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June 28, 2013

Regional Hearing Clerk (6RC-D)
U.S. Environmental Protection Agency
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Via Federal Express

Mr. Jeffrey M. Clay
Assistant Regional Counsel (6RC-EW)
U.S. Environmental Protection Agency
1445 Ross Avenue, Suite 1200
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Via Federal Express

RE: EPA Docket No. CAA-06-2013-3312; In the Matter of Oiltanking Houston, L.P.,
Houston, TX, Respondent; United States Environmental Protection Agency,
Region 6, Dallas, Texas.

Gentlemen:

Enclosed please find an original and two copies of Respondent Oiltanking Houston,
L.P.'s Answer, Affirmative Defenses, and Request for Hearing.

For purposes of providing respondent with a confirmation of this filing, please file stamp
the enclosed additional copy, and return to me in the enclosed self-addressed and postage pre-
paid envelope.

Thank you for your assistance with this matter.

Sincerely,

CRAIN, CATON & JAMES, P.C.

By:


Cory R. Thornton

CRT/tr
Enclosure

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

FILED
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REGIONAL HEARING CLERK
EPA REGION VI

In the Matter of:	§	
	§	EPA DOCKET NO.
Oiltanking Houston, L.P.,	§	CAA-06-2013-3312
Houston, TX	§	
	§	COMPLAINT AND NOTICE OF
Respondent	§	OPPORTUNITY FOR A HEARING
	§	

RESPONDENT'S ANSWER, AFFIRMATIVE DEFENSES, AND REQUEST FOR HEARING

Oiltanking Houston, L.P. ("Respondent") files this Answer, Affirmative Defenses, and Request for Hearing in response to U.S. Environmental Protection Agency's ("EPA") Complaint and Notice of Opportunity for a Hearing filed on or about March 29, 2013 (the "Complaint"). Respondent answers as follows in paragraphs corresponding to the allegations:

RESPONDENT'S ANSWER

1. Respondent admits that this is a civil action brought by the EPA under the Clean Air Act, but Respondent denies that it is in any way liable to EPA as alleged.
2. Respondent admits that the EPA is seeking civil administrative penalties under Section 112(r)(1) of the Clean Air Act and that Respondent owns and operates a storage tank terminal located in Houston, Texas, but Respondent denies that it failed in any way to fulfill its general duties under Section 112(r)(1) of the Clean Air Act leading up to the June 2, 2012 incident at its Houston facility.
3. This Paragraph contains statements of law that Respondent is not required to admit or deny. Subject thereto and without waiving same, denied.

4. This Paragraph contains statements of law that Respondent is not required to admit or deny. Subject thereto and without waiving same, denied.

5. This Paragraph contains statements of law that Respondent is not required to admit or deny. Subject thereto and without waiving same, denied.

6. This Paragraph contains statements of law that Respondent is not required to admit or deny. Subject thereto and without waiving same, denied.

7. This Paragraph contains statements of law that Respondent is not required to admit or deny. Subject thereto and without waiving same, denied.

8. Admitted.

9. Respondent admits that the term "person," as defined in Section 302(e) of the Clean Air Act, 42 U.S.C. § 7602(e), includes a partnership, but Respondent denies all other allegations.

10. Denied.

11. Denied.

12. Denied. Subject thereto and without waiving same, Respondent admits that it owns and operates a storage tank terminal located at 15631 Jacintoport Boulevard, Houston, Texas 77015 (hereinafter referred to as the "Facility").

13. Denied. Subject thereto and without waiving same, Respondent admits that its Facility belongs to SIC code 4226 (petroleum and chemical bulk stations and terminals for hire).

14. To the extent this Paragraph fails to acknowledge that the Facility is located at 15631 Jacintoport Boulevard, Houston, Texas 77015, denied. Subject thereto and without waiving same, admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in this Paragraph. Subject thereto and without waiving same, denied.

19. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in this Paragraph. Subject thereto and without waiving same, denied.

20. Respondent admits that the documents referenced in this Paragraph discuss welding and/or hot work. Respondent denies any implication that such documents constitute legal requirements with which Respondent must comply.

21. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in this Paragraph. Subject thereto and without waiving same, denied.

22. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in this Paragraph. Subject thereto and without waiving same, denied.

23. To the extent this Paragraph assumes a hot work permit was issued before the piping was drained, denied. Respondent also denies this Paragraph to the extent it fails to acknowledge that the Facility is located at 15631 Jacintoport Boulevard, Houston, Texas 77015. Subject to the foregoing denials and without waiving same, Respondent admits a hot work permit was issued to L-Con after the piping was drained.

24. To the extent this Paragraph assumes a hot work permit was issued before the piping was drained, denied. Subject to the foregoing denial and without waiving same, admitted.

25. Admitted.

26. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in this Paragraph. Subject thereto and without waiving same, denied.

27. Denied.

28. Admitted.

29. Denied, except to the extent Respondent admits that Pioneer Works displays the referenced warnings on its website. Respondent also denies that it used the Foreman Night Cap as a pressure holding device.

30. Admitted.

31. To the extent this Paragraph fails to acknowledge that the Facility is located at 15631 Jacintoport Boulevard, Houston, Texas 77015, denied. Respondent also denies this Paragraph to the extent it fails to acknowledge that (i) the welding area was monitored with a Lower Explosive Limit detector and (ii) a hot work permit was issued on June 2, 2012 before welding continued on the piping. Subject to the foregoing denials and without waiving same, Respondent admits that L-Con employees returned to the Facility on June 2, 2012.

32. Respondent denies this Paragraph to the extent it fails to acknowledge that (i) the welding area was monitored with a Lower Explosive Limit detector and (ii) a hot work permit was issued on June 2, 2012 before any welding continued on the piping. Subject to the foregoing denial and without waiving same, admitted.

33. Respondent denies this Paragraph to the extent it fails to acknowledge that (i) the welding area was monitored with a Lower Explosive Limit detector and (ii) a hot work permit was issued on June 2, 2012 before any welding continued on the piping. Subject to the foregoing denial and without waiving same, admitted.

34. Respondent denies this Paragraph to the extent it fails to acknowledge that two L-Con employees were welding and one L-Con employee was assisting on the morning of June

2, 2012. Subject to the foregoing denial and without waiving same, Respondent admits that at the time of the incident two L-Con employees were working on the flange welding project.

35. Admitted.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. Respondent adopts, realleges, and incorporates herein as if fully set forth, its answers to the allegations of Paragraphs 1-46.

48. This Paragraph contains a legal conclusion that Respondent is not required to admit or deny. Subject thereto and without waiving same, denied.

49. This Paragraph contains a legal conclusion that Respondent is not required to admit or deny. Subject thereto and without waiving same, denied.

50. This Paragraph contains a legal conclusion that Respondent is not required to admit or deny. Subject thereto and without waiving same, denied.

51. This Paragraph contains a legal conclusion that Respondent is not required to admit or deny. Subject thereto and without waiving same, denied.

52. This Paragraph contains a legal conclusion that Respondent is not required to admit or deny. Subject thereto and without waiving same, denied.

53. Denied.

54. Denied.

55. Denied.

56. Respondent adopts, realleges, and incorporates herein as if fully set forth, its answers to the allegations of Paragraphs 1-55.

57. Denied.

58. Denied.

59. Respondent adopts, realleges, and incorporates herein as if fully set forth, its answers to the allegations of Paragraphs 1-58.

60. Denied.

61. Denied.

62. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in this Paragraph. Subject thereto and without waiving same, denied. As an additional explanation, EPA has failed to comply with the requirements of 40 CFR 22.14(a)(4)(i) as the violations referenced in the penalty calculation worksheet are different than those referenced in the Complaint:

Penalty Calculation Worksheet

- Count 1 – Alleges that Respondent failed to follow standards regarding preparation of equipment for safe welding.
- Count 2 – Alleges that Respondent failed to follow standards regarding monitoring during welding.

Complaint

- Count 1 – Alleges a failure to follow safety procedures, fill the lateral pipe with an inert substance, clean the pipe, and monitor for gas and pressure.
- Count 2 – Alleges that the Foreman Night Cap was used as a pressure holding device.

EPA has thus failed to provide Respondent with its reasoning behind the proposed penalties as required by 40 CFR 22.14(a)(4)(i), making the Complaint procedurally deficient.

63. Denied.

64. Paragraphs 64–73 contain an explanation of the administrative procedural process and require no response.

Respondent denies all allegations not specifically admitted herein.

DEFENSES

Subject to and without waiving the foregoing and the burden of proof EPA is required to carry on each element of any violation alleged or asserted by EPA, Respondent asserts the following affirmative defenses.

65. EPA has not met its burden of establishing that it has jurisdiction over this matter. The statutory authorization for the General Duty Clause, 42 U.S.C. § 7412(r)(1), states that “the objective of the regulations and programs authorized under this subsection to prevent [] accidental release,” and “accidental release” means “unanticipated emission...into the ambient air.” 42 U.S.C. § 7412(r)(2)(A). Although not specifically defined in the statute, EPA regulations clarify that “ambient air” does not apply to releases that stay within a facility.

“Ambient air is that portion of the atmosphere, external to buildings, to which the general public has access.” 40 C.F.R. § 50.1(e). EPA has failed to establish that there was any release, let alone a release that left Respondent’s facility and entered the ambient air. EPA thus lacks jurisdiction over this matter.

66. EPA must also establish its jurisdiction by demonstrating that it is seeking to prevent the accidental release and to minimize the consequence of any such release of *any substance listed pursuant to 112(r)(3) of the Clean Air Act or any other extremely hazardous substance*. Crude oil is not a listed substance under Section 112(r)(3) of the Clean Air Act, the Emergency Planning and Community Right-to-know Act (“EPCRA”), or 40 CFR Part 68.130 (Tables 1-4). Crude oil is also not otherwise an extremely hazardous substance. Any attempt by EPA to use the Complaint as the first forum to label crude oil as an extremely hazardous substance is entirely arbitrary and capricious. Without the presence of an extremely hazardous substance, EPA lacks jurisdiction to bring penalties for alleged violations of Section 112(r)(1) of the Clean Air Act.

67. Any assertion of jurisdiction by EPA is preempted by OSHA’s jurisdiction over this matter, as set forth in various memorandums of understanding (MOU) between OSHA and EPA. The most recent MOU on “Chemical Accident Investigations” states that “OSHA is the federal agency with primary responsibility for worker safety and health,” while EPA “is the federal agency with primary responsibility for the protection of public health and the environment.” See 1996 MOU between OSHA and EPA (“Background and Responsibilities”). Another MOU makes this separation more explicit by stating that “EPA inspectors are not to perform the role of OSHA inspectors; however, they will refer worker health and safety issues to

OSHA pursuant to the procedures set forth in this MOU and implementing agency directives.”
See 1990, 1991 MOUs between OSHA and EPA.

68. EPA is attempting to cite a lack of safety procedures related to welding that allegedly led to the incident. The cited safety procedures are primarily concerned with worker safety and health, and not protection of public health and the environment. To the extent any agency wishes to investigate Respondent’s compliance with applicable safety standards, the agency with proper jurisdiction would be OSHA. EPA’s attempt to encroach on OSHA’s jurisdiction in this matter is thus preempted.

69. EPA has not met its burden of establishing each and every element of its prima facie case against Respondent. More particularly, EPA has not demonstrated that the Clean Air Act standards under Section 112(r)(1) apply to Respondent or that Respondent failed to comply with such cited standards. At no time prior to the incident in question did Respondent have either actual or constructive knowledge of any potentially unsafe conditions, the existence of which is denied. It is both unfeasible as well as impractical for Respondent to anticipate unexpected acts and/or omissions of third parties, and there is no federal obligation to do so. *See Horne Plumbing & Heating Co. v. OSHA*, 528 F.2d 564 (5th Cir. 1976).

70. Respondent at all times made good faith efforts to comply with the Section 112(r)(1) of the Clean Air Act, and Respondent did not deviate from the requirements of the statute. Respondent would also emphasize that neither of the alleged violations have the potential to undermine Respondent’s ability to prevent releases of extremely hazardous substances and/or to minimize the consequences of a release, as any alleged failure of safety procedures was the result of human error by a third party. At all times relevant to this lawsuit,

Respondent had reasonable grounds for believing its actions were not in violation of any law, rule, regulation, standard or guideline.

71. The proposed penalties by EPA for the alleged violations are excessive and unreasonable and do not give proper consideration to the gravity of the alleged violation, duration of the alleged violation (as established by credible evidence), Respondent's size, good faith and history of previous violations, as required by Section 113(e)(1) of the Clean Air Act, 42 U.S.C. § 7413(e)(1).

72. The violations referenced by EPA in the penalty calculation worksheet are different than those referenced in the Complaint. EPA has thus failed to provide Respondent with its reasoning behind the proposed penalties as required by 40 CFR 22.14(a)(4)(i), making the Complaint procedurally deficient.

73. With respect to Count 1 of the Complaint, as found in Paragraphs 47–55 of the Complaint, Respondent asserts that it designed and maintained a safe facility and took the necessary steps to prevent accidental releases by utilizing appropriate preventive measures.

74. With respect to Count 2 of the Complaint, as found in Paragraphs 56-58 of the Complaint, Respondent asserts that L-Con vented the Foreman Night Cap and L-Con did not use it as a pressure holding device. Thus, there was no failure to minimize the consequences of a hazardous release as alleged.

75. Any alleged failures of safety procedures leading to the incident were the result of isolated events, human errors of a third party, and/or circumstances beyond the control of Respondent. These events were both unforeseeable and unpreventable and thus Respondent cannot be found to have committed a violation of law. *Brock v. L.E. Myers Company*, 818 F.2d 1270, 1276 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987).

76. As applied in this case, Section 112(r)(1) of the Clean Air Act is void for vagueness, since it fails to provide Respondent with the requisite reasonable notice of what was prohibited or required.

REQUEST FOR HEARING

Pursuant to 40 CFR § 22.15(c), Respondent hereby requests a hearing upon the issues raised by EPA's Complaint and this Answer, Affirmative Defenses, and Request for Hearing at which it will contest allegations of material fact and applications of law in the Complaint and contest the appropriateness of the proposed penalties in the Complaint.

PRAYER

WHEREFORE, Respondent ask for a hearing and prays that, following said hearing, the Presiding Officer deny all of EPA's requests for relief and enter judgment in favor of Respondent and against EPA as to all counts of EPA's Complaint. Respondent further prays for such other and further relief to which it may be justly and equitably entitled.

Respectfully submitted,

CRAIN, CATON & JAMES, P.C.

By: _____


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ATTORNEYS FOR OILTANKING
HOUSTON, L.P.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been forwarded on this the 28th day of June, 2013, to:

Regional Hearing Clerk (6RC-D)
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Dallas, TX 75202-2733

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