



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

(C-14J)

December 3, 2008

Judge William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

Re: Pork King Packing, Inc., Marengo, Illinois.
Docket No. EPCRA-05-2008-0024.

Dear Judge Moran:

Attached, please find COMPLAINANT PREHEARING EXCHANGE for this civil administrative action which I filed today with the Regional Hearing Clerk, pursuant to your Prehearing Order, dated October 1, 2008.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Trevino", written over a circular scribble.

Jeffery M. Trevino
Associate Regional Counsel

Attachment

cc: John J. Conway
Sullivan Hincks & Conway
Suite 100
120 West 22nd Street
Oak Brook, IL 60523

Tywanna Greene

Acting Regional Hearing Clerk

Region 5

U.S. Environmental Protection Agency

13th Floor

77 West Jackson Boulevard (R-13J)

Chicago, IL 60604-3590

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

RECEIVED
DEC - 3 2008

In the Matter of:)
Pork King Packing, Inc.,) Docket No. EPCRA-05-2008-0024.
Respondent)

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

COMPLAINANT PREHEARING EXCHANGE

On October 1, 2008, the Court issued to the parties its Prehearing Order requiring the parties to file their respective Prehearing Exchanges for this civil administrative action by Thursday, December 4, 2008. Therefore, Complainant hereby files its Prehearing Exchange.

I. WITNESS(ES) TO BE CALLED AT HEARING

A. William Sandstrom
Senior Environmental Employee Program
Chemical Emergency and Preparedness and Prevention Section
Superfund Division
Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard (SC-6J)
Chicago, IL 60604-3590
(312) 886-6028

Mr. Sandstrom will testify to his educational background, employment experience, his communications with Respondent, his inspection of Respondent, including but not limited to, the following factual allegations.

1. Respondent was a corporation incorporated in the State of Illinois.
2. Respondent was an owner or operator of a building, equipment, and structures, which were located on a single site at 8808 South Illinois Route 23, Marengo, Illinois, ("the Facility").
3. Respondent owned or operated the Facility during calendar years 2003, 2004, and 2005.

4. Respondent was an employer at the Facility during calendar years 2003, 2004, 2005, 2006, and 2007.
5. As of December 31, 2003, Respondent had at its facility at least 500 lbs. of anhydrous ammonia and sulfuric acid.
6. During at least one period of time in calendar year 2003, Respondent had at its facility at least 500 lbs. of anhydrous ammonia and sulfuric acid.
7. During at least one period of time in calendar year 2004, Respondent had at its facility at least 500 lbs. of anhydrous ammonia and sulfuric acid.
8. On March 29, 2005, Respondent released into the environment an unknown amount of chlorine.
9. During at least one period of time in calendar year 2007, Respondent had at its facility at least 500 lbs. of anhydrous ammonia and sulfuric acid.
10. The Illinois State Emergency Response Commission was the State Emergency Response Commission ("SERC") for Illinois pursuant to Section 301(a) of EPCRA, 42 U.S.C. § 11001(a).
11. The McHenry County Local Emergency Planning Committee was the Local Emergency Planning Committee ("LEPC") for McHenry County, Illinois, pursuant to Section 301(c) of EPCRA, 42 U.S.C. § 11001(c).
12. The Marengo Fire Protection District was the fire department with jurisdiction over the Facility.
13. On June 22, 2005, Respondent submitted to the SERC a Material Safety Data Sheet ("MSDS") for, or a list demonstrating its use of, anhydrous ammonia. (Count 1).
14. On June 22, 2005, Respondent submitted to the LEPC an MSDS for, or a list demonstrating its use of, anhydrous ammonia. (Count 2).
15. On June 22, 2005, Respondent submitted to the Marengo Fire Protection District an MSDS for, or a list demonstrating its use of, anhydrous ammonia. (Count 3).
16. On June 22, 2005, Respondent submitted to the SERC an MSDS for, or a list demonstrating its use of, sulfuric acid. (Count 4).

17. On June 22, 2005, Respondent submitted to the LEPC an MSDS for, or a list demonstrating its use of, sulfuric acid. (Count 5).
18. On June 22, 2005, Respondent submitted to the Marengo Fire Protection District an MSDS for, or a list demonstrating its use of, sulfuric acid. (Count 6).
19. On June 22, 2005, Respondent submitted to the SERC, the MSDS and the Marengo Fire Protection District a completed Emergency and Hazardous Chemical Inventory Form for its use of anhydrous ammonia and sulfuric acid for calendar year 2003. (Count 7).
20. On June 22, 2005, Respondent submitted to the SERC, the MSDS and the Marengo Fire Protection District a completed Emergency and Hazardous Chemical Inventory Form for its use of anhydrous ammonia and sulfuric acid for calendar year 2004. (Count 8).
21. On April 11, 2008, Respondent submitted to the SERC a completed Emergency and Hazardous Chemical Inventory Form for its use of anhydrous ammonia and sulfuric acid for calendar year 2007. (Count 9).
22. As of July 16, 2008, Respondent had failed to submit to the LEPC a completed Emergency and Hazardous Chemical Inventory Form for its use of anhydrous ammonia and sulfuric acid for calendar year 2007. (Count 10).
23. On April 11, 2008, Respondent submitted to the Marengo Fire Protection District a completed Emergency and Hazardous Chemical Inventory Form for its use of anhydrous ammonia and sulfuric acid for calendar year 2007. (Count 11).

B. Christopher Weis, Expert Witness
National Enforcement Investigations Center
U.S. Environmental Protection Agency
Box 25227
Building 25
Denver Federal Center
Denver CO 80225
Tel. No. (303) 462-9009
Fac. No. (303) 462-9019

Mr. Weiss will testify to his educational background, employment experience, and provide an expert opinion on anhydrous ammonia, sulfuric acid, their releases into the environment, their potential and actual harm to human health and the environment, and EPCRA.

C. Ginger Jager
Environmental Scientist
Chemical Emergency and Preparedness and Prevention Section
Superfund Division
Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard (SC-6J)
Chicago, IL 60604-3590
(312) 886-0767

Ms. Jager will testify to her educational background, employment experience, communications with Respondent, review of Mr. Sandstrom's Inspection Report for the Facility, and the appropriateness of the proposed civil penalty, including but not limited to, the following factual allegations.

1. The proposed civil penalty of \$152,841.00 is appropriate pursuant to section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), and the U.S. EPA Enforcement Response Policy for Section 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response and Compensation Liability Act, dated September 30, 1999.

D. Mark Ewen, Expert Witness
Industrial Economics, Incorporated
2006 Massachusetts Avenue
Cambridge, Massachusetts, 02140
(617) 354-0074

Mr. Ewen will testify to his educational background, employment experience, and provide an expert opinion on Respondent's ability to pay the proposed civil penalty.

Complainant respectfully reserves the right to amend its Witness(es) to be Called upon timely notice to the Court and Respondent.

II. DOCUMENTS AND EXHIBITS

- A. U.S. Environmental Protection Agency, Emergency Response Notification System, ERNS # 177699 IRIS/NRC # 754167, dated 15:33, 29 March 2005. Bates Stamp Nos. 0-5. (Complainant Exhibit No. 1).
- B. U.S. Environmental Protection Agency, Emergency Response Notification System, ERNS # 177753 IRIS/NRC # 754230, dated 08:49, 30 March 2005. Bates Stamp Nos. 6-11. (Complainant Exhibit No. 2).

- C. OCEPP/REGION 5, EPCRA INSPECTION REPORT, for Pork King Packing, Inc., 8808 South Illinois Route 23, Marengo, Illinois, 60152, dated June 22, 2005, (with Attachments). Bates Stamp Nos. 12-141. (Complainant Exhibit No. 3).
- D. Christopher P. Weiss, Ph.D., DABT, Personal Qualification Statement, dated August 2006, and Bibliography. Bates Stamp Nos. 142-155. (Complainant Exhibit 4).
- E. Dun & Bradstreet Report for Pork King Packing, Inc., printed November 19, 2008. Bates Stamp Nos. 156-189. (Complainant Exhibit 5).
- F. 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 and Compensation Liability Act, dated September 30, 1999, Bates Stamp Nos. 190-219. (Complainant Exhibit No. 6).
- G. Complainant Penalty Calculation Worksheets and Narratives for Respondent. Bates Stamp Nos. 220-259. (Complainant Exhibit No. 7).
- H. Mark Ewen, B.A., M.P.P., Resume, November 2005. Bates Stamp Nos. 260-271. (Complainant Exhibit 8).

Complainant respectfully reserves the right to amend its list of Documents and Exhibits upon timely notice to the Court and Respondent.

III. DESIRED OR REQUIRED HEARING LOCATION

Complainant prefers the hearing be held in Chicago, Illinois, as provided by sections 22.21(d) and 22.19(d) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("the Consolidated Rules"), 40 C.F.R. §§ 22.21(d) and 22.19(d).

However, Complainant does not object to conducting the hearing at a suitable location in the county where the Respondent resides (McHenry County, Illinois) or conducts the business which the hearing concerns (McHenry County, Illinois).

Complainant requests approximately four (4) hours to complete its direct-examination of its witnesses for its case-in-chief.

IV. THE PROPOSED CIVIL PENALTY

Complainant proposes a civil penalty of \$152,841.007.00 for Respondent's violations of sections 311 and 312 of EPCRA, 42 U.S.C. §§ 11021 and 11022, pursuant to section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1).

A EPCRA

In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require. 42 U.S.C. § 11045(c)(1).

B. 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 and Compensation Liability Act, dated September 30, 1999, ("the Penalty Policy").

The Penalty Policy assists EPA in calculating proposed civil penalties for all civil administrative actions concerning EPCRA §§ 304, 311 and 312. The purpose of the Penalty Policy is to ensure enforcement actions for violations of EPCRA §§ 304, 311, and 312 are legally justifiable, uniform and consistent; that the enforcement response is appropriate for the violations committed; and that persons will be deterred from committing such violations in the future. The Penalty Policy reflects the factors enumerated in section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1).

C. Complainant's Proposed Civil Penalty Calculation.

Please see Complainant Penalty Calculation Worksheets and Narratives for Respondent. (Complainant Exhibit No. 7, Bates Stamp Nos. 220-259).

V. THE PAPERWORK REDUCTION ACT

The Paperwork Reduction Act does not apply to this action since the requirements of the Act are imposed by the U.S. Congress, not U.S. EPA rule making or information gathering authority.

Congress enacted the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501-3520, to reduce the regulatory reporting burden on the public. In general, if an agency requires the public to collect and report information, the PRA requires the agency to: 1) first obtain review of the requirement by the Office of Management of Budget, evidenced by an eight digit control number, and, 2) display the control number upon any document associated with the request. The Public

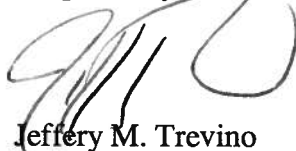
Protection provision of the PRA, 44 U.S.C. § 3512, insulates the public from penalties resulting from a failure to respond to a federal collection of information which does not bear a valid OMB control number.

The Public Protection provision of the PRA does not apply to the facts of this action. The PRA, at 44 U.S.C. § 3502(3), defines "collection of information" to mean "... the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions *by or for an agency*" 44 U.S.C. § 3502(3)(emphasis supplied).

Complainant alleges Respondent violated sections 311 and 312 of EPCRA, 42 U.S.C. §§ 11021 and 11022. These sections are requirements imposed by the U.S. Congress in the enactment of EPCRA, not requirements imposed by U.S. EPA through its rule making or information gathering authority. Therefore, the Public Protection provision of the PRA, 42 U.S.C. § 3512, does not apply to collections of information under sections 311 and 312 of EPCRA, 42 U.S.C. §§ 11021 and 11022., and cannot bar the collection of penalties for this action.

U.S. EPA has promulgated regulations which redundantly require the same submissions mandated in sections 311 and 312 of EPCRA, 42 U.S.C. §§ 11021 and 11022. However, that redundancy does not change the legal analysis. Furthermore, those regulations bear the current control number of 2050-0072. 40 C.F.R. Part 9.

Respectfully submitted,



Jeffery M. Trevino
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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Pork King Packing, Inc.,)
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Respondent)

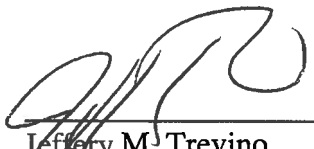
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U.S. ENVIRONMENTAL
PROTECTION AGENCY
Docket No. EPCRA-05-2008-0024.

CERTIFICATE OF SERVICE

I hereby certify that today I filed personally with Tywana Greene, Acting Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, 13th Floor, 77 West Jackson Boulevard (R-13J), Chicago, Illinois, 60604-3590, the original document entitled COMPLAINANT PREHEARING EXCHANGE for this civil administrative action and that I issued to the Court and Respondent by first class mail a copy of the original document:

Judge William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

John J. Conway
Sullivan Hincks & Conway
Suite 100
120 West 22nd Street
Oak Brook, IL 60523



Jeffery M. Trevino
Associate Regional Counsel

3 December 08
Dated