

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

SEP 26 PM 4:10

REGIONAL HEARING
CLERK

In the Matter of:)	Docket No. CERCLA-02-2009-2030
)	
Welch Foods, Inc.)	Administrative Complaint under
100 North Portage Street)	Section 109 of the Comprehensive
Westfield, New York 14787,)	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.

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 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(a)(1) of EPCRA, 42 U.S.C. § 11004(a)(1), 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 a release, if the release is of an extremely hazardous substance referred to in Section 302 of EPCRA, the release occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires notification under Section 103(a) of CERCLA. Section 304(c) of EPCRA requires any owner or operator of a facility from which there has been a release that is reportable under Section 304(a) of EPCRA to provide, as soon as practicable, a

follow-up written notice (or notices) to the SERC and LEPC updating the information required under Section 304(b) of EPCRA.

II. FINDINGS OF VIOLATIONS

5. Respondent is, and at all times referred to herein as 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 owner and operator of a grape juice processing and manufacturing facility, located at 100 North Portage Street, Westfield, New York 14787 (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 located 0.1 miles away from the business district in Westfield.

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

10. On or about November 10, 2008 at approximately 3:00 A.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 the Facility. At approximately 4:00 A.M. on November 10, 2008, the Facility received a call from an adjacent, off-site business reporting the smell of ammonia. Respondent's personnel then shut down the entire system manually, and notified the Facility's ammonia system contractor. The release of ammonia (anhydrous) into the air continued until approximately 7:00 A.M. on November 10, 2008 when a failed pressure switch was replaced, and a leaking pressure relief valve was isolated and removed from service.

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. On November 10, 2008 at 2:05 p.m., Respondent notified the NRC that 1,400 pounds of ammonia (anhydrous) were released from Respondent's Facility to the air during the November 10, 2008 ammonia release. Respondent notified the NRC of this release approximately 10 hours after first learning of the release when an adjacent business notified Respondent of the smell of ammonia, and approximately 7 hours after the release ended.

14. On December 22, 2008, EPA sent an information request pursuant to Section 104(e), 42 U.S.C. § 9604(e), to the facility in order to gather information concerning the release. Respondent submitted its response to the Section 104(e) information request on January 12, 2009. In its January 12, 2009 response, Respondent provided information showing that the amount of ammonia (anhydrous) released to the air during the November 10, 2008 release was 2,405 pounds. The release of 2,405 pounds of ammonia (anhydrous) to the air is greater than twenty-four times the reportable quantity of 100 pounds of ammonia.

15. The LEPC for the area where the Facility is located, and which would likely be affected by the November 10, 2008 ammonia release from the Facility, is the Chautauqua County LEPC.

16. As of its January 12, 2009 response to EPA's information request letter, Respondent had not notified the Chautauqua County LEPC of the ammonia release that occurred on November 10, 2008.

17. The SERC for New York State where the release occurred is the New York State Emergency Response Commission ("NYSERC").

18. On November 10, 2008 at 1:25 p.m., Respondent called the New York State Department of Environmental Conservation Spill Incidents Hotline. Respondent notified the SERC of this release approximately 9 1/2 hours after first learning of the release when an adjacent business notified Respondent of the smell of ammonia, and approximately 6 1/2 hours after the release ended.

19. On August 31, 2009, more than nine months after the ammonia release, Respondent provided follow-up written notices to the SERC and LEPC, pursuant to Section 304(c) of EPCRA, updating the information required under Section 304(b) of EPCRA.

COUNT 1

20. Findings contained in Paragraphs "1" through "19" are incorporated herein by reference.

21. Respondent failed to immediately notify the NRC of the November 10, 2008 ammonia release from the Facility.

22. The November 10, 2008 ammonia release from the Facility was not a federally permitted release, as defined in Section 101(10) of CERCLA, 42 U.S.C. § 9601(10).

23. 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

24. Findings contained in Paragraphs "1" through "23" are incorporated herein by reference.

25. Respondent failed to immediately notify NYSERC of the November 10, 2008 ammonia release from the Facility pursuant to Section 304 of EPCRA.

26. 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.

COUNT III

27. Findings contained in Paragraphs "1" through "26" are incorporated herein by reference.

28. As of January 12, 2009 Respondent did not notify the Chautauqua County LEPC of the November 10, 2008 ammonia release from the Facility.

29. Respondent failed to immediately notify the LEPC for the area likely to be affected by the November 10, 2008 ammonia release from the Facility.

30. 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.

COUNT IV

31. Findings contained in Paragraphs "1" through "30" are incorporated herein by reference.

32. Respondent failed to timely provide follow-up written notices to the SERC and LEPC as required by Section 304(c) of EPCRA.

33. Respondent violated the 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, and Section 325 of EPCRA, 42 U.S.C. § 11045, as modified pursuant to the 2008 Civil Monetary Penalty Inflation Adjustment Rule, 73

Fed. Reg. 75340-46 (December 11, 2008), which was mandated by the Debt Collection Improvement Act of 1996 and as codified at 40 C.F.R. Part 19, EPA is currently 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, through January 12, 2009; and \$37,500 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 January 12, 2009. This amount is subject to revision under federal law and regulation.

On the basis of the violations of Section 103 of CERCLA and Section 304 of EPCRA described above, Complainant has determined that Respondent is subject to penalties under Section 109 of CERCLA, 42 U.S.C. § 9609, and Section 325 of EPCRA, 42 U.S.C. § 11045. Accordingly, Complainant proposes a civil penalty of \$120,000 for the CERCLA and EPCRA violations described above, pursuant to the authorities 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 November 10, 2008 ammonia release:	\$30,000
Count II	Failure of Respondent to immediately notify the SERC for the state likely to be affected by the November 10, 2008 ammonia release.	\$30,000
Count III	Failure of Respondent to immediately notify the LEPC for the area likely to be affected by the November 10, 2008 ammonia release:	\$32,500
Count IV	Failure of Respondent to provide written follow-up emergency notices to the appropriate SERC and LEPC within 14 calendar days following the release.	\$27,500
TOTAL PENALTY PROPOSED		\$120,000

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 and the December 29, 2008 memorandum from Granta Y. Nakayama, Assistant Administrator, Office of Enforcement and Compliance Assurance. 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:

Argie Cirillo
Office of Regional Counsel
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, NY 10007
Phone: (212) 637-3178

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 that 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 to affirmatively 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

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 checks or other instruments 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 as follows:

Payment of the CERCLA portion of the penalty (Count I, \$30,000) shall be made by cashier's or certified check payable to the "Treasurer, United States of America." The check shall 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 document) and shall be sent to:

US Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
PO Box 979076
St. Louis, MO 63197-9000

Payment of the EPCRA portion of the penalty assessed (Counts II - IV, \$90,000) shall be made by sending a cashier's or certified payable to the "Treasurer, United States of America." The check shall 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 document) and shall be sent to:

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

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 following: the right to expend and recover funds under CERCLA; the right to bring enforcement actions seeking injunctive relief under Section 106 of CERCLA and/or other statutes; the right to address releases including those identified in this Complaint; and the right to require further action as necessary to respond to the release addressed in this complaint. EPA also reserves all of its rights to obtain access to the Facility and require Respondent's submission of information to EPA.

Dated: Sept. 25, 2009



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

TO: Welch Foods Inc.
100 North Portage Street

Westfield, New York 14787
Attn: Thomas Buchleitner, Manager

Attachments

cc: Karen Maples, Region 2 Hearing Clerk