UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

A.J. D'Angelo (3RC30)
Sr. Assistant Regional Counsel

Direct dial: (215) 814-2480
Facsimile: (215) 814-2603

VIA HAND DELIVERY

JUL 13 2010

Renée Sarajian
Regional Judicial Officer (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029.

Re: In the Matter of: Kessel Lumber Supply, Inc.
Docket No. RCRA-03-2006-0059
Motion for Default Order

Dear Judge Sarajian:

In accord with the requirements of 40 C.F.R. §§ 22.5, 22.16(a) and 22.17(b), please find enclosed a copy of the Complainant's *Motion for Default Order*, and accompanying Memorandum and Exhibits, in the above-referenced matter. The original and one copy of the same were filed today with the EPA Regional Hearing Clerk, and additional copies were served upon the Respondent at the addresses and in the manner set forth in that attached Certificate of Service.

Sincerely,

A.J. D'Angelo
Sr. Assistant Regional Counsel

Enclosures

cc: Lawrence Kessel, President
Kessel Lumber Supply, Inc.
HC 84 Box 4
New Creek Drive
Keyser, West Virginia 26726
(Article No. 7004 2890 0000 5075 7071)

Steven Shuman, Esquire
Reeder & Shuman
256 High Street
Morgantown, WV 26507
(Article No. 7004 2890 0000 5075 7088)

Ms. Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029
(Hand Delivery)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In the Matter of:	:	
Kessel Lumber Supply, Inc. **HC 84 Box 4** **New Creek Drive** **Keyser, West Virginia 26726,** **Respondent,**	: : :	**Docket No.: RCRA-03-2006-0059** **Proceeding under Section 3008(a) and (g), 42 U.S.C. § 6928(a) of the Resource Conservation and Recovery Act**
Kessel Lumber Supply, Inc. **New Creek Drive** **Keyser, West Virginia 26726,** **Facility.**	: :	

MOTION FOR DEFAULT ORDER

Pursuant to 40 C.F.R. § 22.17(b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules")*, 40 C.F.R. Part 22, the United States Environmental Protection Agency, Region III ("Complainant") respectfully moves for the issuance of a Default Order against Respondent, Kessel Lumber Supply, Inc., for its failure to file a timely Answer to the Complaint, Compliance Order and Notice of Right to Request a Hearing ("Complaint"), which was filed on September 12, 2006. In support of this Motion, the Complainant avers as follows:

The Complaint alleges that the Respondent violated Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921 *et seq.* and the authorized *West Virginia Hazardous Waste Management Regulations ("WVHWMR")*, Title 33, Leg. Rule, Division of Environmental Protection, Office of Waste Management, Series 20, Parts 33-20-1

through 33-20-15. More specifically, the Complaint alleged that Respondent operated a hazardous waste storage facility without a permit or interim status and failed to: have a contingency plan for the Facility; have a closure plan for the Facility; have a contingent post-closure plan for the Facility; provide site security; demonstrate financial assurance; obtain written assessments for two hazardous waste tanks that did not have secondary containment; obtain a written assessment of its wood treatment drip pad; meet the hydraulic conductivity requirement for its wood treatment drip pad, inspect the wood treatment drip pad weekly; and properly store land-disposal restricted waste.

The Complaint was served upon the Respondent on September 12, 2006 by Federal Express, overnight delivery. Federal Express is "a reliable commercial delivery service that provides written verification of delivery", within the meaning of 40 C.F.R. § 22.5(b)(1). A true and correct copy of the Complaint is attached *Exhibit 1* to Complainant's accompanying Memorandum of Law. The Respondent and opposing counsel received copies of the Complaint on September 13, 2006, as evidenced by the *FedEx Tracking Reports, Exhibits 2a, 2b, 2c* to Complainant's accompanying Memorandum of Law.

In the Complaint, Complainant proposed the assessment of a statutory maximum civil administrative penalty against the Respondent, pursuant to Section 3008(a)(3) and (g) of RCRA, 42 U.S.C. § 6928(a)(3) and (g). For the purposes of this Default Motion, Complainant has calculated and now proposes the assessment of a specific penalty in the amount of $335,816.00. The proposed penalty is based upon consideration of the statutory penalty factors set forth in Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), which include the seriousness of the violation and any good faith efforts to comply with the applicable requirements. These factors

were applied to the particular facts and circumstances of this case with specific reference to EPA's October, 1990 RCRA Civil Penalty Policy, as revised in June, 2003 ("RCRA Civil Penalty Policy"), annexed as *Exhibit 3* to Complainant's accompanying Memorandum of Law, which reflect the statutory penalty criteria and factors set forth at Section 3008(a)(3) and (g) of RCRA, 42 U.S.C. §§ 6928(a)(3) and (g), the appropriate *Adjustment of Civil Monetary Penalties for Inflation,* pursuant to 40 C.F.R. Part 19 and the September 21, 2004 memorandum by Acting EPA Assistant Administrator Thomas V. Skinner entitled *Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule* (" Skinner Memorandum"), annexed as *Exhibit 4* to Complainant's accompanying Memorandum of Law.[1] *See Declaration of Jeanna R. Henry, Exhibit 5* to Complainant's accompanying Memorandum of Law. See also, *Summary of Violations* and *Penalty Computation Worksheets, Exhibits 7(a)* and *7(b)* to Complainant's accompanying Memorandum of Law.

Under the *RCRA Civil Penalty Policy*, a company's inability to pay usually will be considered only if the issue is raised by the respondent and the burden of raising and presenting evidence regarding any inability to pay a particular penalty rests with the respondent *RCRA Civil Penalty Policy*, at 39. Respondent herein failed to provide written financial documentation requested by Complainant. Complainant reviewed the limited financial information that the Respondent did provide to Complainant's counsel in pre-filing negotiations. Complainant also

[1] Pursuant to 40 C.F.R. Part 19, and as provided in the Skinner Memorandum and in the RCRA Civil Penalty Policy, penalties for RCRA violations occurring after January 30, 1997 were increased by 10% to account for inflation, not to exceed a $27,500.00 per violation statutory maximum penalty. Pursuant to 40 C.F.R. Part 19, and as provided in the Skinner Memorandum, penalties for RCRA violations occurring after March 15, 2004 and before January 13, 2009 have been increased by an additional 17.23% to account for subsequent inflation, not to exceed a $32,500.00 per violation statutory maximum penalty.

sought out and reviewed additional financial information submitted by Kessel Lumber Supply, Inc. to the EPA Region III Hazardous Site Cleanup Division (hereinafter, "HSCD"), Cost Recovery Branch in response to an information request letter issued under the authority of Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. Section 9604(e).[2] However, Complainant is unable to determine the remaining assets that the Respondent may have available to pay the proposed civil penalty. *See, Memorandum of Leo J. Mullin,* EPA Cost Recovery Expert, and *Memorandum of Gary Morton, EPA* Environmental Protection Specialist, *Exhibits 6* and *8* to Complainant's accompanying Memorandum of Law.

Respondent failed to raise or pursue its pre-filing claim of inability to pay a penalty in the context of the litigation and failed to meet its burden to present evidence regarding any claimed inability to pay a penalty. Therefore, Complainant made no adjustment to the proposed penalty based upon a claim of inability to pay any no such adjustment is appropriate on the record of this proceeding.

In the Complaint, Complainant ordered Respondent to perform certain "*compliance tasks.*" Because Respondent did not file an answer to the Complaint, or otherwise request a hearing, this Compliance Order automatically became a final order 30 days after it was served.

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[2] Complainant has learned that the information request letter was prompted by HSCD's performance of a Removal Site Evaluation of the Facility in the Spring of 2007 which revealed that wood-treatment operations conducted by the Respondent were the source of ongoing releases of arsenic and other hazardous substances into the environment and that such releases posed an actual threat to human health, welfare and the environment and HSCD's anticipated need to engage in removal activities and expend federal Superfund monies at the Facility (which did, in fact. occur over the period of April 2008 through September 2008). *See Declaration of Jeanna R. Henry, Exhibit 5 at 3 - 4.*

40 C.F.R. § 22.37(b). Therefore, it is not necessary for the Regional Judicial Officer to take any further action with regard to the Compliance Order.

Pursuant to 40 C.F.R. § 22.15(a), the deadline for Respondent to file an Answer to the Complaint was 30 days after service of the Complaint, or October 12, 2006. Respondent has not filed an Answer to the Complaint as of the date of filing of this Motion. Counsel for Respondent has stated orally that Respondent does not intend to file an Answer to the Complaint at any time. In accordance with 40 C.F.R. § 22.15(d), "[f]ailure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation."

40 C.F.R. § 22.17(a) provides, in relevant part, that "[a] party may be found to be in default, after motion, upon failure to file a timely answer to the complaint . . .". 40 C.F.R. § 22.17(b) further provides, in relevant part, that "[w]hen the Presiding Officer finds that a default has occurred, [s/]he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. . . The relief proposed in the . . . motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act"

Pursuant to 40 C.F.R. § 22.17(a), Respondent's failure to file an Answer within thirty (30) days of service of the Complaint "constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations." In light of Respondent's admission of all material factual allegations in the Complaint and on the basis of the law, the facts, the supporting evidence and the rationale in support of Complainant's requested relief, as fully set forth in the accompanying Memorandum of Law and the attachments thereto, the Complainant respectfully moves:

(a) for the entry of a Default Order against the Respondent, pursuant to 40 C.F.R. § 22.17(b) of the *Consolidated Rules*; and

(b) for the full assessment of the $335,816.00 civil penalty proposed above, and such other relief as the Regional Judicial Officer determines to be fair and equitable, against Respondent and in the form of the proposed Order that is attached hereto for your consideration.

Such requested relief is clearly consistent with the record in this proceeding and with RCRA.

WHEREFORE, Complainant requests that the Regional Judicial Officer issue a Default Order against the Respondent and therein assess the full amount of the proposed $335,816.00 civil penalty and impose any such further relief to which the Regional Judicial Officer determines that Complainant is entitled, via execution of the proposed Order that is annexed hereto.

Respectfully submitted,

Dated: JUL 13 2010

A.J. D'Angelo
Cheryl L. Jamieson
Sr. Assistant Regional Counsel (3RC30)
U.S. Environmental Protection Agency,
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In the Matter of:	:	
Kessel Lumber Supply, Inc. **HC 84 Box 4** **New Creek Drive** **Keyser, West Virginia 26726,** **Respondent.**	: : : :	**Docket No.: RCRA-03-2006-0059** **Proceeding under Section 3008(a) and (g), 42 U.S.C. § 6928(a) of the Resource Conservation and Recovery Act**
Kessel Lumber Supply, Inc. **New Creek Drive** **Keyser, West Virginia 26726,** **Facility.**	: :	

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused to be hand-delivered to Ms. Lydia Guy, Regional Hearing Clerk (3RC00), U.S. EPA Region III, 1650 Arch Street, 5th Floor, Philadelphia, PA 19103-2029, the original and one copy of the foregoing Motion for a Default Order, supporting Memorandum of Law and Exhibits, and a proposed form of an Order for Default, in the above-captioned matter. I further certify that on the date set forth below, I caused true and correct copies of the same to be served upon each of the following persons at the following addresses and in the manner identified below:

Via Hand Delivery to:

Renée Sarajian
Regional Judicial Officer (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2019.

Via, Certified Mail, Return Receipt Requested, Postage Prepaid, to:

Lawrence Kessel, President
Kessel Lumber Supply, Inc.
HC 84 Box 4
New Creek Drive
Keyser, West Virginia 26726
(Article No. 7004 2890 0000 5075 7071)

Steven Shuman, Esquire
Reeder & Shuman
256 High Street
Morgantown, WV 26507
(Article No. 7004 2890 0000 5075 7088)

JUL 13 2010

A.J. D'Angelo
Sr. Assistant Regional Counsel (3RC30)
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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In the Matter of:	:	
Kessel Lumber Supply, Inc. **HC 84 Box 4** **New Creek Drive** **Keyser, West Virginia 26726,** **Respondent.**	: : : :	**Docket No.: RCRA-03-2006-0059** **Proceeding under Section 3008(a) and (g), 42 U.S.C. § 6928(a) of the Resource Conservation and Recovery Act**
Kessel Lumber Supply, Inc. **New Creek Drive** **Keyser, West Virginia 26726,** **Facility.**	: : :	

MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT'S MOTION FOR A DEFAULT ORDER

The United States Environmental Protection Agency, Region III ("Complainant"), respectfully submits this Memorandum of Law in support of its Motion for the issuance of a Default Order against Respondent, Kessel Lumber Supply, Inc., for its failure to file a timely Answer in accordance with 40 C.F.R. § 22.15(a) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules")*, 40 C.F.R. Part 22.

I. STATEMENT OF FACTS

This action was commenced with an Administrative Complaint, Compliance Order and Right to Request a Hearing ("Complaint") which was filed with the Regional Hearing Clerk on September 12, 2006, pursuant to the Resource Conservation and Recovery Act ("RCRA"), Section 3008(a) and (g), 42 U.S.C. §§ 6928(a) and (g). In the thirteen-count Complaint, Complainant alleged that the Respondent violated RCRA Subtitle C, 42 U.S.C. §§ 6921 *et seq.*, and the authorized *West Virginia Hazardous Waste Management Regulations ("WVHWMR")*, Title 33, Leg. Rule, Division of Environmental Protection, Office of Waste Management, Series 20, Parts 33-20-1 through 33-20-15.

Specifically, the Complaint alleged that Respondent operated a hazardous waste storage facility without a permit or interim status, failed to have a contingency plan for the Facility, failed to have a closure plan for the Facility, failed to have contingent post-closure plans for the drip pad and specified tanks at the Facility, failed to provide site security, failed to demonstrate financial assurance, failed to obtain written assessments for two tanks that did not have secondary containment, failed to obtain a written assessment for a wood treatment drip pad, failed to meet the hydraulic conductivity requirement for the drip pad, failed to inspect the drip pad weekly and after storms, and failed to properly store land-disposal restricted waste.

A true and correct copy of the Complaint is attached hereto as *Exhibit 1*. A copy of the signed original Complaint, and of the *Consolidated Rules*, was served upon the Respondent on September 12, 2006 by Federal Express Overnight Delivery. Federal Express is "a reliable commercial delivery service that provides written verification of delivery", within the meaning of 40 C.F.R. § 22.5(b)(1). The Respondent and Respondent's counsel each received a copy of the Complaint and of the *Consolidated Rules* on September 13, 2006, as evidenced by the copies of the *FedEx Tracking Reports* attached as *Exhibit 2a and 2b*.

In order to effectuate proper service of process of the Complaint, Complainant mailed (via Federal Express, overnight delivery) a copy of the signed original Complaint, and of the *Consolidated Rules*, to two different persons at two separate locations. The first mailing was addressed to Lawrence Kessel, President, Kessel Lumber Supply, Inc., at the Respondent's corporate business address, New Creek Drive HC84 Box 4, Keyser, West Virginia 26726. This Federal Express mailing was delivered to the Respondent's corporate business address by Federal Express and was accepted by the Respondent's corporate Secretary, Patsy Fink. The associated *Fedex Tracking Report* confirms Federal Express' delivery of this mailing to the Respondents' corporate business address, and its acceptance by Ms. Fink by listing "PFINK" as the person to whom Federal Express made the delivery. *Exhibit 2a. See also, Exhibit 2c*, an Experian Business Report for Kessel Lumber Supply, Inc. listing *"Patsy Fink, Secretary"* under "Officers" of this corporation.

In addition to service on the corporation, which was received by the Respondent's corporate Secretary, a second copy of the signed original Complaint, and of the *Consolidated Rules*, was mailed (also via Federal Express, overnight delivery) by Complainant to Respondent's legal counsel, Steven Shuman, Esq., and delivered by Federal Express to Mr. Shuman at his 256 High Street, Morgantown, WV business address, as confirmed via the associated *Fedex Tracking Report. Exhibit 2b.* In a telephone conversation of October 31, 2006, counsel for Respondent indicated to Ms. Cheryl Jamieson, counsel for Complainant, that Respondent was in receipt of the Complaint, and that Respondent would not file an Answer to the Complaint.

Complainant's service of the Complaint and of the *Consolidated Rules* upon the Respondent's corporate Secretary constitutes sufficient service pursuant to 40 C.F.R. § 22.5(b)(1), which provides that:

> (i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.
>
> (ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any

> other person authorized by appointment or by Federal or State law to receive service of process.

Applicable case law clarifies what constitutes sufficient service of a complaint on a respondent or representative. In *Katzon Brothers, Inc. v. United States Environmental Protection Agency*, 839 F.2d 1396 (10th Cir. 1988), the United States Court of Appeals for the Tenth Circuit determined that when service is to be made on a corporation, the *Consolidated Rules* merely require that the letter sending the complaint be properly addressed, rather than actually delivered, to an officer, partner, agent, or other authorized representative. *Id.* at 1399.

> We believe the relevant sections of EPA's Consolidated Rules do not require direct personal service. . . . Service to a "representative" encompasses a personal secretary . . . who regularly receives and signs for certified mail. If "representative" was intended to be narrowly read to include only officers, partners, and agents, it would have been further qualified to incorporate the specific classes of persons mentioned in the second section.

Id.

The *Katzon* court further found that ". . . when service is effectuated by certified mail, the letter need only be addressed, rather than actually delivered, to an officer, partner, agent, or other authorized individual." The court held that Section 22.5(b)(1)(i)-(ii)(A) of the *Consolidated Rules* ". . . ensures that the representative who actually receives the mail will know to whom it should be delivered. Any other interpretation would severely hinder service of process on corporations by certified mail, since the postal service employee would have to wait on the corporation's premises until the officer, partner, or agent could sign the return receipt." *Id.* In addition, "a person who signs a certified mail receipt green card and picks up mail at a respondent's business post office box is authorized to receive service of process under the Rules of Practice." *See In the Matter of Herman Roberts*, Docket No. OPA 99-512, 2000 EPA RJO LEXIS 211 (RJO, "Order," April 14, 2000). Although the delivery method in the instant case was an overnight commercial delivery service and not certified mail by the U. S. Postal Service, the analysis above as to proper service should not differ.

The Complainant originally proposed the assessment of an administrative penalty against the Respondent in the amount of the statutory maximum pursuant to Section 3008(a)(3) and (g) of RCRA, 42 U.S.C. § 6928(a)(3) and (g). Since that time, a specific proposed penalty in the amount of $335,816.00 has been calculated by the Complainant and it is a penalty in this amount which is now being sought. The proposed penalty is based upon information available to EPA at this time, the statutory penalty factors[1] set forth in Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), the guidelines in EPA's October, 1990 RCRA Civil Penalty Policy, as revised in June, 2003 ("*RCRA Civil Penalty Policy*") attached hereto as *Exhibit 3* and the appropriate

[1] The statutory penalty factors include: the seriousness of the violation and any good faith efforts by Respondent to comply with the applicable requirements. RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3).

Adjustment of Civil Monetary Penalties for Inflation, pursuant to 40 C.F.R. Part 19 and the September 21, 2004 memorandum by Acting EPA Assistant Administrator Thomas V. Skinner entitled, *Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule* (" Skinner Memorandum"),[2] attached hereto as *Exhibit 4. See also Declaration of Jeanna R. Henry in Support of the United States Environmental Protection Agency's Proposed Penalty in the Matter of Kessel Lumber Supply Company, Inc., EPA Docket No. RCRA-03-2006-0059 (hereinafter, Declaration of Jeanna R. Henry)*, attached hereto as *Exhibit 5.*

II. ARGUMENT

A. The Respondent is in Default under 40 C.F.R. § 22.17(a)

Section 22.17(a) of the *Consolidated Rules* states that:

> (a) *Default.* A party may be found to be in default: after motion, *upon failure to file a timely answer to the complaint*; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing.

40 C.F.R. § 22.17(a) (*emphasis added*).

Moreover, "[w]hen the Presiding Officer finds that default has occurred, [s]he shall issue a default order against the defaulting party as to any or all parts of the proceeding *unless the record shows good cause why a default order should not be issued.*" 40 C.F.R. § 22.17(c) (*emphasis added*). EPA administrative law judges have recognized that a default order generally should be issued when there has been a failure to comply with an order without "good cause". *In the Matter of Tanana Corp. and Tri-Angle Corp.*, EPA Docket No. RCRA-03-2003-0263 (J. Gunning, Jul. 29, 2004, at 3, *In the Matter of Jack Golden*, EPA Docket No. CWA-10-99-0188 (J. Gunning, Oct. 6, 2000), at fn. 6.

To date, Respondent has failed to file an Answer, as required by 40 C.F.R. § 22.15(a), which provides, in pertinent part, that a written answer to a complaint must be filed with the Regional Hearing Clerk within thirty days after service of the complaint. On October 31, 2006, counsel for Respondent stated to counsel for Complainant that Respondent did not, and does not intend to, file an Answer to the Complaint for the following reasons: (1) Respondent has ceased operations and is no longer in the wood treatment business; (2) Respondent does not have assets

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[2] Pursuant to 40 C.F.R. Part 19, and as provided in the Skinner Memorandum and in the *RCRA Civil Penalty Policy*, penalties for RCRA violations occurring after January 30, 1997 were increased by 10% to account for inflation, not to exceed a $27,500.00 per violation statutory maximum penalty. Pursuant to 40 C.F.R. Part 19, and as provided in the Skinner Memorandum, penalties for RCRA violations occurring after March 15, 2004 and before January 13, 2009 have been increased by an additional 17.23% to account for subsequent inflation, not to exceed a $32,500.00 per violation statutory maximum penalty.

sufficient to pay a penalty or to perform injunctive relief, and (3) Respondent has numerous unresolved claims filed against it by its creditors, and the Internal Revenue Service.

As discussed more fully *infra*, Respondent's claim of financial problems, even if valid, does not constitute "good cause" why a default order should not be granted. Respondent's failure to answer the complaint constitutes a clear default under the Consolidated Rules. 40 C.F.R. § 22.17(a). Accordingly, the Regional Judicial Officer should enter a Default Order against the Respondent.

B. A Default by the Respondent Constitutes an Admission of All Facts Alleged in the Complaint and a Waiver of Respondent's Right to Contest Such Allegations

Section 22.17(a) of the *Consolidated Rules* provides, in relevant part, that:

> Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

40 C.F.R. § 22.17(a). The mandatory language of 40 C.F.R. § 22.17(a) requires the Presiding Officer to accept as true all of the facts alleged in the Complaint. *In the Matter of Tanana Corp. and Tri-Angle Corp.*, EPA Docket No. RCRA-03-2003-0263 (J. Gunning, Jul. 29, 2004, at 3). Therefore, upon determination by the Regional Judicial Officer that the Respondent is in default, the Respondent will be deemed to have admitted all of the facts alleged in the Complaint and will have waived the right to contest such allegations.

The Complaint alleges facts in support of each element of each claim arising from each violation in Counts I through XIII in the Complaint, a copy of which is attached as *Exhibit 1*. The facts alleged in the Complaint — and deemed admitted — are sufficient to establish Respondent's liability for each of such violations of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and of the WVHWMR, by a preponderance of the evidence. Accordingly, the Regional Judicial Officer should enter a Default Order finding that Respondent violated Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and the WVHWMR, as set forth in Counts I through XIII of such Complaint.

C. The Proposed Penalty is Consistent with the Record Evidence and the Law

The Respondent's failure to comply with each of the regulations alleged to have been violated in Counts I through XIII of the Complaint subjects the Respondent to liability for civil penalties. Section 3008(g) of RCRA, 42 U.S.C. § 6928(g), provides in relevant part that any person who violates any requirement of RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e, or provisions of an authorized state program, shall be liable for a civil penalty not to exceed $25,000 for each day of violation. The Debt Collection Improvement Act of 1996 ("DCA") and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19 ("Penalty

Inflation Rule"), increase the maximum civil penalty that can be assessed by EPA under RCRA for each violation occurring on or after January 30, 1997 by 10%, to $27,500 per day, and for each violation occurring after March 15, 2004 and before January 13, 2009, to $32,500 per day.

For purposes of determining the amount of any penalty to be assessed, Section 3008(a)(3), 42 U.S.C. § 6928(a)(3), requires EPA to take into account the seriousness of the violation and any good faith efforts by Respondent to comply with the applicable requirements. RCRA does not include ability to pay as one of the factors that EPA must consider in assessing a penalty, and therefore, Respondent's ability to pay the proposed amount is not an element of Complainant's proof. *In the Matter of Bil-Dry Corp.*, EPA Docket No. RCRA-III-264 (J. McGuire, Oct. 8, 1998), at 19, citing *In the Matter of Central Paint and Body Shop, Inc.*, RCRA Appeal No. 86-3, 2 E.A.D. 309, 313-314, 1987 EPA App. LEXIS 8 (Final Decision, Jan. 7, 1987).

In developing the proposed penalty, Complainant was guided by the *RCRA Civil Penalty Policy*. *See Exhibit 3*. This policy provides a rational, consistent and equitable methodology for applying the statutory penalty factors enumerated above to the specific facts and circumstances of this case. Under RCRA, the ability of a violator to pay a proposed penalty is not a factor that the Agency must consider in assessing a penalty. Under the *RCRA Civil Penalty Policy*, a company's inability to pay usually will be considered only if the issue is raised by the respondent *RCRA Civil Penalty Policy*, at 39.

> The burden of raising and presenting evidence regarding any inability to pay a particular penalty rests with the respondent, as it does with any mitigating circumstances. Thus, a company's inability to pay usually will be considered only if the issue is raised by the respondent. If the respondent fails to fully provide sufficient information, then enforcement personnel should disregard this factor in adjusting the penalty.

Id.

On August 17, 2005, prior to the filing of the Complaint in the instant case, counsel for Respondent submitted documentation to EPA to support Respondent's claim that it had no ability to pay a civil penalty for alleged RCRA violations at the Facility. A review of such documents by Complainant revealed that there was insufficient information to make a finding regarding ability to pay. On September 19, 2005, Complainant requested additional information from counsel for Respondent. A teleconference was held to discuss the previously submitted information and to request additional written information. Although counsel for Respondent participated in the teleconference, Respondent failed to provide additional written documentation requested by Complainant. Without such additional information, Complainant was unable to make an inability to pay determination. *See Exhibit 6, Memorandum of Leo J. Mullin*, EPA Cost Recovery Expert.

Since the filing of the Complaint, Complainant has learned that Respondent has ceased operations at the Facility. Complainant also learned that the EPA Region III Hazardous Site

Cleanup Division (hereinafter, "HSCD") Cost Recovery Branch issued an information request letter to Kessel Lumber Supply, Inc. under the authority of Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. Section 9604(e). In that information request letter, dated October 3, 2007, HSCD sought financial information about the company, its principal owners and its business relationships. In December 2007, Kessel Lumber Supply, Inc. provided information responsive, in part, to the information request letter. Complainant has learned that the information request letter was prompted by HSCD's performance of a Removal Site Evaluation of the Facility in the Spring of 2007 which revealed that wood-treatment operations conducted by the Respondent were the source of ongoing releases of arsenic and other hazardous substances into the environment and that such releases posed an actual threat to human health, welfare and the environment and HSCD's anticipated need to engage in removal activities and expend federal Superfund monies at the Facility (which did, in fact. occur over the period of April 2008 through September 2008). *See Declaration of Jeanna R. Henry, Exhibit 5 at 3 - 4.* Complainant has reviewed such additional information but is unable to determine the remaining assets that the Respondent may have available to pay the proposed civil penalty. *See Exhibit 8, Memorandum of Gary Morton, EPA* Environmental Protection Specialist. Therefore, an adjustment to the assessed penalty based on Respondent's claim of inability to pay a penalty was not made.

Pursuant to the *RCRA Civil Penalty Policy*, an initial gravity-based penalty was calculated for each violation based on two components: the potential for harm of the violation and the extent of deviation from the applicable requirement. The results of that analysis was used to select corresponding penalty values for single day and multi-day violations from the penalty matrices published in the *RCRA Civil Penalty Policy*. The initial penalty for each violation was adjusted in accordance with the *RCRA Civil Penalty Policy* to account for other factors including any good faith efforts to comply with the applicable requirements, and any willfulness or negligence. In addition to the gravity-based penalty, the *RCRA Civil Penalty Policy* recommends that penalty assessments capture any significant economic benefit that Respondent realized as a result of noncompliance.

The Complainant proposes the assessment of a total civil penalty of $335,816.00. The EPA Region III employee who calculated the proposed penalty, Jeanna R. Henry, considered the statutory penalty factors identified at Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), the *RCRA Civil Penalty Policy* and the appropriate inflation adjustment, pursuant to 40 C.F.R. Part 19 and the Skinner Memorandum. *See Declaration of Jeanna R. Henry*, attached as *Exhibit 5*. A summary of each violation alleged in the Complaint is set forth in *Exhibit 7a* and the proposed penalty rationale for each alleged violation is fully discussed in the *Declaration of Jeanna R. Henry* (*Exhibit 5*) and in the associated Penalty Computation Worksheets, attached as *Exhibit 7b*. Each rationale is based upon facts which were alleged in the Complaint and which, upon a finding of default, are deemed admitted.

EPA Region III respectfully submits that the proposed penalty of $335,816.00 for the Respondent's RCRA violations is not "clearly inconsistent with the record" in this case or with RCRA, and that, in accordance with 40 C.F.R. § 22.17(c), the payment of the proposed penalty should be ordered.

III. CONCLUSION

For all of the foregoing reasons, Complainant requests that the Court enter a Default Order assessing the proposed penalty of $335,816.00 against the Respondent in the form of the proposed Order for Default that is attached hereto.

Respectfully submitted,

Dated: JUL 13 2010

A.J. D'Angelo
Cheryl L. Jamieson
Sr. Assistant Regional Counsel (3RC30)
U.S. Environmental Protection Agency,
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

EXHIBITS

Exhibit 1. - *Administrative Complaint and Notice of Opportunity for Hearing* (Docket No. RCRA-03-2006-0059)

Exhibits 2(a - c) - *Fedex Tracking Reports*

Exhibit 3. - *RCRA Civil Penalty Policy*

Exhibit 4. - September 21, 2004 Memorandum by Acting EPA Assistant Administrator Thomas V. Skinner entitled, *Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule* (" Skinner Memorandum")

Exhibit 5. - *Declaration of Jeanna R. Henry in Support of the United States Environmental Protection Agency's Proposed Penalty in the Matter of Kessel Lumber Supply Company, Inc., EPA Docket No. RCRA-03-2006-0059*

Exhibit 6. - *Memorandum of Leo J. Mullin, EPA Cost Recovery Expert*

Exhibit 7(a) - *Summary of Violations*

Exhibit 7(b) - *Penalty Computation Worksheets*

Exhibit 8 - *Memorandum of Gary Morton, EPA* Environmental Protection Specialist