

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105

FILED

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U.S. EPA, REGION IX
REGIONAL HEARING CLERK

In re:) Docket No. EPCRA-09-2007-0021
)
Valimet Inc.,) COMPLAINANT'S INITIAL
) PREHEARING EXCHANGE
)
Respondent.)
_____)

Pursuant to the Prehearing Order in this matter dated May 29, 2008, Complainant submits the following Initial Prehearing Exchange:

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

1. Nancy Sockabasin (fact witness), Environmental Engineer, Pollution Prevention and Solid Waste Office, Waste Management Division, U.S. EPA, Region IX.

Ms. Sockabasin was formerly an Environmental Scientist/Case Development Officer in the Toxics Office, Communities and Ecosystems Division at U.S. EPA, Region IX. She was involved in the initial case development and determination that violations occurred, and will testify as to the basis for these determinations.

2. Karen Vitulano (fact witness), Environmental Scientist, Environmental Review Office, Communities and Ecosystems Division, U.S. EPA, Region IX.

Ms. Vitulano was formerly an Environmental Scientist/Inspector in the Toxics Office, Communities and Ecosystems Division at U.S. EPA, Region IX. She conducted U.S. EPA, Region IX's investigation of Respondent's facility for compliance with EPCRA Section 313 and she will testify concerning her findings during the investigation.

3. Robert Lucas (fact witness), Environmental Engineer, Chemical Emergency Prevention & Preparedness (CEPP) Section, Superfund Division, U.S. EPA, Region IX.

Mr. Lucas was formerly an Environmental Engineer in the Toxics Office, Communities and Ecosystems Division at U.S. EPA, Region IX. He conducted U.S. EPA, Region IX's investigation of Respondent's facility for compliance with EPCRA Section 313 and he will testify concerning his findings during the investigation.

5. Russell Frazer (fact witness), Environmental Protection Specialist/Enforcement Officer, Toxics Office, Communities and Ecosystems Division, U.S. EPA, Region IX.

Mr. Frazer will discuss the violation alleged in the Complaint and show how the evidence supports the violation. He will also explain how the jurisdictional criteria for the violation alleged in the Complaint have been met in this case. Finally, Mr. Frazer will explain how U.S. EPA calculated the proposed penalty in this case and show that U.S. EPA calculated

the penalty in accordance with the applicable enforcement response policy.

6. Gerald Hiatt (expert witness), Senior Regional Toxicologist, U.S. EPA, Region IX.

Mr. Hiatt will testify as an expert in regard to the risk posed to human health and the environment by a potential one-time release of aluminum or copper compounds from the Facility, including potential human and eco risks posed by the releases due to toxicity, particulate matter exposure, and explosivity of the chemicals.

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

II. DOCUMENTS AND EXHIBITS TO BE INTRODUCED AT HEARING
(Including documents that support the allegations in Paragraphs 16, 25, and 35 of the Complaint)

- Complainant's Ex. 1: Inspection Report for Valimet, Inc. dated September 9, 2005.
- Complainant's Ex. 2: Letter from Paula Bisson, Manager of U.S. EPA, Region IX Toxics Office to George Campbell, President of Valimet, dated April 11, 2007.
- Complainant's Ex. 3: Notice of Inspection dated April 28, 2004.
- Complainant's Ex. 4: Tolling Agreement dated June 27, 2007.

- Complainant's Ex. 5: Notice of Office of Management and Budget Action, OMB Control Number 2070-0093, dated March 2, 2008.
- Complainant's Ex. 6: 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. 7: Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule dated June 5, 2006.
- Complainant's Ex. 8: Agency for Toxic Substances and Disease Registry (ATSDR) Fact Sheets on Aluminum and Copper.
- Complainant's Ex. 9: Material Safety Data Sheets for Aluminum and Copper.
- Complainant's Ex. 10: Certified Statement from Tanya Richardson, TRI Info and Outreach Branch, OEI, regarding Form R submittals from Valimet for 2001-2005, dated July 13, 2007.
- Complainant's Ex. 11: Information from Valimet website (www.valimet.com).
- Complainant's Ex. 12: Dun and Bradstreet Report for Valimet, Inc. dated June 19, 2008.
- Complainant's Ex. 13: Corporate information for Valimet, Inc. and Valimet International from the California Secretary of State dated June 13, 2008.
- Complainant's Ex. 14: 2001 Form Rs for Aluminum and Copper for Valimet, Inc.
- Complainant's Ex. 15: 2002-2004 Form Rs for Aluminum and Copper for Valimet, Inc.

- Complainant's Ex. 16: 2005 Form Rs for Aluminum and Copper for Valimet, Inc.
- Complainant's Ex. 17: Threshold Calculations Email dated October 26, 2006 from Valimet to U.S. EPA, Region IX and associated spreadsheets.
- Complainant's Ex. 18: Aluminum Health Guidelines, Occupational Safety and Health Administration, U.S. Department of Labor,
- Complainant's Ex. 19: Draft Toxicological Profile for Aluminum, ATSDR, U.S. Department of Health and Human Services, dated September 2006.
- Complainant's Ex. 20: Toxicological Profile for Copper, ATSDR, U.S. Department of Health and Human Services, dated September 2004.
- Complainant's Ex. 21: Proposed Rule, Toxic Chemical Release Reporting: Community Right-to-Know, 52 Fed. Reg. 21152, June 4, 1997.
- Complainant's Ex. 22: Aerial Photo of Valimet's Facility
- Complainant's Ex. 23: Bio For Gerald Hiatt, Senior Regional Toxicologist, U.S EPA, Region IX.

Other Exhibits

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

III. LOCATION AND ESTIMATION OF TIME FOR THE HEARING

Complainant respectfully requests that the hearing in this matter be held in San Francisco, California. The violation occurred at Respondent's facility located in Stockton, California, which is not far (approximately 65 miles) from San Francisco and Complainant anticipates that many of its witnesses and many of Respondent's witnesses are located in or around the San Francisco, California area. Complainant estimates that it will need 1-2 days to present its direct case.

IV. DAYS OF VIOLATION AND NARRATIVE STATEMENT OF PENALTY FACTORS

1. Statement of the number of days of violation alleged for each count in the Complaint:

Under the EPCRA Section 313 Enforcement Response Policy (Penalty Policy) dated August 10, 1992, days of violation are only relevant where the Form R is less than one year late. If the Form R is filed more than a year late, the penalty is assessed purely from the matrix, as described in Section IV.2, and therefore is not based upon the number of days. As Counts 1 through 8 involved violations where the Form R was filed more than 1 year late, the number of days of violation is not relevant to the penalty calculation for those counts. Nevertheless, as ordered by the Prehearing Order, Complainant provides the number of days of violation as follows:

Count 1:	1,759 days of violation
Count 2:	1,759 days of violation
Count 3:	1,394 days of violation
Count 4:	1,394 days of violation
Count 5:	1,028 days of violation
Count 6:	1,028 days of violation
Count 7:	663 days of violation
Count 8:	663 days of violation
Count 9:	296 days of violation
Count 10:	296 days of violation

2. Narrative statement discussing all applicable penalty assessment factors and other relevant factual information.

The Penalty Policy, as amended by the Civil Monetary Penalty Inflation Adjustment Rule at 40 C.F.R. Part 19,¹ sets forth the methodology used by U.S. EPA to calculate penalties for EPCRA 313 violations. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), and 40 C.F.R. Part 19 authorize U.S. EPA to assess a penalty of up to

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

\$27,500 for each violation of Section 313 of EPCRA that occurred on or after January 31, 1997 but before March 15, 2004 and up to \$32,500 for each violation that occurred on or after March 15, 2004. However, EPCRA Section 325(c) does not provide statutory penalty factors to consider in determining a penalty. The purpose of the Penalty Policy is to ensure that enforcement actions for violations of EPCRA Section 313 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 Section 313 violations. Under this Policy, penalties are determined in two stages: (1) determination of a "gravity-based penalty," and (2) adjustments to the "gravity-based penalty."

The "gravity-based penalty" is determined by considering the "circumstances" of the violation and the "extent" of the violation. The circumstance levels of the matrix take into account the seriousness of the violation as it relates to the accuracy and availability of information to the community, the states, and the federal government. The Penalty Policy recognizes six Circumstance Levels, with Level 1 being the most serious.

Facilities which submit Form Rs after the July 1 deadline have failed to comply with the annual reporting requirement and

have defeated the purpose of EPCRA Section 313, which is to make this toxic release data available to states and the public annually and in a timely manner. Under the Penalty Policy, submitting a Form R more than one year late constitutes a Circumstance Level 1 violation while submitting a Form R less than one year late constitutes a Circumstance Level 4 violation. Consequently, Respondent's failures to file timely Form Rs for aluminium and copper for calendar years 2001-2004 constitute Circumstance Level 1 violations. Respondent's failures to file timely Form Rs for aluminium and copper for calendar year 2005 constitute Circumstance level 4 violations.

The "extent" of the violation is determined by looking at the quantity of each EPCRA Section 313 chemical manufactured, processed, or otherwise used by the facility, as well as the size of the facility, based on a combination of the number of employees at the facility and the gross sales of the facility's total corporate entity at the time that the Complaint is filed. U.S. EPA believes that using the amount of Section 313 chemical involved in the violation as the primary factor in determining the extent level underscores the overall intent and goal of EPCRA Section 313 to make available to the public on an annual basis a reasonable estimate of the toxic substances emitted into their communities from the regulated sources. The size of business is

used as a second factor in determining the appropriate extent level, reflecting the fact that the deterrent effect of a smaller penalty upon a small company is likely to be equal to that of a larger penalty upon a large company. Finally, U.S. EPA decided to use ten times the threshold of Section 313 chemical involved to distinguish between extent levels because it represents a significant amount of toxic substance. The Penalty Policy lists three Extent categories ranging from A to C, with Level A representing the highest level.

In this case, Respondent processed approximately 4,316,000 pounds of aluminium in 2001, 4,125,000 pounds in 2002, 3,910,000 pounds in 2003, 4,884,000 pounds in 2004, and 2,985,000 pounds in 2005. See Complainant's Ex. 17. These amounts are considerably more than ten times the EPCRA Section 313 reporting threshold amount of 25,000 pounds. Respondent also processed 60,000 pounds of copper in 2001, 60,000 pounds in 2002, 60,000 pounds in 2003, 52,700 pounds in 2004, and 62,400 pounds in 2005. See Complainant's Ex. 17. This is less than ten times the EPCRA Section 313 reporting threshold amount of 25,000 pounds.

In addition, according to Dun and Bradstreet, Respondent has over \$18 million in total corporate entity sales and over 50 employees. See Complainant's Ex. 12. Thus, under the Penalty Policy, Respondent is at Extent Level A for the aluminium

violations alleged in the Complaint and at Extent Level B for the copper violations alleged in the Complaint. The Penalty Policy then provides a penalty matrix which incorporates the "circumstances" and the "extent" of a violation and establishes the gravity-based penalty amount.

For a facility that fails to file a Form R in a timely manner, but is less than one year late, the matrix provides that the penalty be calculated according to the following per day penalty formula:

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

A total penalty is determined by calculating the penalty for each violation on a per-chemical, per-facility, per-year basis. In this case, Respondent failed to timely submit Form Rs for one facility for copper compounds at Circumstance Level 1, Extent Level A, for four calendar years, and Circumstance level 4, Extent Level A, for one calendar year. Respondent also failed to timely submit Form Rs for aluminium (fume or dust) at Circumstance Level 1, Extent Level B, for four calendar years, and Circumstance Level 4, Extent Level B, for one calendar year.

Calendar Year	Chemical	Pounds Processed	Days Late	Circumstance Level	Extent Level
2001	Copper	4,316,000	1,759	1	A
	Aluminium	60,000	1,759	1	B
2002	Copper	4,125,000	1,394	1	A
	Aluminium	60,000	1,394	1	B

2003	Copper	3,910,000	1,028	1	A
	Aluminium	60,000	1,028	1	B
2004	Copper	4,884,000	663	1	A
	Aluminium	52,700	663	1	B
2005	Copper	2,985,000	296	4	A
	Aluminium	62,400	296	4	B

After the gravity-based penalty has been determined pursuant to the Penalty Policy, the proposed penalty amount may be adjusted upward or downward in consideration of the following factors: voluntary disclosure, history of prior violations, de-listed chemicals, attitude, ability to pay, supplemental environmental projects, and other factors as justice may require. The Penalty Policy provides that violations of EPCRA Section 313 are strict liability violations and therefore provides no penalty adjustment factor for culpability.

In this case, the Complainant determined that the adjustment factors of voluntary disclosure, history of prior violations, de-listed chemicals, attitude, ability to pay, supplemental environmental projects, and other factors as justice may require are not applicable, and thus would not adjust the gravity-based penalty.

As ordered by the Prehearing Order, Complainant will identify the actual penalties it proposes to assess for Counts 1-10 in its Rebuttal Prehearing Exchange.

V. PAPERWORK REDUCTION ACT STATEMENT

Since EPCRA Section 313 and its implementing regulations at 40 C.F.R. Part 372 require annual reporting to U.S. EPA through the use of forms (Form R or Form A), this paperwork requirement constitutes a collection of information that is subject to the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. § 3501 et seq. Pursuant to § 3512 of the PRA, no person shall be subject to a penalty for failing to comply with a collection of information unless the collection of information displays a valid Office of Management and Budget ("OMB") control number. The OMB control numbers for U.S. EPA regulations are listed in 40 C.F.R. Part 9.

At all times relevant to the Complaint in this matter, the Form R at issue and the controlling U.S. EPA regulations at 40 C.F.R. Part 372 were approved under OMB Control No. 2070-0093 and displayed the valid OMB control number. See Complainant's Ex. 5. Accordingly, Complainant is not precluded from obtaining a penalty in this matter.

Respectfully submitted,

7/11/08
Date



Ivan Lieben
Assistant Regional Counsel
U.S. EPA, Region IX

CERTIFICATE OF SERVICE

I hereby certify that the original and a copy of the foregoing Prehearing Exchange were filed with the Regional Hearing Clerk, U.S. EPA, Region IX, with one complete set of exhibits, and that a copy with a complete set of exhibits was sent by Pouch Mail and Federal Express, respectively, to:

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

and to: Clifton J. McFarland
Downey Brand LLP
555 Capitol Mall, Tenth Floor
Sacramento, CA 95814-4686

7/10/08
Date

Corazon Tolentino
Corazon Tolentino
Office of Regional Counsel
U.S. EPA, Region IX