

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2007 SEP 28 PM 2:11
REGIONAL HEARING
CLERK

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In the Matter of:) Docket No. CERCLA-02-2007-2019
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Suiza Dairy Corporation) Administrative Complaint under
San Patricio Avenue) Section 109 of the Comprehensive
Río Piedras, San Juan, Puerto Rico) Environmental Response, Compensation,
) and Liability Act, 42 U.S.C. § 9609, and
) Section 325 of the Emergency Planning
Respondent.) and Community Right to Know Act,
) 42 U.S.C. § 11045.
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ADMINISTRATIVE COMPLAINT

I. STATUTORY AUTHORITY

1. This Complaint (“Complaint”) initiates an administrative action for the assessment of civil penalties pursuant to Section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9609 and Section 325 of the Emergency Planning and Community Right to Know Act (“EPCRA”), 42 U.S.C. § 11045. The Complainant in this action is the Director of the Emergency and Remedial Response Division of the United States Environmental Protection Agency (“EPA”), Region 2, who has been delegated the authority to institute this action.

2. Section 109 of CERCLA, 42 U.S.C. § 9609, provides for the assessment of penalties for violations of Section 103 of CERCLA. Section 325 of EPCRA, 42 U.S.C. § 11045, provides for the assessment of penalties for violations of Section 304 of EPCRA.

3. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), requires any person in charge of a vessel or offshore or an onshore facility, as soon as he or she has knowledge of a release (other than a federally permitted release) of a hazardous substance from such vessel or facility in a quantity equal to or greater than the reportable quantity, as designated pursuant to Section 102 of CERCLA, to immediately notify the National Response Center (“NRC”) of such release.

4. Section 304 of EPCRA, 42 U.S.C. § 11004, requires immediate notice by the owner or operator of a facility, to the local emergency planning committees (“LEPCs”) and the state emergency response commissions (“SERCs”) for any area and state likely to be affected by the release, if a release of an extremely hazardous substance, referred to in Section 302 of EPCRA, occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires a notification under Section 103(a) of CERCLA.

II. FINDINGS OF VIOLATIONS

5. Respondent is, and at all times referred to herein, was, a "person," within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), and Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

6. Respondent is the operator of a facility, located on San Patricio Avenue, Río Piedras, San Juan, Puerto Rico, 00921 (the "Facility"), which is a "facility," as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9) and Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

7. Respondent was in charge of the Facility at the time of the release described below.

8. The Facility is a dairy processing and manufacturing facility. It is located adjacent to both densely populated residential and commercial areas. In addition, the Facility is near the "Centro Médico" (Puerto Rico's Medical Center), an area which includes various hospitals and Puerto Rico's only industrial, burn, and oncology trauma centers. The Facility is also near the U.S. Veteran's Hospital, major highways, and other public receptors.

9. Ammonia (anhydrous) is used in the refrigeration system at the Facility.

10. On or about May 3, 2007 at approximately 21:56, or 9:56 p.m., a "release," as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22) and Section 329(8) of EPCRA, 42 U.S.C. § 11049(8), of ammonia (anhydrous) began at Respondent's Facility, and ammonia (anhydrous) was released from Respondent's Facility to the air. The release reportedly continued for approximately 45 minutes.

11. Ammonia is a "hazardous substance," as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and is an "extremely hazardous substance," as defined in Section 329(3) of EPCRA, 42 U.S.C. § 11049(3).

12. The reportable quantity for ammonia is 100 pounds, as specified in 40 C.F.R. Sections 302.4 and 355.

13. Respondent's notification to the NRC specified that 1,046 pounds of ammonia (anhydrous) were released from Respondent's Facility to the air during the May 3, 2007 release. During the inspection, Pedro Nieves, the Facility's Environmental Manager, told EPA representatives that the estimated amount of ammonia (anhydrous) released was 1,146 pounds. A release of ammonia (anhydrous) greater than 1,000 pounds is greater than ten times the reportable quantity for ammonia.

14. According to information obtained by EPA, as a result of this release, employees of the Facility and people in the nearby community were evacuated, and it is estimated that at least fifteen people were affected and required medical attention.

15. On May 4, 2007, EPA personnel conducted an inspection and emergency response site assessment at the Facility in response to the release.

COUNT 1

16. Findings contained in Paragraphs "1" through "15" are incorporated herein by reference.

17. At approximately 11:12 a.m. on May 4, 2007 and approximately thirteen hours after the release, Respondent notified the NRC of the May 3, 2007 release of ammonia from the Facility. This notification occurred after EPA personnel went to the Facility for the inspection and emergency response site assessment, and discussed the need for Respondent to make such notification with Respondent's representatives.

18. Respondent failed to immediately notify the NRC of the May 3, 2007 release of ammonia from the Facility.

19. The May 3, 2007 release of ammonia from the Facility was not a federally permitted release, as defined in Section 101(10) of CERCLA, 42 U.S.C. § 9601(10).

20. Respondent violated the notification requirements of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and is therefore subject to the assessment of penalties under Section 109 of CERCLA, 42 U.S.C. § 9609.

COUNT II

21. Findings contained in Paragraphs "1" through "20" are incorporated herein by reference.

22. In Puerto Rico, the SERC is the Puerto Rico Environmental Quality Board ("PREQB").

23. As of July 6, 2007, Respondent had not notified PREQB of the May 3, 2007 release of ammonia from the Facility pursuant to Section 304 of EPCRA.

24. Respondent failed to immediately notify PREQB of the May 3, 2007 release of ammonia from the Facility pursuant to Section 304 of EPCRA.

25. The LEPC for the area where the Facility is located, and which would likely be affected by the release of the May 3, 2007 release of ammonia from the Facility is the San Juan LEPC.

26. As of July 6, 2007, Respondent had not notified the San Juan LEPC of the May 3, 2007 release of ammonia from the Facility.

27. Respondent failed to immediately notify the LEPC for the area likely to be affected by the release of the May 3, 2007 release of ammonia from the Facility.

28. Respondent violated the notification requirements of Section 304 of EPCRA, 42 U.S.C. § 11004, and is therefore subject to the assessment of penalties under Section 325 of EPCRA, 42 U.S.C. § 11045.

III. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

Pursuant to Section 109 of CERCLA, 42 U.S.C. § 9609, Section 325 of EPCRA, 42 U.S.C. § 11045, as modified pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, as mandated by the Debt Collection Improvement Act of 1996 and as codified at 40 C.F.R. Part 19, EPA is authorized to assess civil penalties not to exceed \$32,500 per day for each violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304 of EPCRA, 42 U.S.C. § 11004, that occurred after March 15, 2004.

On the basis of the violations of CERCLA § 103 and EPCRA § 304 described above, Complainant has determined that Respondent is subject to penalties under CERCLA Section 109, 42 U.S.C. § 9609 and EPCRA Section 325, 42 U.S.C. § 11045. Accordingly, Complainant proposes a civil penalty of \$65,000 for the CERCLA and EPCRA violations described above, pursuant to the authority of Section 109 of CERCLA and Section 325 of EPCRA, as set forth below.

Count I	Failure of Respondent to immediately notify the NRC of the May 3, 2007 release of ammonia:	\$ 32,500.
Count II	Failure of Respondent to immediately notify the SERC for the state likely to be affected by the May 3, 2007 release of ammonia and Failure of Respondent to immediately notify the LEPC for the area likely to be affected by the May 3, 2007 release of ammonia:	\$ 32,500.
TOTAL PENALTY PROPOSED		\$ 65,000.

In calculating the CERCLA and EPCRA penalties, Complainant considered the nature, circumstances, extent and gravity of the violations, and with respect to the Respondent, ability to pay, prior history of violations, degree of culpability, economic benefit or savings resulting from the violations, and such other matters as justice may require.

The proposed civil penalties in this matter have been determined in accordance with 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" (September 30, 1999) as modified pursuant to the June 5, 2006 memorandum from Stephanie Brown, Acting Director, Toxics and Pesticides Enforcement Division, Office of Civil Enforcement. Attached to this Complaint as Attachment 1 are Penalty Calculation Worksheets which show how the proposed penalty for each count was calculated.

IV. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation are entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS" (hereinafter, the "Consolidated Rules"), and are codified at 40 C.F.R. Part 22. A copy of the Consolidated Rules accompanies this Complaint.

A. Notice of Opportunity to Request a Hearing and Answering The Complaint

To request a hearing, Respondent must file an Answer to the Complaint, pursuant to 40 C.F.R. §§ 22.15(a) - (c). Pursuant to 40 C.F.R. § 22.15(a), such Answer must be filed within 30 days after service of the Complaint.

An Answer is also to be filed, pursuant to 40 C.F.R. § 22.15(a), if Respondent contests any material fact upon which the Complaint is based, contends that the proposed penalty is inappropriate, or contends that Respondent is entitled to judgment as a matter of law. If filing an Answer, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written Answer to the Complaint. The address of the Regional Hearing Clerk of EPA, Region 2, is:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Respondent shall also serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a). Complainant's copy of Respondent's Answer, as well as a copy of all other documents that Respondent files in this action, shall be sent to:

Andrew L. Praschak
Office of Regional Counsel
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, NY 10007
Phone: (212) 637-3172

Pursuant to 40 C.F.R. § 22.15(b), Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which Respondent has any knowledge. Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied, pursuant to 40 C.F.R. § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether Respondent requests a hearing.

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation, pursuant to 40 C.F.R. § 22.15(d).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

B. Failure To Answer

If Respondent fails to file a timely answer to the Complaint, EPA may file a Motion for Default pursuant to 40 C.F.R. §§ 22.17(a) and (b), which may result in the issuance of a default order assessing the proposed penalty pursuant to 40 C.F.R. § 22.17(c). If a default order is issued, any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final. If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court.

V. INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions and objectives of CERCLA and EPCRA and the applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged; (2) any information relevant to Complainant's calculation of the proposed penalty; (3) the effect the proposed penalty would have on Respondent's ability to continue in business; and/or (4) any other special facts or circumstances Respondent wishes to raise. Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant or to dismiss any or all of the charges, if

Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to the EPA Assistant Regional Counsel identified in Section IV.A., above.

Respondent's request for a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing pursuant to 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction will be made simply because an informal settlement conference is held.

In the event settlement is reached, its terms shall be recorded in a written Consent Agreement signed by the parties and incorporated into a Final Order, pursuant to 40 C.F.R. §§ 22.18(b)(2) and (3).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in such Consent Agreement terminates this administrative litigation and the civil proceedings arising out of the allegations made in this Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VI. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the address provided in Section IV.A., above), a copy of the check or other instrument of payment, as provided in 40 C.F.R. § 22.18(a). A copy of the check or other instrument of payment should be provided to the EPA Assistant Regional Counsel identified in Section IV.A., above. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America," in the full amount of the penalty assessed in this Complaint to the following addressee:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

The check must be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this Complaint. Pursuant to 40 C.F.R. § 22.18(a)(3), upon EPA's receipt of such payment, a Final Order shall be issued. Furthermore, as provided in 40 C.F.R. § 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's rights to contest the allegations made in the Complaint and to appeal the Final Order. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable regulations and requirements, and to maintain such compliance.

VII. RESERVATION OF RIGHTS

EPA reserves all rights against Respondent, including but not limited to, the right to expend and recover funds under CERCLA; to bring enforcement actions seeking injunctive relief under Section 106 of CERCLA and/or other statutes; to address releases including those identified in this Complaint; and to require further action as necessary to respond to the release addressed in this notice. EPA also reserves all of its rights to obtain access to the Facility and require Respondent's submission of information to EPA.

Dated: Sept 19, 2007



George Pavlou, Director
Emergency and Remedial Response Division
U.S. Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

TO: Suiza Dairy Corporation
P.O. Box 363207
San Juan, Puerto Rico 00936-3207
Attn: Carmen Laura Marrero, President

Attachment

cc: Patricio Martinez Lorenzo, Esq.
Karen Maples, Region 2 Hearing Clerk

ATTACHMENT 1

PENALTY CALCULATION WORKSHEET

Respondent: Suiza Dairy Group, Rio Piedras, San Juan, Puerto Rico

Count#: 1

Chemical Name/RQ/TPQ: Anhydrous Ammonia RQ - 100 pounds

NATURE: Type of Violation: CERCLA 103**EXTENT:** Time passed from deadline to actual date of compliance (in hours or days): No notification to NRC within 2 hours after the person in charge had knowledge that an RQ was released.Matrix Level: 1**GRAVITY:** Divide amount of chemical involved in the violation (lbs.): 1,146 lbs. by 100 (RQ/TPQ) = slightly in excess of 10 times the threshold. (11.46 times the threshold)Matrix Level: A**CIRCUMSTANCES:** Specify choice of penalty amount from range listed for the cell of the matrix based on circumstance factors:

Top of Matrix - over ten times the threshold amount of an EHS.

1.	Base Penalty		\$ <u>32,500.</u>
2.	If per day, continuing reportable release, multiply line 1 by _____ days, beginning with the second day of violation.		\$ _____
3.	Other per day violations, multiply line 1 by .01 = _____. Multiply the per day penalty _____ by _____ days, beginning with the second day of violation.		\$ _____
4.	Add lines 1-3		\$ <u>32,500.</u>
5.	Prior History: (Treble, 25%, 50%: + _____%)		\$ _____
6.	Culpability (% increase or decrease +/- _____%)	\$ _____	
7.	Other factors as justice may require (- _____%)	(\$ _____)	
8.	Size of business reduction (- _____%)	(\$ _____)	
9.	Attitude (- _____%)	(\$ _____)	
10.	Supplemental Environmental Project (- _____%)	(\$ _____)	
11.	Voluntary Disclosure (- _____%)	(\$ _____)	
12.	Subtract lines (5-11) from line 4		\$ <u>32,500</u>

Repeat procedure for each violation.

Prepared by: Angel Rodriquez, Ellen Banner

Date: 7/18/07

PENALTY CALCULATION WORKSHEET

Respondent: Suiza Dairy Group, Rio Piedras, San Juan, Puerto Rico
 Count#: 2
 Chemical Name/RQ/TPQ: Anhydrous Ammonia RQ - 100 pounds

NATURE: Type of Violation: EPCRA 304

EXTENT: Time passed from deadline to actual date of compliance (in hours or days): No notification to SERC or LEPC within 2 hours after the person in charge had knowledge that an RQ was released.
 Matrix Level: 1

GRAVITY: Divide amount of chemical involved in the violation (lbs.): 1,146 lbs. by 100 (RQ/TPQ) = slightly in excess of 10 times the threshold. (11.46 times the threshold)
 Matrix Level: A

CIRCUMSTANCES: Specify choice of penalty amount from range listed for the cell of the matrix based on circumstance factors:
 Top of Matrix - over ten times the threshold amount of an EHS.

1.	Base Penalty		\$ <u>32,500.</u>
2.	If per day, continuing reportable release, multiply line 1 by _____ days, beginning with the second day of violation.		\$ _____
3.	Other per day violations, multiply line 1 by .01 = _____. Multiply the per day penalty _____ by _____ days, beginning with the second day of violation.		\$ _____
4.	Add lines 1-3		\$ <u>32,500.</u>
5.	Prior History: (Treble, 25%, 50%: + _____%)		\$ _____
6.	Culpability (% increase or decrease +/- _____%)	\$ _____	
7.	Other factors as justice may require (- _____%)	(\$ _____)	
8.	Size of business reduction (- _____%)	(\$ _____)	
9.	Attitude (- _____%)	(\$ _____)	
10.	Supplemental Environmental Project (- _____%)	(\$ _____)	
11.	Voluntary Disclosure (- _____%)	(\$ _____)	
12.	Subtract lines (5-11) from line 4		\$ <u>32,500</u>

Repeat procedure for each violation.

Prepared by: Angel Rodriquez, Ellen Banner
 Date: 7/18/07

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

-----X
IN THE MATTER OF:)
Suiza Dairy Corporation)
San Patricio Avenue)
Río Piedras, San Juan, Puerto Rico)
Respondent.)
-----X

Docket No. EPCRA-02-2007-2019
Administrative Complaint Under
Section 325 of the Emergency Planning
and Community Right to Know Act,
42 U.S.C. § 11045

ADMINISTRATIVE COMPLAINT
CERTIFICATION OF SERVICE

I certify that on the date noted below, I caused to be sent, by certified mail, return receipt requested, a copy of the foregoing "ADMINISTRATIVE COMPLAINT" and a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, to the following person at the address listed below:

Carmen Laura Marrero
President
Suiza Dairy Corporation
P.O. Box 363207
San Juan, Puerto Rico 00936-3207

Date: September 26, 2007
Name: Aileen Sanchez
Title: Program Support ASST
Address: 1492 Ponce de Leon