

QUINN, BUSECK, LEEMHUIS, TOOHEY & KROTO, INC.
ATTORNEYS AT LAW

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October 28, 2009

VIA OVERNIGHT MAIL

Karen Maples,
Regional Hearing Clerk
U.S. EPA, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

RE: In the Matter of Welch Foods, Inc.
Docket No. CERCLA-02-2009-2030

Dear Ms. Maples:

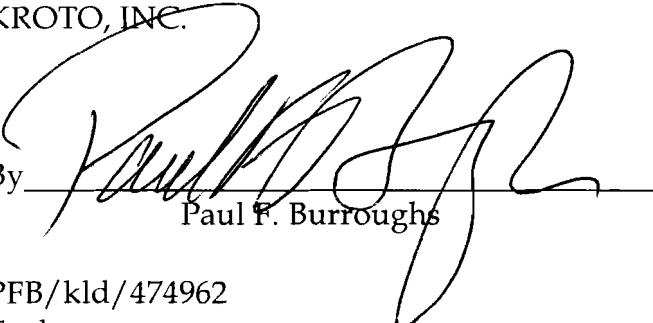
I enclose herewith for filing the original and one copy of the Response of Welch Foods, Inc. to the EPA Administrative Complaint at the above docket number.

Thank you for your assistance in this regard.

Very truly yours,

QUINN, BUSECK, LEEMHUIS, TOOHEY &
KROTO, INC.

By


Paul F. Burroughs

PFB/kld/474962

Enclosure

c: Thomas Buchleitner, Manager, Welch Foods, Inc.
Paul Zorzie, Plant Manager, Welch Foods, Inc.
Argie Cirillo, Esq., U.S. EPA, Region 2

U.S. ENVIRONMENTAL PROTECTION AGENCY
PROTECTION AGAINST POLLUTION
2000 OCT 29 PM 2:06
REGIONAL HEARING
CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of:

WELCH FOODS, INC.
100 North Portage Street
Westfield, NY 14787

DOCKET NO. CERCLA-02-2009-2030

Administrative Complaint under
Section 109 of the Comprehensive
Environmental Response, Compensation
and Liability Act, 42 U.S.C. §9609 and
Section 325 of the Emergency Planning
and Community Right to Know Act,
42 U.S.C. §11045

U.S. ENVIRONMENTAL PROTECTION AGENCY - REG. II
PROTECTION
2009 OCT 29 PM 2:05
HEARING
REGION 2030

ANSWER TO ADMINISTRATIVE COMPLAINT

AND NOW, comes the Respondent, Welch Foods, Inc., by and through its attorneys, Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., and files the following Answer to the Administrative Complaint and responds to said Complaint as follows:

I. STATUTORY AUTHORITY

1-4. The averments of paragraphs 1 through 4 set forth conclusions of law for which no further response is required.

II. FINDINGS OF VIOLATIONS

5. The averments of paragraph 5 set forth conclusions of law for which no further response is required.

6. Admitted in part and denied in part. It is admitted that the Respondent is the owner and operator of the Facility. The balance of the averments of paragraph 6 set forth conclusions of law for which no response is required.

7. Admitted.

8. Following reasonable investigation, the Respondent is unable to determine the truth or veracity of the alleged distance from the Facility to the area designated by the Complainant as the "business district in Westfield." The same is, therefore, denied and strict proof demanded. By way of response, the Respondent previously estimated the distance.

9. Admitted.

10. Admitted in part and denied in part. A portion of the averments of paragraph 10 set forth conclusions of law for which no response is required. As to the factual allegations, it is denied that the release began as averred. It is admitted that on November 10, 2008, at a time that can only be estimated at about 3:00 a.m. under the circumstances, ammonia was released from the facility. It is believed that a part on the ammonia handling system failed, through no knowledge at the time, fault or negligence on the part of the Respondent. It is admitted that the Facility received a telephone call at approximately 4:00 a.m. from another business (that also uses ammonia) reporting the smell of ammonia, which was the first notice of an ammonia release to the Respondent. At that time the Respondent immediately took action to discover the source of the release and to control the release through its contractor that was contacted

at approximately 5:15 a.m. to assist in the investigation and repair and was fully engaged in such control during the entire period of time until the time of the notification. During this time, the Respondent had engaged its regular ammonia contractor to assist in locating and controlling the source of the release. It is admitted that the cause of the release was a failed ammonia compressor mercoid switch. The replacement of the switch terminated the cause of the release. It is admitted that a pressure relief valve did not reseat following the release, and the pressure relief valve was isolated and removed. The relief valve was among those that had been installed as a result of the Respondent's procedure to replace such parts on a regular basis. At all times, the Respondent was engaged in the immediate need to terminate the release and to determine if a reportable quantity of ammonia had been released.

11. The averments of paragraph 11 set forth conclusions of law for which no further response is required.

12. The averments of paragraph 12 set forth conclusions of law for which no further response is required.

13. It is admitted that on November 10, 2008, Respondent, at approximately 2:05 p.m., notified the NRC that 1,400 pounds of ammonia were released from the Facility into the air. Immediately prior to that notice, the Respondent had calculated the loss and determined that a reportable quantity had been released. It is admitted only that 10 hours passed from the time of the first call to Respondent about a possible release and approximately 7 hours after the release ended, but only minutes after the

Respondent was reasonably able to calculate the amount of the release and determine that it exceeded the reportable quantity.

14. Admitted that on or about December 22, 2008, the EPA sent the request for information. As to the response, which was mailed to EPA on January 12, 2009, the response speaks for itself.

15. It is admitted that the LEPC is the Chautauqua County LEPC. The balance of the averments are denied in that the Respondent is uncertain as to the intended meaning of the phrase "would likely be affected." The same is, therefore, denied and strict proof demanded.

16. It is believed and, therefore, averred that the Chautauqua County LEPC was aware of the ammonia release and had been notified by the New York State Emergency Response Commission (NYSERC). The NYSERC stated, upon release notification, that they would contact the LEPC directly on behalf of Welch.

17. Admitted.

18. Admitted that the New York State Department of Environmental Conservation Spill Incidents Hotline was notified on November 10, 2008, at or about 1:25 p.m. It is admitted only that 9 1/2 hours passed from the time of the first call to Respondent about a possible release and approximately 6 1/2 hours after the release ended, but only minutes after the Respondent was reasonable able to calculate the amount of the release.

19. Admitted.

COUNT I

20. The responses to paragraphs 1 through 19 of the Administrative Complaint are incorporated herein by reference as though fully set forth.
21. Denied. The averment that the respondent failed to "immediately" notify the NRC sets forth a conclusion of law for which no response is required. To the extent a response is required, the Respondent believes it acted in a responsible and timely fashion to address the release and to determine that a reportable quantity had been released and then immediately make the notifications.

22. The averments of paragraph 22 set forth conclusions of law for which no further response is required.

23. The averments of paragraph 23 set forth conclusions of law for which no further response is required. However, for the reasons set forth, *supra*, it is denied that any such violation occurred.

COUNT II

24. The responses to paragraphs 1 through 23 of the Administrative Complaint are incorporated herein by reference as though fully set forth.
25. The averments of paragraph 25 set forth conclusions of law for which no further response is required.

26. The averments of paragraph 26 set forth conclusions of law for which no further response is required. However, for the reasons set forth, *supra*, it is denied that any such violation occurred.

COUNT III

27. The responses to paragraphs 1 through 26 of the Administrative Complaint are incorporated herein by reference as though fully set forth.

28. Admitted, but answering further that upon notification to NYSERC, the Facility's representative was advised that NYSERC would notify the Chautauqua County LEPC.

29. The averments of paragraph 29 set forth conclusions of law for which no further response is required.

30. The averments of paragraph 30 set forth conclusions of law for which no further response is required. To the extent a response is required, Respondent incorporates its response to paragraph 28 as its further response to this paragraph.

COUNT IV

31. The responses to paragraphs 1 through 30 of the Administrative Complaint are incorporated herein by reference as though fully set forth.

32. The averments of paragraph 32 set forth conclusions of law for which no further response is required.

33. The averments of paragraph 33 set forth conclusions of law for which no further response is required.

III. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

The Respondent is uncertain as to the information and methodology utilized by EPA other than as set forth in the relevant statutory and regulatory framework. Therefore, it is believed and, therefore, averred that EPA has failed to give due consideration to the factors required to be utilized by it in calculating any penalty, including that EPA did not have sufficient information in order to undertake such a review. In addition, the Complainant failed to consider the following actions of the Respondent and other factors, including the following:

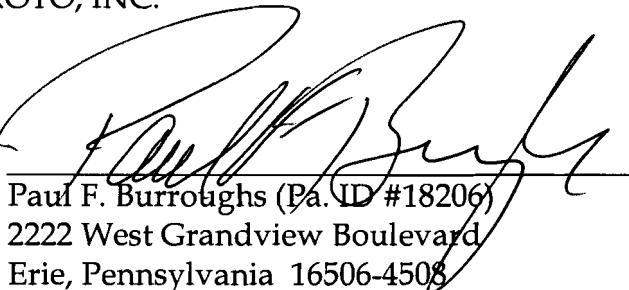
- a. the good faith of the Respondent in addressing the release;
- b. the Respondent's history of environmental compliance;
- c. that Respondent did not profit in any way by the release;
- d. that Respondent called in its experts within a short time of recognizing a release was in progress; and
- e. that the Respondent had replaced the valve within a short rotation period of preventative maintenance.

WHEREFORE, the Respondent demands a hearing on this matter contesting the factual allegations to the extent set forth above and the calculation of any penalty.

Respectfully submitted,

QUINN, BUSECK, LEEMHUIS, TOOHEY & KROTO, INC.

By


Paul F. Burroughs (Pa. ID #18206)
2222 West Grandview Boulevard
Erie, Pennsylvania 16506-4508
Telephone: 814-833-2222
Counsel for Respondent, Welch Foods, Inc.

#474946

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of:

WELCH FOODS, INC.
100 North Portage Street
Westfield, NY 14787

DOCKET NO. CERCLA-02-2009-2030

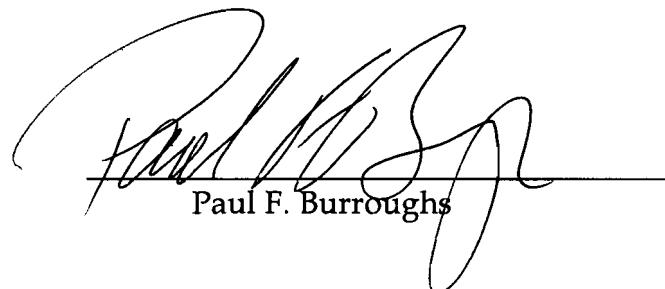
Administrative Complaint under
Section 109 of the Comprehensive
Environmental Response, Compensation
and Liability Act, 42 U.S.C. §9609 and
Section 325 of the Emergency Planning
and Community Right to Know Act,
42 U.S.C. §11045

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon the following by United Parcel Service's overnight mail on the 28th day of October, 2009:

Karen Maples
Regional Hearing Clerk
U.S. EPA, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

Argie Cirillo, Esq.
Office of Regional Counsel
U.S. EPA, Region 2
290 Broadway, 17th Floor
New York, NY 10007-1866



Paul F. Burroughs