

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 SEP 21 AM 9:21

FILED
EPA REGION VIII
HEARING CLERK

In the Matter of:)

Cenex Harvest States, Inc.)
Milk River Cooperative)
246 Industry Road)
Malta, Montana 59538)

Respondent)

COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING

DOCKET NO.: EPCRA-08-2010-0001

ADMINISTRATIVE COMPLAINT

JURISDICTION

1. This civil administrative enforcement action ("Complaint") is authorized by Congress in section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11045, also known as the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"). EPA regulations authorized by the statute are set out in part 370 of title 40 of the Code of Federal Regulations. The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Rules of Practice")," 40 CFR part 22, a copy of which is enclosed.
2. The undersigned EPA officials have been properly delegated the authority to issue this action.
3. EPA alleges that Respondent has violated section 312 of EPCRA, U.S.C. § 11022, and proposes the assessment of a civil penalty as more fully explained below.

GENERAL ALLEGATIONS

4. Section 312 of EPCRA, 42 U.S.C. §11022, requires regulated parties that store chemicals in excess of established threshold amounts to file and submit to designated state and local offices annual inventory reports ("Tier II inventory reports").
5. Respondent is Cenex Harvest States, Inc. located at 246 Industry Road, Malta, Montana.
6. Respondent is a "person" as that term is defined by section 329(7) of EPCRA, 42 U.S.C. § 11049(7).
7. Respondent is an owner or operator of a "facility" as that term is defined in section 329(4) of EPCRA, 42 U.S.C. § 11049(4).
8. In calendar year 2008, Respondent stored Rascal Plus and RT-3 in excess of 10,000 pounds each at the 246 Industry Road facility in Malta, Montana.
9. Rascal Plus contains salt of glyphosate (41%) (CAS number: 38641-94-0) which is a hazardous chemical as defined by 29 C.F.R. § 1910.1200(c).
10. RT-3 contains potassium salt of glyphosate (48%) (CAS number: 70901-12-1) which is a hazardous chemical as defined by 29 C.F.R. § 1910.1200(c).
11. Pursuant to 40 C.F.R. § 370.20(a), reporting requirements under EPCRA are applicable to any facility that is required to prepare or have available a material safety data sheet (MSDS) for a hazardous chemical under the Occupational Health and Safety Act of 1970 and regulations promulgated under that act.
12. At all times relevant to this Complaint, respondent was required to prepare or have available a material safety data sheet ("MSDS") for each hazardous chemical used and stored at

the facility, including Rascal Plus and RT-3, pursuant to the Occupational Safety and Health Act of 1970 and the regulations promulgated under that Act.

13. Respondent is required to file a Tier II inventory report for hazardous chemicals it stored in excess of established thresholds. Pursuant to 40 CFR 370.20(b)(4), the reporting threshold for Rascal Plus is 10,000 lbs. The reporting threshold for RT-3 is also 10,000 lbs.

14. Respondent was required to submit a Tier II inventory report for Rascal Plus to the State Emergency Response Commission (SERC) by March 1, 2009.

15. As of February 3, 2010, Respondent had not provided a Tier II inventory report for Rascal Plus to the SERC.

16. Respondent was required to submit a Tier II inventory report for RT-3 to the State Emergency Response Commission (SERC) by March 1, 2009.

17. As of February 3, 2010, Respondent had not provided a Tier II inventory report for RT-3 to the SERC.

COUNT I

18. Respondent failed to file a Tier II inventory report to the SERC for Rascal Plus stored in excess of the established threshold for reporting year 2008.

19. Respondent's failure to file a Tier II inventory report to the SERC for Rascal Plus for reporting year 2008 constitutes a violation of Section 312 of EPCRA, 42 U.S.C. § 11022.

COUNT II

20. Respondent failed to file a Tier II inventory report to the SERC for RT-3 stored in excess of the established threshold for reporting year 2008.

21. Respondent's failure to file a Tier II inventory report to the SERC for RT-3 for reporting year 2008 constitutes a violation of Section 312 of EPCRA, 42 U.S.C. § 11022

PROPOSED CIVIL PENALTY

22. Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c), as amended, authorizes EPA to assess a civil penalty of \$37,500 for each violation of section 312. Based upon the violation cited in this Complaint, and, to the extent known, upon the nature, circumstances, extent and gravity of the violations alleged, Respondent's history of prior violations of EPCRA, and degree of culpability, as set forth in the *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, EPA proposes to assess the following civil penalty for the violation described above:

COUNT	VIOLATION	PROPOSED PENALTY
1 & 2	Failure to submit Tier II to the Montana SERC for Rascal Plus and RT-3 stored in 2008	\$13,300
TOTAL PROPOSED PENALTY		\$13,300

The reasoning behind the proposed penalty in this matter is detailed in the penalty calculation memorandum, incorporated herein by reference. A copy is enclosed.

NOTICE OF OPPORTUNITY FOR A HEARING

23. Respondent has the right to a public hearing before an administrative law judge to disagree with the allegations or proposed penalty contained in the complaint.

24. To contest the complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk [8RC], 1595 Wynkoop Street, Denver, Colorado 80202-1129, within 30 days of receiving this complaint. The answer must clearly

admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in your answer.

**FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING
WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO
DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY,
AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF
THE PENALTY PROPOSED IN THE COMPLAINT.**

QUICK RESOLUTION

25. Respondent may resolve this proceeding at any time by paying the specific penalty proposed in this complaint. Such payment need not contain any response to, or admission of, the allegations in the complaint. Such payment constitutes a waiver of Respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process. If Respondent chooses to resolve this proceeding by paying the specific penalty proposed in this complaint, the payment shall be made by remitting a cashier's or certified check, including the name and docket number of this case, for the amount, payable to "Treasurer, United States of America," (or be paid by one of the other methods listed below) and sent as follows:

Regular Mail:

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

Wire Transfers:

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

Federal Reserve Bank of New York

ABA = 021030004

Account = 68010727

SWIFT address = FRNYUS33

33 Liberty Street

New York NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727
Environmental Protection Agency"

Overnight Mail:

U.S. Bank

1005 Convention Plaza

Mail Station SL-MO-C2GL

St. Louis, MO 63101

Contact Natalie Pearson

314-418-4087

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank

808 17th Street, NW

Washington, DC 20074

Contact – Jesse White 301-887-6548

ABA = 051036706

Transaction Code 22-checking

Environmental Protection Agency

Account 310006

CTX Format

On Line Payment:

This payment option can be accessed from the information below:

www.pay.gov

Enter sfo1.1 in the search field

Open form and complete required fields

A copy of the check, or notification that the payment has been made by one of the other methods listed above, including proof of the date payment was made, shall be sent to both:

David Cobb, 8ENF-AT
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

and

Tina Artemis 8RC
Regional Hearing Clerk
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

SETTLEMENT NEGOTIATIONS

26. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you would like to pursue the possibility of settling this matter, or if you have any other legal questions, contact Linda Kato at 303-312-6852; kato.linda@epa.gov; or, at the address below:

Linda Kato, ENF-L
Enforcement Attorney
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129

Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.

Date: 9/17/10

By: Cynthia J. Reynolds
Cynthia J. Reynolds, Director
Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Date: 9/17/2010

By: Michael T. Risner
Michael T. Risner, Director
Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Date: 9/17/10

By: Linda Kato
Linda Kato
Enforcement Attorney
Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

In the Matter of:
Cenex Harvest States, Inc
Milk River Cooperative

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street; Denver, Colorado 80202-1129, and that a true copy of the same was sent via Certified Mail, Postage Pre-Paid, to:

Peter Mutschler, EH&S Manager
Cenex Harvest States, Inc.
5500 Cenex Drive
Inver Grove Heights, MN 55077

and

CT Corporation System, Inc.
Registered Agent for CHS. Inc.
100 S. 5th Street, #1075
Minneapolis, MN 55402

9/21/2010
Date

Judith McTernan
Judith McTernan

§21.13

40 CFR Ch. I (7-1-08 Edition)

approve or disapprove the State issued statement, in accordance with the requirements of §21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with §21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in §21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

§21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

- Sec.
- 22.1 Scope of this part.
 - 22.2 Use of number and gender.
 - 22.3 Definitions.
 - 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
 - 22.5 Filing, service, and form of all filed documents; business confidentiality claims.
 - 22.6 Filing and service of rulings, orders and decisions.
 - 22.7 Computation and extension of time.
 - 22.8 *Ex parte* discussion of proceeding.
 - 22.9 Examination of documents filed.

Subpart B—Parties and Appearances

- 22.10 Appearances.
- 22.11 Intervention and non-party briefs.
- 22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding.
- 22.14 Complaint.
- 22.15 Answer to the complaint.
- 22.16 Motions.
- 22.17 Default.
- 22.18 Quick resolution; settlement; alternative dispute resolution.
- 22.19 Prehearing information exchange; prehearing conference; other discovery.
- 22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing.
- 22.22 Evidence.
- 22.23 Objections and offers of proof.
- 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.
- 22.25 Filing the transcript.
- 22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision.
- 22.28 Motion to reopen a hearing.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

MEMORANDUM

DATE: August 13, 2010

SUBJECT: Cenex Harvest States, Inc, (Milk River Cooperative)
EPCRA 312 Penalty Justification

FROM: David Cobb, Program Coordinator
CERCLA § 103/EPCRA/CAA § 112(r) Enforcement
Technical Enforcement Program

TO: File

The following is the justification for the proposed EPCRA § 312 penalty for Cenex Harvest States, Inc, - Milk River Cooperative (CHS).

The proposed penalty is \$13,300. This penalty was calculated using the *Enforcement Response Policy for Sections 304, 311, and 311 of EPCRA and Section 103 of CERCLA*, September 30, 1999. Per the Civil Monetary Penalty Inflation Adjustment Rule (effective January 12, 2009), an inflation adjustment multiplier of 1.0983 was used and the final units rounded to the nearest \$100 as required by the Memorandum from Thomas Skinner, dated September 21, 2004. The adjustments have been made to the matrix which follows.

- A. **Nature:** Failure to provide Tier II Inventory reports
- B. **Extent: Level 1** – Failure to submit Tier II within 30 days of reporting deadline
- C. **Gravity: Level C** – Storage of 1-5 hazardous chemicals; less than 5 times the TPQ
- D. **Circumstances:** Proximity of surrounding population; release at facility: emergency planners did not have access to any required Tier II reports/community affected (mid-point of cell).
- E. Adjustment Factors during settlement negotiations:
 - a. Size of Business = Downward adjustment only; not applicable
 - b. Attitude = Up to 35% reduction; to be determined

Calculation:

- Extent = Level 1 (> 30 days)
- Gravity = Level C (1 – 5 H.C.'s; <5x TPQ)
- Circumstances = Surrounding population evacuated/no Tier II reports available to emergency planners (mid-point of cell)
- Adjustment Factors: not applicable prior to settlement negotiations
- Penalty = \$13,300

EXTENT (timeliness of submission)	LEVEL A (>10x TPQ/10+ H.C.'s)	LEVEL B (5-10x TPQ/6-9 H.C.'s)	LEVEL C (1-4x TPQ/1-5 H.C.'s)
LEVEL 1 (>30 days)	\$37,500 - \$26,560	\$26,560 - \$17,710	\$17,710 - \$8,860
LEVEL 2 (20 - 29 days)	\$26,560 - \$17,710	\$17,710 - \$8,860	\$8,860 - \$4,430
LEVEL 3 (10 - 19 days)	\$17,710 - \$8,860	\$8,860 - \$4,430	\$4,430 - \$2,220