

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

2014 AUG -8 AM 8: 54

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:

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Docket Nos. CAA-07-2014-0021

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EPCRA-07-2014-0003

INHANCE TECHNOLOGIES LLC,
Formerly FLUORO-SEAL INTERNATIONAL,
L.P.,

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)

Proceeding under Section 113(d) of the

)

Clean Air Act, 42 U.S.C. § 7413(d), and

)

Section 325(c) of the Emergency Planning

Respondent.

)

And Community Right-to-Know Act,

)

42 U.S.C. § 11045(c)

**ANSWER TO COMPLAINT, AFFIRMATIVE DEFENSES
AND REQUEST FOR HEARING**

Respondent, Inhance Technologies LLC, formerly known as Fluoro-Seal International, L.P. (“Inhance” or “Respondent”), through the undersigned attorney, presents its Answer to the Administrative Complaint (“Complaint”) issued by the United States Environmental Protection Agency Region 7 (“EPA” or “Complainant”), and respectfully states, alleges and prays as follows:

I. JURISDICTION

1. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

2. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to

form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

II. PARTIES

3. Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

4. Respondent admits the allegations contained in this paragraph.

III. STATUTORY AND REGULATORY REQUIREMENTS

Risk Management Program

5. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

6. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

7. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

8. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to

form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

9. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

10. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

Tier II Reporting

11. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

12. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

13. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

IV. DEFINITIONS

Risk Management Program

14. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

15. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

16. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

17. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

Tier II Reporting

18. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

19. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

20. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

IV. GENERAL FACTUAL ALLEGATIONS

Risk Management Program

21. Respondent admits the allegations contained in this paragraph.

22. Respondent admits the allegations contained in the first sentence of this paragraph. Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in the second sentence of this paragraph regarding what is relevant to this action, and the allegations are therefore denied. The third sentence of this paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in the third sentence of this paragraph, and the allegations are therefore denied.

23. Respondent admits that it has processed, handled and stored hydrogen fluoride at its facilities.

24. Respondent admits the allegations contained in this paragraph.

25. Respondent denies that more than 1,000 pounds of hydrogen fluoride were ever present in a “process”, as defined in 40 C.F.R. § 68.3, at its Mt. Pleasant, Iowa facility. Respondent is without knowledge or information sufficient to form a belief as to whether the intent of the inspection was to ascertain Respondent’s compliance with the Emergency Planning and Community Right-to-Know Act (“EPCRA”), the release reporting provisions of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) and Section 112(r) of the Clean Air Act. Respondent admits other allegations contained in this paragraph.

26. Respondent denies that more than 1,000 pounds of hydrogen fluoride were ever present in a “process”, as defined in 40 C.F.R. § 68.3, at its Kansas City, Missouri facility. Respondent is without knowledge or information sufficient to form a belief as to whether the intent of the inspection was to ascertain Respondent’s compliance with EPCRA, the release reporting provisions of CERCLA and Section 112(r) of the Clean Air Act. Respondent admits other allegations contained in this paragraph.

27. Respondent denies that more than 1,000 pounds of hydrogen fluoride were present in a “process”, as defined in 40 C.F.R. § 68.3, at its St. Louis, Missouri, or its Centerville, Iowa facilities and further denies that its November 2011 response established same. Respondent otherwise admits the allegations of this paragraph.

28. Respondent admits only that Respondent reduced the amount of hydrogen fluoride present at any location within each of the subject facilities to less than 1,000 pounds by or before December 2011, and denies the remaining allegations in this paragraph.

29. Respondent admits only that Respondent reduced the amount of hydrogen fluoride present at any location within each of the subject facilities to less than 1,000 pounds by or before December 2011, and denies the remaining allegations in this paragraph.

30. Respondent denies the allegations in this paragraph.

31. Respondent denies the allegations in this paragraph.

32. Respondent denies the allegations in this paragraph.

Tier II Reporting

33. Respondent admits the allegations contained in this paragraph.

34. Respondent admits the allegations contained in the first sentence of this paragraph.

Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in the second sentence of this paragraph regarding what facilities are relevant, and the allegations are therefore denied. The third sentence of this paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in the third sentence of this paragraph, and the allegations are therefore denied.

35. Respondent denies the allegations in this paragraph.

36. Respondent denies the allegations in this paragraph.

37. Respondent admits only that EPA conducted an inspection of its West Chicago, Illinois facility on or about September 20, 2011. Respondent is without knowledge or information sufficient to form a belief as to whether the intent of the inspection was to ascertain Respondent's compliance with EPCRA, and such allegation is therefore denied.

38. Respondent admits the allegations in this paragraph.

39. Respondent admits only that it did not submit emergency and hazardous chemical inventory forms to the state emergency response commission ("SERC"), local emergency planning commission ("LEPC") or local fire department for aluminum oxide for reporting years 2009 and

2010 for its Kansas City, Missouri; Mt. Pleasant, Iowa; St. Louis, Missouri; Centerville, Iowa and West Chicago, Illinois facilities. Respondent denies such reporting was required, and Respondent further denies the remaining allegations in this paragraph.

40. Respondent denies the allegations in this paragraph.

41. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

V. RELIEF

42. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

43. Respondent denies the allegations of the first sentence of this paragraph. The second sentence of this paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in the second sentence of this paragraph, and the allegations are therefore denied.

44. This paragraph sets forth legal conclusions to which no response is required. To the extent further response is required, Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations stated in this paragraph, and the allegations are therefore denied.

45. This paragraph sets forth legal conclusions to which no response is required.

VI. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

46. Paragraphs 46-55 contain legal conclusions and procedures. To the extent further response is required, it is contained in this Answer, Affirmative Defenses and Request for Hearing.

VIII. AFFIRMATIVE DEFENSES

Risk Management Program

FIRST DEFENSE

47. Hydrogen fluoride stored at Respondent's facilities is contained in DOT 3AA-2400-certified seamless steel cylinders, each containing a maximum of 80 pounds of hydrogen fluoride. The hydrogen fluoride is neither flammable nor explosive and is stored in liquid form.

48. At no time were more than four cylinders of hydrogen fluoride interconnected at any of Respondent's facilities. The maximum volume of hydrogen fluoride in interconnected cylinders at any subject facility was 320 pounds.

49. Unconnected cylinders of hydrogen fluoride were stored in racks of up to 12 cylinders. Twelve cylinders would contain a maximum combined volume of 960 pounds. Cylinders used by Respondent were designed, constructed and located in each subject facility such that a potential release would not be reasonably expected.

50. Respondent considered circumstances that could reasonably be expected to cause a release of hydrogen fluoride at one of the facilities subject to this Complaint, including fire, building collapse, or vehicle impact. Based on Respondent's analysis, none of the reasonably anticipated events would result in a release either from a single hydrogen fluoride cylinder nor, in the unlikely event that a release from one cylinder were to occur, any such release from one cylinder would not reasonably be expected to result in, cause or contribute to a release from another cylinder located within the facility.

51. During all times relevant to this Complaint, the amount of hydrogen fluoride in a process at Respondent's facilities has not exceeded 1000 pounds and therefore Respondent was not required by Clean Air Act ("CAA") Section 112(r) to submit a Risk Management Plan to EPA.

52. Respondent did not fail to comply with 40 C.F.R. §§ 68.12 and 68.150(a) at its subject facilities and did not violate Section 112(r) of the CAA because a threshold quantity was not present in a process at any of the subject facilities.

SECOND DEFENSE

53. Paragraphs 47 to 52 are incorporated herein by reference.

54. In March 2011, the Iowa Occupational Safety and Health Administration ("IOSHA") inspected Respondent's Mt. Pleasant, Iowa facility. In April 2011 IOSHA issued a citation alleging that hydrogen fluoride was present in excess of the threshold quantity that would subject the facility to OSHA's Process Safety Management Program.

55. The quantity and configuration of hydrogen fluoride storage at Respondent's Mt. Pleasant, Iowa facility at the time of the IOSHA inspection in March 2011 were substantially the same as alleged by EPA to be noncompliant following EPA's inspection of the same facility in July 2011.

56. In May 2011, following a hearing on the IOSHA allegation, the IOSHA vacated the IOSHA citations concluding that the potential for a catastrophic release of hydrogen fluoride at Respondent's Mt. Pleasant, Iowa, facility did not exist and Respondent was not in contravention of OSHA's Process Safety Management Program since the amount of hydrogen fluoride in any single process at the facility did not exceed the threshold quantity.

57. OSHA and EPA have announced an intent to interpret the definition of "process" as used in OSHA's Process Safety Management Program and EPA's Risk Management Program consistently (61 Fed. Reg. 31693 (June 20, 1996)). The interpretation of "process" is the basis for

determining the applicability to Respondent's facilities of both OSHA's Process Safety Management Program and EPA's Risk Management Program.

58. Respondent relied on the determination of IOSHA regarding the applicability of the definition of "process" to the hydrogen fluoride stored at its Mt. Pleasant, Iowa facility. Further, since the storage of hydrogen fluoride at Respondent's Kansas City and St. Louis, Missouri and its Centerville, Iowa facilities was substantially similar to that of the Mt. Pleasant, Iowa facility and the IOSHA decision was the only interpretation of "process" explicitly applicable to Respondent's storage of hydrogen fluoride, Respondent was entitled to, and did, rely on the IOSHA determination.

59. Published agency guidance, though not explicitly related to Respondent's facilities, was consistent with and supportive of the IOSHA decision.

60. After EPA conveyed to Respondent its preliminary findings in September 2011 contrary to the determination of IOSHA, Respondent requested a meeting with EPA to discuss, among other things, the discrepancy between EPA's and IOSHA's interpretation of applicable requirements. After a meeting with EPA in October 2011 at which the discrepancy between the agencies was not resolved, Respondent reduced the amount of hydrogen fluoride present at each of the subject facilities to less than a total of 1000 pounds. Amounts of hydrogen fluoride present at Respondent's Centerville, Iowa and St. Louis, Missouri facilities have been below a total of 1000 pounds since October 2011.

61. Respondent acted reasonably and in good faith when EPA took action inconsistent with the IOSHA determination.

THIRD DEFENSE

62. The allegations asserted by Complainant have not resulted in any injury, death or release related to hydrogen fluoride.

Tier II Reporting

FOURTH DEFENSE

63. Pursuant to 29 C.F.R. 1910.1200(d)(1), a chemical manufacturer is required to complete the hazard determination for all substances it manufactures, and the manufacturer's customers are entitled to rely on this determination. Respondent did not manufacture the aluminum oxide pellets located at the subject facilities.

64. The manufacturer of Respondent's aluminum oxide pellets, Porocel, made a hazard determination for the pellets and determined the pellets were not hazardous.

65. Respondent properly relied on the manufacturer's hazard determination.

FIFTH DEFENSE

66. Respondent uses aluminum oxide "as is" in the pellet form in which it is sold by its manufacturer, Porocel. Porocel has evaluated the aluminum oxide it manufactures and has determined that no physical or health hazards exist. In particular, the five hazard categories under OSHA's 1994 Hazard Communication Standard, which Porocel used in preparing its MSDS for aluminum oxide, are fire hazard, sudden release of pressure, reactivity, immediate (acute) health hazard and delayed (chronic) health hazard. Per its MSDS, Porocel determined that there is no explosion hazard and concluded a "0" hazard rating applies for the remaining categories. Porocel further determined the aluminum oxide it manufactures has no irritant effect on eyes or skin, no sensitizing effects, and no harmful effects.

67. Aluminum oxide is not a "hazardous chemical" under 29 C.F.R. § 1910.1200(c) and 40 C.F.R. § 370.66 because Porocel, Respondent's aluminum oxide manufacturer, has completed a hazard determination and determined there are no physical or health hazards associated with aluminum oxide in pellet form.

68. Porocel advises that, pursuant to EPCRA Section 312, it is not required to, and does not report, the aluminum oxide pellets it manufactures because these aluminum oxide pellets are not a hazardous chemical.

SIXTH DEFENSE

69. Based on Porocel's determination that aluminum oxide is not a "hazardous chemical" under 29 C.F.R. § 1910.1200(c) and 40 C.F.R. § 370.66, on which Respondent was entitled to rely and did so rely, Respondent was not required to have available an MSDS or submit a completed emergency and hazardous chemical inventory form for aluminum oxide for reporting years 2009 or 2010 to the SERC, the LEPC or the local fire department for Respondent's Kansas City, Missouri; Mt. Pleasant, Iowa; St. Louis, Missouri; Centerville, Iowa or West Chicago, Illinois facilities.

70. Accordingly, Respondent has not violated EPCRA Section 312(a), 42 U.S.C. § 11022(a) and 40 C.F.R. § 370.40(a) with respect to aluminum oxide.

SEVENTH DEFENSE

71. It is not possible for Respondent to complete EPCRA Section 312 reporting for aluminum oxide using the information provided in the MSDS prepared by Porocel because electronic EPCRA Section 312 reporting typically involves "checking the boxes" of (or selecting from a drop-down menu) all applicable physical and health hazards for a particular material, and one or more of these boxes must be checked before the system will allow the reporter to complete EPCRA Section 312 reporting. Porocel has determined no physical or health hazards exist for aluminum oxide in pellet form, with the result that an electronic report cannot be made based on Porocel's MSDS.

EIGHTH DEFENSE

72. OSHA created a permissible exposure limit for aluminum oxide only in its powder form. The aluminum oxide used by Respondent “as is” from its manufacturer, Porocel, is in pellet, not powder, form, and the OSHA permissible exposure limit therefore does not apply.

General

NINTH DEFENSE

73. Respondent has created no danger to health and public safety or human welfare, nor any danger to the environment.

74. The absence of harm has not adequately been considered as a mitigating factor in connection with the penalty assessment.

TENTH DEFENSE

75. Any and all alleged actions or omissions concerning Respondent’s compliance with Section 112(r) of the Clean Air Act, 42 U.S.C. § 7412(r), 40 C.F.R. Part 68, Section 312 of EPCRA, 42 U.S.C. § 11048, and 40 C.F.R. Part 370 have not resulted in any economic benefit to Respondent.

ELEVENTH DEFENSE

76. The Complaint is barred in whole or in part by the doctrines of waiver and/or estoppel.

TWELFTH DEFENSE

77. The Complaint fails to state a claim upon which relief can be granted against Respondent.

THIRTEENTH DEFENSE

78. The proposed penalty is excessive, inappropriate and unwarranted, and Complainant has not provided adequate explanation as to how the penalty amount was calculated.

FOUTEENTH DEFENSE

79. Complainant's allegations are barred by laches.

FIFTEENTH DEFENSE

80. Complainant's allegations are barred by the applicable statute of limitations.

SIXTEENTH DEFENSE

81. Complainant's allegations are not supported by substantial evidence.

SEVENTEENTH DEFENSE

82. Complainant's penalty assessment constitutes an abuse of discretion.

RESERVATION OF RIGHT TO AMEND ANSWER AND ADD AFFIRMATIVE DEFENSES

83. Respondent reserves the right to amend this answer and to add further affirmative defenses, including those which may become apparent through discovery and development of this case.

IX. REQUEST FOR HEARING

84. Inhance hereby requests an Administrative Hearing on the issues raised by the Administrative Penalty Complaint and this Answer.

Respectfully submitted,

PORTER HEDGES LLP

By: *Ragna Hennrichs*

Ragna Hennrichs

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**ATTORNEYS FOR RESPONDENT
INHANCE TECHNOLOGIES LLC,
FORMERLY FLUORO-SEAL
INTERNATIONAL, L.P.**

CERTIFICATE OF SERVICE

I certify that on the 7th day of August, 2014 I sent by overnight delivery the original and one true copy of this Answer to Complaint, Affirmative Defenses and Request for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further certify that on the same date noted I sent by certified mail, return receipt requested, a true and correct copy of the signed Answer to Complaint, Affirmative Defenses and Request for Hearing to the following representatives of the EPA:

John Smith
Deputy Director
Air and Waste Management Division
U.S. EPA Region 7
11201 Renner Boulevard
Mail Code: AWMDSTOP
Lenexa, KS 66219

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Ragna Henrichs