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**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

2014 JUN 19 PM 4:03  
ENVIR. APPEALS BOARD

In re: )  
)  
EarthECycle, LLC )  
d/b/a United Recyclers of America, Inc. )  
7401 E. 46th Place )  
Tulsa, OK 74145 )  
)  
Respondent )

**EPA Docket No. RCRA-HQ-2009-0001**

**MOTION TO REQUEST LEAVE TO FILE SECOND AMENDED COMPLAINT,  
COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING**

Complainant, the United States Environmental Protection Agency (“EPA”), requests that the Environmental Appeals Board (“Board”) grant an order allowing EPA to file a Second Amended Complaint, Compliance Order and Notice of Opportunity for Hearing pursuant to Section 22.14(c) of the Consolidated Rules of Practice (“Consolidated Rules”). 40 C.F.R. § 22.14(c).

**I. Procedural Background**

EPA filed a Complaint, Compliance Order and Notice for Opportunity for Hearing against the Respondent pursuant to Sections 3002 and 3017 of Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6922 and 6938, and the Pennsylvania hazardous waste management regulations set forth at 25 PA. CODE 260a *et seq.* on June 5, 2009. Approximately twenty days later, EPA filed an Amended Complaint, Compliance Order and Notice of Opportunity for Hearing (“First Amended Complaint and Compliance Order”) on June 26, 2009 pursuant to Section 22.14(c) of the Consolidated Rules. 40 C.F.R. § 22.14(c). EXHIBIT A.

Under Sections 22.7(b) and 22.15 of the Consolidated Rules, EPA and Respondent jointly requested a twenty day extension to the deadline for the filing of Respondent's answer to the First Amended Complaint and Compliance Order. 40 C.F.R. §§ 22.14(b), 22.15. EXHIBIT B. Consequently, Respondent's deadline to file an answer was on (or before) August 11, 2009. Respondent faxed a one-sentence, hand-written statement to the EPA staff attorney, Ann Stephanos, on August 11, 2009 at 11:20 p.m. stating, "[p]lease accept this fax as request for hearing concerning Docket No. RCRA-HQ-2009-0001." EXHIBIT C. The EPA staff attorney emailed Respondent and indicated that while she did receive the fax, she could not file the request for a hearing on Respondent's behalf. EXHIBIT D. Additionally, the EPA staff attorney faxed Respondent's request to the Hearing Clerk on August 13, 2009. EXHIBIT E. Both the Hearing Clerk in EPA's Office of Administrative Law Judges and the Clerk of the Board do not have a record of receiving the EPA staff attorney's fax with Respondent's request. EXHIBIT F.

Notwithstanding the faxed request for a hearing, Respondent has failed to file an answer to the First Amended Complaint and Compliance Order with the Hearing Clerk as required by 40 C.F.R. § 22.15.

## **II. Actions Taken and Evidence Obtained Since EPA Filed the First Amended Complaint, Compliance Order and Notice of Opportunity for Hearing**

EPA has reviewed the Compliance Order attached to the First Amended Complaint and the compliance obligations requested in that Order are now moot. The Compliance Order required Respondent to: (1) make arrangements for the return of the two containers to the United States from South Africa within thirty (30) days of receipt of the Order; (2) take possession of the containers, remove them from the port of arrival, and transport the containers to a secure warehouse for temporary storage; (3) take possession of the containers that were returned to the United States from Hong Kong within thirty (30) days and remove them from the Port of Newark

to a secure warehouse for temporary storage; (4) submit a plan to EPA within forty-five (45) days from receipt of the Order to detail how the Respondent would manage each item in each container subject to EPA's approval; and (5) submit a written report to EPA within thirty (30) days of EPA's approval of the plan to confirm compliance with the plan, specifically stating all actions taken by Respondent to comply with the plan, including an inventory of all items, the actual disposition of each item listed on the inventory and the total cost of returning to compliance.

Respondent made limited attempts to comply with the Compliance Order since the First Amended Complaint was filed. For example, on July 3, 2009, Respondent contacted the authorities in South Africa to arrange for the return of the two containers to the United States, after which Respondent intended to test and repackage the cathode ray tubes ("CRTs") for re-export. After authorities in South Africa confirmed that Respondent would have to pay local charges and storage fees before the containers could be returned to the United States, Respondent disputed the charges and claimed that the importer in South Africa was responsible for all charges. Due to the fee dispute between Respondent and the importer, the CRTs in the two containers were unloaded and stored under the control of the South African Revenue Service ("SARS") in Johannesburg until the matter could be resolved. SARS concluded that the CRTs constituted "hazardous waste" according to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ("Basel Convention"). Since South Africa is a party to the Basel Convention, the CRTs could not be imported into South Africa unless there was a bilateral agreement with the United States. Consequently, the CRTs were destroyed in January 2012.

Similarly, the electronic waste in Respondent's three containers remained at the Port of Newark until August 2012 despite Respondent's assurances on July 7, 2009 to the EPA staff attorney that arrangements would be made "in perfect order" to remove the containers.

EXHIBIT G. By October 5, 2009, Respondent still had not removed the three containers from Port of Newark, but contacted the EPA staff attorney to indicate, among other things, that he did not have anywhere to move the three containers.

Since EPA filed the First Amended Complaint and Compliance Order, a parallel EPA criminal investigation of the matter has been closed. The Office of Civil Enforcement at EPA Headquarters has therefore reinstated efforts to resolve this matter. Respondent's refusal to comply with the Compliance Order has resulted in the abandonment of electronic waste at the Port of Newark, including CRTs in containers that were returned to the Port of Newark from Hong Kong. (First Amended Complaint and Compliance Order, ¶¶ 34-36). According to the United States Customs and Border Control ("CBP") and Harbor Freight Transport Corporation ("Harbor Freight"), the private entity that stored Respondent's abandoned CRTs in the Port of Newark, Respondent's CRTs have been recycled and/or destroyed at a cost to Harbor Freight of \$557,839.70. EXHIBITS H and I. In addition, the National Department of Environmental Affairs in South Africa ("South Africa DEA") informed EPA that it has paid ZAR 48,425.00 for the destruction of the CRTs that were illegally exported by Respondent after storing the CRTs abandoned by Respondent through November 2011. First Amended Complaint and Compliance Order, ¶¶ 37-39; EXHIBIT J. Thus, any question of Respondent's compliance with the removal or disposal of CRTs pursuant to the Compliance Order is now moot.

### **III. The Environmental Appeals Board has the Authority to Rule on this Motion**

According to Section 22.14 of the Consolidated Rules, the Complainant may amend the complaint once as a matter of right at any time before the answer is filed, but may amend the complaint thereafter only upon motion granted by the Presiding Officer. 40 C.F.R. § 22.14(c). The "Presiding Officer" means an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed. 40 C.F.R. § 22.3. Although the Board typically rules on appeals from the initial decisions, rulings and orders of a Presiding Officer, the Board acts as the Presiding Officer until the respondent files an answer in proceedings commenced at EPA Headquarters. 40 C.F.R. § 22.4. Since the above-captioned matter was filed by the Complainant at EPA Headquarters, the Board has the authority to rule on this motion.

### **IV. Relief Requested**

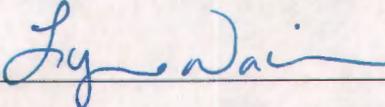
EPA believes that the most appropriate next step is to seek leave to file a Second Amended Complaint that includes an administrative penalty and to issue an accompanying Compliance Order that narrows the injunctive relief requested based upon the actions and evidence obtained since the First Amended Complaint was filed. In the First Amended Complaint, EPA reserved its right to seek civil penalties and did not include a specific penalty amount due to the criminal investigation. In light of the statutory factors and the specific facts of this case, EPA will seek an administrative penalty in the Second Amended Complaint in the amount of **\$134,550.00**. Additionally, EPA will seek to file a Compliance Order with the Second Amended Complaint requesting that Respondent reimburse the South Africa DEA and Harbor Freight for CRT storage, transport and destruction costs in the amount of **ZAR 48,425.00** and **\$557,839.70**, respectively. Finally, should this Board allow EPA to file a Second Amended Complaint and Compliance Order, Respondent would be provided the opportunity to properly

request a hearing according to the Consolidated Rules. The Second Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing is attached as EXHIBIT K. In addition to including a civil penalty amount and a revised Compliance Order, EPA updated the General and Factual Allegations with information obtained since filing the First Amended Complaint, and clarified Count 1.

For all of the above reasons, EPA moves for the issuance of an Order allowing it to file a Second Amended Complaint, Compliance Order and Notice of Opportunity for Hearing.

Respectfully submitted,

Date: 6/19/14

By: 

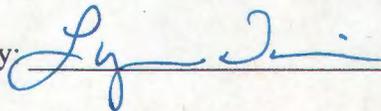
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Request Leave to File Second Amended Complaint, Compliance Order and Notice of Opportunity for Hearing in the matter of EarthECycle, LLC, was served by United States First Class Mail on the following persons, this 19<sup>th</sup> day of June 2014:

Mr. Jeffrey Nixon  
EarthECycle, LLC  
7401 E. 46th Place  
Tulsa, OK 74145

Date: 6/19/14

By: 

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