

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

RECEIVED  
MAR - 6 2009

In the Matter of: )

Pennant Foods Company, )

Respondent )

) Docket No. EPCRA-05-2009-0001

) CERCLA-05-2009-0001

) MM- 05-2009-0002

REGIONAL HEARING CLERK  
MAR 2009  
PROTECTION AGENCY

COMPLAINANT PREHEARING EXCHANGE

On January 13, 2009, the Court issued to the parties its Prehearing Order requiring Complainant to file its Prehearing Exchange for this civil administrative action by Friday, March 6, 2009.

Therefore, Complainant hereby files its Prehearing Exchange.

I. WITNESS(ES) TO BE CALLED AT HEARING

A. 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, review of the record for this matter against Respondent, communications with Respondent, and the appropriateness of the proposed civil penalty, including but not limited to, the following factual allegations.

1. Respondent was a corporation incorporated in the State of Delaware doing business 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 111 North Northwest Avenue, Northlake, Illinois, 60164, ("the Facility").

3. Respondent owned or operated the Facility during calendar year 2005.
4. Respondent was an employer at the Facility during calendar year 2005.
5. On June 27 and 28, 2005, Respondent used and stored at its facility at least 500 lbs. of anhydrous ammonia.
6. Beginning at approximately 6:30 p.m., on Monday, June 27, 2005, Respondent's anhydrous ammonia refrigeration system emitted into the air approximately 3,000 pounds of anhydrous ammonia.
7. Respondent's emission of anhydrous ammonia exceeded 3,000 pounds and within a 24-hour period.
8. The emission affected Illinois.
9. On June 27, 2005, 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).
10. The emission affected Cook County.
11. On June 27, 2005, the Cook County Local Emergency Planning Committee was the Local Emergency Planning Committee ("LEPC") for Cook County, Illinois, pursuant to Section 301(c) of EPCRA, 42 U.S.C. § 11001(c).
12. At approximately 11:15 a.m., on Tuesday, June 28, 2005, Respondent notified the National Response Center of the emission.
13. At approximately 11:20 a.m., on Tuesday, June 28, 2005, Respondent notified the SERC of the emission.
14. At approximately 11:25 a.m., on Tuesday, June 28, 2005, Respondent notified the LEPC of the emission.
15. The proposed civil penalty of \$97,500.00 is appropriate pursuant to Sections 109(b) of CERCLA, 42 U.S.C. § 9609(b), and 325(b) 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.

- 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, its release into the environment, its potential and actual harm to human health and the environment, and EPCRA.

- C. 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, Request for Information to Chef Solutions, 111 Northwest Avenue, Northlake, Illinois, dated August 5, 2005. Bates Stamp Nos. 00-19. (Complainant Exhibit No. 1).
- B. Chef Solutions Response, dated September 6, 2005, to U.S. Environmental Protection Agency, Request for Information. Bates Stamp Nos. 20-171. (Complainant Exhibit No. 2).
- C. U.S. Environmental Protection Agency, Request for Information to Andrew. H. Perellis, Counsel to Chef Solutions, 111 Northwest Avenue, Northlake, Illinois, dated March 29, 2006. Bates Stamp Nos. 172-177. (Complainant Exhibit No. 3).
- D. Andrew H. Perellis, Counsel to Chef Solutions, Information Response, dated April 25, 2006, to U.S. Environmental Protection Agency. Bates Stamp Nos. 178-185. (Complainant Exhibit No. 4).

- E. U.S. Environmental Protection Agency letter, dated July 9, 2008, to the National Response Center Bates Stamp Nos. 186-189. (Complainant Exhibit No. 5).
- F. U.S. Environmental Protection Agency, Emergency Response Notification System, ERNS # 181453 IRIS/NRC # 763690, dated 12:09, 29-Jun-05. Bates Stamp Nos. 190-195. (Complainant Exhibit No. 6).
- G. U.S. Environmental Protection Agency letter to Kathy Allen, Bureau of Disaster Assistance and Preparedness, Illinois Emergency Management Agency, dated July 9, 2008. Bates Stamp Nos. 196-199. (Complainant Exhibit No. 7).
- H. Kathy Allen, Bureau of Disaster Assistance and Preparedness, Illinois Emergency Management Agency letter to James Entzminger, U.S. EPA, dated July 23, 2008. Bates Stamp Nos. 200-215. (Complainant Exhibit No. 8).
- I. Dun & Bradstreet Report for Chef Solutions, Inc., printed July 18, 2005. Bates Stamp Nos. 216-233. (Complainant Exhibit 9).
- J. Dun & Bradstreet Report for Pennant Foods Company, printed December 14, 2005. Bates Stamp Nos. 234-257. (Complainant Exhibit 10).
- K. Dun & Bradstreet Report for Chef Solutions, Inc., printed May 6, 2008. Bates Stamp Nos. 258-265. (Complainant Exhibit 11).
- L. Dun & Bradstreet Report for Pennant Foods Company, printed May 6, 2008. Bates Stamp Nos. 266-277. (Complainant Exhibit 12).
- M. 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. 278-343. (Complainant Exhibit No. 13).
- N. Complainant Penalty Calculation Worksheets and Narratives for Respondent. Bates Stamp Nos. 344-355. (Complainant Exhibit No. 14).
- O. Christopher P. Weiss, Ph.D., DABT, Personal Qualification Statement, dated August 2006, and Bibliography. Bates Stamp Nos. 356-371. (Complainant Exhibit 15).
- P. Mark Ewen, B.A., M.P.P., Resume, November 2005. Bates Stamp Nos. 372-383. (Complainant Exhibit 16).

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 any suitable location in the county where the Respondent resides (Cook County, Illinois) or conducts the business which the hearing concerns (Cook County, Illinois).

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

### IV. ADDITIONAL REQUESTED SUBMISSIONS

- A. Complainant does not allege, and has no submission to demonstrate, Respondent “produced” anhydrous ammonia at the Facility.
- B. Complainant’s documentation supporting its allegation Respondent released 3,000 pounds of anhydrous ammonia are included in the listed and attached exhibits.
- C. Complainant’s documentation supporting its allegation Respondent failed to notify the NRC, SERC, and LEPC as soon as it had knowledge of the release are included in the listed and attached exhibits.
- D. The following facts to be provided at hearing will demonstrate that on June 27, 2005, Respondent had knowledge of a release of a reportable quantity of anhydrous ammonia:

At approximately 7:00 a.m., on June 27, 2005, Respondent’s employees note significant anhydrous ammonia odor in one room and hallway. Respondent orders evacuation. Respondent immediately contacts and employs Plant Director and contractors. Neighboring buildings and businesses evacuate. Respondent does not call the fire department, but the fire department arrives. Safety personnel, wearing safety equipment, record anhydrous ammonia readings of 600 ppm and 100 ppm. Respondent allows some employees to leave for the evening. Over the next three to four hours, the leaking continues, three separate leaks are found, and repaired. Respondent finishes repairs at approximately 11:00 p.m.

The strong odor of anhydrous ammonia, from three (3) separate leaks, for several hours,

with measured readings of 100 ppm and 600 ppm, and employee evacuated buildings, provided Respondent with the knowledge it had a release of a reportable quantity of anhydrous ammonia.

- E. Complainant's narrative statement and penalty calculation worksheets for the proposed civil penalty are included in the listed and attached exhibits.
- F. Complainant has no other documents upon which it relied to arrive at the proposed civil penalty.
- G. 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,

A handwritten signature in black ink, appearing to read 'J. Trevino', written over a horizontal line.

Jeffery M. Trevino

Associate Regional Counsel

Office of Regional Counsel

Region 5

U.S. Environmental Protection Agency

77 West Jackson Boulevard (C-14J)

Chicago, Illinois 60604-3590

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Docket No. EPCRA- 05-2008-0024  
CERCLA- 05-2009-0001  
MM- 05-2009-0002

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, 19<sup>th</sup> Floor, 77 West Jackson Boulevard (R-19J), 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:

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

Andrew H. Perellis  
Seyfarth Shaw LLP  
Suite 2400  
131 South Dearborn Street  
Chicago, IL 60603

  
\_\_\_\_\_  
Jeffery M. Trevino  
Associate Regional Counsel

6 March 2009  
Dated