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ENVIRONMENTAL APPEALS BOARD

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

**BRIEF IN SUPPORT OF WASATCH  
PROPANE, INC.'S 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 submits this Brief in Support of its Notice of Appeal. Wasatch appeals the Presiding Officer's determination in the Initial Decision dated November 15, 2005 (the "**Initial Decision**") that Wasatch be assessed a civil penalty in the amount of \$13,751.00.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Wasatch presents the following issue for appeal: Based on the factors contained in 42 U.S.C. § 11045(b)(1)(c), should the Presiding Officer have reduced the amount of the administrative penalty assessed against Wasatch to an amount that was significantly less than the \$13,751.00 requested by Complainant United States Environmental Protection Agency Region 8 (“**Complainant**”) and assessed by the Presiding Officer in the Initial Decision?

Section 325(b)(1)(C) of the Emergency Planning and Community Right to Know Act (“**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 violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.”

The Initial Decision indicates that the Complainant used the penalty matrix contained in the *Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right to Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act* (the “**Penalty Policy**”) to calculate the base penalty amount that Wasatch should be assessed. The Complainant argued that \$13,751.00 was the base penalty amount that should be charged to Wasatch under the Penalty Policy. The Initial Decision further indicates that Complainant then considered what adjustments should be made to the base penalty amount based on the factors contained in §11045(b)(1)(C). The Complainant argued that no adjustments should be made to the base amount of \$13,751.00. The Initial Decision by the

Presiding Officer adopted the Complainant's calculations of penalty and assessed Wasatch a penalty of \$13,751.00.

However, a cursory review of the Initial Decision demonstrates that, when considering whether the base penalty amount of \$13,751.00 should be reduced, the Presiding Officer completely neglected to consider some of the factors listed in §11045(b)(1)(C). Specifically, the Presiding Officer failed to consider prior history of violations and other matters as justice may require. *See id.* When Wasatch's prior history of violations and other matters as justice may require are considered, it is clear that the penalty amount of \$13,751.00 was arbitrary and capricious and should have been reduced. As a result, Wasatch requests that the Appeals Board overturn the Initial Decision and substantially reduce the penalty assessed to Wasatch.

**STATEMENT OF NATURE OF THE CASE AND FACTS RELEVANT TO  
ISSUES PRESENTED FOR REVIEW**

The following facts are relevant to the issues presented for review by Wasatch:

1. Wasatch is a Utah corporation with its principal place of business in Salt Lake County, Utah. Wasatch is in the business of providing propane to customers in Utah.
2. As an owner of a facility that stores propane, Wasatch has been required by EPCRA to submit a Tier II hazardous chemical inventory form ("Tier II") to the local emergency planning committee ("LEPC"). The Tier IIs for the previous year are required to be filed on every March 1.
3. For many years, Wasatch has faithfully complied with the EPCRA requirements to submit a Tier II to the LEPC. Specifically, Wasatch timely filed its Tier II for 1998, 1999, 2000, 2001, 2002 and 2004. *See* Initial Decision at p.5.

4. Beginning in late 2003 or early 2004, Bret Steel of Wasatch spoke with Mike Montmorency, the LEPC representative for Salt Lake County, to discuss how Wasatch could obtain its Tier II LEPC form for the 2003 reporting year. Mr. Montmorency informed Mr. Steel that the form could be downloaded via an internet site.

5. On several occasions, Mr. Steel attempted to download the LEPC Tier II form from the designated website both from the computer at his office and from the computer at his home. However, Mr. Steel was unable to download the Tier II form. After failing to successfully download the Tier II form, Mr. Steel contacted his internet service provider and asked them to download the form. The internet service provider was also unable to download the form.

6. Because Mr. Steel could not download the Tier II form, he again contacted Mr. Montmorency and asked Mr. Montmorency to mail or fax the Tier II form to him. Mr. Montmorency refused and informed Mr. Steel that the only way the form could be obtained was via the internet.

7. As with end, Mr. Steel made a copy of the Tier II form that he was required to submit to the City of South Salt Lake (the "City"), which is the city in which Wasatch is located. He then sent a copy of that Tier II form to the LEPC along with a check to cover the annual filing fee.

8. The LEPC cashed Wasatch's filing fee. However, the LEPC concluded that Wasatch had filed the wrong Tier II form and would not accept the Tier II form filed by Wasatch.

9. In September 2004, Complainant filed its Complaint with the Regional hearing Clerk and alleged that Wasatch had violated section 312 of EPCRA, 42 U.S.C. § 11022.

10. Upon receiving a copy of this Complaint, Mr. Steel contacted an EPA Region 8 officer and explained Wasatch's troubles in obtaining the correct LEPC Tier II and its attempt to comply with the filing requirement by sending the City's Tier II form to the LEPC. The Region 8 officer with whom Mr. Steel spoke informed Mr. Steel that he would see what he could do to get the Complaint dismissed.

11. Relying upon the statements of the Region 8 officer, Mr. Steel assumed that the Complaint would be dismissed. Therefore, he failed to file an answer or to otherwise respond to the Complaint.

12. Despite the Region 8 officer's representations, the Complaint was not dismissed and, on November 15, 2005, the Presiding Officer issued the Initial Decision. The Initial Decision assessed Wasatch a civil penalty for failing to file its 2003 Tier II in the amount of \$13,751.00.

### **ARGUMENT**

Agency actions which are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law are illegal and can be overturned on appeal. *See* 5 U.S.C. § 706. An action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Here, as explained above, the Presiding Officer issued an order assessing Wasatch a penalty of \$13,751.00 for an alleged violation of § 312 of EPCRA. The Initial Decision indicates that the Complainant used the penalty matrix contained in the Penalty Policy to calculate the base penalty that should be assessed to Wasatch. Using that policy, the Complainant argued that \$13,751.00 was the base penalty that should be assessed to Wasatch. The Initial Decision adopted the Complainant’s arguments and assessed Wasatch a penalty of \$13,751.00. *See* Initial Decision at p. 11.

However, the Presiding Officer is also required to consider what adjustments should be made to the base penalty amount based on the factors contained in §11045(b)(1)(C). Those factors include the violator’s ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. *See* 42 U.S.C. § 11045(b)(1)(C). In this instance, it appears that the Presiding Officer did consider Wasatch’s culpability, the size of Wasatch’s business, and the economic benefit of the violation. *See* Initial Decision at pps. 10-11. However, the Presiding Officer specifically failed to consider Wasatch’s prior history of violations, or lack thereof, in deciding whether the penalty should be reduced. *See id.* This is despite the fact that the Presiding Officer concluded in the Initial Decision that Wasatch had a good record of complying with EPCRA and had complied with the Tier II requirements in 1998, 1999, 2000, 2001, 2002 and 2004. *See id.* at p. 10. The complete lack of any history of violations on Wasatch’s part should have been a factor in substantially reducing the \$13,751.00 assessment. The Presiding

Officer's failure to specifically consider Wasatch's prior history of complying with the Tier II requirements makes the Presiding Officer's assessment of a \$13,751.00 fine against Wasatch an arbitrary and capricious decision that should be overturned by the Appeals Board.

Moreover, on appeal the Appeals Board should consider other factors "as justice may require" that, if considered, would lead to a reduction of the \$13,751.00 assessment. Specifically, the Appeals Board should consider that Wasatch attempted in good faith to comply with the Tier II filing requirements. It attempted on several occasions to obtain the proper Tier II form from the internet but was unable to do so. It also attempted to obtain a Tier II form directly from the LEPC but was told that the form could only be obtained from the internet. Further, it submitted a Tier II form and a filing fee to the LEPC, but the LEPC rejected the filing simply because it was not on the proper form. Finally, based on its understanding that the Complaint would be dismissed, Wasatch failed to submit an answer in writing to the Complaint or to otherwise respond in any way. When considering all of these factors together, it would certainly appear that justice requires substantially reducing the assessed penalty of \$13,751.00.

### CONCLUSION

Wasatch requests that the Appeals Board overturn the Initial Decision which assessed Wasatch a penalty of \$13,751.00 for alleged violations of EPCRA § 312 and significantly reduce the penalty assessed against Wasatch. Specifically, Wasatch asks the Appeals Board to conclude that the factors contained in 42 U.S.C. § 11045(b)(1)(C), including Wasatch's history of no violations of EPCRA and other factors "as justice may require," require the Appeals Board to substantially reduce the \$13,751.00 penalty assessed by the Presiding Officer in the Initial Decision.

DATED this 14<sup>th</sup> day of December, 2005.

**SNELL & WILMER, LLP**

A handwritten signature in black ink, appearing to read "Scott Rosevear", written over a horizontal line.

Bradley R. Cahoon

Scott C. Rosevear

*Attorneys for Wasatch Propane, Inc.*



**TABLE OF AUTHORITIES**

**CASES**

*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).....6

**STATUTES AND REGULATIONS**

40 C.F.R. §§ 22.27 and 22.30 .....1

42 U.S.C. § 11045 .....2, 6,7

*Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right to Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act* .....2,3,6

42 U.S.C. § 11022.....5

5 U.S.C. § 706.....5

**TABLE OF CONTENTS**

Statement of Issues Presented for Review .....2

Statement of Nature of Case and Facts Relevant to Issues Presented for Review .....3

Argument .....5

Conclusion .....7

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 14<sup>th</sup> day of December, 2005, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF WASATCH PROPANE, INC.'S 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 18<sup>th</sup> Street  
Suite 300  
Mail Code: 8RC  
Denver, CO 80202-2466

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

