



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

REPLY TO THE ATTENTION OF:

SC-5J

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

David Steiner, Esq.
Barrett & McNagny LLP
215 East Berry Street
Fort Wayne, Indiana 46802

Re: Vicksburg Pike, LLC, Ft. Wayne, Indiana
Consent Agreement and Final Order – Docket No: **EPCRA-05-2011-0027**

Dear Mr. Steiner:


Enclosed please find a fully executed Consent Agreement and Final Order (CAFO) in resolution of the above case. The U.S. EPA filed the other original CAFO with the Regional Hearing Clerk on August 17, 2011.

Please direct your client Vicksburg Pike, LLC to pay the EPCRA civil penalty in the amount of \$6,165 in the manner prescribed in paragraphs **51** and **52**, and reference the check with the number BD 2751144E025 and docket number EPCRA-05-2011-0027.

The payment is due on September 17, 2011.

Please feel free to contact Ruth McNamara at (312) 353-3193 if you have any questions regarding the enclosed documents. Please direct any legal questions to Gary Steinbauer, Assistant Regional Counsel, at (312) 886-4306. Thank you for your assistance in resolving this matter.

Sincerely,


Bob Mayhugh, Acting Chief
Chemical Emergency Preparedness
and Prevention Section

Enclosure

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their respective interests and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of this CAFO.

Jurisdiction, Non-Admission and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO.

8. Respondent neither admits nor denies the factual allegations in this CAFO.

9. Respondent waives its right to request a hearing as provided at 40 C.F.R.

§ 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

Statutory and Regulatory Background

10. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and its implementing regulations at 40 C.F.R. Part 370 require the owner or operator of a facility, which is required by the Occupational Safety and Health Act (OSHA) to prepare or have available a material safety data sheet (MSDS) for a hazardous chemical, to prepare and submit to the state emergency response commission, community emergency coordinator for the local emergency planning committee, and fire department with jurisdiction over the facility by March 1, 1988, and annually thereafter on March 1, an emergency and hazardous chemical inventory form (Tier 1 or Tier II as described in 40 C.F.R. Part 370). The form must contain the information required by Section 312(d) of EPCRA, covering all hazardous chemicals present at the facility at any one time during the preceding year in amounts equal to or exceeding 10,000 pounds and all extremely hazardous chemicals present at the facility at any one time in amounts equal to or greater than 500 pounds or the threshold planning quantity designated by U.S. EPA at 40 C.F.R. Part 355, Appendices A and B, whichever is lower.

11. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), assists state and local committees in planning for emergencies and makes information on chemical presence and hazards available to the public. A delay in reporting could result in harm to human health and the environment.

12. Under 29 C.F.R. § 1910.1200(b)(1), all employers are required to provide information to their employees about the hazardous chemicals to which they are exposed including, but not limited to, MSDSs.

13. Under 29 C.F.R. § 1910.1200(d)(3), chemicals listed in 29 C.F.R. Part 1910, Subpart Z are hazardous.

14. Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), authorizes U.S. EPA to assess a civil penalty of up to \$25,000 for each EPCRA Section 312 violation. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, note, and its implementing regulations at 40 C.F.R. Part 19, increased the statutory maximum penalty to \$32,500 per day of violation for violations that occurred after March 15, 2004 through January 12, 2009.

Factual Allegations

Respondent and VP Warehousing, LLC

15. Respondent is a “person” as that term is defined under Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

16. At all times relevant to this CAFO, Respondent was an owner of the facility located at 7235 Vicksburg Pike, Fort Wayne, Indiana (Facility).

17. U.S. EPA alleges that, at all times relevant to this CAFO, Respondent was an employer at the Facility.

18. Respondent's Facility consists of buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites, and which are owned or operated by the same person.

19. Respondent's Facility is a "facility" as that term is defined under Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

20. At all times relevant to this CAFO, Respondent leased a portion of the Facility and certain equipment to VP Warehousing, LLC (VP Warehousing) for the purposes of operating a commercial warehouse.

21. VP Warehousing is a "person" as that term is defined under Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

22. At all times relevant to this CAFO, VP Warehousing was an operator of a commercial warehouse at the Facility.

23. At all times relevant to this CAFO, VP Warehousing was an employer at the Facility.

**Respondent and VP Warehousing are Subject
to the Requirements of EPCRA Section 312**

24. At all times relevant to this CAFO, ammonia was produced, used or stored at the Facility.

25. Ammonia CAS# 7446-41-7 is listed as a toxic and hazardous substance under OSHA regulations at 29 C.F.R. Part 1910, Subpart Z, and 29 C.F.R. § 1910.1000, Table Z-1.

26. Ammonia CAS# 7446-41-7 is a "hazardous chemical" within the meaning of Section 311(e) of EPCRA, 42 U.S.C. § 11021(e), and 29 C.F.R. § 1910.1200(c).

27. Ammonia CAS# 7446-41-7 has a minimum threshold level of 500 pounds, as provided in 40 C.F.R. Part 370.

28. Ammonia CAS# 7446-41-7 is an "extremely hazardous substance" according to Section 302(a)(2) of EPCRA, 42 U.S.C. § 11002(a)(2).
29. During at least one period of time in calendar year 2007, ammonia was present at the Facility in an amount equal to or greater than the minimum threshold level.
30. OSHA requires Respondent or VP Warehousing to prepare, or have available, an MSDS for Ammonia CAS# 7446-41-7.
31. Respondent or VP Warehousing was required to submit to the state emergency response commission (SERC), local emergency planning committee (LEPC), and fire department on or before March 1, 2008, a completed emergency and hazardous chemical inventory form including ammonia for calendar year 2007.
32. At all times relevant to this CAFO, the Indiana State Emergency Response Commission was the SERC for Indiana under Section 301(a) of EPCRA, 42 U.S.C. § 11001(a).
33. At all times relevant to this CAFO, the Allen County Local Emergency Planning Committee was the LEPC for Allen County, Indiana under Section 301(c) of EPCRA, 42 U.S.C. § 11001(c).
34. At all times relevant to this CAFO, the Fort Wayne Fire Department was the fire department with jurisdiction over the facility.

Count 1 – Failure to Timely Submit Hazardous Chemical Inventory Form to SERC

35. Paragraphs 1-34 of this CAFO are incorporated as if set forth in this paragraph.
36. Respondent did not submit to the SERC a completed Emergency and Hazardous Chemical Inventory Form including ammonia until November 11, 2008, for calendar year 2007.
37. Each day Respondent failed to submit to the SERC a completed Emergency and Hazardous Chemical Inventory Form including ammonia by March 1, 2008, for calendar year

2007, constitutes a separate violation of Section 312(a) of EPCRA, 42 U.S.C. §11022(a).

Count 2 – Failure to Timely Submit Hazardous Chemical Inventory Form to LEPC

38. Paragraphs 1-34 of this CAFO are incorporated as if set forth in this paragraph.

39. Respondent did not submit to the LEPC a completed Emergency and Hazardous Chemical Inventory Form including ammonia until November 11, 2008, for calendar year 2007.

40. Each day Respondent failed to submit to the LEPC a completed Emergency and Hazardous Chemical Inventory Form including ammonia by March 1, 2008, for calendar year 2007, constitutes a separate violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

Count 3 – Failure to Timely Submit Hazardous Chemical Inventory Form to Fort Wayne Fire Department

41. Paragraphs 1-34 of this CAFO are incorporated as if set forth in this paragraph.

42. Respondent did not submit to the Fort Wayne Fire Department a completed Emergency and Hazardous Chemical Inventory Form including ammonia until November 11, 2008, for calendar year 2007.

43. Each day Respondent failed to submit to the Fort Wayne Fire Department a completed Emergency and Hazardous Chemical Inventory Form including ammonia by March 1, 2008, for calendar year 2007, constitutes a separate violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

Count 4 – Respondent’s Derivative Liability for VP Warehousing’s Violations of EPCRA Section 312

44. Paragraphs 1-34 of this CAFO are incorporated as if set forth in this paragraph.

45. Count 4 is pleaded in the alternative to Counts 1, 2, and 3 alleged above.

46. VP Warehousing committed three separate violations of Section 312(a) of EPCRA, 42 U.S.C. § 11022, when it failed to submit to the SERC, LEPC, and Fort Wayne Fire

Department a completed Emergency and Hazardous Chemical Inventory Form including ammonia by March 1, 2008, for calendar year 2007.

47. U.S. EPA alleges that Respondent exerts a level of control over VP Warehousing such that VP Warehousing was a mere instrumentality or adjunct of Respondent.

48. U.S. EPA alleges that equity requires that Respondent be held liable for any penalty associated with VP Warehousing's violations of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

49. U.S. EPA alleges that the corporate veil of VP Warehousing should be pierced and Respondent should be held liable for VP Warehousing's violations of Section 312(a) of EPCRA.

Civil Penalty

50. Complainant has determined that an appropriate civil penalty to settle this action is Six Thousand One Hundred Sixty-five Dollars (\$6,165). In determining the penalty amount, Complainant considered the nature, circumstances, extent, and gravity of the violations, and with respect to Respondent, its ability to pay, prior history of violations, economic benefit or savings resulting from the violations, and any other matters as justice may require. Complainant also considered U.S. 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, dated September 30, 1999 (EPCRA/CERCLA Enforcement Response Policy).

51. Within 30 days after the effective date of this CAFO, Respondent must pay a \$6,165 civil penalty for the EPCRA violations using one of the following methods:

for checks sent by regular U.S. postal service

sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

for check sent by express mail

sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

The check must note the following: In the Matter of Vicksburg Pike, LLC, the docket

number of this CAFO, and the EPCRA billing document number 2751144E025
EPCRA-05-2011-0027

for electronic funds transfer

electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read:
"D68010727 Environmental Protection Agency"

In the comment or description field of the electronic funds transfer, state the following:

In the Matter of Vicksburg Pike, LLC, the docket number of this CAFO, and the EPCRA billing
document number 2751144E025
EPCRA-05-2011-0027

52. If paying by check a transmittal letter, stating Respondent's name, the case title, Respondent's complete address, the case docket number, and the billing document must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk, (E-19J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Ruth McNamara, (SC-5J)
Chemical Emergency Preparedness
and Prevention Section
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Gary Steinbauer, (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

53. This civil penalty is not deductible for federal tax purposes.

54. If Respondent does not timely pay the civil penalty, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States' enforcement expenses for the collection action. The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

55. Pursuant to 31 C.F.R. §901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date the payment was due at a rate established pursuant to 31 U.S.C. § 3717. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, U.S. EPA will assess a 6 percent per year penalty on any principal amount 90 days past due.

General Provisions

56. This CAFO only resolves Respondent's and VP Warehousing's liability for federal civil penalties for the violations and facts alleged in this CAFO.

57. This CAFO does not affect the rights of U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any other violations of law.

58. Respondent certifies that it is complying with Section 312 of EPCRA, 42 U.S.C. § 11022.

59. This CAFO does not affect Respondent's and VP Warehousing's responsibility to comply with EPCRA and other applicable federal, state, and local laws and regulations.

60. This CAFO is a "final order" for purposes of U.S. EPA's EPCRA/CERCLA Enforcement Response Policy.

61. The terms of this CAFO bind Respondent and its successors and assigns.

62. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

63. Each party agrees to bear its own costs and attorney's fees in this action.

64. This CAFO constitutes the entire agreement between the parties.

[Signature page follows.]

In the Matter of: Vicksburg Pike, LLC, Fort Wayne, Indiana

Docket No. EPCRA-05-2011-0027

Billing Document # 2751144E025

Vicksburg Pike, LLC, Respondent

7/25/11
Date

Scott A. Olson
Scott A. Olson
Managing Member
Vicksburg Pike, LLC

U.S. Environmental Protection Agency, Complainant

8/3/11
Date

Richard Karl
Richard Karl
Director
Superfund Division
U.S. Environmental Protection Agency
Region 5

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AUG 17 2011

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of: Vicksburg Pike, LLC, Fort Wayne, Indiana

Docket No. EPCRA-05-2011-0027 *Billing Document # 275114460e*

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

8-10-11

Date



Susan Hedman
Regional Administrator
U.S. Environmental Protection Agency
Region 5

[Faint, illegible stamp or text]

In the Matter of: Vicksburg Pike, LLC, Fort Wayne, Indiana
Docket No. EPCRA-05-2011-0027 *Billing Document # 2751144E025*

Certificate of Service

I, Ruth McNamara, certify that I filed the original and a copy of the Consent Agreement and Final Order (CAFO) with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 5, delivered a copy of the CAFO by intra-office mail to the Regional Judicial Officer, U.S. Environmental Protection Agency, Region 5, and mailed the second original CAFO by first-class, postage prepaid, certified mail, return receipt requested, to Respondent by placing it in the custody of the United States Postal Service addressed as follows:

David R. Steiner, Esq.
Barrett & McNagny LLP
215 East Berry Street
Fort Wayne, Indiana 46802

on the 17th day of August, 2011

RECEIVED

AUG 17 2011

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Ruth McNamara

501 Ruth McNamara
U.S. Environmental Protection Agency
Region 5

