UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	Docket No. EPCRA-05-2009-0005 CERCLA-05-2009-0001 MM-05-2009-0002
Pennant Foods Company 111 North Northwest Avenue Northlake, IL 60164	Proceeding to Assess a Civil Penalty Under Section 109(b) of CERCLA, and Section 325(b)(2) of the EPCRA
Respondent.	

ANSWER TO COMPLAINT AND REQUEST FOR HEARING

NOW COMES Respondent PENNANT FOODS COMPANY ("Pennant"), by and through its attorneys, Seyfarth Shaw LLP, and for its Answer to Complaint, states as follows:

COMPLAINT NO. 1:

This is an administrative proceeding to assess a civil penalty under Section 109(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. § 9609(b), and Section 325(b)(2) of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11045(b)(2).

ANSWER:

Pennant admits the allegations of Paragraph 1 of the Complaint.

COMPLAINT NO. 2:

The Complainant is, by lawful delegation, the Chief of the Emergency Response Branch 2, United States Environmental Protection Agency (U.S. EPA), Region 5.

ANSWER:

Pennant lacks sufficient information to determine the truth or falsity of the allegations contained in Paragraph 2 of the Complaint, and therefore denies same.

COMPLAINT NO. 3:

The Respondent is Pennant Foods Company, a Delaware corporation doing business in the State of Illinois.

ANSWER:

Pennant admits the allegations of Paragraph 3 of the Complaint.

Statutory and Regulatory Background

COMPLAINT NO. 4:

Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), requires any person in charge of a facility to immediately notify the National Response Center (NRC) as soon as that person has knowledge of any release of a hazardous substance from the facility in an amount equal to or greater than the hazardous substance's reportable quantity.

ANSWER:

The terms of Section 103(a) of CERCLA stand on their own, and Pennant denies any allegation contained in Paragraph 4 of the Complaint inconsistent with those terms.

COMPLAINT NO. 5:

Section 304(a)(1) of EPCRA, 42 U.S.C. § 11004(a)(1), requires that the owner or operator of a facility must immediately provide notice, as described in Section 304(b) of EPCRA, 42 U.S.C. § 11004(b), if a release of an extremely hazardous substance in quantities equal to or greater than a reportable quantity occurs from a facility at which hazardous chemicals are produced, used, or stored and such release requires notice under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

ANSWER:

The terms of Section 304(a)(1) of EPCRA stand on their own, and Pennant denies any allegation contained in Paragraph 5 of the Complaint inconsistent with those terms.

COMPLAINT NO. 6:

Under Section 304(b) of EPCRA, 42 U.S.C. § 11004(b), notice required under 304(a) of EPCRA, 42 U.S.C. § 11004(a), must be given immediately after the release by the owner or operator of a facility to the community emergency coordinator for the local emergency planning committee (LEPC) for any area likely to be affected by the release and to the state emergency planning commission (SERC) of any state likely to be affected by a release. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304 of EPCRA, 42 U.S.C. § 11004, provide a mechanism to alert federal, state, and local agencies that a response action may be necessary to prevent deaths or injuries to emergency responders, facility personnel and local community. A delay or failure to notify could seriously hamper the governments' response to an emergency.

ANSWER:

The terms of Section 304(b) of EPCRA stand on their own, and Pennant denies any allegation contained in Paragraph 6 of the Complaint inconsistent with those terms. Pennant lacks sufficient information to determine the truth or falsity of the remaining allegations contained in Paragraph 6 of the Complaint, and therefore denies same

COMPLAINT NO. 7:

Under 29 C.F.R. § 1910.1200(d)(3), chemicals listed in 29 C.F.R. Part 1910, Subpart Z are hazardous.

ANSWER:

The terms of 29 C.F.R. § 1910.1200(d)(3) stand on their own, and Pennant denies any allegation contained in Paragraph 7 of the Complaint inconsistent with those terms.

General Allegations

COMPLAINT NO. 8:

On June 27 and 28, 2005, Respondent was a corporation.

ANSWER:

Pennant admits the allegations of Paragraph 8 of the Complaint.

COMPLAINT NO. 9:

Therefore, Respondent was a "person" as that term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

ANSWER:

Paragraph 9 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant admits the allegations of Paragraph 9 of the Complaint.

COMPLAINT NO. 10:

Therefore, Respondent was a "person" as that term is defined under Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

ANSWER:

Paragraph 10 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant admits the allegations of Paragraph 10 of the Complaint.

COMPLAINT NO. 11:

On June 27 and 28, 2005, Respondent owned or operated an ammonia refrigeration system and a building at 111 North Northwest Avenue, Northlake, Illinois, 60164.

ANSWER:

Pennant admits the allegations of Paragraph 11 of the Complaint.

COMPLAINT NO. 12:

Therefore, on June 27 and 28, 2005, Respondent owned or operated "equipment" and a "building" at 111 North Northwest Avenue, Northlake, Illinois, 60164.

ANSWER:

Paragraph 12 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant admits the allegations of Paragraph 12 of the Complaint.

COMPLAINT NO. 13:

Therefore, on June 27 and 28, Respondent owned or operated a "facility" at 111 North Northwest Avenue, Northlake, Illinois, 60164, as that term is defined under Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

ANSWER:

Paragraph 13 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant admits the allegations of Paragraph 13 of the Complaint.

COMPLAINT NO. 14:

Therefore, on June 27 and 28, 2005, Respondent owned or operated a "facility" at 111 North Northwest Avenue, Northlake, Illinois, 60164, as that term is defined under Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

ANSWER:

Paragraph 14 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant admits the allegations of Paragraph 14 of the Complaint.

COMPLAINT NO. 15:

Therefore, on June 27 and 28, 2005, Respondent was the "owner or operator" of the facility at 111 North Northwest Avenue, Northlake, Illinois, 60164, as that term is defined under Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A).

ANSWER:

Paragraph 15 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant admits the allegations of Paragraph 15 of the Complaint.

COMPLAINT NO. 16:

On June 27 and 28, 2005, Respondent produced, used, or stored at the facility, anhydrous ammonia.

ANSWER:

Pennant admits that on June 27 and 28, 2005, it used and stored at the facility anhydrous ammonia, and denies the remaining allegations of Paragraph 16 of the Complaint.

COMPLAINT NO. 17:

Anhydrous ammonia, CAS #7664-41-7 is an "extremely hazardous substance" pursuant to Section 302(a)(2) of EPCRA, 42 U.S.C. § 11002(a)(2).

ANSWER:

The terms of Section 302(a)(2) of EPCRA stand on their own, and Pennant denies any allegation contained in Paragraph 17 of the Complaint inconsistent with those terms.

COMPLAINT NO. 18:

The reportable quantity for anhydrous ammonia, CAS #7664-41, is 100 pounds pursuant to 40 C.F.R. Part 355, Appendix A.

ANSWER:

Paragraph 18 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant admits the allegations of Paragraph 18 of the Complaint

COMPLAINT NO. 19:

Beginning at approximately 6:30 p.m. on Monday, June 27, 2005, Respondent's ammonia refrigeration system emitted into the air approximately 3,000 pounds of anhydrous ammonia.

ANSWER:

Pennant admits that at approximately 6:30 p.m. on Monday, June 27, 2005, Respondent's ammonia refrigeration system emitted anhydrous ammonia into its building, and denies the remaining allegations of Paragraph 19 of the Complaint.

COMPLAINT NO. 20:

Therefore, Respondent "released" from its facility and into the air approximately 3,000 pounds of anhydrous ammonia, pursuant to Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

ANSWER:

Paragraph 20 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant denies the allegations of Paragraph 20 of the Complaint.

COMPLAINT NO. 21:

Therefore, Respondent "released" from its facility and into the air approximately 3,000 pounds of anhydrous ammonia, pursuant to Section 329(8) of EPCRA, 42 U.S.C. § 11049(8).

ANSWER:

Paragraph 21 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant denies the allegations of Paragraph 21 of the Complaint.

COMPLAINT NO. 22:

The release exceeded 3,000 pounds within a 24-hour period.

ANSWER:

Pennant denies the allegations of Paragraph 21 of the Complaint.

COMPLAINT NO. 23:

The release affected Illinois.

ANSWER:

Pennant lacks sufficient information to determine the truth or falsity of the allegations contained in Paragraph 23 of the Complaint, and therefore denies same.

COMPLAINT NO. 24:

On June 27, 2005, the SERC for Illinois was the Illinois State Emergency Management Agency, pursuant to Section 301(a) of EPCRA, 42 U.S.C. § 11001(a).

ANSWER:

Pennant lacks sufficient information to determine the truth or falsity of the allegations contained in Paragraph 24 of the Complaint, and therefore denies same.

COMPLAINT NO. 25:

The release affected Cook County.

ANSWER:

Pennant lacks sufficient information to determine the truth or falsity of the allegations contained in Paragraph 25 of the Complaint, and therefore denies same.

COMPLAINT NO. 26:

On June 27, 2005, the LEPC for Cook County was the Cook County LEPC, pursuant to Section 301(c) of EPCRA, 42 U.S.C. § 11001(c).

ANSWER:

Pennant lacks sufficient information to determine the truth or falsity of the allegations contained in Paragraph 26 of the Complaint, and therefore denies same.

Count 1

COMPLAINT NO. 27:

Complainant incorporates paragraphs 1 through 26 of this Complaint as if set forth in this paragraph.

ANSWER:

Pennant incorporates by reference as if set forth fully herein its Answers to Paragraphs 1 through 26 of the Complaint.

COMPLAINT NO. 28:

At approximately 11:15 a.m., on Tuesday, June 28, 2005, Respondent notified the NRC of the release.

ANSWER:

Pennant admits the allegations of Paragraph 21 of the Complaint.

COMPLAINT NO. 29:

Therefore, Respondent failed to immediately notify the NRC of the release as soon as Respondent had knowledge of the release, in violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

ANSWER:

Paragraph 29 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant admits that it had knowledge that ammonia had released into its building at some point in time before it notified the NRC, but denies that it was in violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), because Section 103(a) does **not** require Respondent to notify the NRC as soon as it has knowledge of an ammonia release. Section 103(a) of CERCLA requires notification of a person in charge of a facility "as soon as he has knowledge" of a covered release "in quantities equal to or greater than" the reportable quantity ("RQ"). Pennant notified the NRC immediately after it had knowledge that the RQ for ammonia (100 pounds) had been released into its building.

Count 2

COMPLAINT NO. 30:

Complainant incorporates paragraphs 1 through 26 of this Complaint as if set forth in this paragraph.

ANSWER:

Pennant incorporates by reference as if set forth fully herein its Answers to Paragraphs 1 through 26 of the Complaint.

COMPLAINT NO. 31:

At approximately 11:20 a.m., Tuesday, June 28, 2005, Respondent notified the SERC of the release.

ANSWER:

Pennant admits the allegations of Paragraph 31 of the Complaint.

COMPLAINT NO. 32:

Therefore, Respondent failed to immediately notify the SERC of the release as soon as Respondent had knowledge of the release, in violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

ANSWER:

Paragraph 32 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant admits that it had knowledge that ammonia had released into its building at some point in time before it notified the SERC, but denies that it was in violation of Section 304(a) of EPCRA this Section requires notification to the SERC when notification to the NRC is required under Section 103(a) of CERCLA, and Section 103(a) of CERCLA does **not** require Respondent to notify the NRC as soon as it has knowledge of an ammonia release. Section 103(a) of CERCLA requires notification of a person in charge of a facility "as soon as he has knowledge" of a covered release "in quantities equal to or greater than" the reportable quantity ("RQ"). Pennant notified the SERC immediately after it had knowledge that the RQ for ammonia (100 pounds) had been released into its building.

Count 3

COMPLAINT NO. 33:

Complainant incorporates paragraphs 1 through 26 of this Complaint as if set forth in this paragraph.

ANSWER:

Pennant incorporates by reference as if set forth fully herein its Answers to Paragraphs 1 through 26 of the Complaint.

COMPLAINT NO. 34:

At approximately 11:25 a.m., Tuesday, June 28, 2005, Respondent notified the LEPC of the release.

ANSWER:

Pennant admits the allegations of Paragraph 34 of the Complaint.

COMPLAINT NO. 35:

Therefore, Respondent failed to immediately notify the LEPC after Respondent had knowledge of the release, in a violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

ANSWER:

Paragraph 35 of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Pennant admits that it had knowledge that ammonia had released into its building at some point in time before it notified the LEPC, but denies that it was in violation of Section 304(a) of EPCRA this Section requires notification to the LEPC when notification to the NRC is required under Section 103(a) of CERCLA, and Section 103(a) of CERCLA does **not** require Respondent to notify the NRC as soon as it has knowledge of an ammonia release. Section 103(a) of CERCLA requires notification of a person in charge of a facility "as soon as he has knowledge" of a covered release "in quantities equal to or greater than" the reportable quantity ("RQ"). Pennant notified the LEPC immediately after it had knowledge that the RQ for ammonia (100 pounds) had been released into its building.

Proposed CERCLA Penalty

COMPLAINT NO. 36:

Section 109(b) of CERCLA, 42 U.S.C. § 9609(b), authorizes U.S. EPA to assess a civil penalty of up to $25,000 per day of violation of Section 103 of CERCLA, 42 U.S.C. § 9609(3). The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulations at 40 C.F.R. Part 19 increased the statutory maximum penalty to $27,500 per day of violation that occurred from January 31, 1997, through March 15, 2004, and to $32,500 per day of violation for violations that occurred after March 15, 2004.

ANSWER:

The terms of Section 109(b) of CERCLA and of the Debt Collection Improvement Act and its implementing regulations stand on their own, and Pennant denies any allegation contained in Paragraph 36 of the Complaint inconsistent with those terms.

COMPLAINT NO. 37:

Section 109(a)(3) of CERCLA, 42 U.S.C. § 9609(a)(3), requires U.S. EPA to consider the nature, circumstances, extent and gravity of the violations, a violator's ability to pay, prior

history of violations, degree of culpability, economic benefit or savings resulting from the violation, and any other matters that justice may require, when assessing an administrative penalty under Section 109(b) of CERCLA, 42 U.S.C. § 9609(b).

ANSWER:

The terms of Section 109(a)(3) of CERCLA stand on their own, and Pennant denies any allegation contained in Paragraph 37 of the Complaint inconsistent with those term

COMPLAINT NO. 38:

Based upon an evaluation of the facts alleged in this Complaint and the factors in Section 109(a)(3) of CERCLA, 42 U.S.C. § 9609(a)(3), Complainant proposes that the U.S. EPA assess a civil penalty against Respondent of $32,500 for the CERCLA violation alleged in Count 1 of this Complaint.

ANSWER:

Pennant lacks sufficient information to determine the truth or falsity of the allegations contained in Paragraph 38 of the Complaint, and therefore denies same.

COMPLAINT NO. 39:

Complainant calculated the CERCLA penalties by evaluating the facts and circumstances of this case with specific reference to the U.S. EPA's "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 (dated September 30, 1999)," a copy of which is enclosed with this Complaint.

ANSWER:

Pennant lacks sufficient information to determine the truth or falsity of the allegations contained in Paragraph 39 of the Complaint, and therefore denies same.

Proposed EPCRA Penalty

COMPLAINT NO. 40:

Section 325(b) of EPCRA, 42 U.S.C. § 11045(b), authorizes U.S. EPA to assess a civil penalty of up to $25,000 per day per violation of Section 304 of EPCRA, 42 U.S.C. § 11004. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulations at 40 C.F.R. Part 19 increased the statutory maximum penalty to $27,500 per day of violation that occurred from January 31, 1997, through March 15, 2004, and to $32,500 per day per violation for violations that occurred after March 15, 2004.

ANSWER:

The terms of Section 325(b) of EPCRA and of the Debt Collection Improvement Act and its implementing regulations stand on their own, and Pennant denies any allegation contained in Paragraph 40 of the Complaint inconsistent with those terms.

COMPLAINT NO. 41:

Based upon an evaluation of the facts alleged in this Complaint, and after considering the nature, circumstances, extent and gravity of the violations, the violator's ability to pay, prior history of violations, degree of culpability, economic benefit or saving resulting from the violations, and any other matters that justice may require, Complainant proposes that the U.S. EPA assess a civil penalty against Respondent of $65,000 for the EPCRA violations alleged in this Complaint. Complainant allocated this proposed penalty to the various EPCRA counts of this Complaint as follows:

Count 2 EPCRA Section 304(a) (SERC): $32,500
Count 3 EPCRA Section 304(a) (LEPC): $32,500

ANSWER:

Pennant lacks sufficient information to determine the truth or falsity of the allegations contained in Paragraph 41 of the Complaint, and therefore denies same.

COMPLAINT NO. 42:

Complainant calculated the EPCRA penalties by evaluating the facts and circumstances of this case with specific reference to U.S. EPA's "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 (dated September 30, 1999)," a copy of which is enclosed with this Complaint.

ANSWER:

Pennant lacks sufficient information to determine the truth or falsity of the allegations contained in Paragraph 42 of the Complaint, and therefore denies same.

REQUEST FOR HEARING

Pennant hereby request a hearing on this matter.

RESPONDENT'S DEFENSES, DISPUTED FACTS, AND, BASIS FOR OPPOSING THE PROPOSED PENALTY

The following is provided without any admission of liability and without waiver and any right, argument, defense or contention available to Pennant. Pennant disputes that it violated the release reporting provisions of the involved statutes, and disputes the appropriateness of the penalty.

The trigger for reporting is not that a release has occurred, but rather whether the Company knows that the release exceeds the RQ. *In re: Indiana Michigan Power Co.,* 2005 EPA ALJ LEXIS 23 (5/3/05) ("[K]nowledge of the release, by itself, is not sufficient to trigger the reporting requirements under §§ 304. The release must also be of a 'reportable quantity' pursuant to EPCRA §§ 304(a)(2)(B). . . . '[K]nowledge' (even 'constructive knowledge') involves some level of knowledge of a 'reportable quantity'.").

Throughout the time of this incident, Pennant was aware of the obligation to report if and when the release exceeded 100 pounds of ammonia. It attempted to ascertain the amount of the release, and when it reasonably concluded that the RQ had been exceeded, it immediately reported.

It is the contention of the EPA that Pennant should be charged with "constructive knowledge" that the RQ had been exceeded. *In re: Genicom Corp.*, 1992 ALJ LEXIS 528 (7/16/92) holds that constructive knowledge will be imputed where a company is ignorant of the reporting requirements or is "hostile or indifferent to them." Such was not the case here. Conversely, no reporting violation arises where there is "uncertainty that a release in reportable quantities had taken place." *Id.* This is so, because, as stated, the obligation to report is dependent upon knowledge that a release in excess of the RQ has occurred. Facility personnel must be allowed an opportunity – in the prudent exercise of reasonable diligence – to determine whether a "reportable quantity" of a hazardous substance has been released.

Assuming *arguendo* that Pennant did violate the applicable statutes, the proposed penalty is excessive after considering the nature, circumstances, extent and gravity of the violations, the violator's ability to pay, prior history of violations, degree of culpability, economic benefit or saving resulting from the violations, and any other matters that justice may require. EPA incorrectly applied its penalty guidance, and in any event, the Administrative Law Judge is not obligated to follow the penalty policy.

DATED: November 21, 2008

Respectfully submitted,

PENNANT FOODS COMPANY

By_____
One of Its Attorneys

Andrew H. Perellis
Meagan Newman
SEYFARTH SHAW LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000

CERTIFICATE OF FILING AND SERVICE

I, Andrew H. Perellis, an attorney, do hereby certify that I have caused the original and one copy of the foregoing ANSWER TO COMPLAINT to be filed with the Regional Hearing Clerk by depositing them in the U.S. Mail, postage prepaid, on this 21st day of November, 2008, addressed to the following:

Regional Hearing Clerk (E-13J)
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, Illinois 60604

I, Andrew H. Perellis, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing ANSWER TO COMPLAINT to be served upon the following, by depositing a copy of same in the U.S. Mail, postage prepaid, on this 21st day of November, 2008:

Jeffrey M. Trevino (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, Illinois 60604

Andrew H. Perellis