

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:

**Hutson Enterprises, Inc.
d/b/a Sparkle Pool Service &
Supply of Indiana,
Indianapolis, Indiana**

Respondent.

(**Docket No. EPCRA-05-2007-0027**
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(**Proceeding to Assess a Civil Penalty**
(**Under § 325(c) of the Emergency**
(**Planning and Community Right-to-**
(**Know Act of 1986.**
(
(

**ANSWER TO COMPLAINT
AND REQUEST FOR HEARING**

1. Admit
2. Without Knowledge as to this factual allegation
3. Admit
4. Admit
5. Admit
6. Admit
7. Without knowledge
8. Admit
9. Admit
10. Admit that Respondent's facility consists of a building, equipment, structures and other stationary items which are owned or operated by the same person; without knowledge as to the reference to "single site" or on "contiguous or adjacent sites" as they are not defined.
11. Without knowledge

12. Without knowledge
13. Without knowledge
14. Admit
15. Admit
16. Admit
17. Admit
18. Admit
19. Denied
20. Admit
21. Admit
22. Admit
23. Admit
24. Without knowledge
25. Without knowledge
26. Admit
27. Admit
28. Admit the form was submitted, deny as to the date submitted
29. Without knowledge
30. Without knowledge
31. Admit the form was submitted, deny as to the date submitted
32. Without knowledge
33. Admit
34. Admit the form was submitted, deny as to the date submitted

35. Without knowledge
36. Without knowledge
37. Admit the form was submitted, deny as to the date submitted
38. Without knowledge
39. Without knowledge
40. Without knowledge
41. Without knowledge
42. Admit that Respondent received a letter dated March 27, 2006 and that Respondent then submitted financial documentation regarding its inability to pay. Without knowledge as to the basis for Complainant's penalty amount.

REQUEST FOR HEARING and DEFENSES

The circumstances which Respondent alleges constitute grounds of defense are:

1. **The penalty is excessive based on ability to pay.**
 - a) EPA's initial recommended penalty of \$84,150 and adjusted penalty of \$33,000 are excessive and not appropriate under the circumstances in this case. A civil penalty of the magnitude proposed by EPA is beyond Respondent Sparkle Pool Company's ability to pay and would put the company in financial crisis or completely out of business. Such harsh penalty enforcement is contrary to EPA's own General Enforcement Policy GM-21 ("GM-21") which states that it will not request penalties that are clearly beyond the means of the violator.
2. **The penalty is extreme under EPA's deterrence policy:**
 - b) EPA's proposed penalty is extreme and exceeds the stated EPA goal: (GM 21 at page 3) "If a penalty is to achieve deterrence, both the violator and the general

public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion.” EPA sent its first Notice by letter dated November 2005, and Respondent Sparkle immediately complied with the filing of the past due Tier II reports. For almost two (2) years since EPA’s First Notice and immediate compliance, Sparkle has incurred substantial expense and time away from business to respond to EPA regarding this matter. The Tier II form Sparkle failed to timely file would have taken less than one hour to prepare and submit and there is no fee involved with the filing. Sparkle is clearly “worse off” than if they had timely filed the Tier II in the first place, and they have not even been assessed a penalty yet.

3. **The Penalty is Inconsistent with other EPA Penalty Assessments:**

“The second goal of penalty assessment is the fair and equitable treatment of the regulated community. Fair and equitable treatment requires that the Agency’s penalties must display both consistency and flexibility.” GM-21 at page 5. The “regulated community” covers the entire United States.

- a) The amount of the penalty is excessive, particularly where other EPA cases have assessed lesser penalties to companies who failed to file the same Tier II DESPITE forewarning from the EPA by a compliance package, a reminder notice and/or a telephone call regarding their Tier II obligations. In this case, Respondent Sparkle Pool Service received NO FOREWARNING. Respondent received an EPA compliance package and immediately complied, and was nonetheless fined \$33,000 (as an example, in a similar case the Respondent ignored the EPA’s package, notice and phone call, and were only assessed a penalty of \$5,845 for

failure to file a Tier II. *In the Matter of Newman Construction Inc.*, EPCRA-08-2004-0005).

- b) In other cases, EPA collapsed the counts and did not penalize a company multiple counts for failure to file the same Tier II report to separate agencies. For example, an Administrative Complaint was filed in *In the Matter of Newman Construction Inc.*, EPCRA-08-2004-0005, asserting a penalty of \$5,845 for failure to timely submit Tier II reports to both the SERC and LEPC. Failure to file with multiple agencies was not listed as separate counts, but rather one count and one penalty for general failure to file. In this case, EPA did not collapse the counts and Respondent was penalized three times for failure to file one report (with 3 agencies). If EPA did collapse the counts in this case, the penalty would be significantly reduced.

4. **Allowable Adjustments Were Not Applied**

“The third goal of penalty assessment is swift resolution of environmental problems.” GM-21 at pages 5, 23. Reporting failures are significant because the failure to report under EPCRA deprives the local communities, states and the federal government of information needed to inform citizens and the local community about toxic chemicals used by the regulated community.

- a) Sparkle reported the same Tier II information through other agency reports, including the US EPA Risk Management Plan (RMP). They also prepared an OSHA Process Safety Management Plan (PSM) and a Hazardous Materials Security Plan for the site. Significantly, Sparkle has never caused an “environmental problem” and has a perfect safety record with no releases and no

contamination of the environment. Although Sparkle did fail to file the Tier II report, the local communities, state and federal government (including EPA) did receive reports from Sparkle indicating the type and quantity of chemicals stored on site - the same information that would have been supplied in the Tier II. Sparkle's timely reporting to other related agencies diminishes any potential harm which could have been caused by their failure to file the Tier II since all agencies were on notice of the type and amount of chemical on site. In fact, the fire department at issue inspected Respondent's premises in person prior to EPA's Penalty, and were clearly aware of the chemicals and quantity on site.

- b) Sparkle has also fully cooperated with EPA since it received the first Notice in November of 2005. Then Sparkle produced all financial information requested by EPA for analysis, and brought in professional legal and accounting assistance to help explain its dilemma to EPA and to avoid financial crisis or bankruptcy. The assessed penalty in this action does not consider any of these allowable adjustments in EPA's enforcement policy, and under the circumstances, the resulting penalty is excessive and inappropriate.

ACCORDINGLY, Respondent respectfully requests a Hearing before an Administrative Law Judge in this matter to contest the excessive penalty amount, and to establish that in this case justice requires a reduction of the proposed penalty.

Dated: August 15, 2007

By: Timothy D. Hutson
Timothy D. Hutson, President
Hutson Enterprises, Inc. D/b/a/ Sparkle Pool
Service and Supply of Indiana

IN THE MATTER OF: Hutson Ents., d/b/a Sparkle Pool Service & Supply of Indiana
Indianapolis, Indiana

DOCKET NO: EPCRA-05-2007-0027

Certificate of Service

I, Timothy Hutson, certify that I filed the original and one copy of the Answer to Administrative Complaint and Request for Hearing, this 15th day of August, 2007, with the Regional Hearing Clerk, (E13J) U.S. EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604, and that I provided a copy to Robert S. Guenther, Office of Regional Counsel (C-14J), U.S. EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604-3511, both via Federal Express Overnight Delivery to the above address.

Date: August 15, 2007

By: Timothy D. Hutson
Timothy D. Hutson, President
Hutson Enterprises, Inc.
d/b/a/ Sparkle Pool Service and
Supply of Indiana