

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

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HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF: )  
)  
Chem-Way Corporation, ) Docket No. EPCRA-04-2010-2015  
)  
Respondent. )  
\_\_\_\_\_ )

COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE

Comes now Complainant EPA, by and through its counsel, and in response to the Prehearing Order issued in this matter by Chief Administrative Law Judge Susan L. Biro, respectfully submits its Rebuttal Prehearing Exchange.

**I. Respondent's Denials of Allegations in Complaint**

In response to the Prehearing Order, Respondent was required to provide "...a narrative statement explaining in detail the factual and legal bases for the denials of the allegations in Paragraph 10, 15 and 20 of the Complaint..." (Prehearing Order at ¶ 3(A)). Respondent has not provided the required narrative. Respondent states in its Prehearing Exchange that "[t]he testimony of Mr. Swain will explain chemical identity and amounts present in 2005 through 2007." (Respondent's Prehearing Exchange at ¶ 3.A.). Respondent has violated the explicit language of the Prehearing Order by declining to provide a narrative statement regarding the denials in its Prehearing Exchange. Complainant is not afforded the opportunity to rebut the bases of the denials if they are not provided in Respondent's Prehearing Exchange as required by the Prehearing Order. Complainant respectfully requests that the Court either 1) refuse to allow testimony regarding information that Respondent has not supplied in its Prehearing Exchange or 2) require Respondent to provide a narrative statement as to the bases of the denials of the allegations in Paragraphs 10, 15 and 20 of the Complaint as required by the Prehearing Order.

**II. Respondent's Bases for Defenses**

Also in response to the Prehearing Order, Respondent was required to provide "...a narrative statement explaining in detail the factual and legal bases of the defenses in Paragraph 11, 16 and 21 of the Answer that involve 1) Respondent's reports to the local fire department in Charlotte (regarding its annual permit), and 2) an EPA inspection of Respondent's facility." (Prehearing Order at ¶ 3(B)). Respondent did not provide a narrative statement detailing the factual and legal bases for the abovementioned defenses (Respondent's Prehearing Exchange at ¶ 3.B.), and Complainant respectfully requests that the Court require Respondent to provide the narrative statement as directed by the Prehearing Order. Complainant will attempt to respond to

the defenses based on the statement in Paragraph 11 of the Answer and the Exhibits cited by Respondent in response to the Prehearing Order.

Respondent states that it is not required to prepare Tier II reports and that it reports to the local fire department of Charlotte significantly more information than required by the Tier I reports. (Answer at ¶ 11). Complainant agrees that the regulations at 40 C.F.R. § 370.40 require Tier II information only if requested by the State Emergency Response Center (SERC), the Local Emergency Planning Committee (LEPC) or the fire department having jurisdiction over the facility. While the State of North Carolina currently requires electronic filing of Tier II reports (Complainant's Exhibit 12), it has not passed legislation reflecting that requirement. However, Tier I information is the minimum information that must be reported to be in compliance with the inventory reporting requirements as described at EPCRA § 312(d), 42 U.S.C. § 11022(d), and 40 C.F.R. § 370.41. The Tier I information required pursuant to 40 C.F.R. § 370.41 includes:

- (a) Certification by the owner, operator or officially designated representative that all information included in the Tier I submission is true, accurate and complete;
- (b) The calendar year for the reporting period;
- (c) The complete name, and address of the facility;
- (d) The North American Industry Classification System (NAICS) code for the facility;
- (e) The Dun & Bradstreet number of the facility
- (f) The owner or operator's full name, mailing address and phone number;
- (g) The name, title, and phone number(s) of at least one local individual or office that can act as a referral if emergency responders need assistance in responding to a chemical accident at the facility;
- (h) An indication whether the information being reported is identical to that submitted the previous year;
- (i) An estimate (in ranges) of the maximum amount of hazardous chemicals in each hazard category present at the facility at any time during the preceding calendar year;
- (j) An estimate (in ranges) of the average daily amount of hazardous chemicals in each hazard category present at the facility during the preceding calendar year;
- (k) The maximum number of days that any single hazardous chemical within each hazard category was present at the facility during the reporting period;
- (l) The general location of hazardous chemicals in each hazard category within the facility.

Respondent's reports to the local fire department do not include all the necessary information as required by EPCRA § 312(d), 42 U.S.C. § 11022(d), and 40 C.F.R. § 370.41. Specifically, the reports to the fire department do not include a certification, a NAICS code, a Dun & Bradstreet number, emergency contact information, whether the information is identical to the previous year, hazard categories, the maximum amount of hazardous chemicals present during the preceding year, the average amount of chemicals present during the preceding year, and the maximum amount of days that a hazardous chemical was present on site. (Complainant's Exhibits 9 and 10). Furthermore, Respondent has not provided any information at all to the LEPC or the SERC. (Complainant's Exhibits 7 and 8; Respondent's Exhibit 2).

Respondent also states that it was never cited for failure to prepare Tier I reports during the EPA inspection of its facility. EPA does not issue citations during its EPCRA inspections. The inspection is simply to determine compliance with EPCRA. (See Complainant's Exhibits 4 and 5). If such violations are found, a Notice of Violation and Opportunity to Show Cause letter is issued which was the case here. (Respondent's Exhibit 7). The original letter cited Tier II violations because Tier II is the reporting requirement of most of the Region 4 states. That letter was withdrawn and a Notice of Violation and Opportunity to Show Cause letter citing Tier I or Tier II was issued. (See Respondent's Exhibit 1).

### **III. Respondent's Affirmative Defenses**

Respondent's first affirmative defense asserts that the 2005 alleged violations are time barred because EPA is bound by a five year statute of limitations. (Respondent's Prehearing Exchange at ¶ 3.C.; Answer at ¶ 23). The violations related to the 2005 calendar year do not begin until March 1, 2006, when the required report was due to the LEPC, SERC and fire department with jurisdiction over the facility pursuant to EPCRA § 312(a)(2), 42 U.S.C. § 11022(a)(2), and 40 C.F.R. § 370.45. Thus the statute of limitations on the 2005 calendar year violations does not run until March 1, 2011.

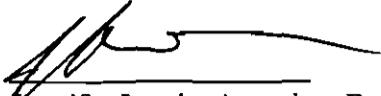
Respondent's second and third affirmative defenses assert that the inspection was in retaliation for providing exculpatory information in another EPA enforcement action and that the inspector acted improperly. (Respondent's Prehearing Exchange at ¶ 3.C.; Answer at ¶¶ 24 and 25). EPA was notified of Respondent's noncompliance by Mr. Garry McCormick of the Charlotte, North Carolina LEPC. (See Complainant's Exhibit 7). Complainant's Exhibit 7 clearly demonstrates that when Mr. Poole asked if there were any facilities in the area Mr. McCormick thought we should inspect, Mr. McCormick stated that Chem-Way had never filed a Tier II with the LEPC. Again, while a Tier II is preferred, a Tier I should have been filed at the very least.

Respondent's fourth affirmative defense is that the penalty is excessive and should be eliminated. (Respondent's Prehearing Exchange at ¶ 3.C.; Answer at ¶ 26). The penalty is appropriate for the violations alleged in the Complaint particularly in light of the fact that Respondent remains noncompliant. Complainant calculated the penalty in accordance with the penalty policy as explained in Complainant's Exhibit 2.

Respondent's fifth affirmative defense is that its reporting efforts meet or exceed any applicable EPCRA requirements. (Respondent's Prehearing Exchange at ¶ 3.C.; Answer at ¶ 27). Complainant does not agree and points to the discussion regarding the statutory and regulatory requirements of EPCRA *supra*. The statutory and regulatory requirements are clearly set out at EPCRA § 312, 42 U.S.C. § 11022, and 40 C.F.R. Part 370. These requirements have not been followed by Respondent. The permit information required by the fire department is incomplete with regards to the required Tier I or Tier II information. The LEPC and the SERC have never received any information (permit information, Tier I or Tier II) as clearly required by the EPCRA statute and the regulations.

Dated: May 18, 2010

Respectfully Submitted,



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Dated: 5-18-10