

FILED

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105
U.S. EPA. REGION IX
REGIONAL HEARING CLERK

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In re:) Docket No. EPCRA-09-2007-0028
)
Arizona Environmental Container)
Corporation,)
) INITIAL
) PREHEARING EXCHANGE
Respondent.)
)
_____)

Pursuant to the Prehearing Order in this matter dated March 13, 2008, Complainant submits the following Initial Prehearing Exchange:

I. NAMES OF EXPECTED WITNESSES AND BRIEF NARRATIVE OF EXPECTED TESTIMONY.

1. Nancy Sockabasin, Environmental Engineer, Pollution Prevention and Solid Waste Office, Waste Management Division, U.S.E.P.A., Region IX.

Ms. Sockabasin was formerly an Environmental Scientist/Case Development Officer in the Toxics Office, Communities and Ecosystems Division at EPA Region IX. She conducted EPA Region IX's investigation of Respondent's facility for compliance with EPCRA Section 313 for Reporting Year 2005 and she will testify concerning her findings during the investigation.

2. Cory Wagner, Environmental Protection Specialist, Toxics Release Inventory ("TRI") Information and Outreach Branch, TRI Program Division, Office of Environmental Information, U.S.E.P.A, Washington, DC.

1 Mr. Wagner is the current project manager for the TRI-
2 Made Easy ("TRI-ME") software and TRI-ME web system development.
3 He will testify about the process for electronic filing of Toxics
4 Release Inventory Reporting Form ("Form R") submissions and the
5 consequences of electronically submitting a Form R but not
6 certifying it.

7 3. Russell Frazer, Environmental Protection
8 Specialist/Enforcement Officer, Toxics Office, Communities and
9 Ecosystems Division, U.S.E.P.A. Region IX.

10 Mr. Frazer will discuss the violation alleged in the
11 Complaint and show how the evidence supports the violation. He
12 will also explain how the jurisdictional criteria for the
13 violation alleged in the Complaint have been met in this case.
14 Finally, Mr. Frazer will explain how EPA calculated the proposed
15 penalty in this case and show that EPA calculated the penalty in
16 accordance with the applicable enforcement response policy.

17 4. Ole A. Solberg P.E., Consulting Engineer, Solberg
18 Engineering, Casa Grande, AZ.

19 Mr. Solberg prepared Respondent's Reporting Year 2005
20 Form R and he will testify about his contacts with EPA (through
21 its contractor) and Respondent during the time when Respondent
22 attempted to electronically file the Form R. He will also
23 testify about his contacts with EPA and Respondent after EPA
24 cancelled Respondent's electronic submission for lack of
25 certification.

26 5. Mark Rackley, Former General Manager, Arizona
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1 Environmental Container Corporation/San Juan Pools, Arizona City,
2 AZ.

3 Mr. Rackley was the General Manager at Respondent's
4 facility at the time when Respondent attempted to electronically
5 file its Reporting Year 2005 Form R. He will testify about his
6 contacts with Ole Solberg, the preparer of Respondent's
7 electronic Form R, and EPA concerning the need for Respondent to
8 certify the electronic submission and what steps Respondent took
9 to attempt to certify the submission.

10 6. Other Witnesses: Complainant respectfully reserves the
11 right to supplement its witness list upon adequate notice to
12 Respondent and the Presiding Administrative Law Judge.

13 II. DOCUMENTS AND EXHIBITS TO BE INTRODUCED AT HEARING.

14 Complainant's Ex. 1: Inspection Notes in EPA Region IX TRI
15 Enforcement Database Review Sheet for
16 Arizona Environmental Container Corp. This document supports the allegations
17 in Paragraphs 9, 11, and 12 of the
18 Complaint.

19 Complainant's Ex. 2: Email from Cory Wagner, OEI, EPA
20 Washington, DC to Russell Frazer, EPA
21 Region IX re: Arizona Environmental
22 Container Corp. This document supports
23 the allegations in Paragraphs 11 and 12
24 of the Complaint.

25 Complainant's Ex. 3: Email dated 6/20/06 from EPACDX Help
26 Desk to Todd Sullivan, AECC and Ole
27 Solberg, Solberg Engineering re: EPCRA
28 Section 313 TRI submission waiting for
certification.

Complainant's Ex. 4: Emails dated 7/7/06, 7/21/06, 8/4/06,
8/18/06, 9/1/06, 9/15/06, 9/29/06,
10/13/06, 10/27/06, 11/10/06, 11/24/06
and 12/8/06 from EPACDX TRIME Admin to
Ole Solberg, Solberg Engineering re:

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FYI! You still have a pending TRI submission. These documents support the allegations in Paragraphs 11 and 12 of the Complaint.

Complainant's Ex. 5: Section A.2.a., How to Submit Form R(s) and/or Form A(s) to EPA via the Internet (EPA's Central Data Exchange (CDX)), from the Toxic Chemical Release Inventory Reporting Forms Instructions (Revised 2005 Version)

Complainant's Ex. 6: Screens that appear after pressing CDX Certification Hyperlink in EPACDX TRIME Admin emails to Ole Solberg.

Complainant's Ex. 7: Email dated 2/14/07 from Mark Rackley, AECC to Nancy Sockabasin, EPA Region IX re: FYI! You still have a pending TRI submission. This document supports the allegations in Paragraphs 11 and 12 of the Complaint.

Complainant's Ex. 8: Certified Statement from Tonya J. Richardson, TRI Information and Outreach Branch, OEI re: Date of Arizona Environmental Container Corp's Form R Filing. This document supports the allegations in Paragraphs 11 and 12 of the Complaint.

Complainant's Ex. 9: EPA Envirofacts Warehouse TRI Form R Report and TRI Facility Data Profile for Arizona Environmental Container Corp. These documents support the allegations in Paragraphs 11 and 12 of the Complaint.

Complainant's Ex. 10: ReferenceUSA Report for San Juan Pools, Eloy, AZ.

Complainant's Ex. 11: EPCRA Section 313 Gravity-Based Penalty Calculation Worksheet.

Complainant's Ex. 12: Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA Section 313) dated August 10, 1992.

Complainant's Ex. 13: Letter dated August 16, 2007 from Ken Butler, Director of Engineering, San Juan Pools to Russ Frazer, EPA Region IX

1 re: 2005 Form-R for Arizona
2 Environmental Container Corp. This
3 document supports the allegations in
4 Paragraphs 11 and 12 of the Complaint.

5 Complainant's Ex. 14: EPA OPPT Chemical Fact Sheet on Styrene.

6 Complainant's Ex. 15: Agency for Toxic Substances and Disease
7 Registry (ATSDR) Fact Sheet on Styrene.

8 Other Exhibits

9 Complainant respectfully reserves the right to supplement
10 its exhibit list upon adequate notice to Respondent and the
11 Presiding Administrative Law Judge, if the need arises. In
12 addition, Complainant may request the Presiding Administrative
13 Law Judge to take official notice of appropriate matters within
14 40 C.F.R. § 22.22(f).

15 III. NARRATIVE EXPLANATION OF PENALTY CALCULATION

16 The penalty proposed in the Complaint for this case is
17 \$21,100. This penalty was calculated in accordance with the
18 EPCRA Section 313 Enforcement Response Policy ("Penalty Policy")
19 dated August 10, 1992, as amended by the Civil Monetary Penalty
20 Inflation Adjustment Rule at 40 C.F.R. Part 19¹. Section 325(c)
21 of EPCRA, 42 U.S.C. § 11045(c), and 40 C.F.R. Part 19 authorize
22 EPA to assess a penalty of up to \$27,500 for each violation of
23 Section 313 of EPCRA that occurred on or after January 31, 1997
24 but before March 15, 2004 and up to \$32,500 for each violation

25 ¹Forty C.F.R. Part 19 increases the statutory maximum civil
26 monetary penalty that may be assessed in either civil judicial or
27 administrative proceedings for each statute that EPA administers
28 by 10 percent for all violations that occur after January 30,
1997 but before or on March 15, 2004 and by 30% for all
violations that occur after March 15, 2004.

1 that occurred on or after March 15, 2004. However, EPCRA Section
2 325(c) does not provide statutory penalty factors to consider in
3 determining a penalty. The purpose of the Penalty Policy is to
4 ensure that enforcement actions for violations of EPCRA Section
5 313 are arrived at in a fair, uniform and consistent manner; that
6 the enforcement response is appropriate for the violation
7 committed; and that persons will be deterred from committing
8 EPCRA Section 313 violations. Under this Policy, penalties are
9 determined in two stages: (1) determination of a "gravity-based
10 penalty," and (2) adjustments to the "gravity-based penalty."

11 The "gravity-based penalty" is determined by considering the
12 "circumstances" of the violation and the "extent" of the
13 violation. The "circumstances" of the violation concern the
14 seriousness of the violation as it relates to the accuracy and
15 availability of information to the community, the states, and the
16 federal government. The Penalty Policy recognizes six
17 Circumstance Levels, with Level 1 being the most serious.

18 Facilities which submit Form Rs after the July 1 deadline have
19 failed to comply with this annual reporting requirement and have
20 defeated the purpose of EPCRA Section 313, which is to make this
21 toxic release data available to states and the public annually
22 and in a timely manner. In this case, Respondent failed to file
23 a timely Form R for styrene for the calendar year 2005;
24 Respondent filed it 344 days late. Under the Penalty Policy,
25 submitting a Form R more than one year late constitutes a
26 Circumstance Level 1 violation while submitting a Form R less
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1 than one year late constitutes a Circumstance Level 4 violation.
2 Consequently, Respondent's failure to file a timely Form R for
3 styrene for calendar year 2005 in this case constitutes a
4 Circumstance Level 4 violation.

5 The "extent" of the violation is determined by looking at
6 the quantity of each EPCRA Section 313 chemical manufactured,
7 processed, or otherwise used by the facility and the size of the
8 facility, based on a combination of the number of employees at
9 the facility and the gross sales of the facility's total
10 corporate entity at the time that the Complaint is filed. EPA
11 believes that using the amount of Section 313 chemical involved
12 in the violation as the primary factor in determining the extent
13 level underscores the overall intent and goal of EPCRA Section
14 313 to make available to the public on an annual basis a
15 reasonable estimate of the toxic substances emitted into their
16 communities from the regulated sources. The size of business is
17 used as a second factor in determining the appropriate extent
18 level to reflect the fact that the deterrent effect of smaller
19 penalty upon a small company is likely to be equal to that of a
20 larger penalty upon a large company. Finally, EPA decided to use
21 ten times the threshold of Section 313 chemical involved to
22 distinguish between extent levels because it represents a
23 significant amount of toxic substance. The Penalty Policy lists
24 three Extent categories ranging from A to C, with Level A
25 representing the highest level. In this case, Respondent
26 processed approximately 731,661 pounds of styrene, which is
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1 considerably more than ten times the EPCRA Section 313 reporting
2 threshold amount of 25,000 pounds. In addition, according to the
3 publicly available database, Reference USA, Respondent has less
4 than \$10 million in total corporate entity sales (\$2.5 to \$5
5 million) and less than 50 employees (35 employees). Thus, under
6 the Penalty Policy, Respondent is at Extent Level B for the
7 violation alleged in the Complaint.

8 The Penalty Policy then provides a penalty matrix which
9 incorporates the "circumstances" and the "extent" of a violation
10 and establishes the gravity-based penalty amount. For a facility
11 that fails to file a Form R in a timely manner at Circumstance
12 Level 4, Extent Level B, like Respondent, the matrix provides
13 that the penalty be calculated according to the following per day
14 penalty formula:

$$15 \text{ Formula} = \text{Level 4 Penalty} + \frac{(\# \text{ days late} - 1) \times (\text{Level 1} - \text{Level 4 Penalty})}{365}$$

$$16 = \$7,737 + \frac{(344 \text{ days late} - 1) \times (\$21,922 - \$7,737)}{365}$$

$$17 = \$7,737 + \frac{(343 \times \$14,185)}{365}$$

$$18 = \$7,737 + \$13,330$$

19 = \$21,067, which is rounded to the nearest unit of \$100,
20 pursuant to Page 11-B of the Penalty Policy, for a penalty
21 of \$21,100.
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23 A total penalty is determined by calculating the penalty for each
24 violation on a per-chemical, per-facility, per-year basis. In
25 this case, there is one facility that failed to submit a Form R
26 for one chemical at Circumstance Level 4, Extent Level B for one
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2 case is \$21,100.

3 After the gravity-based penalty has been determined, this
4 proposed penalty amount may be adjusted upward or downward in
5 consideration of the following factors: voluntary disclosure,
6 history of prior violations, delisted chemicals, attitude,
7 ability to pay, supplemental environmental projects, and other
8 factors as justice may require. The Penalty Policy provides that
9 violations of EPCRA Section 313 are strict liability violations
10 and therefore provides no penalty adjustment factor for
11 culpability. In this case, the adjustment factors of voluntary
12 disclosure, history of prior violations, delisted chemicals,
13 ability to pay, supplemental environmental projects, and other
14 factors as justice may require are not applicable and Complainant
15 did not adjust the proposed penalty based on the attitude factor
16 at the time of filing the Complaint. Thus, the penalty in this
17 case is \$21,100.

18 IV. PAPERWORK REDUCTION ACT STATEMENT

19 Since EPCRA Section 313 and its implementing regulations at
20 40 C.F.R. Part 372 require annual reporting to EPA through the
21 use of forms (Form R or Form A), this paperwork requirement
22 constitutes a collection of information that is subject to the
23 Paperwork Reduction Act of 1995 ("PRA"), 44 U.S.C. § 3501 et seq.
24 Pursuant to § 3512 of the PRA, no person shall be subject to a
25 penalty for failing to comply with a collection of information
26 unless the collection of information displays a valid Office of
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1 Management and Budget ("OMB") control number. The OMB control
2 numbers for EPA regulations are listed in 40 C.F.R. Part 9. At
3 all times relevant to the Complaint in this matter, the Form R at
4 issue and the controlling EPA regulations at 40 C.F.R. Part 372
5 were approved under OMB Control No. 2070-0093 and displayed the
6 valid OMB control number. Accordingly, Complainant is not
7 precluded from obtaining a penalty in this matter.

8 V. LOCATION AND ESTIMATION OF TIME FOR THE HEARING

9 Complainant respectfully requests that the hearing in this
10 matter be held in Phoenix, Arizona. The violation occurred at
11 Respondent's facility located in Eloy, Arizona, which is not far
12 (approximately 70 miles) from Phoenix, and Complainant
13 anticipates that its non-EPA witnesses and many of Respondent's
14 witnesses are located in the Eloy, Arizona area.

15 Complainant estimates that it will need 1-2 days to present
16 its direct case.

17 Respectfully submitted,

18
19 4/18/08
Date

20 Carol Bussey
Carol Bussey
Assistant Regional Counsel
U.S.E.P.A, Region IX

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2 CERTIFICATE OF SERVICE

3 I hereby certify that the original and a copy of the
4 foregoing Prehearing Exchange was filed with the Regional Hearing
5 Clerk, Region IX and that a copy was sent by Pouch Mail and First
6 Class Mail to:

7 The Honorable Susan L. Biro
8 Chief Administrative Law Judge
9 Office of Administrative Law Judges
10 United States Environmental Protection Agency
11 1200 Pennsylvania Avenue, N.W.
12 Mail Code 1900L
13 Washington, D.C. 20460

14 and to: Kirk Sullivan
15 President
16 Arizona Environmental Container Corporation
17 2302 Lasso Lane
18 Lakeland, FL 33801

19 4/18/08
20 Date

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22 Office of Regional Counsel
23 U.S.E.P.A., Region IX
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