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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	
)	
Chilkoot Lumber Company, Inc. and)	DOCKET NO. TSCA 10-2010-0253
Mr. L. Edward Lapeyri)	
)	
Haines, Alaska)	
)	
Respondents.)	
)	

COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE

Respondents Chilkoot Lumber Company (“CLC”) and Mr. L. Edward Lapeyri (“Mr. Lapeyri”) submitted a Prehearing Exchange (“PHE”) that was filed by the Regional Hearing Clerk on April 11, 2011. Pursuant to the Prehearing Order issued on December 15, 2010, as amended by the Order Granting Motions to Adjust Prehearing Exchange Schedule issued on April 8, 2011, Complainant submits the following rebuttal.

I. Expected witnesses in rebuttal

Complainant does not intend to present any additional witnesses in response to Respondents’ PHE, other than those identified in Complainant’s PHE.

II. Additional exhibits and documents that Complainant intends to introduce into evidence

Complainant expects to offer the following additional documents and exhibits into evidence during or prior to the hearing. The exhibits are numbered Complainant's Exhibit ("CX") 21 to 25.

- CX-21 Prudential Jack White Vista Real Estate, Site History :: Chilkoot Lumber Dock Facility for Sale :: Haines, Alaska, <http://www.alaskadock.com/site-history.html> (last visited Apr. 19, 2011)
- CX-22 Notice of Intent to be covered under NPDES General Permit for Seafood Processors in Alaska, submitted by Chilkoot Fish and Caviar, Inc. to EPA Region 10, NPDES Permit Unit (Jul. 1, 2007)
- CX-23 Annual Report for NPDES General Permit for Seafood Processors in Alaska, submitted by Chilkoot Fish & Caviar, Inc. to EPA Region 10, NPDES Permit Unit for 2004, 2005, 2006 and 2007
- CX-24 Chilkoot Fish & Caviar, Inc., Business Corporation Biennial Filing (Jun. 14, 2010)
- CX-25 Bonnie Hedrick, *Fate of Lutak fish plant to be decided in jury trial*, The Chilkat Valley News (Mar. 7, 2005)

III. Rebuttal to Respondents' statements explaining why the proposed penalty should be reduced or eliminated

The December 15, 2010 Prehearing Order required Respondents to submit a statement explaining why the proposed penalty should be reduced or eliminated, and to furnish supporting documentation if Respondents intend to take the position that they are unable to pay the proposed penalty, or if such penalty will have an adverse effect on their ability to continue to do business.

As an initial matter, none of the exhibits provided in Respondents' PHE provide documentation that they are unable to pay the proposed penalty, or that the penalty will have an adverse effect on their ability to continue to do business. Instead, Section 4 of Respondents' PHE, titled "*The proposed fine is so large that it will result in insolvency for CLC and put an end to its current and continuing cleanup efforts on the site,*" sets forth a number of statements, unsupported by documentation, that concern ability to pay, ability to remain in business, and why the proposed penalty should be reduced. Section 4 of Respondents' PHE is comprised of five paragraphs designated (a) through (e). Complainant addresses statements made in Respondents' Section 4 paragraphs (a) through (e) in order below.

(a) Rebuttal to: "CLC is a company with a passive, non-productive asset but no cash flow"

Respondent CLC claims that it earns no revenue from the site, has no financial records to provide, and that it hasn't filed a tax return since 1993. Respondent CLC provided no evidence in its PHE to support these statements, and Complainant does not presently have access to any direct evidence to rebut such claims. However, a recent real estate listing for the site owned by Respondent CLC indicates that it is subleased to Chilkoot Fish and Caviar, Inc. ("CFC"). A copy of this real estate listing is provided as CX-21. In addition, CFC filed a Notice of Intent to obtain a permit to discharge seafood processing waste and submitted annual operating reports that show the quantity of seafood processed for the years 2004 through 2007. Copies of the Notice of Intent and operating reports are provided as CX-22 and CX-23, respectively. These documents indicate that, from at least 2004 to 2007, CFC processed seafood at the site and presumably generated revenue. Respondent Mr. Lapeyri is a shareholder and the president of

CFC. A copy of CFC's most recent biennial report filed with the state of Alaska is provided as CX-24.

Until approximately 1998, Respondent CLC leased the site to Rainbow Glacier Seafoods, Inc. ("Rainbow Glacier"). See Respondents' Exhibit #2, p. 10 (describing Rainbow Glacier as subleasing a portion of the property); and CX-4, p. 2. A newspaper article describes a 2005 legal dispute in Alaska Superior Court between Respondents and Rainbow Glacier concerning the payment of \$110,000 in rent and storage fees. The article further claims that the site was leased to company called Seapak in 1999 and 2000, and to Chilkoot Fish Co. in 2001. A copy of the newspaper article describing the litigation is provided as CX-25. Complainant was unable to obtain documents concerning this litigation from the Alaska Superior Court prior to the filing deadline for this rebuttal, and respectfully requests that it be allowed to supplement its rebuttal with these court documents, if necessary.

Complainant raises the multiple lease agreements with the seafood companies to question Respondent CLC's statements that it earns no revenue and has no financial records. The existence of the leases suggests that some form of consideration was provided for use of the site. As the owner of the property, Respondent CLC may have received or may be entitled to receive rental income. If Respondent CLC did not receive any revenue from the seafood operations on its property, it would appear that the company is wasting what, according to Respondents, is its only valuable asset. This raises questions about how Respondent CLC is operated and whether it is properly capitalized. However, because Respondent CLC provided no documentation to support its statements, Complainant can only guess as to how the property was leased but Respondent CLC earned no revenue and has no financial records.

(b) Rebuttal to: “Although the complaint alleges that stored transformers leaked fluids containing PCB’s, no PCB’s actually leaked”

Respondents’ PHE states that Complainant has documentation confirming that no fluid containing PCBs leaked from transformers stored at the site, that no environmental harm or spill occurred, and that therefore the proposed penalty should be adjusted downward. Respondents conflate a spill of PCBs to soil with PCBs leaking from electrical equipment. The PCB regulations define the term “leak” to mean “any instance in which a PCB Article, PCB Container, or PCB Equipment has any PCBs on any portion of its external surface.” 40 C.F.R. § 761.3. Pictures and documents submitted in Complainant’s PHE show and describe leaks of PCBs from transformers and capacitors stored at the site. See CX-1, p. 2 (describing a leaking General Electric PCB-Contaminated Transformer with the serial number 8174727, and soils samples taken beneath the transformer which tested at 14 parts per million (ppm) PCBs); CX-4, pp. 2-6 (describing two leaking PCB-Contaminated Transformers, three leaking PCB Transformers, and low levels of PCBs in sawdust (0.591 ppm) and soil (0.061 ppm); Respondents’ Exhibit #3, Table 5 p. 39 (describing a cracked and leaking PCB Capacitor containing 100% PCBs).

Respondents state that Complainant has documentation that no fluid leaked from transformers. Complainant assumes this statement refers to the PCB Remedial Action Closure Report provided in Complainant’s PHE as CX-12. This report does not document that no leaks occurred. Instead, it documents that PCB concentrations of samples collected from discrete areas around the site were below the 1ppm cleanup level established by the Alaska Department of Environmental Conservation (“ADEC”). CX-12, pp. 24-28 (describing, for example, that composite soil samples contained 84.1 parts per billion PCB, below the 1 ppm cleanup level).

(c) Rebuttal to: "The TSCA site has been completely cleaned up and the components of the offending transformers have been properly removed and disposed"

Respondents state that they hired a certified company to completely clean TSCA chemicals at a cost of \$290,000. This statement misses the scope of the alleged violations which do not address a failure to remediate the site, but the regulatory violations that created the conditions requiring remediation.

Respondents knew as early as November 1997 that electrical equipment at the site contained PCBs. See CX-4, pp. 1-2 and CX-12, Attachment G. Respondents were notified by ADEC of the need to comply with PCB regulations in a letter dated January 7, 1998, and by Complainant of violations of the PCB regulations in a Notice of Noncompliance dated November 2, 2000. See CX-4, Attachment B and CX-12, Attachment A. On August 21, 2007, Complainant inspected the site and identified the same violations that Respondents' were alerted to in the Notice of Noncompliance dated November 2, 2000. See CX-1. Respondents had knowledge of the violations alleged in the complaint, but did not take action to come into compliance or to remove PCB electrical equipment until nearly eight years later, and only after Complainant re-inspected the site and discovered the same violations.

(d) Rebuttal to: "The alleged violations that are viable are reporting violations, and did not result in any environmental harm"

Respondents state that the transformers were placed on the site by a third party. Complainant presently has no evidence as to when electrical equipment containing PCBs was first placed on the site. However, Respondents Exhibit #3, Attachment 3, contains an agreement dated November 7, 1986, under which Respondent Mr. Lapeyri purchased the site, and the

sawmill and wood waste power plant located on the site, from Alaska Resources Corporation. The purchase agreement provides that the purchaser inspected the premises, structures, improvements, and equipment on the site, and agreed to acquire the property as is and where is. Accordingly, any electrical equipment containing PCBs that was on the site as of the date of the purchase agreement was presumably purchased by Respondent Mr. Lapeyri. Furthermore, the power plant was operated for a period of time following the purchase of the site by Respondent Mr. Lapeyri. See CX-3; CX-4 pp. 5-6; and Respondents' PHE Exhibit #3, p. 19. Operation of a power plant requires the use of transformers to regulate the flow of electrical current from the plant to supply lines.

Respondents also state that at all relevant times EPA was aware of the transformers at the site. However, Complainant was not notified of the presence of electrical equipment containing PCBs until November 20, 1997. See CX-1, Attachment B. Complainant followed this notification by inspecting the site on July 16, 1999, and issuing Respondents a Notice of Noncompliance on November 2, 2000. Accordingly, shortly after EPA learned that PCB electrical equipment was present on the site, it took action to inspect the equipment and provided Respondents a description of the violations identified.

(e) Rebuttal to: "Respondent Lapeyri is not liable"

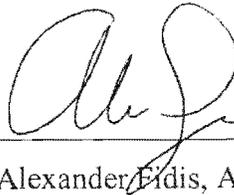
Complainant will address Respondent Lapeyri's claim that he is not liable in prehearing motions and/or at hearing. In response to the footnote stating that Mr. Lapeyri mailed his answer to the Regional Hearing Clerk on November 3, 2010, Complainant can confirm that it received a copy of Mr. Lapeyri's answer to the complaint on November 10, 2010.

IV. Reservation of rights

Complainant respectfully reserves the right to supplement its list of witnesses and/or its list of exhibits upon reasonable notice to the Court and Respondents, or by order of the Court.

Complainant further reserves the right to call any of the witnesses listed in the prehearing exchange and the rebuttal as witnesses in its case in chief and/or in Complainant's rebuttal.

Dated this 26th day of April, 2011.



Alexander Eidis, Assistant Regional Counsel
Office of Regional Counsel

CERTIFICATE OF SERVICE

In re Matter of Chilkoot Lumber Company, Inc. And Mr. L. Edward Lapeyri, No. TSCA-10-2010-0253, I hereby certify that a copy of the COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE, with copies of all exhibits, was sent to the following persons in the manner specified on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk
US Environmental Protection Agency, Region 10
Suite 900
1200 Sixth Avenue, ORC-158
Seattle, Washington 98101

A true and correct copy, by certified mail, return receipt requested:

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A true and correct copy by pouch mail:

Hon. Barbara A. Gunning
Administrative Law Judge
EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, DC 20460-2001

DATED this 26th day of April 2011.



Carol Kennedy
Regional Hearing Clerk
EPA Region 10