

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

In the Matter of:

SuperClean Brands, Inc.
St. Paul, Minnesota

Respondent.

DOCKET NO. EPCRA 95-2009-0016

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RESPONDENT'S INITIAL PREHEARING EXCHANGE

Pursuant to the Presiding Officer's Order dated May 11, 2009, Respondent SuperClean Brands, Inc. ("SuperClean"), located at 51 Maryland Avenue, St. Paul, Minnesota, ("Facility") hereby respectfully submits its Initial Prehearing Exchange relating to an alleged violation of §313 of the Emergency Preparedness and Community Right-to-know Act of 1986 ("EPCRA").

Introductory Information

A. Witnesses to be called.

SuperClean does not intend to call any expert witnesses.

SuperClean intends to call the following as fact witnesses: Mr. Elliott Badzin, Mr. Kraig Reash, Mr. Gene Jensen, and Mr. Sean Lynch. A brief narrative summary of the witnesses' expected testimony follows:

i. Mr. Elliott Badzin; Chief Executive Officer - SuperClean Brands, Inc.

Mr. Badzin will testify to his background, philosophy regarding running a company and communications with staff of the U.S. Environmental Protection Agency. He will testify about his duties as Chief Executive Officer of SuperClean, and describe the Splash brand product segment of the business.

ii. Mr. Kraig Reasch; Chief Operating Officer - SuperClean Brands, Inc.

Mr. Kraig Reasch will testify to his background, philosophy regarding managing operations of a company and the challenges faced by the company during the 2004-2006 timeframe.

iii. Mr. Gene Jensen; Operations Manager - SuperClean Brands Inc.

Mr. Gene Jensen will testify to his educational background, the processing for managing the plant, his record keeping practices, his efforts at learning about being in full compliance with regulatory matters, and the challenges he faced upon taking the role as plant manager and the circumstances surrounding the audit conducted for calendar year 2005.

iv. Mr. Sean Lynch; Traffic Compliance Manager – SuperClean Brands, Inc.

Mr. Lynch will testify to his background and the system he implemented to prevent future oversights regarding filing deadlines.

B. Documents and Exhibits.

SuperClean expects to introduce into evidence Respondent's Exhibits identified on Respondent's List of Exhibits submitted as part of this Prehearing Exchange.

C. Desired location of the hearing.

SuperClean submits that an appropriate place of hearing is Ramsey County, Minnesota, the county where SuperClean conducts the business that the hearing concerns. SuperClean notes that SuperClean plans to rely on testimony from witnesses who reside in the Twin Cities area.

Translation services are not needed.

Additional Information

Pursuant to additional items by SuperClean listed in the Presiding Officer's Order, SuperClean hereby respectfully submits the following:

A. Narrative statement, and documents in support, explaining the factual and legal basis for Respondent's denial of the truth of the Allegation in Paragraph 26 of the Complaint.

Mr. Gene Jensen, who assumed role of the Facility Plant Manager in June of 2004, filed the 2003 Form R for methanol on October 1, 2004 (Respondent's Exhibit 1). It was Mr. Jensen's practice to complete the form and place it in the mail on the day he signed the form. In the following year, upon submission of the 2004 Form R for methanol, Mr. Jensen noticed that his file did not contain the certified mail receipt evidencing the filing for the year 2003. Therefore, he resubmitted the 2003 Form R for methanol (Respondent's Exhibit 2). In early 2009, after SuperClean received notice from Complainant that the 2003 Form R for methanol still did not populate the CDX database, Mr. Jensen again submitted the 2003 Form R for methanol (Respondent's Exhibit 3). Thus, the allegations contained in Paragraph 26 of the Complaint are simply not true.

B. Narrative statement, and documents in support, explaining the factual and legal basis for Respondent's First Defense, regarding "unique circumstances" resulting in the failure to report referenced on page 11 of the Answer, including copies of the affidavit and "confirmation of filing" and supporting evidence that Form R for 2003 was submitted.

SuperClean's failure to submit reports was due to unique circumstances that are not likely to recur. In June of 2004, management of the plant transitioned to a new staff, with Mr. Jensen taking over as plant manager. Shortly after Mr. Jensen had begun the learning process of plant management, sales started to spike and SuperClean experienced astronomical growth. By mid-2005 the plant had experienced a surge in orders that virtually doubled the normal volume. This put a tremendous strain on managing the supply chain as well as the production facilities; all solely done by Mr. Jensen. Mr. Jensen repeatedly requested an assistant. Unfortunately, one was not hired until late 2005. However, on the day the new team member was to report for work, she elected to take a different job, which further strained the workload for Mr. Jensen.

During the beginning of 2006, Mr. Jensen worked diligently to keep all aspects of supply chain and plant management on track, doing his best not to allow anything to slip through the cracks.

With respect to the filing of the 2003 Form R for methanol, it is important to note that Mr. Jensen assumed the position of Plant Manager only weeks before the filing was due. Even in light of the immense workload, he diligently and filed the Form, albeit in early October (Respondent's Exhibit 4). As noted above, he followed up the initial filing with two subsequent submissions. In light of the issues SuperClean experienced with the 2003 Form R for methanol not populating the CDX database, after the last submission by Mr. Jensen in March of 2009, he printed the TRI Facility Data Profile, confirming receipt of the document and its entry into the CDX database (Respondent's Exhibit 5).

Mr. Jensen's oversight in making timely filings was contributed to by the immense workload at the time due to staff shortages, increased workload and rapid growth of a historically small business at a time when he, himself, was learning a new position. Notwithstanding the demands of the business, Mr. Jensen conscientiously worked to meet all regulatory requirements.

C. *Narrative statement, and documents in support, explaining the factual and legal basis for Respondent's Second Defense raising the doctrines of accord and satisfaction, settlement and waiver, lack of jurisdiction, equitable estoppel and laches.*

SuperClean believed that it was in compliance with all required environmental filings. On October 18, 2006, John D. Myhre, EPCRA Compliance Inspector, audited the Facility for calendar year 2005, the same year for which Complainant alleges that SuperClean failed to timely file the Form R. He was accompanied by Steve Tomlyanovich of the Minnesota Environmental Protection Agency. As part of the audit, Mr. Myhre asked Mr. Tomlyanovich if SuperClean's reports had been filed; Mr. Tomlyanovich confirmed that they had. He did not ask about when the filing was made or otherwise indicate that timeliness was a critical factor. With

that information and other facts gathered during the audit, Mr. Myhre submitted his audit outcomes to SuperClean, requesting only that SuperClean provide invoices for purchases of methanol, ethylene glycol and isopropyl alcohol, as well as Material Safety Data Sheets for the same (Complainant's Exhibit 16, Section VII). No other audit outcomes were delivered, nor were outcomes of failure to timely file raised. In fact, there is no evidence in Complainant's submissions that SuperClean was advised of the alleged violations from the calendar year 2005 audit. As such, SuperClean was led to believe that it was in compliance with environmental filing and permitting requirements.

Moreover, the Minnesota Pollution Control Agency ("MPCA") conducted an Air Pollutant Emissions Inventory Report for calendar year 2005 (Respondent's Exhibit 6). The report specifically addressed SuperClean's usage of the same hazardous materials that are reported in the Form R reports. Once again, no indication was given to SuperClean that it somehow failed to comply with environmental compliance requirements. SuperClean had no reason to believe there was anything to correct, voluntarily report, or otherwise needed bring itself into compliance.

In addition, the State of Minnesota requires an annual filing of the Tier II Report ("Tier II Form"). The Tier II Form contains very similar information to the Form R. Such a required filing on substantially similar information met the public purpose of EPCRA. Because the public was thoroughly informed through a variety of filings required by EPCRA, the risk of harm to the community for delayed and missing filings was extremely low.

D. If Respondent takes the position that it is unable to pay the proposed penalty, a copy of any and all documents it intends to rely upon in support of such.

Not applicable.

E. If Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a detailed statement of such position, and documents in support.

SuperClean believes that the proposed penalty should be reduced or eliminated.

SuperClean will exercise its right to defend against the proposed penalty by way of direct evidence, rebuttal evidence and through cross-examination of the Complainant's witnesses.

SuperClean intends to rely upon the listed Exhibits and the Exhibits submitted by Complainant in support of its position that the proposed penalty should be reduced or eliminated.

Complainant seeks a combined penalty of \$57,870 for the alleged failure to file Forms R for methanol in 2003, 2004 and 2005, and ethylene glycol in 2004 and 2005. SuperClean maintains that Complainant has failed to meet its burden of presentation and persuasion as required by 40 CFR 22.24, including but not limited to, the following:

1. Gravity Calculation. SuperClean has consistently filed its Forms R for methanol (Complainant's Exhibits 9-11). The goal of EPCRA is to inform the public. Because of SuperClean's consistency in filing, albeit late, the potential for harm to the community through its lack of knowledge of the presence of hazardous chemicals is extremely low. In light of SuperClean's history of conducting itself in a compliant manner and having no prior violations (Complainant's Exhibit 14), Complainant could have utilized one of the other, lower quantity hazardous materials in calculating the proposed penalties.

SuperClean asserts that Matrix Level C should have been utilized based on the facts in this case.

2. Circumstances. SuperClean asserts that Complainant's election to assess a Category I violations for methanol relating to reporting year 2003 is excessive. As noted above, SuperClean made numerous attempts to file the 2003 Form R for methanol.

Given SuperClean has a consistent record of filing the Forms R for methanol, the application of Category I is harsh. SuperClean asserts that Category II should be used to calculate the proposed penalty for the 2003 filing of Form R for methanol.

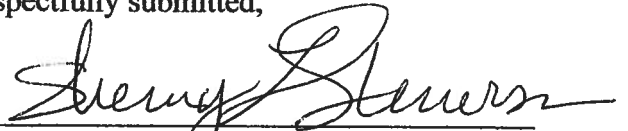
3. Attitude. Since receipt of the Notice of Intent to File Civil Administrative Complaint (“Notice of Intent”), SuperClean has worked cooperatively with the Environmental Protection Agency (“EPA”). SuperClean did an initial inquiry and responded with full candor to the Notice of Intent. SuperClean then immediately addressed the oversight in filing the Forms R for ethylene glycol and resubmitted the 2003 Form R for methanol (Respondent’s Exhibit 7). In light of SuperClean’s cooperative posture from the moment it received the Notice of Intent, SuperClean is entitled to a reduction in proposed penalty for its attitude throughout the process.

SuperClean maintains that any violation posed at most a minor potential for harm and should be considered, at most, a minor deviation from the regulatory requirements, particularly in light of the fact that SuperClean’s practice prior to the alleged violation had been to regularly file, thereby putting all authorities on notice of the hazardous materials and quantities thereof present at SuperClean’s Facility. SuperClean maintains that any penalty that may be imposed for any possible remaining violation should be further reduced based on the following: 1) SuperClean’s good faith efforts to comply; 2) SuperClean’s status as a small business; and 3) other factors as justice may require. In light of the foregoing, SuperClean asserts that the *minimum* base fine under §313 is appropriate.

Dated: July 16, 2009.

Respectfully submitted,

By: _____



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RESPONDENT'S LIST OF EXHIBITS

- RX1. Form R for Methanol – October 1, 2004
- RX2. Form R for Methanol – October 3, 2005
- RX3. Form R for Methanol – March 5, 2009
- RX4. Affidavit of Gene Jensen
- RX5. TRI Facility Data Profile
- RX6. Minnesota Pollution Control Agency Air Pollutant Emissions Inventory Report for Inventory Year 2005
- RX7. 2004 and 2005 Forms R for Ethylene Glycol

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