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Bradley R. Cahoon (5925)
Scott C. Rosevear (9953)
SNELL & WILMER L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, UT 84101
Telephone: 801-257-1900
Facsimile: 801-257-1800

Attorneys for Wasatch Propane, Inc.

BEFORE THE ENVIRONMENTAL APPEALS BOARD OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF Wasatch Propane 201 West 2700 South South Salt Lake City, UT 84106 Appellant	**NOTICE OF APPEAL** Docket No. EPCRA-08-2004-0004 Proceeding under Sections 312 and 325 of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA"), 42 U.S.C. §§ 11022 and 11045 Cause No. _____

Pursuant to 40 C.F.R. §§ 22.27 and 22.30, Wasatch Propane, Inc. ("**Wasatch**"), through counsel, hereby appeals to the Environmental Appeals Board of the United States Environmental Protection Agency the Initial Decision of the Region 8 Regional Hearing Officer dated November 15, 2005. Specifically, Wasatch appeals the Hearing Officer's decision that Wasatch be "assessed a civil penalty, in the amount of Thirteen Thousand, seven-hundred and fifty-one

dollars ($13,751.00) for violating section 312 of EPCRA, 42 U.S.C. § 11022." *See* Initial Decision at p.13. A copy of the Initial Decision is attached as **Exhibit A** hereto.

DATED this 14th day of December, 2005.

SNELL & WILMER, LLP

Bradley R. Cahoon
Scott C. Rosevear
Attorneys for Wasatch Propane, Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on the 14th day of December, 2005, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served via express courier service upon the following:

Clerk of the Board
Environmental Appeals Board
United States Environmental Protection Agency
1341 G. Street, NW Suite 600
Washington, DC 20005

Tina Artemis
Region 8 Regional Hearing Clerk
U.S. EPA, Region 8
999 18th Street
Suite 300
Mail Code: 8RC
Denver, CO 80202-2466

Judge Alfred C. Smith
Presiding Officer
United States Environmental Protection Agency Region 8
999 18th Street
Suite 300
Mail Code: 8RC
Denver, CO 80202-2466

Dana Stotsky
Enforcement Attorney
999 18th Street
Suite 300
Mail Code: 8ENF-L
Denver, CO 80202-2466
Attorney for United States Environmental Protection Agency Region 8

EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2005 NOV 15 AM 10:36

EPA REGION VIII
HEARING CLERK

IN THE MATTER OF	)	
	)	**Docket No. EPCRA-08-2004-0004**
Wasatch Propane	)	**Proceeding under Sections 312 and 325**
201 West 2700 South	)	**of the Emergency Planning and Community**
South Salt Lake City,	)	**Right-to-Know Act of 1986 ("EPCRA"),**
Utah 84106	)	**42 U.S.C. §§ 11022 and 11045**
Respondent.	)	
	)	

DEFAULT ORDER /INITIAL DECISION

On March 15, 2005, the United States Environmental Protection Agency, Region 8 ("U.S. EPA","EPA", "Agency", or "Complainant") filed a motion pursuant to section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a)[1], to find Wasatch Propane ("Wasatch", or "the Respondent") in default for failing to file a timely answer to an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint")[2], issued pursuant to section 11045 of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11045, for an alleged violation of § 312 of EPCRA, 42 U.S.C. § 11022, as amended, and regulations promulgated pursuant thereto. For the alleged violation, the Complainant is requesting the assessment of an administrative penalty, pursuant to section 11045(c) of EPCRA, 42 U.S.C. § 11045(c), in the amount of **Thirteen-thousand, seven-hundred, fifty-one dollars ($13,751.00).**

This proceeding is governed by EPA's ***Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation or Suspension of Permits,*** 40 C.F.R. Part 22, Fed. Reg./Vol. 64, N. 141/July 23, 1999 ("Consolidated Rules of Practice," "Consolidated Rules", or "the Rules").

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[1] "Motion for Default"

[2] "Motion for Default - Exhibit 1.

I. BACKGROUND

On September 14, 2004, Complainant filed a Complaint and Notice of Opportunity for Hearing with the Regional Hearing Clerk citing Wasatch Propane for violating section 312 of EPCRA, 42 U.S.C. § 11022. This statute requires regulated parties that store hazardous chemicals, in excess of established threshold amounts, to file and submit annual inventory (Tier II) reports to designated state and local offices. The Complaint alleges that the Respondent failed to file the required report for the 2003 calendar year.

On March 15, 2005, the EPA filed a motion pursuant to section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a)[3], to find Wasatch Propane in default for failing to file a timely answer to the Complaint.

On June 16, 2005, the Presiding Officer issued an Order to Show Cause why the matter should not be dismissed for failure to state a ***prima facia*** case against the Respondent. On July 14, 2005, the Complainant filed its response to the Show Cause Order. After considering the Complainant's response and the entire Administrative Record, for the reasons set forth below, the Respondent is found in default for failing to file a timely answer to the Complaint, and assessed a civil penalty in the amount of **Thirteen Thousand, seven-hundred, fifty-one dollars ($13,751.00).**

II. STATUTORY/REGULATORY FRAMEWORK

1. Statutory Framework

Section 312(a) of EPCRA, 42 U.S.C. § 11022(a)(1), requires the owner or operator of any facility which is required to prepare or have available a material safety data sheet ("MSDS")[4] for a hazardous chemical, under the Occupational Safety and Health Act ("OSHA") of 1970, 29 U.S.C. § 651 et seq., and regulations promulgated under that Act, to prepare and submit an emergency and hazardous chemical inventory form ('inventory form") to each of the following: (A) the appropriate local emergency planning committee ("LEPC"); (B) the State emergency response commission ("SERC"); and (C) the fire department with jurisdiction over the facility, on an annual basis.

[3] "Motion for Default"

[4] See Section 321 of EPCRA, 42 U.S.C. § 11021 regarding who is required to prepare and file a material safety data sheet ("MSDS").

The inventory form containing Tier II information is required to be filed with the appropriate state and local offices for each calendar year, by March 1, of the succeeding year. See section 312 of EPCRA, 42 U.S.C. § 11022 (d)(2).

Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), provides that: . . . [a]ny person who violates any requirement of section 11022 or 11023 . . . shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation."[5]

Section 325(c)(4) of EPCRA, 42 U.S.C. § 11045(c)(4), provides that "[t]he Administrator may assess any civil penalty for which a person is liable under this subsection by administrative order . . . ."

Section 325(b)(1)(C) of EPCRA, 42 U.S.C. § 11045(b)(1)(C), provides that: "In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

2. Regulatory Framework/Consolidated Rules

Section 22.17(a) of the Consolidated Rules[6], authorizes a finding of default upon failure of the Respondent to timely answer a Complaint. Section 22.15(a) of the Consolidated Rules[7], requires that an answer to the Complaint be filed with the Regional Hearing Clerk within thirty (30) days after service. The Rules further provide that default by Respondent constitutes, for purposes of the pending proceeding, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations[8]. Section 22.17(c) of the

[5] As a result of the Debt Collection Improvement Act of 1996 (DCIA), and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (December 31, 1996), violations of § 325 of EPCRA which occur between January 30, 1997 and March 15, 2004, will be subject to a statutory maximum civil penalty of $27,500.00 for each violation.

[6] 40 C.F.R. § 22.17(a).

[7] 40 C.F.R. § 22.15(a).

[8] Section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a)

Consolidated Rules[9], provides that when the Presiding Officer finds that default has occurred, a default order shall be issued against the defaulting party, unless the record shows good cause why a default order should not be issued. Section 22.17(c) of the Consolidated Rules, also provides that the relief proposed in the Complaint, or the motion for default, shall be ordered unless the record clearly demonstrates that the requested relief is inconsistent with the record of these proceedings, or the Act. This order shall constitute an Initial Decision in this matter, under section 22.27 of the Consolidated Rules of Practice[10].

III. DETERMINATION OF LIABILITY

A. Prima Facie Case

For a default order to be entered against the Respondent, the Presiding Officer must conclude that Complainant has established a ***prima facie*** case of liability against the Respondent. To establish a ***prima facie*** case of liability, Complainant must present evidence sufficient to establish a given fact . . . which if not rebutted or contradicted, will remain sufficient . . . to sustain judgment in favor of the issue which it supports, but which may be contradicted by other evidence." **Black's Law Dictionary** 1190 (6th ed. 1990).

As stated above, section 312 of EPCRA, 42 U.S.C. § 11022, requires the owner or operator of any facility which stores hazardous chemicals, in excess of established threshold amounts, to file a Tier II inventory report with each of the following: (A) the appropriate local emergency planning committee ("LEPC"); (B) the State emergency response commission ("SERC"); and (C) the fire department with jurisdiction over the facility, on an annual basis.

The inventory form containing Tier II information shall be submitted on or before March 1, 1988, and annually thereafter on March 1, of each succeeding year, and shall contain data with respect to the preceding calendar year. See section 312 of EPCRA[11].

Wasatch Propane is located a 201 West 2700 South, South Salt Lake City, Utah. Respondent is a "person" as that term is defined by section 329(7) of EPCRA, 42 U.S.C. § 11049(7). Respondent is an owner or operator of a "facility" as that term is defined in section 329(4) of EPCRA, 42 U.S.C. § 11049(4). Respondent is a wholesaler of propane and allegedly

[9] 40 C.F.R. § 22.17(c).

[10] 40 C.F.R. § 22.27.

[11] 42 U.S.C. § 11022 (d)(2).

annually stores in excess of 10,000 pounds of propane at its facility.

Propane is a hazardous chemical, as defined by 29 C.F.R. § 1910.1200(c), for which a material safety data sheet ("MSDS") is required pursuant to section 321 of EPCRA, 42 U.S.C. § 11021.

Pursuant to section 312(b) of EPCRA[12], the Administrator established a reportable threshold, for the amount of propane stored at a facility during any calendar year, to be in excess of 10,000 pounds.

During calendar year 2003, Complainant alleges that the Respondent stored more than 10,000 pounds of propane at its facility located at 201 West 2700 South, South Salt Lake City, Utah. The Complainant based its allegation on the following:

On June 9, 1998, LEPC Representative, Mike Montmorency, inspected Wasatch Propane. During that inspection, Mr. Montmorency observed a 30,000 gallon liquid propane tank. On April 25, 2002, OSHA inspected the Wasatch Propane facility. The OSHA inspection revealed the maximum intended inventory of propane at the facility was a minimum of 96,000 pounds. Propane weighs approximately 4 pounds per gallon. A propane tank will usually be filled to no more that 80% capacity. The amount of propane in the 30,000 gallon tank would be approximately 96,000 pounds. This amount far exceeds the reportable amount of propane - 10,000 pounds.

Further, Respondent certified in its Tier II reports to LEPC that it had on hand at its facility in the calendar years 1998, 1999, 2000, 2001, 2002 and 2004, quantities of propane exceeding the 10,000 pound threshold amount which required it to file a Tier II Inventory Report. In determining that the Respondent stored more than 10,000 pounds of propane during the calendar year 2003, the Complainant relied on information which the Respondent provided to the LEPC and OSHA. This is an admission by a party opponent and is credible evidence to prove the fact admitted.

[12] 42 U.S.C. § 11022.

Based on the above, I find that the evidence supports the Complainant's allegation[13] that in the calendar year 2003 Respondent stored more that 10,000 pounds of propane (the threshold amount) at its South Salt Lake facility and therefore was required to submit a Tier II inventory report to the appropriate Agencies.

As Wasatch stored more than the threshold amount of propane at its South Salt Lake facility during calendar year 2003, it was required to file a Tier II Inventory Report with the LEPC and SERC, by March 1, 2004.

In December of 2003, the LEPC mailed a reporting and information packet to Wasatch Propane to assist the facility in meeting its obligations for the March 1, 2004 reporting deadline. Wasatch failed to file its report by the March 1, 2004, deadline. The LEPC mailed another reporting package to the facility on April 1, 2004. On May 17, 2004, the facility received notice from the LEPC that an enforcement action would be initiated if a Tier II Inventory Form was not received within 10 days of receipt of their letter. In May 2004, Mr. Montmorency faxed another Tier II reporting form to Wasatch. Even after providing Wasatch with this reporting form, the LEPC did not receive a response from the facility.

On June 21, 2004, the Salt Lake County LEPC issued a Notice of Violation (NOV) and order of Compliance to Wasatch Propane for failure to provide inventory information to the LEPC by March 1, 2004.

As of September 1, 2004, Wasatch Propane had not responded to the NOV issued by the LEPC. The subject complaint alleges that Respondent failed to file the required report, under section 312 of EPCRA, 42 U.S.C. § 11022. The LEPC referred the matter to EPA, for action.

Based on the record of these proceedings and the facts herein admitted, I find that the Complainant has established a ***prima facie*** case of liability against the Respondent for violating the section 312 of EPCRA, 42 U.S.C. § 11022, and regulations promulgated pursuant thereto, by not filing a Tier II Inventory Report listing the propane it stored at its South Salt Lake facility, above the threshold amount, for the calendar year 2003, by March 1, 2004, with the appropriate

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[13] The allegation gives rise to a presumption. A presumption is a legal inference or assumption that a fact exists based on the known or proven existence of some other facts or group of facts. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overturn the presumption. "Black's Law Dictionary", Seventh Edition, 1999. (By failing to answer the Complaint Respondent waived its right to challenge this presumption. See section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a)).

State of Utah and local, Salt Lake County, offices.

B. Default by Respondent

As stated above, under section 22.15(a) of the Consolidated Rules[14], the Respondent is required to file an answer to the Complaint, within 30 days after service of the Complaint. Further, section 22.17(a) of the Consolidated Rules[15], provides that after motion, a party may be found to be in default for failure to file a timely answer to the Complaint.

In the instant case, the Complaint was filed with the Regional Hearing Clerk on September 14, 2004. The Complaint was served on the Respondent on September 17, 2004[16]. Respondent's Answer to the Complaint was due to be filed with the Regional Hearing Clerk, within 30 days after service of the Complaint - by October 18, 2004.[17] To date, nearly one-year later, the Respondent has yet to file an answer to the Complaint.

On March 15, 2005, the Complainant filed a Motion for Default Order with the Regional Hearing Clerk. As of the date of that Motion, the Respondent had still not filed an answer to the Complaint. Pursuant to section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a), and based on the entire record of these proceedings, I find the Respondent, **Wasatch Propane**. in default, for failing to file a timely answer to the Complaint. I hereby grant the Complainant's March 15, 2005, Motion for Default.

IV ASSESSMENT OF ADMINISTRATIVE PENALTY

Under the section 22.27(b) of the Consolidated Rules of Practice[18], ". . . the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer

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[14] 40 C.F.R. § 22.15(a).

[15] 40 C.F.R. § 22.17(a).

[16] Motion for Default, Exhibit # 2.

[17] Since the 30th day of the 30-day period within which Respondent's answer was due fell on October 17, 2004, a Sunday, the initial deadline for filing an answer was extended until the next business day. 40 C.F.R. § 22.7(a)

[18] 40 C.F.R. § 22.27(b).

shall consider any civil penalty guidelines issued under the Act . If the Respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by Complainant in the Complaint . . . , or motion for default, whichever is less."

The Courts have made it clear that, notwithstanding a Respondent's default, the Presiding Officer must consider the statutory criteria and other factors in determining an appropriate penalty. Katzson Brothers Inc. v. U.S. EPA 839 F.2d 1396 (10th Cir. 1988). Moreover, the Environmental Appeals Board has held that the Board is under no obligation to blindly assess the penalty proposed in the Complaint. Rybond, Inc. RCRA (3008) Appeal No. 95-3, 6 E.A.D. 614 (EAB, November 8, 1996).

DISCUSSION

In determining the appropriate civil penalty to be assessed in this matter, Complainant relied on the Agency's ***"Enforcement Response Policy for sections 304, 311 and 312 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), and section 103 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (Enforcement Response Policy", or "Penalty Policy"), September 30 1999"***[19]. The Penalty Policy used by the Complainant incorporates all of the statutory factors set forth in section 325(b)(1)(C) of EPCRA[20]. The statute provides that: ". . . [I]n determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

Following the protocol established in the Penalty Policy, the Complainant first calculated a base penalty using the statutory factors pertaining to the seriousness of the violation: the nature, circumstances, extent, and gravity of the violation. The base penalty amount was then adjusted by considering the Respondent's ability to pay, prior history of violations, the degree of culpability, economic benefit or savings, and other matters as justice may require, to arrive at a final penalty figure.

[19] Motion for Default, Exhibit # 4.

[20] 42 U.S.C. § 11045(b)(1)(C).

Base Penalty Amount

The enforcement action against Wasatch Propane is based on its failure to submit an Inventory form to SERC, LEPC, or the Fire Department within 30 calendar days of the reporting deadline, for propane being stored onsite, as required by section 312 of EPCRA, 42 U.S.C. § 11022. In determining the base penalty amount, Complainant used the base Penalty Matrix found on page 21 of the Penalty Policy[21]. Following the Matrix, the nature of the violation was used to determine which specific penalty guidelines should be used to determine the appropriate matrix levels of extent and gravity of the violation. Using the matrix, Complainant determined that the nature of Respondent's violation fell under the emergency preparedness/right-to-know parameter. As the Respondent should have filed a Tier II form, the violation constituted a single count.

The factors: extent and gravity were used to determine which cell of the matrix applies to the violation. Using the extent guidelines, Complainant determined that failure to file inventory forms with the SERC, LEPC, or fire department within 30 calendar days of the reporting deadline constituted a Level 1 violation. Under the gravity guidelines, if the amount of any hazardous chemical not included in the inventory report is greater than five times the reporting threshold, Level B applies.

To set the specific penalty within the range, the Complainant considered the circumstances of the violation. Failure to report the presence of these chemicals hinders the LEPC's ability to plan for chemical emergencies; however, the facility had provided inventory information to the local authorities in previous years so there was a degree of familiarity with the nature of the operation and the chemicals stored on location. For this reason, the Complainant selected the low point of the B range as the appropriate base penalty amount for the violation.

Applying the above factors, the Complainant arrived at a base penalty amount of **Thirteen-thousand, Seven hundred, and Fifty-one dollars ($13,751.00).**

Adjustment Factors

After the base penalty was determined, Complainant considered what adjustments, if any, were appropriate. In making any adjustment the Complainant considered the following statutory adjustment factors: ability to pay/continue in business, prior history of violations - upward adjustment only, degree of culpability, economic benefit or savings, and other matters as justice

[21] Exhibit # 4.

may require. The Agency also considers: size of business, attitude, Supplemental Environmental Projects (SEPs), and voluntary disclosure, in determining an appropriate penalty.

Culpability. A review of the record revealed that Respondent, through its officer, Brett Steele, did call the attorney for the Complainant on September 17, 2004, to discuss the "letter"[22] it received from EPA. Mr. Steele said he was frustrated by numerous attempts to download the model Tier II form from the LEPC's computer. He said that he had called the LEPC to request they fax him a blank model of the Tier II form, and that they had refused to do so. The Attorney for the EPA suggested that Mr. Steele write down his statement and submit it as an answer to the Complaint. Further Complainant stated that once an answer was received, EPA would offer to negotiate the case, and that EPA would contact him with some options regarding negotiations, once the answer was received[23].

Further, the Complainant argues that "the record establishes that the Respondent has continued to violate the Act after being informed by LEPC on September 1, 2004, and by EPA on September 17, 2004." I find that this is not the case. The record clearly shows that the Respondent did not continue to violate the Act, as the Complainant argues. The violation of the Act is for failing to file a Tier II report, not failing to answer the Complaint. I find that the Respondent's only act of non-compliance with the Act is failing to file a Tier II report for the Calendar year 2003[24].

By failing to file an answer to the Complaint, the Respondent did not continue to violate the Act, but is subject to Default pursuant to the Consolidated Rules of Practice. See 40 C.F.R. § 22.17, as determined herein, above.

The Complainant also argues that Respondent's unresponsiveness to the April 2003 Order has demonstrated a pattern (emphasis ours) of refusing to communicate with regulatory agencies. The record shows that this is not the case. It is a legally significant fact that the Respondent filed the appropriate reports for1998, 1999, 2000, 2001, 2002 and 2004. This clearly demonstrates a record of the Respondent's compliance with the Act. After considering the size of the business and the Complaint's adoption of the low end of the penalty matrix, no downward adjustment to the base penalty amount was deemed appropriate.

Size of Business. Information available to the agency indicated that the company has 14 employees, with annual sales in excess of $46,000,000. This facility does not qualify for the 15% reduction from the base penalty for size of business, as allowed by the Penalty Policy(fewer than 100 employees, sales below $20,000,000).

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[22] This letter is assumed to be the cover letter accompanying the Complaint, which the Respondent failed to answer.

[23] See Motion for Default, p.3, ¶ 1.

[24] See Motion for Default, p. 5, ¶ 3.

Economic Benefit. No economic benefit amount was added to the gravity based penalty. Economic benefit was calculated, but it fell below the *de minimis* amount of $5,000. The Complainant did not consider the other adjustment factors relevant to this case.

By failing to answer the Complaint, the Respondent failed to present any information as to any mitigating circumstances, such as its inability to pay the proposed penalty. Under the "Framework"[25], the burden to demonstrate inability to pay, as with the burden of any mitigating

The Consolidated Rules provide that: ". . . [t]he relief proposed in the Complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding, or the Act"[26]. On the basis of the statutory factors, the EPCRA Penalty Policy and the entire Administrative Record, the Respondent, **Wasatch Propane**, is assessed a civil penalty in the amount of **Thirteen Thousand, Seven hundred and Fifty-one dollars ($13,751.00)**, for its violation of section 312 of EPCRA, 42 U.S.C. § 11022, as amended, and regulations promulgated pursuant thereto.

V. FINDINGS OF FACT/CONCLUSIONS OF LAW

1. Section 312 of EPCRA, 42 U.S.C. § 11022, requires the owner or operator of a facility that stores hazardous chemicals, above the threshold amount, during a calendar year, to prepare an annual report (Tier II Inventory Report) and submit it to the appropriate state and local offices, by March 1, of the succeeding year.

2. Respondent is an owner or operator of Wasatch Propane, a "facility" as that term is defined in section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

3. Wasatch Propane is located at 201 West 2700 South, South Salt Lake City, Utah.

4. Respondent is a "person", as that term is defined by section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

5. Respondent is a wholesaler of propane and allegedly stores in excess of 10,000 pounds of propane at 201 West 2700 South, South Salt Lake City, Utah.

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[25] See GM-21, "EPA General Enforcement Policy"; and GM-22, "A Framework for Statute - Specific Approaches to Penalty Assessments" (February 16, 1984).

[26] Section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c).

6. Propane is a hazardous chemical (CAS number 74-98-6), as defined by 29 C.F.R. § 1910.1200(c).

7. An inspection of the facility, by a LEPC representative on June 9, 1998, revealed that a 30,000 gallon liquid propane tank was located on the premises of the facility. Further, an April 25, 2002, inspection of the facility by an OSHA inspector confirmed the existence of the same 30,000 gallon tank. A propane tank will usually be filled to no more than 80% capacity. Propane weighs approximately 4 pounds per gallon. The amount of propane in a 30,000 gallon tank would be approximately 96,000 pounds. This far exceeds the 10,000 pound threshold amount for this hazardous chemical.

8. Further, Respondent certified, in its Tier II reports to LEPC, it had on hand at its facility propane in excess of the threshold amount for the calendar years 1998, 1999, 2000, 2001, 2002 and 2004.

9. Given the facts set forth in paragraphs 7 and 8 above, there is a rebuttable presumption that the Respondent had on hand at its facility propane in excess of the threshold amount - 10,000 pounds, in the 2003 calendar year. Therefore, Wasatch was required to file a Tier II report with the LEPC and SERC, by March 1, 2004.

10. I find the Respondent, Wasatch Propane violated section 312 of EPCRA, 42 U.S.C. § 11022, by failing to file and submit to the LEPC and SERC its annual inventory (Tier II) report for propane (a hazardous chemical) held at its facility, in excess of the threshold amount (10,000 pounds), for the 2003 calendar year, by the March 1, 2004 deadline.

11. On June 24, 2004, the Salt Lake County Local Emergency Planning Committee ("LEPC") issued a Notice of Violation and Order of Compliance to Wasatch Propane for failure to provide inventory information to the LEPC, by March 1, 2004, and subsequently referred the matter to EPA for action.

12. On September 14, 2004, the Complainant filed a Complaint with the Regional Hearing Clerk, pursuant to section 325 of EPCRA, 42 U.S.C. § 11045, citing Wasatch Propane for violating section 312 of EPCRA, 42 U.S.C. § 11022. The Complainant requested a civil penalty, in the amount of $13,751.00, for said violation.

13. Pursuant to section 22.15(a) of the Consolidated Rules, 40 C.F.R. § 22.15(a), the Respondent was required to file an answer to the September 14, 2004, Complaint with the Regional Hearing Clerk, within 30 days of service - by October 18, 2004.

14. Notwithstanding, the Respondent failed to meet the October 18, 2004, deadline, and the record indicates that, as of the date of this decision, the Respondent has yet to file an answer to the Complaint.

15. On March 15, 2005, the Complainant filed a motion pursuant to section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a), to find the Respondent in default for failing to file an answer to the September 14, 2004, Complaint.

16. Pursuant to section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), I find the Respondent in default for failing to file a timely answer to the Complaint.

17. Pursuant to section 22.17(a) of the Consolidated Rules, 40 C.F.R § 22.17(a), "[d]efault by Respondent constitutes, for the purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations". I find that the Respondent is deemed to have admitted all of the factual allegations in the Complaint

18. Pursuant to section 325(c)(2) of EPCRA, 42 U.S.C. § 11045(c)(2), the Complainant requested that a civil penalty in the amount of $13,751.00 be assessed against the Respondent for its violation of section 312 of EPCRA, 42 U.S.C. § 11022, and regulations promulgated pursuant thereto.

19. Pursuant to section 22.17(c) of the Consolidated Rules, 40 C.F.R. § 22.17(c), . . . "the relief proposed in the Complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act."

20. Considering the statutory factors set forth in section 325(b)(1)(C) of EPCRA, 42 U.S.C. § 11045(b)(1)(C), the Agency "Penalty Policy" and the entire Administrative Record, the Respondent, **Wasatch Propane**, is assessed a civil penalty, in the amount of **Thirteen Thousand, seven-hundred and fifty-one dollars ($13,751.00)** for violating section 312 of EPCRA, 42 U.S.C. § 11022.

DEFAULT ORDER

In accordance with section 22.17 of the Consolidated Rules, 40 C.F.R. § 22.17, and based on the entire administrative record, I hereby grant the Complainant's Motion for Default Order and assess an administrative penalty, in the amount of **Thirteen Thousand, Seven-Hundred and fifty-one dollars ($13,751.00)** against the Respondent, **Wasatch Propane**, for its violations

of section 312 of EPCRA, 42 U.S.C. § 11022, and regulations promulgated pursuant thereto.

No later than 30 days after the date that this Default Order becomes final, Respondents shall submit a cashier's check or certified check, payable to the order of "Treasurer, United States of America," in the amount of **Thirteen Thousand, Seven-Hundred and fifty-one dollars ($13,751.00)** to the following address:

Mellon Bank
EPA Region 8
Lockbox 360859
Pittsburgh, Pennsylvania 15251-6859

Respondent shall note on the check the title and docket number of this Administrative action.

Respondent shall serve a photocopy of the check on the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
EPA Region 8
999 18th Street, Suite #300
Denver, Colorado 80202

Each party shall bear its own costs in bringing or defending this action.

Should the Wasatch Propane fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).

Also, in accordance with section 325(f) of EPCRA, 42 U.S.C. § 11045(f), if Respondent fails to pay any portion of the assessment of a civil penalty, after this Order becomes final, the Administrator may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction and authority to decide such action. In hearing such action, the court shall have authority to review the violation and assessment of civil penalty, on the record.

This Default Order constitutes an Initial Decision, in accordance with section 22.27(a) of the Consolidated Rules, 40 C.F.R. § 22.27(a). This Initial Decision shall become a Final Order 45 days after its service upon a Party, and without further proceedings unless: (1) A party moves to reopen the hearing; (2) A party appeals the initial decision to the Environmental Appeals Board; (3) A party moves to set aside a default order that constitutes an initial decision; or (4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

Within 30 days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board.[27]

Where a Respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to § 22.30 of the Consolidated Rules, and that initial decision becomes a Final Order pursuant to § 22.27(c) of the Consolidated Rules, **RESPONDENT WAIVES ITS RIGHTS TO JUDICIAL REVIEW.**

SO ORDERED This 15th Day of November, 2005.

Alfred C. Smith
Presiding Officer

[27] See § 22.30 of the Consolidated Rules.

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT ORDER/INITIAL DECISION** in the matter of **WASATCH PROPANE, DOCKET NO.: EPCRA-08-2005-0004** was filed with the Regional Hearing Clerk on November 15, 2005.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Dana Stotsky, Enforcement Attorney, U. S. EPA – Region 8, 999 18th Street, Suite 300, Denver, CO 80202-2466. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on November 15, 2005, to:

Ms. Becky B. Taylor
Registered Agent
Wasatch Propane
201 W. 2700 S.
South Salt Lake, UT 84115-3016

November 15, 2005

Tina Artemis
Regional Hearing Clerk