



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

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Office of Regional Hearing Clerk

February 8, 2011

Wanda Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

BY HAND

Re: In the Matter of Demoulas Super Markets, Inc.
EPCRA-01-2010-0015

Dear Ms. Santiago:

Enclosed for filing in the above-referenced action, please find the original and one copy of an Administrative Complaint and Opportunity to Request a Hearing.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Maximilian Boal".

Maximilian Boal
Enforcement Counsel

Enclosure

cc: Normand Martin, Market Basket Facilities Manager

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

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Office of Regional Hearing Clerk

In the Matter of:)

DeMoulas Super Markets, Inc.)
875 East Street)
Tewksbury, MA 01876-1495)

Respondent.)

Docket No. EPCRA-01-2010-0015

**ADMINISTRATIVE COMPLAINT
AND
NOTICE OF
OPPORTUNITY FOR HEARING**

STATUTORY AND REGULATORY BASIS

This is a civil administrative action under the authority of Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11045(c) (also known as the Emergency Planning and Community Right-to-Know Act of 1986, hereinafter "EPCRA"), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Part 22"). Complainant is the Legal Enforcement Manager of the Office of Environmental Stewardship, United States Environmental Protection Agency, Region 1 ("Complainant"). This Complaint alleges that DeMoulas Super Markets, Inc. ("Respondent") violated Sections 311 and 312(a) of EPCRA, 42 U.S.C. §§ 11021 and 11022(a), and the federal regulations that set out in greater detail these statutory requirements, 40 C.F.R. Part 370. EPA promulgated new regulations to implement EPCRA §§ 311 and 312 on November 30, 2008 (73 Fed. Reg. 65478), which became effective on December 3, 2008, but the substantive requirements relevant to the violations alleged herein did not change. Hereinafter,

this Complaint cites the current version of the applicable 40 C.F.R. Part 370 regulations with cross references to the former citations.

Section 311 of EPCRA, 42 U.S.C. § 11021, and its implementing regulations at 40 C.F.R. §§ 370.10, 370.12, 370.20, and 370.30-370.33 (formerly 40 C.F.R. §§ 370.20 and 370.21), require the owner or operator of a facility which is required by the Occupational Safety and Health Act (“OSHA”), and the hazard communication standards promulgated thereunder at 29 C.F.R. § 1910.1200(b)(1), to prepare or have available a material safety data sheet (“MSDS”) for at least one hazardous chemical, to submit to the state emergency response commission (“SERC”), community emergency coordinator for the local emergency planning committee (“LEPC”), and the fire department with jurisdiction over the facility, a MSDS for each hazardous chemical present at the facility at any one time in an amount equal to or greater than 10,000 pounds and for each extremely hazardous chemical present at the facility in an amount equal to or greater than 500 pounds, or the threshold planning quantity, whichever is lower, or to submit a list of such chemicals. The owner or operator must submit the required MSDS or list within three months after the owner or operator is first required to have the MSDS available or after the hazardous chemical requiring an MSDS first becomes present at the facility in an amount exceeding the threshold level established in 40 C.F.R. § 370.10(a) (formerly 40 C.F.R. § 370.20(b)).

Under Section 312(a) of EPCRA, 42 U.S.C. § 11022(a) and 40 C.F.R. §§ 370.10, 370.12, 370.20, 370.40, 370.44, and 370.45 (formerly 40 C.F.R. §§ 370.20 and 370.25), the owner or operator of any facility that is required by OSHA to prepare or have available a MSDS for at least one hazardous chemical must prepare and submit an emergency and hazardous chemical inventory form (“Tier I” or “Tier II” form) to the SERC, the LEPC, and the local fire

department with jurisdiction over the facility. Pursuant to 40 C.F.R. § 370.45 (formerly 40 C.F.R. § 370.25), the Tier I or Tier II form must be submitted annually on or before March 1 and is required to contain information with respect to the preceding calendar year.

Sections 311 and 312 of EPCRA, 42 U.S.C. §§ 11021 and 11022, assist state and local committees in planning for emergencies and make information on chemical presence and hazards available to the public. A delay in reporting could result in harm to human health and the environment.

GENERAL ALLEGATIONS AND STATEMENT OF FACTS

1. Respondent is a corporation incorporated under the laws of Massachusetts and is a “person” as that term is defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7), 40 C.F.R. § 370.66 (formerly 40 C.F.R. § 370.2).

2. Respondent owns and operates a perishables distribution warehouse facility at 340 Ballardvale Street, Andover, Massachusetts 01810 (the “facility”). The facility consists of buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites, and that are owned or operated by the same person.

3. The facility is a “facility” as that term is defined under Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), and 40 C.F.R. § 370.66 (formerly 40 C.F.R. § 370.2).

4. On or about December 4, 2008, duly authorized representatives of EPA inspected Respondent’s facility. The purpose of the inspection was to determine Respondent’s compliance with EPCRA reporting requirements.

5. At all times relevant to the violations cited herein, Respondent was required, pursuant to OSHA and regulations promulgated thereunder, to prepare or have available a MSDS for sulfuric acid, lead, gasoline, diesel fuel, and R507.

6. Beginning in calendar year 2008, Respondent was required, pursuant to OSHA and regulations promulgated thereunder, to prepare or have available a MSDS for Genetron 22.

7. At all times relevant to the violations cited herein, Respondent stored lead, gasoline, diesel fuel, and R507, which are “hazardous chemicals” within the meaning of Section 311(e) of EPCRA, 42 U.S.C. § 11021(e), and as defined under 29 C.F.R. § 1910.1200(c), in a quantity that exceeds the minimum threshold level (“MTL”) of 10,000 pounds set forth in 40 C.F.R. § 370.10(a)(2)(i) (formerly 40 C.F.R. § 370.20(b)(4)) at the facility.

8. Beginning on or about March 2008, Respondent stored Genetron 22, which is a “hazardous chemical” within the meaning of Section 311(e) of EPCRA, 42 U.S.C. § 11021(e), and as defined under 29 C.F.R. § 1910.1200(c), in a quantity that exceeds the MTL of 10,000 pounds set forth in 40 C.F.R. § 370.10(a)(2)(i) (formerly 40 C.F.R. § 370.20(b)(4)) at the facility.

9. At all times relevant to the violations cited herein, Respondent stored sulfuric acid, which is a “hazardous chemical” within the meaning of Section 311(e) of EPCRA, 42 U.S.C. § 11021(e), and as defined under 29 C.F.R. § 1910.1200(c), and an “extremely hazardous chemical” as listed in Appendices A and B of 40 C.F.R. Part 355, in a quantity that exceeds the MTL of 500 pounds set forth in 40 C.F.R. § 370.10(a)(1) (formerly 40 C.F.R. § 370.20(b)(1)) at the facility.

COUNT I

10. Complainant re-alleges paragraphs 1 through 9.

11. On or about March 4, 2008, Respondent began storing 60,000 pounds of Genetron 22 at the facility, exceeding the MTL of 10,000 pounds set forth in 40 C.F.R. § 370.10(a)(2)(i) (formerly 40 C.F.R. § 370.20(b)(4)).

12. Respondent was required to prepare or have available a MSDS for Genetron 22, which is a “hazardous chemical.”

13. Respondent failed to submit within three months of the chemical’s exceeding its threshold planning quantity for the first time, a MSDS for Genetron 22 or a list of chemicals including Genetron 22 to the LEPC, the SERC, and the fire department with jurisdiction over the facility, in violation of the reporting requirements of Section 311(a) of EPCRA, 42 U.S.C. § 11021(a), and 40 C.F.R. §§ 370.12(a), 370.30(a), 370.31(b), 370.32(a), and 370.33(a) (formerly 40 C.F.R. §§ 370.20 and 370.21).

14. Respondent is therefore subject to an assessment of penalties under Section 325(c)(2) of EPCRA, 42 U.S.C. § 11045(c)(2).

COUNT II

15. Complainant re-alleges paragraphs 1 through 14.

16. During the calendar year 2007, Respondent stored lead, gasoline, diesel fuel, and R507 at the facility in quantities that exceed the MTL of 10,000 pounds set forth in 40 C.F.R. § 370.10(a)(2)(i) (formerly 40 C.F.R. § 370.20(b)(4)) and sulfuric acid in a quantity that exceeds the MTL of 500 pounds set forth in 40 C.F.R. § 370.10(a)(1) (formerly 40 C.F.R. § 370.20(b)(1)).

17. Respondent was required to prepare and submit a Tier I or Tier II form to the SERC, LEPC, and the local fire department with jurisdiction over the facility in order to report the data required by Section 312(d) of EPCRA, 42 U.S.C. § 11022(d), for calendar year 2007 on or before March 1, 2008.

18. Respondent failed to prepare and submit a Tier I or Tier II form by March 1, 2008 to the SERC, LEPC, and the local fire department with jurisdiction over the facility, in violation

of the reporting requirements of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and 40 C.F.R. §§ 370.12(a), 370.40, 370.44, and 370.45(a) (formerly 40 C.F.R. §§ 370.20 and 370.25)).

19. Respondent is therefore subject to an assessment of penalties under Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), and 40 C.F.R. Part 19.

PROPOSED PENALTIES

20. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c) and 40 C.F.R. Part 19, authorize EPA to assess a penalty of up to \$11,000 per day for each violation of EPCRA Section 311, 42 U.S.C. § 11021, occurring after January 30, 1997 through January 12, 2009 and a penalty of \$32,500 per day for each violation of EPCRA Section 312, 42 U.S.C. § 11022, occurring after March 15, 2004 through January 12, 2009. Failure to report in a timely manner, as required by Sections 311 and 312 of EPCRA, may deprive the community of its right to know about chemicals used, stored near, or in the neighborhood that may affect public health and the environment, and may prevent comprehensive planning by federal, state, and local authorities to properly prepare for accidental chemical releases.

21. The proposed civil penalty has been determined in accordance with Section 325(c) of EPCRA, 42 U.S.C. § 11045(c). For purposes of determining the amount of any penalty to be assessed, EPA considered the nature, circumstances, extent, and gravity of the violations, and with respect to the Respondent, its ability to pay, prior history of violations, degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require. To develop the proposed penalty in this Complaint, the Complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's "Interim Final 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, as amended through April 6, 2010) (“ERP”), a copy of which is enclosed with this Complaint. This policy provides a rational, consistent, and equitable calculation methodology for applying the statutory penalty factors enumerated above to particular cases.

22. Pursuant to Part V of the ERP, the first stage of calculating a penalty requires the determination of the “extent” level of the violation and the second stage concerns the “gravity” level of the violation. Under the ERP, EPA has discretion to select an amount within the range specified in the appropriate matrix box.

23. The “extent” of the violation alleged in Count I was determined to be “Level 1” because Respondent failed to submit a MSDS for each required hazardous chemical (or list of such chemicals that require MSDSs) as required by EPCRA § 311(a) to the SERC, LEPC, or fire department with jurisdiction over the facility within 30 calendar days of the reporting deadline. The “gravity” of the violation alleged in Count I was determined to be “Level B” because the amount of the unreported hazardous chemical present at the facility at any time during the reporting period was greater than 5, but less than or equal to 10 times the reporting threshold.

24. For Count I, Respondent’s failure to submit the MSDS was determined to fall at the top end of Level 1-B matrix box, based on the circumstances of the violation, resulting in a penalty of \$9,671. No adjustments pursuant to Section VIII were made.

25. The “extent” of the violation alleged in Count II was determined to be “Level 1” because Respondent failed to submit a Tier I or Tier II chemical inventory form to the SERC, LEPC, or fire department within 30 calendar days of the reporting deadline. The “gravity” of the violation alleged in Count II was determined to be “Level A” because the amount of unreported hazardous chemicals present at the facility was greater than 10 times the reporting threshold.

26. For Count II, Respondent's failure to submit the Tier I or Tier II form was determined to fall in the top end of the Level 1-A matrix box, based on the circumstances of the violation, resulting in a penalty of \$32,500. No adjustments pursuant to Section VIII were made.

27. After consideration of the Respondent's failure to voluntarily disclose the violations, its lack of history of prior violations, degree of culpability, and economic benefit, the Complainant proposes no further adjustments to the gravity-based penalty amounts for Counts I and II.

28. The proposed penalty as stated in this Complaint was developed based on the best information available to the Agency at this time and may be adjusted if the Respondent establishes bona fide issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty.

29. Based upon the violations cited in this Complaint, and taking into account the nature, circumstances, and gravity of these violations, the Complainant proposes that Respondent be assessed a civil penalty in the amount of \$42,171 for the violations alleged in this Complaint.

For each violation, the proposed penalty is as follows:

Count I:	\$9,671.
Count II:	\$32,500.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Respondent has the right to request a formal hearing to contest any material fact set forth in this Complaint or to contest the appropriateness of the proposed penalty. Any such hearing would be conducted in accordance with Part 22, a copy of which is enclosed with this Complaint.

To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to a hearing, and having the above-cited penalty assessed

without further proceedings, Respondent must file a written Answer within thirty (30) days of Respondent's receipt of this Complaint. The Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondent has any knowledge. If Respondent has no knowledge of a particular fact and so states, the allegation is considered denied. Failure to deny an allegation constitutes an admission. Respondent's Answer must also state all facts and circumstances, if any, which constitute grounds for a defense, and, if desired, must specifically request an administrative hearing. If Respondent denies any material fact or raises any affirmative defense, Respondent will be considered to have requested a hearing. The Answer must be sent to:

Wanda Santiago, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region I
5 Post Office Square, Suite 100 (ORA18-1)
Boston, MA 02109-3912

Respondent should also send a copy of the Answer and all other documents which Respondent files in this action to Maximilian Boal, the attorney assigned to represent EPA in this matter, at:

Maximilian Boal
Enforcement Counsel
U.S. Environmental Protection Agency, Region I
5 Post Office Square, Suite 100 (OES04-2)
Boston, MA 02109-3912

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a hearing, Respondent may confer informally with EPA concerning the facts of this case, or the amount of the proposed penalty, and the possibility of settlement. Such a conference provides Respondent with an opportunity to respond informally to the charges, and to provide any additional information that may be relevant to this matter.

Respondent or its attorney is encouraged to contact Maximilian Boal, Enforcement Counsel, at (617) 918-1750, to discuss this matter or to arrange an informal settlement conference.

Please note that a request for an informal settlement conference does not lengthen the thirty-day period within which a written Answer must be submitted to avoid default.

Payment of the civil penalty alone does not satisfy Respondent's legal obligation to file complete and accurate emergency and hazardous chemical inventory forms (Tier I or Tier II forms). If Respondent chooses to remit the proposed penalty, it is still under a legal duty to submit complete and accurate Tier I or Tier II forms. Failure or refusal to file such forms may subject Respondent to additional civil penalties of up to \$37,500 per day of violation.

Maximilian Boal, Enforcement Counsel, at the above address and telephone number, has been designated to represent the Complainant and is authorized to receive service of process in this action.

2/7/11
Date



Joanna Jerison
Legal Enforcement Manager
Office of Environmental Stewardship
U.S. EPA, Region I

**In the Matter of DeMoulas Super Markets, Inc.
EPCRA-01-2010-0015**

CERTIFICATE OF SERVICE

I certify that the foregoing Compliant was transmitted to the following persons, in the manner specified, on the date below:

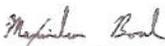
Original and one copy
hand-delivered:

Wanda Santiago,
Regional Hearing Clerk
U.S. EPA – Region I
5 Post Office Square, Suite 100
Mail Code: ORA18-1
Boston, MA 02109-3912

Copy and copy of Part 22 Rules and
Section 311 and 312 ERP
by certified mail, return receipt
requested:

Normand Martin, Facilities Manager
DeMoulas Super Markets, Inc.
875 East Street
Tewksbury, MA 01876-1495

Dated: February 8, 2011



Maximilian Boal
Enforcement Counsel
U.S. EPA – Region I
5 Post Office Square, Suite 100
Mail Code: OES04-2
Boston, MA 02109-3912