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G. ALAN PERKINS
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February 6, 2015

Via Federal Express
Ms. Lorena Vaughn
Regional Hearing Clerk (6RC-D)
US Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

RE: In the Matter Of: Ludwig, Inc., Waldo, Arkansas
Docket No: EPCRA-06-2015-0502

Dear Ms. Vaughn:

Enclosed please find the original and two copies of Respondent's Answer to Complaint and Notice of Opportunity for Hearing in the above-referenced matter for filing. Please file and return the extra copy in the self-addressed, stamped envelope. Please also e-mail a stamped copy to alan@ppgmrlaw.com and nicole@ppgmrlaw.com. If you have any questions, please call me at 501-603-9000. Thank you for your time.

Sincerely,

PPGMR LAW, PLLC

A handwritten signature in cursive script, appearing to read 'Nicole Frazier', is written over the typed name.

Nicole Frazier
Paralegal to G. Alan Perkins

Enclosures
/mf

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

2015 FEB -9 PM 2:41
REGIONAL HEARING CLERK
EPA REGION VI

IN THE MATTER OF:

LUDWIG, INC.
WALDO, ARKANSAS

RESPONDENT

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DOCKET NO. EPCRA-06-2015-0502

**ANSWER TO COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

Comes now Respondent, Ludwig, Inc., by and through its counsel, PPGMR Law, PLLC, and in Answer to the Complaint and Notice of Opportunity for Hearing (“Complaint”) states as follows:

I. STATUTORY AND REGULATORY BACKGROUND

1. Paragraph 1¹ contains a general background summary of certain federal statutory and regulatory provisions, which speak for themselves, and the legal summary requires no response. To the extent a response is required, Respondent denies that the summary is complete, and Respondent relies on the full text of the applicable statutes and regulations, including any other statutory or regulatory provisions needed for appropriate context.

2. Paragraph 2 contains a general background summary of certain federal statutory and regulatory provisions, which speak for themselves, and the legal summary requires no response. To the extent a response is required, Respondent denies that the summary is complete,

¹ References in this Answer to numbered paragraphs refer to the numbered paragraphs in the Complaint and Notice of Opportunity for Hearing, unless otherwise specifically stated.

and Respondent relies on the full text of the applicable statutes and regulations, including any other statutory or regulatory provisions needed for appropriate context.

3. Respondent admits that Paragraph 3 contains an accurate recitation of the regulatory definition of “Manufacture.”

4. Respondent admits that Paragraph 4 contains a substantially accurate recitation, although not exact, of the regulatory definition of “Process.”

5. Respondent denies that Paragraph 5 contains the complete regulatory definition of “Otherwise use,” but admits that a portion of the definition is quoted correctly.

6. Paragraph 6 contains a general summary of a single provision in a complex federal statute, which provision speaks for itself, and the legal summary requires no response. To the extent a response is required, Respondent denies that the summary is complete, and Respondent relies on the full text of the applicable statutes and regulations, including any other statutory or regulatory provisions needed for appropriate context.

II. RESPONSE TO PRELIMINARY ALLEGATIONS

7. Respondent admits Paragraph 7.

8. Respondent admits Paragraph 8.

9. Respondent admits Paragraph 9.

10. Respondent admits Paragraph 10.

11. Respondent admits Paragraph 11.

12. Respondent admits Paragraph 12.

13. Respondent admits Paragraph 13.

14. Respondent admits Paragraph 14.

15. Respondent admits that it received an email from a representative of EPA Region 6 on July 31, 2014 regarding data quality review for the calendar year 2013 only. Respondent denies that the email expressed that it was either “investigatory” or that “abnormalities” had been detected in the reporting of diisocyanates for the facility.

III. RESPONSE TO ALLEGED VIOLATIONS

Count 1 – Failure to Timely Report Diisocyanates for Calendar Year 2009

- 16. Respondent incorporates all preceding paragraphs of this Answer.
- 17. Respondent admits Paragraph 17.
- 18. Respondent admits Paragraph 18.
- 19. Respondent denies Paragraph 19.
- 20. Respondent admits Paragraph 20.

Count 2 – Failure to Timely Report Diisocyanates for Calendar Year 2010

- 21. Respondent incorporates paragraphs 1-15 of this Answer.
- 22. Respondent admits Paragraph 22.
- 23. Respondent admits Paragraph 23.
- 24. Respondent admits Paragraph 24.
- 25. Respondent admits Paragraph 25.

Count 3 – Failure to Timely Report Diisocyanates for Calendar Year 2011

- 26. Respondent incorporates paragraphs 1-15 of this Answer.
- 27. Respondent admits Paragraph 27.
- 28. Respondent admits Paragraph 28.
- 29. Respondent admits Paragraph 29.

30. Respondent admits Paragraph 30.

Count 4 – Failure to Submit a Complete and Accurate Report for Diisocyanates Releases for Calendar Year 2013

31. Respondent incorporates paragraphs 1-15 of this Answer.

32. Respondent admits Paragraph 32.

33. Respondent denies Paragraph 33.

34. Respondent denies that its mistake, which amounts to a typographical error, indicates a “significant data quality error” and denies that it “compromised the integrity of the data submitted to EPA and the states.”

35. Respondent admits that it was contacted by an EPA enforcement representative on July 31, 2014, regarding data quality review for the calendar year 2013. Respondent denies that the representative inquired about the “basis for the initial reported data.”

36. Respondent denies that paragraph 36 contains an accurate account of the response to EPA’s initial inquiry about data quality. Respondent admits that it subsequently made the appropriate correction to the inadvertent error in its initial report, on October 16, 2014.

37. Respondent denies paragraph 37.

Count 5 – Failure Maintain Records for Calendar Year 2011

38. Respondent incorporates Paragraphs 1-15 of this Answer.

39. Respondent admits Paragraph 39.

40. Respondent admits that an EPA representative requested information related to the reported values for diisocyanates, but denies that the request was for the documentation required to be maintained at the facility for calendar year 2011.

41. Respondent denies Paragraph 41.

42. Respondent denies Paragraph 42.

43. Respondent denies Paragraph 43.

44. Respondent denies Paragraph 44.

Count 6 – Failure Maintain Records for Calendar Year 2012

45. Respondent incorporates Paragraphs 1-15 of this Answer.

46. Respondent admits Paragraph 46.

47. Respondent admits that an EPA representative requested information related to the reported values for diisocyanates, but denies that the request was for the documentation required to be maintained at the facility for calendar year 2012.

48. Respondent denies Paragraph 48.

49. Respondent denies Paragraph 49.

50. Respondent denies Paragraph 50.

51. Respondent denies Paragraph 51.

Count 7 – Failure Maintain Records for Calendar Year 2013

52. Respondent incorporates Paragraphs 1-15 of this Answer.

53. Respondent admits Paragraph 53.

54. Respondent admits that an EPA representative requested information related to the reported values for diisocyanates, but denies that the request was for the documentation required to be maintained at the facility for calendar year 2013.

55. Respondent denies Paragraph 55.

56. Respondent denies Paragraph 56.

57. Respondent denies Paragraph 57.

58. Respondent denies Paragraph 58.

59. Respondent denies each and every allegation of the Complaint not specifically admitted herein.

60. Respondent reserves the right to amend its Answer, including adding additional affirmative defenses, pending additional investigation and exchange of information and documents.

IV. RESPONSE TO PROPOSED CIVIL PENALTY

To develop the proposed penalties in the Complaint, the Complainant attempted only to make a rigid application of EPA's "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right to Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) [Amended]," dated April 12, 2001 (the "Policy"). The stated purpose of the Policy is:

to ensure that enforcement actions for violations of EPCRA § 313 and the PPA are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA § 313 violations and the PPA.

Policy, at p. 1. EPA requires its enforcement personnel to solely use the Policy to determine civil penalties.

The Policy, however, is not binding. The guidepost for determining the amount of any civil penalty is included in the EPCRA statute:

In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

42 U.S.C. § 11045(b)(1)(C). While the EPCRA considerations are generally included in a formulaic manner in the policy, the Policy itself removes substantial discretion from EPA enforcement personnel.

In this proceeding, however, the Administrative Law Judge has discretion to assess a penalty different in amount from the Policy. Under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, which governs these proceedings, the Policy is not to be unquestioningly applied as if it were a rule with “binding effect.”² “The Administrative Law Judge ‘has the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant.’”³

Respondent affirmatively asserts that the proposed civil penalty of \$25,400 is grossly excessive in this case, and it should be substantially reduced or eliminated for each of the individual claims. Each of the proposed civil penalties in the Complaint is addressed below:

Count 1 – Failure to Timely Report Diisocyanates for Calendar Year 2009

Respondent’s Form R report for the calendar year 2009 was due July 1, 2010. Respondent, like many small businesses, engaged a consultant to assist with this procedure. For the calendar year 2009, the consultant filed the Form R report on August 29, 2010, 59 days beyond the deadline. The report contained all of the required TRI information, and there is no allegation that the information was incorrect. Respondent was not aware of any deficiencies with the filing. However, EPA contends that the original report was not signed. When a

² *In re Bituma-Stor, Inc.*, EPCRA-7-99-0045 (EAB, Jan. 22, 2001), citing *In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, 6 E.A.D. 735, 755-762 (EAB, Feb. 11, 1997); see also *In re Steeltech, Limited*, EPCRA Appeal No. 98-6, at 10-16 (EAB, Aug. 26, 1999), affirmed, *Steeltech Limited v. United States Environmental Protection Agency*, 105 F.Supp.2d 760 (W.D. Mich. 2000).

³ *In re Bituma-Stor, Inc.*, EPCRA-7-99-0045 (EAB, Jan. 22, 2001), citing *In re DIC Americas, Inc.*, TSCA Appeal No. 94-2, 6 E.A.D. 184, 189 (EAB, Sept. 27, 1995).

signature was requested by EPA, it was promptly provided on June 20, 2014. Notwithstanding these facts, EPA treats this minor infraction the same as an instance where a party did not file any Form R report at all until years later. There was no environmental harm from this minor infraction, and the \$7,090 penalty is grossly in excess of the gravity of the violation.

Count 2 – Failure to Timely Report Diisocyanates for Calendar Year 2010

Respondent did not file a Form R report for the calendar year 2010 until August 29, 2012, just over one year past the deadline. Respondent discovered the problem on its own and filed the report as soon as it realized the oversight, without the opening of any investigation or enforcement action by EPA. Respondent accepts responsibility for this violation. However, Respondent was taking measures at the time to resolve its paperwork compliance, and corrected the problem on its own. EPA does not contend that the report was inaccurate or otherwise deficient. Respondent gained nothing by failing to report on time, and there was no environmental harm from this infraction. The proposed penalty of \$7,090 is grossly excessive under the circumstances.

Count 3 – Failure to Timely Report Diisocyanates for Calendar Year 2011

Respondent's Form R report for the calendar year 2011 was due on July 1, 2012. Respondent missed the deadline and filed its report 59 days late on August 29, 2012. The missed deadline for calendar year 2010 was discovered at the same time that Respondent realized it had missed the filing deadline for the calendar year 2011. (See explanation for Count 2, above). It remedied both of these issues at the same time and as quickly as possible after discovering the problem. Respondent corrected the problem on its own, without the opening of any investigation or enforcement action by EPA. Respondent gained nothing by failing to report on time, and

there was no environmental harm from this infraction. Under these circumstances, the proposed penalty of \$2,321 is arbitrary and excessive.

Count 4 – Failure to Submit a Complete and Accurate Report for Diisocyanates releases for Calendar Year 2013

Respondent denies that it committed any infraction in reporting for the calendar year 2013. Respondent filed its Form R electronically for the first time (e-filing was implemented during this reporting year), and made what amounts to a typographical error in its entry of pounds emitted for diisocyanates. Instead of “450” the entry was inadvertently “45000,” which easily could have occurred merely by pressing the “0” key too long. Respondent was unfamiliar with the new electronic reporting system and merely made an understandable mistake. The mistake had nothing to do with records of processes or calculations of emissions. The error was corrected on October 16, 2014. Furthermore, the EPA enforcement official stated unequivocally in an email to Respondent on October 23, 2014: “I am not assessing any penalty for the data quality violation on the 2013 Form R for diisocyanates.” (emphasis in original). But when the Respondent did not agree to everything the enforcement officer demanded, he broke his word and included the penalty anyway. EPCRA was not intended to punish regulated companies trying to do the right thing, for inadvertent typographical errors, and this Count should carry no penalty.

Count 5 – Failure Maintain Records for Calendar Year 2011

Count 6 – Failure Maintain Records for Calendar Year 2012

Count 7 – Failure Maintain Records for Calendar Year 2013

Counts 5, 6, and 7 are essentially the same claim that Complainant attempts to multiply into 3 different violations. Over the course of several emails and phone conversations, the EPA enforcement officer attempted to catch Respondent in as many violations as possible, rather than

attempting to assist Respondent in achieving full compliance. During the discourse, Respondent understood the request for information to be targeted at the technical engineering or mathematical basis for the underlying formula used or developed by the consultant in arriving at the calculated emissions for diisocyanates. When Respondent indicated he needed to check with the consultant and get back with him, the EPA enforcement officer treated that response as meaning that Respondent did not have the annual supporting data on hand at the facility. All of the requested information was provided promptly to the EPA enforcement officer. The actual facts of the discourse support a conclusion that the enforcement officer was attempting to manipulate a person less knowledgeable about the finer points of the regulatory language, rather than attempting to obtain an answer about supporting information. At all times, Respondent had supporting data and information to back up the annual reports on hand at its facility. These manufactured “violations” simply did not occur and no penalty is due for Counts 6, 7, or 8.

V. AFFIRMATIVE DEFENSES

1. Respondent, like many small businesses, engaged a consultant to assist it with filing Form R reports. At all times, Respondent cooperated with its consultant and attempted to comply with the regulations.

2. For the calendar year 2009, the consultant filed the Form R report on August 29, 2010, 59 days beyond the deadline. The report contained all of the required TRI information, and the information was correct. Respondent was not aware of any deficiencies with the filing.

3. When EPA informed Respondent that a signature was missing from the 2009 report, it was promptly provided on June 20, 2014.

4. Respondent filed its Form R report for the calendar year 2010 on August 29, 2012, just over one year past the deadline. Respondent discovered the problem on its own and

filed the report as soon as it realized the oversight, without the opening of any investigation or enforcement action by EPA.

5. Respondent's Form R report for the calendar year 2011 was filed on August 29, 2012.

6. The missed deadline for calendar year 2010 was discovered at the same time that Respondent realized it had missed the filing deadline for the calendar year 2011. Respondent remedied both of these issues at the same time and as quickly as possible after discovering the problem. Respondent corrected the problem on its own, without the opening of any investigation or enforcement action by EPA.

7. Respondent filed its Form R electronically for the first time (e-filing was implemented during this reporting year) for the calendar year 2013. Respondent filed the report on June 20, 2015, prior to the deadline.

8. When e-filing its 2013 report, Respondent made what amounts to a typographical error in its entry of pounds emitted for diisocyanates. Instead of "450" the entry was inadvertently "45000." Respondent was unfamiliar with the new electronic reporting system and merely made an understandable mistake. The mistake had nothing to do with records of processes or any miscalculation of emissions. The error was corrected on October 16, 2014.

9. The EPA enforcement official represented in an email to Respondent on October 23, 2014: "I am not assessing any penalty for the data quality violation on the 2013 Form R for diisocyanates." (emphasis in original). But when the Respondent did not agree to everything the enforcement officer demanded, he broke his word and included the penalty anyway.

10. EPCRA was not intended to punish regulated companies trying to do the right thing, for inadvertent typographical errors.

11. Counts 5, 6, and 7 of the Complaint are essentially the same claim that Complainant attempts to multiply into 3 different violations. Over the course of several emails and phone conversations, the EPA enforcement officer attempted to catch Respondent in as many violations as possible, rather than attempting to assist Respondent in achieving full compliance.

12. All supporting information requested by the EPA enforcement officer was promptly provided by Respondent.

13. At all times, Respondent had supporting data and information to back up the annual reports on hand at its facility, in compliance with the recordkeeping requirements of EPCRA.

14. With regard to Counts 1, 2, and 3, Respondent cured all of the deficiencies in annual reports promptly upon discovering the problem, without any EPA investigation or enforcement action.

15. With regard to Count 4, the deficiency was merely a typographical error while entering data into an electronic reporting system for the first time. This type of error is not a violation within the intent or meaning of EPCRA.

16. At all times, Respondent was cooperative and responsive to all inquiries by the EPA. Respondent promptly provided all requested information and promptly cured all deficiencies.

17. Respondent did not profit in any manner from the alleged regulatory infractions.

18. No environmental harm resulted from the alleged regulatory infractions.

19. The proposed penalties are grossly excessive for the alleged violations.

20. Respondent has no history of previous violations.

21. The proposed civil penalties for individual counts of the Complaint are arbitrary, capricious and unsupported by the facts.

22. Respondent reserves the right to amend its affirmative defenses as additional information is discovered.

VI. REQUEST FOR HEARING

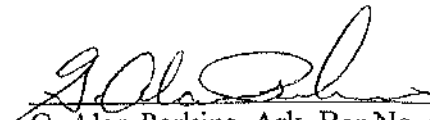
Respondent requests a hearing in this matter.

VII. CONCLUSION

WHEREFORE, Respondent pray that the Complaint be dismissed, and for all other just and proper relief to which they may be entitled.

Respectfully Submitted,

By:



G. Alan Perkins, Ark. Bar No. 91115
PPGMR Law, PLLC
PO BOX 251618
Little Rock, AR 72225
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Fax 501-603-0556
alan@ppgmrlaw.com

Dated: 2/6/15

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer, dated, February 6, 2015, was sent this day in the following manner to the addresses listed below:

Original by FedEx to:


Ms. Lorena Vaughn
Regional Hearing Clerk (6RC-D)
U.S. Environmental Protection Agency Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
(214) 665-8021 Phone
(214) 665-2182 Fax

Copy by Regular Mail and E-mail to:

Attorney for Complainant:
Brian Tomasovic
Office of Regional Counsel (6RC-ER)
U.S. Environmental Protection Agency, Region 6
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Dallas, Texas 75202-2733
Tomasovic.brian@epa.gov

Copy by Regular Mail:

Morton E. Wakeland, Jr. Ph.D
EPCRA 313 Enforcement Coordinator
Toxic Section (6PD-T)
U.S. EPA – Region 6
1445 Ross Avenue
Dallas, TX 75202-2733



G. Alan Perkins

Dated: 2/6/15