

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 2

U.S. Environmental
Protection Agency
2016 JUL 20 AM 7:12
REGIONAL OFFICE

In The Matter of:

The City of New York

Including the

**New York City Department of Health
and Mental Hygiene,**

Respondent.

Proceeding Under Section 3008 of the Solid
Waste Disposal Act, as amended

**COMPLAINT, COMPLIANCE ORDER
AND NOTICE OF OPPORTUNITY
FOR HEARING**

Docket No. RCRA-02-2016-7102

COMPLAINT

This is a civil administrative proceeding instituted pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation and Recovery Act, and the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. §§ 6901-6991 (together hereafter the "Act" or "RCRA"), for injunctive relief and the assessment of civil penalties. The United States Environmental Protection Agency ("EPA") has promulgated regulations governing the handling and management of hazardous waste at 40 C.F.R. Parts 260 - 273 and 279.

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING ("Complaint") serves notice of EPA's preliminary determination that the City of New York ("NYC") including the New York City Department of Health and Mental Hygiene (hereinafter "DOHMH")(collectively known as the "Respondent") has violated requirements of the authorized New York State hazardous waste program.

Section 3006(b) of the Act, 42 U.S.C. § 6926(b), provides that EPA's Administrator may, if certain criteria are met, authorize a state to operate a hazardous waste program (within the meaning of Section 3006 of the Act, 42 U.S.C. § 6926) in lieu of the regulations comprising the federal hazardous waste program (the Federal Program). The State of New York received final authorization to administer its base hazardous waste program on May 29, 1986. Since 1986, New York State has been authorized for many other hazardous waste requirements promulgated by EPA pursuant to RCRA. See 67 Fed. Reg. 49864 (August 1, 2002), 70 Fed. Reg. 1825 (January 11, 2005) 74 Fed. Reg. 31380 (July 1, 2009) and 78 Fed. Reg. 15299 (March 11, 2013).

New York is authorized for most hazardous waste regulations issued by EPA as of January 22, 2002 and the Uniform Hazardous Waste Manifest Amendments issued by EPA on March 4, 2005 and June 16, 2005.

Section 3008(a) of the Act, 42 U.S.C. § 6928(a), authorizes EPA to enforce the regulations constituting the authorized State program, and EPA retains primary responsibility for the enforcement of certain requirements promulgated pursuant to HSWA.

The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA Region 2, who has been duly delegated the authority to institute this action, hereby alleges upon information and belief:

General Allegations

Jurisdiction

1. This Tribunal has jurisdiction over the subject matter of this action pursuant to Section 3008(a) of RCRA, 42 U.S.C. 6928(a), and 40 C.F.R. § 22.1(a)(4).

Notice

2. In accordance with Section 3008(a)(2) of RCRA, 42 U.S.C § 6928(a)(2), EPA has given the State of New York prior notice of this action.

Respondent's Background

3. DOHMH is a department of the City of New York responsible for public health along with enforcement of public health rules and regulations.
4. NYC has legal responsibilities for DOHMH.
5. Public Health Laboratories ("PHL") is a laboratory engaged in the business of diagnosing medical illnesses and diseases and testing for pathogens and/or toxins associated with disease outbreaks, bioterrorism or toxic compounds.
6. PHL is located at 455 First Avenue, New York, New York 10016.
7. PHL has occupied the above location since 1966.
8. DOHMH has executive or operational responsibilities for PHL.
9. NYC is ultimately responsible for the operation of PHL.

10. The location discussed in paragraph 6 & 7, above constitutes Respondent's "Facility" as that term is defined at 6 NYCRR § 370.2(b).
11. Respondent's Facility consists of a building with 5 floors of laboratories, a hazardous waste container storage area on the second floor, an annex to the storage area, and satellite accumulation areas located in various laboratories.
12. NYC is a "person" as that term is defined in Section 1004(15) of the Act, 42 U.S.C § 6903(15), and in Title 6 of the New York Codes, Rules and Regulations at 6 NYCRR § 370.2(b).¹
13. Mary Travis Bassett is the Commissioner of DOHMH.
14. Respondent has been and remains the owner and operator of the Facility.

Respondent's Generation of Waste

15. PHL, in carrying out its activities including the diagnosis of illnesses and diseases, testing for pathogens and/or toxins associated with disease outbreaks, bioterrorism or toxic compounds, and in the course of conducting normal building maintenance operations, has been generating, and continues to generate, "solid waste" (within the meaning of 6 NYCRR § 371.1(c)) at its Facility.
16. In carrying out its activities, including the diagnosis and treatment of illnesses and diseases, testing for pathogens and/or toxins associated with disease outbreaks, bioterrorism or toxic compounds, and in the course of normal building maintenance, PHL has been generating, and continues to generate, hazardous waste, as defined in 6 NYCRR § 371.1(d), at the Facility.
17. As of May 2015, and prior and subsequent thereto, Respondent has been a generator of hazardous waste at the Facility.
18. Subsections 6 NYCRR 373-1.1(d) and 6 NYCRR 372.2(a)(8)(ii) provide, in part, that a generator may accumulate hazardous waste on-site for a period of 180 days or less without being subject to the permitting requirements [*i.e.* without having obtained a permit or without having interim status], provided such generator complies with the requirements of, *inter alia*, 6 NYCRR § 373-1.1(d)(1)(iii), (iv), (xix), and (xx).

¹ All words or phrases that have been defined in reference to statutory and/or regulatory provisions are used throughout the Complaint as so defined.

19. The requirements for generators are set forth in 6 NYCRR §372.2. A small quantity generator may accumulate non-acute hazardous waste on-site for one hundred eighty (180) days or less without having a permit or interim status provided it complies with *all* applicable conditions set forth in 6 NYCRR §372.2(a)(8) including but not limited to 6 NYCRR §372.2(a)(8)(iii) - (v).
20. At the time of EPA's Inspection described in paragraph 24 below, and for the year prior thereto Respondent was a small quantity generator as that phrase is defined in 6 NYCRR §370.2(b) at the Facility.
21. Respondent's Facility is an "existing hazardous waste management facility" (or "existing facility") within the meaning of 6 NYCRR § 370.2(b).

Regulatory Filings

22. Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, DOHMH-PHL informed EPA that it generated hazardous waste through a notification (EPA form 8700-12) on June 8, 1990.
23. In response to the Notification, EPA provided DOHMH-PHL with the following EPA Identification Number: NYD986904035.

EPA Inspection

24. On or about May 11-12 & 20, 2015, a duly designated representative of EPA conducted a Compliance Evaluation Inspection ("Inspection") of Respondent's Facility pursuant to Section 3007 of the Act, 42 U.S.C. § 6927.

EPA Notice of Violations and Request for Information

25. On or about October 23, 2015, EPA issued to PHL a combined Notice of Violation ("NOV") and Information Request Letter ("IRL") regarding its Facility.
26. The NOV, which was issued pursuant to Section 3008 of the Act, 42 U.S.C. § 6928, informed PHL that EPA had identified a number of potential RCRA violations at its Facility and required PHL to provide EPA with detailed descriptions and documentation of any subsequent actions it had taken to correct such violations.
27. The IRL, which was issued pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, sought information and documentation relating to hazardous waste activities at the Facility and required that Respondent submit specific types of documentation relating to hazardous waste activities at its Facility.

28. On or about November 23, 2015, a duly authorized representative of DOHMH/PHL submitted its certified Response to the combined NOV and IRL attesting that the information provided in the Response was true and accurate.
29. In its response to the NOV/IRL, DOHMH/PHL stated that it disposed of the following hazardous wastes on 9/29/2015, after EPA's Inspection:
 - a. Room 221: expired chemicals stored in the cabinet (D001);
 - b. Room 443: four 100 milliliter ("ml") bottles of corrosive chemicals and nine 500 ml bottles of expired sodium hydroxide (D002);
 - c. Room 429: the bottle of unused ammonium hydroxide opened in 1994 (D002);
 - d. Room 966/967: one 100 ml bottle of expired isopropanol (D001); and
 - e. Room 473: Mercury thermometers (D009).
30. At the time of the Inspection and times prior thereto, the hazardous wastes listed in paragraph 29 were not marked with the words "hazardous waste."
31. In its response to the NOV/IRL, DOHMH/PHL made the following admissions regarding the chemical waste generated during gram staining in rooms 451, 453, and 473 and disposed into the sink:
 - a. "Waste determination was conducted for each individual chemical in question [for wastes listed in the NOV/IRL]."
 - b. "The [hazardous waste] determination was performed on May 12, 2015."
 - c. "It was determined that the waste poured down the drain since May 2012 is 720 ml total."
 - d. "After pouring down the drain [hazardous wastes] copious amounts of water were flushed."
 - e. "Yes this practice [of pouring hazardous waste] down the drain was stopped. It was stopped on May 11, 2015."
 - f. "It was determined that the following were poured down the drain:
 - i. "Acetone-3ml weekly/ 12 ml monthly/ 144 yearly (since May 2012=432ml)";

- ii. “Isopropanol-5ml weekly/ 20 ml monthly/ 240 yearly (since May 2012=720ml);
 - iii. “acetic acid 1N-1ml weekly/ 4ml monthly/ 48 yearly (since May 2012=144ml)”;
 - iv. “ethanol- 3ml weekly/ 12 ml monthly/ 144 yearly (since May 2012=432ml)”;
 - v. “methanol- 1ml weekly/ 4 ml monthly/ 48 yearly (since May 2012=144ml).”
- g. “As of May 11, 2015 all [hazardous waste] containers except those in use must be closed.”
- h. In response to EPA’s statement about facility representatives stating that containers and the hazardous waste container storage area had not been inspected weekly for the past three years, DOHMH/PHL admitted that “the response provided by the facility representatives at the time of inspection was correct. As of May 11, 2015 there is a weekly log.”
- i. “At the time of inspection the fire extinguishers mentioned (Room numbers 271, 274, 345) were not inspected. Since May 11, 2015 a new system is in place.”
- j. “At the time of inspection PHL did not have any “hazardous waste” labels on hand.” A temporary label with the caption “chemical waste” was affixed.”

COUNT 1 – Respondent’s Failures to Make Hazardous Waste Determinations

32. Complainant repeats and re-alleges each allegation contained in paragraphs 1 through 31, inclusive, with the same force and effect as if fully set forth below.
33. Pursuant to 6 NYCRR § 372.2(a)(2), a person who generates a solid waste must determine if that waste is a hazardous waste using the procedures specified in that provision.
34. Pursuant to 6 NYCRR § 371.1(c), subject to certain inapplicable exclusions, a solid waste is any discarded material that includes abandoned, recycled or inherently waste-like materials as those terms are further defined therein.
35. Pursuant to 6 NYCRR § 371.1(c)(3), materials are solid wastes if they are abandoned by being:

- a. disposed of;
 - b. burned or incinerated; or
 - c. accumulated, stored, or treated before or in lieu of being abandoned by being disposed of, burned or incinerated.
36. Prior to the Inspection, Respondent had not made hazardous waste determinations on the following chemicals:
- a. Room 221: various containers of expired chemicals stored in a cabinet;
 - b. Room 263: Kinyoun and Auramin staining was conducted over a sink; staining wastes containing acid were disposed in the sink were acid alcohols;
 - c. Room 429: one old unused 500 ml container of ammonium hydroxide labeled only with the chemical name and not labeled "hazardous waste," dated April 6, 1994;
 - d. Room 443: four abandoned 100 ml containers of corrosive chemicals and nine 500 ml of expired ammonium hydroxide;
 - e. Room 451: gram staining waste which was disposed down the sink and expired chemicals which were disposed of in the drain;
 - f. Room 453: gram staining waste which was disposed down the sink at least once a day;
 - g. Room 463: gram staining waste which was disposed down the sink at least once a day;
 - h. Room 473: gram staining waste which was disposed down the sink and thirteen discarded thermometers which had been stored for more than ten years;
 - i. Annex to the hazardous waste container storage room: two 55 gallon containers (one full other ¼ full) of ethanol, eight 500 ml containers of ethanol (dated April '09), three 2 gallon and one 5 gallon containers of ethanol; and
 - j. Room 966/967: one 100 ml container of expired isopropanol.
37. Prior to the Inspection, Respondent had not determined if any of the wastes identified in the preceding paragraph, above constituted a hazardous waste.

38. Respondent's failures to determine if each solid waste generated at its Facility constitutes a hazardous waste are violations of 6 NYCRR § 372.2(a)(2).
39. Respondent's failure to comply with 6 NYCRR § 372.2(a)(2) subjects it to injunctive relief and penalties pursuant to Section 3008 of the Act, 42 U.S.C. § 6928.

COUNT 2 – Respondent's Storage of Hazardous Waste Without a Permit at the Facility

40. Complainant repeats and re-alleges each allegation contained in paragraphs 1 through 31, inclusive, with the same force and effect as if fully set forth below set forth herein.

Legal Requirements for Permit and Exemptions

41. Respondent's Facility has been a "storage" facility as that term is defined in 6 NYCRR § 370.2(b).
42. Respondent stores hazardous waste at its Facility for a finite period, at the end of which the hazardous waste is treated, disposed of or stored elsewhere. This storage occurs in various locations including in the hazardous waste container storage area and in numerous satellite accumulation areas located at its Facility.
43. Pursuant to each of the following provisions, the owner or operator of any facility used for the treatment, storage or disposal of hazardous waste must first obtain a permit or qualify for interim status in order to treat, store or dispose of such waste:
 - a. Section 3005 of the Act, 42 U.S.C. § 6925 provides that owners and operators of existing facilities for the treatment, storage, or disposal of hazardous waste must have a permit issued pursuant to this section and prohibits the treatment, storage, and disposal of hazardous waste except in accordance with such a permit; and
 - b. 6 NYCRR § 373-1.2(a), provides that no person shall operate an existing hazardous waste management facility without a permit issued pursuant to this Part or without interim status pursuant to this Part.
44. Pursuant to 6 NYCRR § 372.2(a)(8)(iii)(d'), a generator who generates more than 100 kilograms but less than 1,000 kilograms of hazardous waste in any calendar month may accumulate non-acute hazardous waste on-site for 180 days or less without being subject to the permitting requirements of 6 NYCRR Part 373 [i.e. without having obtained a

permit or without having interim status], provided such generator complies with the requirements of, *inter alia*:

- a. Six NYCRR § 373-3.9 (except for 6 NYCRR § 373-3.9(f));
 - b. Six NYCRR § 373-1.1(d)(1)(iii)(‘c’)(‘2’) - (‘3’);
 - c. Six NYCRR § 373-3.3; and
 - d. Six NYCRR § 376.1(g)(1)(iv).
45. Six NYCRR § 372.2(a)(8)(i)(‘a’) provides, that a generator of hazardous waste can be exempt from the permit requirements and still accumulate up to 55 gallons of hazardous waste or one quart of acutely hazardous waste in containers at or near any point of generation where wastes initially accumulate, which is under the control of the operator of the process generating the waste, and provided further that the generator complies with the use and management standards set forth in 6 NYCRR §373-3.9(b)-(d).
 46. Pursuant to 6 NYCRR § 373-3.9(d)(3), a generator storing containers holding hazardous waste must mark such containers with the words “Hazardous Waste” and with other words identifying their contents.
 47. Pursuant to 6 NYCRR § 372.2(a)(8)(i)(a)(2), a small quantity generator storing containers holding hazardous waste must mark such containers with the words “Hazardous Waste” and with other words that identify the contents of the containers.
 48. Pursuant to 6 NYCRR § 372.2(a)(8)(ii), a small quantity generator may store hazardous waste in a container storage area provided the date upon which each period of generation begins is clearly marked and visible for inspection on each container.
 49. Pursuant to 6 NYCRR § 373-3.9 (d)(1), a container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.
 50. Pursuant to 6 NYCRR 373-3.3(g)(1)(i), an owner or operator must attempt to make arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility; properties of hazardous waste handled at the facility and their associated hazards; places where facility personnel would normally be working; entrances into and the roads inside the facility; and possible evacuation routes.
 51. Pursuant to 6 NYCRR § 373-3.9(e), a generator must inspect areas where hazardous waste containers are stored at least weekly, and to look for leaking containers, deterioration of containers and problems in the containment system caused by corrosion or other factors.

52. Pursuant to 6 NYCRR § 373-3.3(d), all facility communications or alarm systems, fire protection equipment, and spill control equipment must be tested and maintained as necessary to assure their proper operation in time of emergency.
53. Pursuant to 6 NYCRR § 372.2 (a)(8)(iii)(e)(2)(ii), the generator must post, next to the telephone, the location of the fire extinguishers, spill control material and fire alarm, if present.

Facility's Storage of Hazardous Waste and Failures to Qualify for Exemption from Permit

54. At the times of the Inspection, and for some time prior thereto, PHL stored containers of waste at its Facility.
55. Some of the aforementioned containers held hazardous waste.
56. Respondent does not have interim status or a permit authorizing the storage of hazardous waste at its Facility.

Failure to label with words "Hazardous Waste" and other identifying words

57. On at least one of the days of the Inspection of the PHL and for some time prior to, PHL was storing the following containers of hazardous waste in the Hazardous Waste Storage Area without marking them with the words "Hazardous Waste" and other words to identify their contents:
 - a. twenty-one 4 liter containers, marked chemical waste;
 - b. eighteen 1 gallon containers;
 - c. nine 1 liter containers; and
 - d. a number of small containers of discarded chemicals.
58. On at least one of the days of the Inspection and for some time prior to, PHL was storing the following containers of hazardous waste in the satellite accumulation areas without marking them with the words "Hazardous Waste" and other words to identify their contents:
 - a. Rm. 274:
 - i. two 4- liter open containers accumulating hazardous waste (labeled chemical waste 70% 2-isopropanol, 30% methanol);

- ii. one 1 liter container stored in the High Performance Liquid Chromotography instrument cabinet;
 - iii. seven 4 liter containers storing hazardous waste in a cabinet;
- b. Room 443: four abandoned 100 ml. of corrosive chemicals;
- c. Room 568: one 5 gallon container accumulating hazardous waste;
- d. Room 559: a container and a 750 ml containers accumulating hazardous waste.

Storing Hazardous Waste for more than one hundred eighty days

59. At the time of the Inspection and for some time prior thereto, PHL stored two 55 gallon containers of ethanol waste for more than 180 days in the annex to the container storage room.

Failure to mark accumulation start dates

60. At the time of the Inspection, PHL stored the following containers of hazardous waste in the hazardous waste container storage area without marking the accumulation start dates on the containers:
- a. twenty-one 4 liter containers, marked chemical waste;
 - b. eighteen 1 gallon containers; and
 - c. nine 1 liter containers.

Failure to close containers

61. At the time of the Inspection and for some time prior thereto, the following containers were not fully closed, and waste was neither being added to nor removed from the containers:
- a. Room 568: one 5 gallon container storing hazardous waste; and
 - b. Room 559: one 5 gallon container storing hazardous waste.

Failure to make emergency arrangements

62. As of the time of the Inspection, Respondent had not made arrangements to familiarize the police and fire departments with facility specific information.

Failure to conduct weekly inspections

63. At the time of the Inspection and for three years prior thereto, PHL did not conduct weekly inspections of its hazardous waste container storage area and its containers.

Failure to test fire extinguishers

64. At the time of the Inspection, the fire extinguishers located in the following rooms in the Facility had not been inspected:
- a. Room 271 - for at least 2 months;
 - b. Room 274 -for at least 2 months; and
 - c. Room 345- for at least 9 months.

Posting location of fire extinguishers and spill control material

65. At the time of the Inspection, PHL had not posted the location of the fire extinguishers and the spill control material next to the telephone.

Respondent's Violations of Hazardous Waste Permitting Rules at PHL.

66. The aforementioned (paragraphs 54-61, above) instances of storage at PHL constitutes "storage" within the meaning of:
- a. Section 1004(33) of RCRA, 42 U.S.C. § 6903(33); and
 - b. Six NYCRR § 370.2(b).
67. Respondent's Facility never obtained a RCRA hazardous waste permit or qualified for interim status.
68. Up through the completion of the Inspection (although not necessarily limited to that time period), Respondent was required to obtain a permit for the storage of hazardous waste at the Facility.
69. Respondent's aforementioned operations of a hazardous waste management facility without having obtained a permit or qualifying for interim status constitutes a violation of each of the following:
- a. Section 3005 of the Act, 42 U.S.C. § 6925; and

b. Six NYCRR § 373-1.2(a).

70. Respondent's failure to comply with Section 3005 of the Act, 42 U.S.C. § 6925 and Six NYCRR § 373-1.2(a) subjects it to injunctive relief and penalties pursuant to Section 3008 of the Act, 42 U.S.C. § 6928

II. PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 3008(a)(3) of the Act, 42 U.S.C. § 6928(a)(3). For purposes of determining the amount of any penalty assessed, Section 3008(a)(3) requires EPA to "take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

To develop the proposed penalty in this complaint, the Complainant has taken into account the particular facts and circumstances of this case and used EPA's 2003 RCRA Civil Penalty Policy, a copy of which is available upon request or can be found on the internet at the following address:

<http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf>. The penalty amounts in the 2003 RCRA Civil Penalty policy have been and will continue to be amended to reflect inflation adjustments. The adjustments to date have been made pursuant to the following: the December 29, 2008 document entitled "Amendments to the EPA Civil Penalty Policies to Implement the 2008 Monetary Penalty Inflation Adjustment Rule (effective January 12, 2009)"; and the November 16, 2009 document entitled Adjustment Penalty Policy Matrices Based on the 2008 Civil Monetary Penalty Inflation Adjustment Rule" (with a further revision not relevant to this action on April 6, 2010) and the memorandum entitled "Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 2013). This policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors to particular cases.

The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, required EPA to adjust its penalties for inflation on a periodic basis. The penalty amounts were amended for violations occurring on or after January 31, 1997. The maximum civil penalty under Section 3008(a) (3) of RCRA, 42 U.S.C. 6928(a) (3), for violations after January 12, 2009 is \$37,500 per day of violation. 40 C.F.R. Part 19. Be advised that the 2015 Federal Civil Penalties Inflation Adjustment Act Improvement Act required EPA to make further adjustments to penalty amounts under RCRA and this maximum penalty will increase as of August 1, 2016 for certain violations.

The Complainant proposes, subject to receipt and evaluation of further relevant information from the Respondent that the Respondent be assessed the following civil penalty for the violations alleged in this Complaint. A penalty calculation worksheet and narrative explanation to support the penalty figure for each violation cited in this Complaint are included

in Attachment I, below. Matrices employed in the determination of individual and multi-day penalties are included as Attachment II, below.

Count 1:	\$12,979
Count 2:	<u>\$36,199</u>
TOTAL	\$49,178

III. COMPLIANCE ORDER

Based upon the foregoing, and pursuant to the authority of Section 3008 of the Act, Complainant herewith issues the following Compliance Order to Respondent:

The Respondent shall, to the extent it has not already done so, immediately upon the effective date of this Order correct, to the extent possible, the past violations alleged in Counts 1 and 2 of this Complaint. Respondent shall thereafter maintain compliance at its Facility with the requirements cited in Counts 1 and 2.

This Compliance Order shall take effect with respect to the Respondent within thirty (30) days of date of service of the Order, unless by that date the Respondent has requested a hearing pursuant to 40 C.F.R. Section 22.15. See 42 U.S.C. Section 6928(b) and 40 C.F.R. §§ 22.37(b) and 22.7(c).

All responses, documentation, and evidence submitted in response to this Compliance Order should be sent to:

Mr. Abdool Jabar
Environmental Engineer
RCRA Compliance Branch
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency, Region 2
290 Broadway, 21st floor
New York, New York 10007-1866

Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all other applicable RCRA statutory or regulatory (federal and/or state) provisions, nor does such compliance release Respondent from liability for any violations at its Facilities. In addition, nothing herein waives, prejudices or otherwise affects EPA's right to enforce any applicable provision of law, and to seek and obtain any appropriate penalty or remedy under any such law, regarding Respondent's generation, handling and/or management of hazardous waste at its Facility.

IV. NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

Pursuant to the terms of Section 3008(c) of RCRA, the Debt Collection Improvement Act of 1996, and the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 a violator failing to take corrective action within the time specified in a compliance order that has taken effect is liable for a civil penalty of up to \$56,467 for each day of continued noncompliance (81 Fed. Reg. 43091, July 1, 2016). Such continued noncompliance may also result in suspension or revocation of any permits issued to the violator whether issued by the EPA or the State of New York.

V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

Upon receipt of a compliance order issued under RCRA Section 3008(a), Respondent may seek administrative review in accordance with 40 C.F.R. Part 22. The Respondent may seek judicial review of the compliance order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701 - 706, once it is final and reviewable pursuant to RCRA Section 3008(b) and 40 C.F.R. Part 22.

The rules of procedure governing this civil administrative litigation have been set forth in 64 *Fed. Reg.* 40138 (July 23, 1999), entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS," and which are codified at 40 C.F.R. Part 22. A copy of these rules accompanies this Complaint, Compliance Order and Notice of Opportunity for Hearing.

A. Answering The Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty and/or the Compliance Order is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within 30 days after service of the Complaint. 40 C.F.R. §§ 22.15 (a) and 22.7(c). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866**

B. Opportunity To Request A Hearing

If requested by Respondent, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c). With regard to the Compliance Order in the Complaint, unless Respondent requests a hearing pursuant to 40 C.F.R. § 22.15 within thirty (30) days after the Compliance Order is served, the Compliance Order shall automatically become final. 40 C.F.R. § 22.37

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

(NOTE: Except for compliance information sent to EPA to satisfy the requirements of the compliance Order in Section III, any documents that are filed after the Answer has been filed should be filed as specified in "D" below.)

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. §22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. §22.15(b).

The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of their defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

C. Failure To Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth

in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). 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). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court. Any default order requiring compliance action shall be effective and enforceable against Respondent without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d).

D. Filing Of Documents Filed After the Answer

Unless otherwise ordered by the Presiding Officer for this proceeding, all documents filed after Respondent has filed an Answer should be filed with the Headquarters Hearing Clerk acting on behalf of the Regional Hearing Clerk, addressed as follows:

If filing by the United States Postal Service:

Sybil Anderson
Headquarters Hearing Clerk
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900R
Washington, D.C. 20460

If filing by UPS, FedEx, DHL or other courier or personal delivery, address to:

Sybil Anderson
Headquarters Hearing Clerk
Office of the Administrative Law Judges
Ronald Reagan Building, Room M1200
U.S. Environmental Protection Agency
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

E. Exhaustion Of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Agency's Environmental Appeals Board (EAB) see 40 C.F.R. § 1.25(e) pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

To appeal an initial decision to the EAB, Respondent must do so [w]ithin thirty (30) days after the initial decision is served. 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document. Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

VI. INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in the Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this complaint should be directed to:

Jeannie M. Yu, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, Room 1635
New York, New York 10007-1866
212-637-3205

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference will be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waive its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). To conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

If, instead of filing an Answer, Respondent wishes not to contest the Compliance Order in the Complaint and wants to pay the total amount of the proposed penalty within thirty (30) days after receipt of the Complaint, Respondent should promptly contact the Assistant Regional Counsel identified on the previous page.

Complainant:

re: Kathon Mabe - Bogus

Dore LaPosta, Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency, Region 2

Date: 7/15/2016

To: Bill de Blasio
Mayor of the City of New York
City Hall Park
New York, NY 10007

Mary Travis Bassett
Commissioner
New York City Department of Health and Mental Hygiene
42-09 28th Street
WS 8-59 Mailbox 24
Long Island City, NY 11101

cc: Kelly Lewandowski, Chief
Site Control Section
Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway, 11th Floor
Albany, New York 12233-7250

CERTIFICATE OF SERVICE

This is to certify that on the day of July 20, 2016, I caused to be mailed a true and correct copy of the foregoing COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING, bearing Docket Number RCRA-02-2016-7102, together with Attachments I and II (collectively henceforth referred to as the Complaint), and with a copy of the CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS, 40 C.F.R. Part 22, by certified mail, return receipt requested, to Bill de Blasio, Mayor of the City of New York, City Hall Park, New York, NY 10007 and Mary Travis Bassett, Commissioner, New York City Department of Health and Mental Hygiene, 42-09 28th Street, WS 8-59 Mailbox 24, Long Island City, NY 11101. I hand carried the original and a copy of the Complaint to the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2, 290 Broadway, 16th floor, New York, New York 10007-1866.

Dated: 7/20/2016,
New York, New York

Galena Mjive

ATTACHMENT 1

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT Penalty Computation Worksheet (Count 1)

Respondent: New York City Department of Health and Mental Hygiene

Facility Address: 455 First Avenue, New York, New York

Requirement Violated: Failure to make hazardous waste determinations.

PENALTY AMOUNT FOR COMPLAINT

1. Gravity-based penalty from matrix	\$ 9,658
(a) Potential for harm.	Moderate
(b) Extent of Deviation.	Moderate
2. Select an amount from the appropriate multi-day matrix cell.	\$ 1,359
3. Multiply line 2 by number of waste streams minus 1.	\$ 2,718
4. Add line 1 and line 3	\$ 12,376
5. Percent increase/decrease for good faith.	N/A
6. Percent increase for willfulness/negligence.	N/A
7. Percent increase for history of non-compliance.	N/A
8. Total lines 5 through 7.	N/A
9. Multiply line 4 by line 8.	N/A
10. Calculate economic benefit.	N/A
11. Add lines 4, 9 and 10 for penalty amount to be inserted into the complaint.	\$ 12,376
12. Apply December 2013 Inflation Adjustment Multiplier (1.0487) to line 11	\$12,979

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT
Penalty Computation Worksheet (Count 1)

1. Gravity Based Penalty

- a. Potential for Harm – The RCRA Civil Penalty Policy provides that the potential for harm should be based on two factors: the risk of human or environmental exposure and the adverse impact of the non-compliance on the regulatory scheme. Where an owner/operator of a facility generating solid waste fails to perform the required hazardous waste determination, the adverse impact on the regulatory scheme is maximized. This follows because, if the owner/operator is unaware that the facility is generating hazardous waste, there is a much greater likelihood that the owner/operator will not comply with the applicable provisions of the regulatory scheme. In this case, the Potential for Harm was determined to be MODERATE due to the relatively small amount of wastes involved.
- b. Extent of Deviation - The extent of deviation present in this violation was determined to be MODERATE: Hazardous waste determinations failed to be conducted on only a small percentage of the wastes generated at the Facility.

The applicable cell ranges from \$7,435 to \$11,881. The mid-point (\$9,658) for the cell was selected, in consideration of the fact that Respondent had characterized most of its solid wastes.

- 2. Multiple Violations** – EPA used its discretion and used the multiday penalty matrix to assess the penalty for the Respondent’s failure to make a hazardous waste determination for three distinct types of waste at its Facility. The same moderate/moderate cell was used and the mid-point of the cell was used for the same reasons cited above.

3. Adjustment Factors

- a. Good Faith - Based upon Facility-specific factors and available information, and considering that Respondent did not identify the violation and take corrective action prior to the EPA Inspection, no adjustment has been made at this time.
- b. Willfulness/Negligence - Not applicable.
- c. History of Compliance - Not applicable.
- d. Ability to Pay - Not applicable.

- e. Environmental Project – Not applicable.
- f. Other Unique Factors – Not applicable.
- a. Economic Benefit – The cost of conducting the hazardous waste determinations is considered to be less than \$4,918 because Respondent could have easily used generator knowledge to make the determination.
- g. Recalculation of Penalty Based on New Information: - Not applicable.

**NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT
Penalty Computation Worksheet (Count 2)**

**Respondent: New York City Department of Health and Mental Hygiene
Facility Address: 455 First Avenue, New York, New York**

Requirements Violated: Operating a Hazardous Waste Storage Facility Without a Permit

PENALTY AMOUNT FOR COMPLAINT

1. Gravity-based penalty from matrix	\$34,518
(a) Potential for harm.	MAJOR
(b) Extent of Deviation.	MAJOR
2. Select an amount from the appropriate multi-day matrix cell.	N/A
3. Multiply line 2 by number of days of violation minus 1.	N/A
4. Add line 1 and line 3	\$ 34,518
5. Percent increase/decrease for good faith.	N/A
6. Percent increase for willfulness/negligence.	N/A
7. Percent increase for history of non-compliance.	N/A
8. Total lines 5 through 7.	N/A
9. Multiply line 4 by line 8.	N/A
10. Calculate economic benefit.	N/A.
11. Add lines 4, 9 and 10 for penalty amount to be inserted into the complaint.	\$34,518
12. Apply December 2013 Inflation Adjustment Multiplier (1.0487) to line 11	\$36,199

**NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT
Penalty Computation Worksheet (Count 2)**

1. Gravity Based Penalty

- a. Potential for Harm - The potential for harm present in these violations was determined to be MAJOR. Storage of hazardous waste without a permit is a serious violation and has substantial adverse effects on the program. The Respondent effectively did not comply with some storage and preparedness and prevention requirements resulting in the improper handling and management of hazardous waste, including the storage of some hazardous waste without marking them with the words "Hazardous Waste" and other words to identify their contents; storage of hazardous waste for over 180 days; failure to mark accumulation start dates; failure to close containers; failure to make emergency arrangements; failure to conduct weekly inspections; failure to test fire extinguishers; and failure to post the locations of fire extinguishers and spill control material.
- b. Extent of Deviation -The extent of deviation present in this violation was determined to be MAJOR. Respondent did not have the required hazardous waste permit for its Facility, and was out of compliance with many regulations that must be met by SQGs to be exempt from RCRA permitting.

The applicable cell ranges from \$29,710 to \$39,326. The mid-point for the cell matrix (\$34,518) was selected. Although Respondent was in compliance with some requirements, Respondent violated many requirements that had to be complied with to be exempt from permitting at its Facility.

2. Multiple/Multi-day Violations- Not assessed at this time.

3. Adjustment Factors

- a. Good Faith - Based upon facility-specific factors and available information, and considering that Respondent did not identify the violation and take corrective action prior to the EPA Inspection, no adjustment has been made at this time.
- b. Willfulness/Negligence - Not applicable.
- c. History of Compliance - Not applicable.

- d. Ability to Pay - Not applicable.
- e. Environmental Project - Not applicable.
- f. Other Unique Factors - Not applicable.
- g. Economic Benefit – The cost of complying with the violated requirements (e.g., marking and labeling containers, writing letters to make emergency arrangements, etc.) are believed to be less than \$4,918.
- h. Recalculation of Penalty Based on New Information - Not applicable.

ATTACHMENT II

Gravity-Based Penalty Matrix
To Supplement the RCRA Civil Penalty Policy
For Violations that Occur after December 6, 2013

EXTENT OF DEVIATION FROM REQUIREMENT				
P O T E N T I A L F O R H A R M		MAJOR	MODERATE	MINOR
	MAJOR	\$39,326 to \$29,710	\$29,709 to \$22,285	\$22,284 to \$16,339
	MODERATE	\$16,339 to \$11,882	\$11,881 to \$7,435	\$7,434 to \$4,457
	MINOR	\$4,457 to \$2,234	\$2,233 to \$745	\$744 to \$157

Multi-Day Matrix of Minimum Daily Penalties
 To Supplement the RCRA Civil Penalty Policy
 For Violations That Occur After December 6, 2013

		EXTENT OF DEVIATION FROM REQUIREMENT		
P O T E N T I A L F O R H A R M		Major	Moderate	Minor
	Major	\$7,435 to \$1,489	\$5,946 to \$1,122	\$4,457 to \$818
	Moderate	\$3,272 to \$598	\$2,339 to \$378	\$1,489 to \$231
	Minor	\$891 to \$157	\$451 to \$157	\$157