



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

290 BROADWAY

NEW YORK, NEW YORK 10007-1866

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.11  
2010 SEP 30 A 8:52  
REGIONAL HEARING  
CLERK

September 29, 2010

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Milmar Food Group II, LLC  
One 6 ½ Station Road  
Goshen, New York 10924  
Attn: Martin Hoffman, President

RE: In the Matter of MilMar Food Group II, LLC., Docket No. EPCRA-02-2010-4002

Dear Mr. Bauer,

Enclosed please find an Administrative Complaint ("Complaint") that the United States Environmental Protection Agency ("EPA") has filed against MilMar Food Group II LLC. ("Respondent") under the authority of Section 325 of the Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11045, regarding compliance with the risk management program requirements.

In the Complaint, EPA alleges that Respondent has violated the reporting requirements of Section 312 of EPCRA, 42 U.S.C. Section 11022. Section 312 of EPCRA and the regulations found at 40 C.F.R. Part 370, requires that the owner or operator of a facility which is required to prepare or have available a Material Safety Data Sheet ("MSDS") for a hazardous chemical under the Occupational Safety and Health Act of 1970, 29 U.S.C. Section 651, *et seq.*, shall submit to the State Emergency Response Commission ("SERC"), the Local Emergency Planning Committee ("LEPC"), and the fire department with jurisdiction over the facility, by March 1 of each year, completed Emergency and Hazardous Chemical Inventory Forms ("Tier I/Tier II" forms). Respondent failed to timely submit such Tier II forms for calendar years 2007, 2008 and 2009.

The Complaint includes Proposed Civil Administrative Penalties, a Notice of Opportunity to Request a Hearing, and information on requesting an informal settlement conference.

You have the right to request a hearing to contest any allegations set forth in the Complaint or to contest the appropriateness of the proposed penalty. Please pay particular attention to the section in the Complaint entitled "Notice of Opportunity to Request a Hearing." If you fail to request a hearing within thirty (30) days of service of the Complaint, you will waive your right to a hearing and the proposed civil penalty may be assessed against you without further proceedings. You

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

-----X  
)  
IN THE MATTER OF: ) Docket No. EPCRA-02-2010-4002  
)  
MilMar Food Group II, LLC ) Administrative Complaint Under  
One 6 1/2 Station Road ) Section 325 of the Emergency Planning  
Goshen, New York 10924, ) and Community Right to Know Act,  
) 42 U.S.C. § 11045  
Respondent. )  
-----X

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
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ADMINISTRATIVE COMPLAINT

I. STATUTORY AUTHORITY

1. This Complaint ("Complaint") initiates an administrative action for the assessment of civil penalties pursuant to 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, Region 2 ("EPA"), who has been delegated the authority to institute this action.
2. Section 325 of EPCRA, 42 U.S.C. § 11045, provides for the assessment of penalties for violations of Section 312 of EPCRA.
3. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and the regulations found at 40 C.F.R. Part 370, provide that the owner or operator of a facility required to prepare or have available a Material Safety Data Sheet ("MSDS") for a hazardous chemical under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq. ("OSHA") shall submit to the Local Emergency Planning Committee ("LEPC"), the State Emergency Response Commission ("SERC"), and the local fire department with jurisdiction over the facility, by March 1, 1988 (and annually thereafter), a completed emergency and hazardous chemical inventory form (Tier I or Tier II form as described in 40 C.F.R. §§ 370.40 – 370.45). This inventory form must contain the information required by Section 312 of EPCRA and 40 C.F.R. Part 370, Subpart C, for all hazardous chemicals present at the facility at any one time during the preceding year in amounts equal to or greater than the threshold levels set forth in 40 C.F.R. § 370.10(a).

## II. FINDINGS OF VIOLATIONS

4. Respondent MilMar Food Group II, LLC ("Respondent") is, and at all times referred to herein, was, a "person," within the meaning of Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

5. Respondent is, and during the relevant time periods referred to herein was, the owner and/or operator of a facility located at One 6 ½ Station Road, Goshen, New York 10924 (hereinafter, the "Facility"), which is a "facility" as defined in Section 329(4) of EPCRA, 42 U.S.C. § 11049(4). Respondent manufactures specialty frozen foods and uses anhydrous ammonia in its refrigeration system.

6. Respondent owned and/or operated the Facility at the time of EPA's March 17, 2010 inspection and during the relevant periods described below.

7. Anhydrous ammonia is an "extremely hazardous substance" as defined under 329(3) of EPCRA, 42 U.S.C. § 11049(3), and 40 C.F.R. § 370.66, with a minimum threshold level for reporting of 500 pounds pursuant to 40 C.F.R. § 370.10(a)(1), and as set forth in 40 C.F.R. Part 355 Appendices A and B.

8. According to information provided to the EPA representative during the inspection, since at least December of 2007, anhydrous ammonia has been present at the Facility in amounts equal to or greater than the 500-pound reporting threshold level established in 40 C.F.R. § 370.10(a)(1).

9. In 2007, anhydrous ammonia was present at the Facility in quantities above the threshold level set forth in 40 C.F.R. § 370.10(a)(1) and Respondent was required under OSHA to prepare or have available an MSDS for anhydrous ammonia for the Facility. Therefore, Respondent was required, pursuant to Section 312 of EPCRA, 42 U.S.C. § 11022, to submit a completed emergency and hazardous chemical inventory form (Tier I or Tier II form) for anhydrous ammonia for the Facility to the LEPC, the SERC, and the fire department with jurisdiction over the Facility by March 1, 2008.

10. In 2008, anhydrous ammonia was present at the Facility in quantities above the threshold level set forth in 40 C.F.R. § 370.10(a)(1) and Respondent was required under OSHA to prepare or have available an MSDS for anhydrous ammonia for the Facility. Therefore, Respondent was required, pursuant to Section 312 of EPCRA, 42 U.S.C. § 11022, to submit a completed emergency and hazardous chemical inventory form (Tier I or Tier II form) for anhydrous ammonia for the Facility to the LEPC, the SERC, and the fire department with jurisdiction over the Facility by March 1, 2009.

11. In 2009, anhydrous ammonia was present at the Facility in quantities above the threshold level set forth in 40 C.F.R. § 370.10(a)(1) and Respondent was required under OSHA to prepare or have available an MSDS for anhydrous ammonia for the Facility. Therefore, Respondent was required, pursuant to Section 312 of EPCRA, 42 U.S.C. § 11022, to submit a completed emergency and hazardous chemical inventory form (Tier

I or Tier II form) for anhydrous ammonia for the Facility to the LEPC, the SERC, and the fire department with jurisdiction over the Facility by March 1, 2010.

12. The LEPC with jurisdiction over the Facility is the Orange County Department of Emergency Services located in Goshen, New York.

13. The SERC with jurisdiction over the Facility is the New York State Emergency Response Commission located in Albany, New York.

14. The local fire department with jurisdiction over the Facility is the Goshen Fire Department located in Goshen, New York.

#### **COUNT I**

15. The allegations contained in Paragraphs "1" through "14" are incorporated herein by reference.

16. Respondent did not submit a completed emergency and hazardous chemical inventory form (Tier I or Tier II form) for anhydrous ammonia for the Facility for the year 2007 by March 1, 2008 to the LEPC, the SERC, and/or the local fire department with jurisdiction over Respondent's Facility.

17. Respondent violated the reporting requirements of Section 312 of EPCRA, 42 U.S.C. § 11022, and is therefore subject to the assessment of penalties under Section 325 of EPCRA, 42 U.S.C. § 11045.

#### **COUNT II**

18. The allegations contained in Paragraphs "1" through "17" are incorporated herein by reference.

19. Respondent did not submit a completed emergency and hazardous chemical inventory form (Tier I or Tier II form) for anhydrous ammonia for the Facility for the year 2008 by March 1, 2009 to the LEPC, the SERC, and/or the local fire department with jurisdiction over Respondent's Facility.

20. Respondent violated the reporting requirements of Section 312 of EPCRA, 42 U.S.C. § 11022, and is therefore subject to the assessment of penalties under Section 325 of EPCRA, 42 U.S.C. § 11045.

#### **COUNT III**

21. The allegations contained in Paragraphs "1" through "20" are incorporated herein by reference.

22. Respondent did not submit a completed emergency and hazardous chemical inventory form (Tier I or Tier II form) for anhydrous ammonia for the Facility for the year 2009 by March 1, 2010 to the LEPC, the SERC, and/or the local fire department with jurisdiction over Respondent's Facility.

23. Respondent violated the reporting requirements of Section 312 of EPCRA, 42 U.S.C. § 11022, 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 325 of EPCRA, 42 U.S.C. § 11045, as modified pursuant to the 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 312 of EPCRA, 42 U.S.C. § 11012, that occurred after March 15, 2004 through January 12, 2009; and \$37,500 per day for each violation of Section 312 of EPCRA, 42 U.S.C. § 11012, that occurred after January 12, 2009.

On the basis of the violations of Section 312 of EPCRA described above, Complainant has determined that Respondent is subject to penalties under EPCRA Section 325, 42 U.S.C. § 11045. Accordingly, pursuant to the authority of Section 325 of EPCRA, Complainant proposes a civil penalty of \$16,200 for the EPCRA violations described above as set forth below.

Count I	Failure of Respondent to timely file Tier I/Tier II forms for 2007 with the LEPC, the SERC, and/or local fire department:	\$ 1,500.00
Count II	Failure of Respondent to timely file Tier I/Tier II forms for 2008 with the LEPC, the SERC, and/or local fire department:	\$ 1,500.00
Count III	Failure of Respondent to timely file Tier I/Tier II forms for 2009 with the LEPC, the SERC, and/or local fire department:	\$ 13,200.00
TOTAL PENALTY PROPOSED		\$ 16,200.00

In calculating the 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 to the Regional Administrators. 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:

Carol Y. Berns  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency

290 Broadway, 17<sup>th</sup> Floor  
New York, NY 10007  
Phone: (212) 637-3177

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 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 affirmatively to 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 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

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 action as herein alleged exists.

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 check or other instrument of payment should be

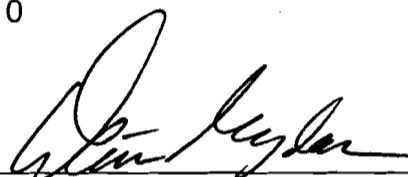


provided to the EPA Assistant Regional Counsel identified in Section IV.A., above. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America," in the full amount of the penalty assessed in this Complaint to the following addressee:

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

The check must 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 Complaint. 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.

Dated: Sept. 29, 2010



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

TO: MilMar Food Group II, LLC  
One 6 ½ Station Road  
Goshen, New York 10924  
Attn: Martin Hoffman, President

Attachment

cc: Karen Maples, Region 2 Hearing Clerk  
John Augustinski, Maintenance Manager

**ATTACHMENT 1**

PENALTY CALCULATION WORKSHEET

Respondent: MilMar Food Group, Goshen, NY

Count#: 1

Chemical Name/RQ/TPQ: Ammonia - RQ - 500 lbs.

**NATURE:** Type of Violation: EPCRA 312  
**EXTENT:** Not Applicable, as per September 30, 1999 Penalty Policy  
**GRAVITY:** Not Applicable, as per September 30, 1999 Penalty Policy  
**CIRCUMSTANCES:** Not Applicable, as per September 30, 1999 Penalty Policy

1. Base Penalty - Reporting Year – 2008 \$ 1,500  
(September 30, 1999 Penalty Policy: Flat Penalty for Past Year Violations)

Total Proposed Penalty \$ 1,500

Prepared by: E. Banner  
Signature: *Ellen Banner*

Date: 9/27/10

PENALTY CALCULATION WORKSHEET

Respondent: MilMar Food Group, Goshen, NY  
Count#: 2  
Chemical Name/RQ/TPQ: Ammonia - RQ - 500 lbs.

**NATURE:** Type of Violation: EPCRA 312  
**EXTENT:** Not Applicable, as per September 30, 1999 Penalty Policy  
**GRAVITY:** Not Applicable, as per September 30, 1999 Penalty Policy  
**CIRCUMSTANCES:** Not Applicable, as per September 30, 1999 Penalty Policy

1. Base Penalty - Reporting Year – 2009 \$ 1,500  
(September 30, 1999 Penalty Policy: Flat Penalty for Past Year Violations)

Total Proposed Penalty \$ 1,500

Prepared by: E. Banner  
Signature: *Ellen Banner*

Date: 9/27/10

PENALTY CALCULATION WORKSHEET

Respondent: MilMar Food Group, Goshen, NY  
 Count#: 3  
 Chemical Name/RQ/TPQ: Ammonia - RQ - 500 lbs.

**NATURE:** Type of Violation: EPCRA 312

**EXTENT:** Time passed from deadline to actual date of compliance (in hours or days): greater than 30 days past deadline  
 Matrix Level: 1

**GRAVITY:** Divide amount of chemical involved in the violation (lbs.): 2,000  
 lbs.by 500 (RQ/TPQ) = 4 times the threshold  
 Matrix Level: C

**CIRCUMSTANCES:** Specify choice of penalty amount from range listed for the cell of the matrix based on circumstance factors: Middle of the Matrix Box - Material is an EHS.

- |     |   |           |
|-----|---|-----------|
| 1.  | Base Penalty - Reporting Year – 2010                            | \$ 12,000 |
| 2.  | Inflationary Adjustment: Increase 9.83% (Post January 12, 2009) | \$ 1,180  |
| 3.  | Add lines 1 & 2   | \$ 13,180 |
| 4.  | Prior History: (Treble, 25%, 50%: + _____)                      |           |
| 5.  | Culpability (% increase or decrease +/- _____ %)                |           |
| 6.  | Other factors as justice may require (- _____ %)                |           |
| 7.  | Size of business reduction (- _____ %)                          |           |
| 8.  | Attitude (- _____ %)  |           |
| 9.  | Supplemental Environmental Project (- _____ %)                  |           |
| 10. | Voluntary Disclosure (- _____ %)                                |           |
| 11. | Subtract lines (5-11) from line 3                               |           |

Total Proposed Penalty –rounded to nearest hundred \$ 13,200

Prepared by: E. Banner  
 Signature: *Ellen Banner* Date: 9/27/10