

June 10, 2011

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**VIA OVERNIGHT FEDERAL EXPRESS**

Regional Hearing Clerk (R-19J)  
U.S. EPA, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

*Re: In the matter of: Lake's Farm Service LLC*  
*Docket number: CAA-05-2010-0058*  
*Respondent's Prehearing Exchange*

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PROTECTION AGENCY**

Dear Sir/Madame:

Enclosed please find for filing an original plus one (1) copy of Respondent Lake's Farm Service LLC's Prehearing Exchange. By copy of this correspondence, the Administrative Law Judge and opposing counsel have been served.

Thank you for your cooperation. Should you have any questions, please feel free to contact me.

Sincerely,



Michael J. Schmidt

MJS/smr  
Enc.

cc: Judge Barbara A. Gunning, EPA Office of Administrative Law Judges (with enclosure)  
Louise Gross, Esq., Office of Regional Counsel, U.S. EPA, Region 5 (with enclosure)

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EPA OFFICE OF ADMINISTRATIVE LAW JUDGES  
1099 14<sup>th</sup> Street, NW  
Suite 350, Franklin Court  
Washington, DC 20005

IN THE MATTER OF: ) Docket No. CAA-05-2010-0058  
)  
Lake's Farm Service LLC ) Proceeding to Assess  
) Civil Penalty under  
New Carlisle, Indiana ) Section 113(d) of the  
) Clean Air Act,  
Respondent. ) 42 U.S.C. § 7413(d)

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**RESPONDENT'S PREHEARING EXCHANGE**

In accordance with the April 6, 2011 Prehearing Order and Section 22.19 of the Consolidated Rules of Practice Governing the Administration Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. § 22, Respondent, Lake's Farm Service, LLC, ("Respondent" or "Lake"), by counsel, submits its Prehearing Exchange.

I. **THE PROPOSED PENALTY SHOULD BE REDUCED OR ELIMINATED**

The United States Environmental Protection Agency (the "Agency" or "EPA") assessed a \$76,000<sup>1</sup> civil penalty against Lake based on alleged "Major" violations under §113(d)(1) of the Clean Air Act of 1974 (the "Act") and 40 C.F.R. § 68. Lake believes that the proposed penalty should be reduced or eliminated for three reasons: (1) the alleged violations were minor, not major; (2) contrary to the Agency's position, Lake had a Risk Management Plan ("RMP") in place; and (3) the Agency failed to consider mitigating factors that should have reduced the assessed civil penalty.

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<sup>1</sup> The EPA originally proposed a civil penalty of \$112,000. In its amended complaint, the EPA reduced the proposed fine to \$76,000 based on a \$10,000 mathematical error and a \$26,000 reduction in the duration period based on the federal statute of limitations.

A. The Agency's "Major" Violation Determination Is Without Support Under the Facts of the Matter or Under the EPA's Civil Penalty Policy.

The EPA's Civil Penalty Policy ("Policy") governs the civil penalty calculation. Under the Policy, the EPA's determination that allegations against Lake constitute a "Major" violation requires a finding that "cumulatively, the violations have a significant effect on the ability of the facility to prevent or respond to releases through the development and implementation of the RMP."<sup>2</sup> Here, there are *no* facts which support EPA's determination that a "Major" violation occurred. As such, the EPA was without justification under the Policy to assess a \$76,000 penalty for alleged violations of documentation and reporting requirements related to Lake's RMP from July 21, 2004 through September 10, 2008.

According to the Policy, the seriousness of a violation depends, in part, on the risk posed to the surrounding population and the environment as a result of the violation. The greater the deviation from the requirements, the more likely the facility has compromised the safe operation of the facility and management of chemicals. At no point has the Agency alleged, let alone demonstrated, that the safe operation of the facility or the safe management of anhydrous ammonia was jeopardized by Lake's alleged lack of documentation. To the contrary, Lake always had mechanisms in place to notify emergency responders if and when the need arose. The Agency's own inspection report noted that Lake has "mechanisms in place to notify emergency responders if and when the need should arise." This fact alone should preclude a finding of a "Major" violation.

At worst, Lake's "violation" should be considered "Minor" -- which the Policy defines as "cumulatively, the violations have only a minor effect on the ability of the

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<sup>2</sup> See Policy page 8.

facility to prevent or respond to releases through the development and implementation of the RMP.<sup>3</sup>”

B. Development/Implementation of a RMP.

The Agency also has asserted that Lake failed to comply with the Act and 40 C.F.R. § 68. There is not one allegation which suggests Lake did not develop or implement a RMP or that Lake was not in a position to respond to an emergency situation. Rather, the allegations are entirely focused on Lake’s ability to document its compliance with the RMP regulations. The Agency may disagree with the format of many of the supporting documents related to the development and implementation of Lake’s RMP. However, the Agency cannot challenge that Lake developed and implemented an RMP. This is evidenced by the documents presented to the Agency and its own inspection report which noted Lake had “mechanisms in place to notify emergency responders if and when the need should arise” which is one of the fundamental purposes of the regulation.

C. The Agency Failed to Consider and/or Apply Mitigating Factors to its Penalty Calculation.

The third issue is whether the EPA failed to properly consider the mitigating circumstances related to Lake’s operations. Proper consideration of the mitigating factors should result in either waiver or significant reduction of the civil penalty.

The Policy provides the EPA with the power to adjust any proposed civil penalty in order to promote flexibility and national consistency. The Policy states that “in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case, yet must produce results consistent enough to

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<sup>3</sup> See Policy page 8.

ensure that similarly-situated violators are treated similarly.<sup>4</sup> Specifically, the Policy allows for an adjustment based on the degree of cooperation and litigation risks. Litigation risks are to be considered based on specific facts, equities, evidentiary issues or other legal problems of a particular case and adverse legal precedents affirmatively argued by the violator which are indistinguishable from the current enforcement action. In In the Matter of Heiman, Inc. P.O. Box 39 Rockville, Missouri 64780, 2007 WL 2979637 (E.P.A.), Region VII settled allegations nearly identical to those here for \$7,550 as opposed to the \$76,000 assessment proposed by Region V. The only difference in the allegations between Heiman and here is that the EPA alleged Heiman did not even attempt to comply with the requirements under 40 C.F.R. § 68. Lake's facts are far more supportive of a downward departure in the penalty calculation.

The litigation risks to the Agency are significant. Heiman is one example of similarly-situated RMP allegations which the EPA has unquestionably handled in a dissimilar manner. Applying the Heiman rationale to the circumstances involving Lake should result in a substantially decreased civil penalty. Heiman, with precedential effect for the Policy, demonstrates that the Agency has arbitrarily imposed a civil penalty against Lake. And this proposed penalty is disproportionate to the alleged violations. The environment has not been harmed in any manner. The process equipment has not failed. Lake inspected and maintained the mechanical integrity of its process equipment. Lake developed and implemented the requirements of a RMP. The proposed civil penalty should be reduced.

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<sup>4</sup> See Policy page 11.

II. WITNESS LIST

A. Allen Lake, Chief Executive Officer of Lake's Farm Service, LLC

Mr. Lake will testify as to his experience as an employee and as owner of Lake. He will testify as to Lake's emphasis on employee training and its fifty (50) plus year incident free work record. He will also testify to Lake's compliance with the regulatory requirements and its continuing efforts to respond to the Agency's requests for additional information in an effort to remediate any alleged violations, the sufficiency of documents provided by Respondent which address the alleged violations, Respondent's lack of willfulness and other mitigating factors that support a waiver or significant reduction of the assessed penalty. Mr. Lake's testimony may include his conversations with Lake employees, Mr. Greg Chomycia, an environmental engineer with the EPA, and Ken Nuehoff and R.C. Smith from the Indiana State Chemist's Office. Mr. Lake will also discuss Lake's response after receiving notice of a probable violation and its efforts to address the Agency's concerns and other matters as Respondent deems relevant.

B. Kristin Boklund, Lake's Farm Service, LLC

Ms. Boklund will testify as to Lake's operations, its training protocols, her qualifications to develop and implement the RMP, her recollection of the events surrounding the inspection on September 10, 2008, Respondents efforts to comply with additional information requests by the EPA, conversations with Mr. Greg Chomycia, and other matters as Respondent deems relevant.

C. Thomas McCormick, Lake's Farm Service, LLC

Mr. McCormick will testify to his professional experience at Lake including his responsibilities related to the storage and handling of anhydrous ammonia. He may testify as to the training requirements of Lake as well as his knowledge, training and experience in anhydrous ammonia.

D. Louis Zelasko, Lake's Farm Service, LLC -- Facility Manager

Mr. Zelasko will testify as to his capacity as Lake's facility manager and to his knowledge of Lake's Hazard Review, compliance audits and process equipment maintenance standards and protocols.

E. Mark Miller, Murray Equipment

Mr. Miller will testify as to his knowledge of process equipment which he sold on behalf of Murray Equipment to Lake, his interactions with Lake

personnel, and his knowledge of whether any of the process equipment was breached or functioned incorrectly.

F. Ken Nuehoff, Indiana State Chemist's Office – Inspector

Mr. Nuehoff will testify as to his professional experience as an inspector for the Indiana State Chemist's Office and his personal experience of inspecting Lake. His primary testimony will focus on his knowledge of and familiarity with Lake's operation including its handling of anhydrous ammonia. Mr. Nuehoff will also testify to the practices of the Indiana State Chemist's Office with respect to inspections, compliance and recordkeeping.

G. R.C. Smith, Indiana State Chemist's Office - Inspector

Mr. Smith will testify to his professional experience as the only anhydrous ammonia inspector employed by the State of Indiana and his experience with and knowledge of Lake's anhydrous ammonia procedures and process equipment. Mr. Smith will also testify concerning the Indiana State Chemist's Office compliance and recordkeeping requirements.

H. Willy Pua & Bill Sandstrom – EPA, Inspectors

Mr. Pua and Mr. Sandstrom may be called as witnesses by Lake to discuss their experience and qualifications to serve as inspectors for the EPA and their experience inspecting Lake, including their roles as inspectors vis a vis Mr. Bordy. Lake requests the right to treat Mr. Pua and Mr. Sandstrom as an adverse or hostile witness and to examine them through the use of leading questions should Lake elect to call Mr. Pua or Mr. Sandstrom as a witness.

I. Ed Bordy – EPA, Inspector

Mr. Bordy may be called as a witness by Lake to discuss his experience and qualifications to serve as an inspector for the EPA, the inspection of Lake on September 10, 2008, the inspection findings, the inspection report and the process which occurs after he completes an inspection. His testimony may include conversations he had with Lake employees and Mr. Greg Chomycia. Lake requests the right to treat Mr. Bordy as an adverse or hostile witness and to examine him through the use of leading questions should Lake elect to call Mr. Bordy as a witness.

J. Allen Summers – Asmark Institute

Mr. Summers will testify as to Asmark's relationship with Lake and Lake's ongoing commitment to training and documentation protocols. He may be asked to describe how the Asmark program works and how clients

of Asmark who adhere to its program are in full compliance with the requirements set forth under the RMP.

K. Jean Payne – Illinois Chemical and Fertilizer Association

Ms. Payne will testify as to her direct experience with RMP disputes with the EPA and how organizations with whom she has represented with similar allegations have been assessed under the Policy.

III. TRIAL DURATION

Hearing in this matter should not exceed three days.

IV. TRIAL LOCATION

Respondent requests a hearing site near South Bend, Indiana, because Respondent's primary witnesses and counsel are located there and the property from which this dispute arose is located there. Michigan City, Indiana is an acceptable alternative trial site due to its proximity to South Bend and Respondent's primary witnesses.

V. EXHIBITS<sup>5</sup>

**Respondent Exhibit 1 - Inspection Report dated September 10, 2008**

**Respondent Exhibit 2 - Lake Management System/Organizational Chart as of May 26, 2010**

Respondent Exhibit 3 Kristin Boklund Performance Review, January 18, 2000

Respondent Exhibit 4 Kristin Boklund's Qualifications and Certifications

Respondent Exhibit 5 2010 RMP Submission

Respondent Exhibit 6 2011 RMP Submission

**Respondent Exhibit 7 RMP Worst Case Scenario Report**

**Respondent Exhibit 8 RMP Alternative Case Scenario Report**

**Respondent Exhibit 9 Anhydrous Ammonia Safety Manual**

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<sup>5</sup> Exhibits which are highlighted are also exhibits presented by the EPA.



Respondent Exhibit 10 - Anhydrous Ammonia Material Safety Data Sheet

Respondent Exhibit 11 - Anhydrous Ammonia Safe Upper and Lower Temperature Report

**Respondent Exhibit 12 - Indiana Agricultural Ammonia Law**

**Respondent Exhibit 13 - Anhydrous Ammonia Process Checklist**

Respondent Exhibit 14 - Anhydrous Ammonia Nurse Tank Inspection Report

Respondent Exhibit 15 - Vehicle Service, Maintenance, Inspection and Repair Records

**Respondent Exhibit 16 - Indiana State Chemist's Office 2003 Anhydrous Ammonia Inspection Report**

Respondent Exhibit 17 - Written Operating Procedures as of the date of the inspection

**Respondent Exhibit 18 - Written Operating Procedures adopted on May 26, 2010**

Respondent Exhibit 19 - Affidavit of Thomas McCormick, Lake Employee

**Respondent Exhibit 20 - Indiana State Chemist's Office Anhydrous Ammonia Checklist April, 20 2007**

**Respondent Exhibit 21 - Compliance Audit dated June 27, 2007**

Respondent Exhibit 22 - Process Equipment Instruction Manuals

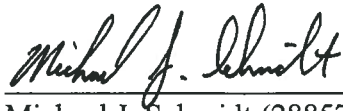
**Respondent Exhibit 23 - Combined Enforcement Policy for Section 112(r) of the Clean Air Act**

VI. RESERVATION OF RIGHTS

Respondent respectfully reserves the right to file a motion in the future seeking leave to supplement its list of witness and/or its list of exhibits upon reasonable notice to Complainant, and by order of the Presiding Officer.

Dated: June 10, 2011.

Respectfully submitted,



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Michael J. Schmidt (28857-71)

Stephen A. Studer (16301-71)

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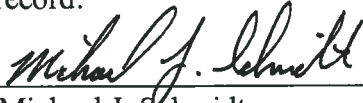
Attorneys for Respondent

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Respondent's Prehearing Exchange was served by first class mail, postage prepaid, this 10th day of June, 2011, upon the following party of record:

  
\_\_\_\_\_  
Michael J. Schmidt

Honorable Barbara Gunning  
Administrative Law Judge  
EPA Office of Administrative Law Judges  
1099 14<sup>th</sup> Street, NW  
Suite 350, Franklin Court  
Washington, D.C. 20005

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