy served by Regular Mail and email to:

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Dated: September 2, 2020.

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