

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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P.B.

IN THE MATTER OF:)

Barry University, Inc.)
11300 NE 2nd Avenue)
Miami Shores, Florida)
33161)

EPA ID NO.: FL0000856393)

RESPONDENT)

DOCKET NO.: RCRA-04-2008-917)

PROCEEDING UNDER SECTION)
3008(a) OF THE RESOURCE)
CONSERVATION AND RECOVERY)
ACT, 42 U.S.C. § 6928(a))

CONSENT AGREEMENT AND FINAL ORDER

I. NATURE OF THE ACTION

1. This is a civil administrative enforcement action, ordering compliance with the requirements of the Florida Statutes (F.S.), Part IV Resource Recovery and Management, Section 403.702 et seq. (LEXIS 2006) (Subtitle C of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6921, et seq.), This action is seeking the imposition of civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), for alleged violations set forth at Chapter 62-730, Florida Administrative Code (Fla. Admin. Code R.) (regulations promulgated pursuant to RCRA and set forth at Title 40 of the Code of Federal Regulations (C.F.R.), Parts 260 through 270).
2. The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22, provide that where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a Consent Agreement and Final Order (CAFO). 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).
3. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18 and desire to settle this action. Accordingly, before any testimony has been taken upon the pleadings and without any admission of violation or adjudication of any issue of fact or law and in accordance with 40 C.F.R. § 22.13(b), Complainant and Respondent have agreed to the execution of this CAFO, and Respondent agrees to comply with the terms of this CAFO.

II. THE PARTIES

4. Complainant is the Chief, RCRA & OPA Enforcement and Compliance Branch, RCRA Division, Region 4, United States Environmental Protection Agency (EPA).
5. Respondent is Barry University, Inc., a corporation incorporated under the laws of the State of Florida. Respondent operates facilities at 11300 NE 2nd Avenue, Miami Shores, Florida 33161 and 6441 East Colonial Drive, Orlando, Florida 32807.

III. PRELIMINARY STATEMENTS

6. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), on February 12, 1985, the State of Florida (the State) received final authorization from EPA to carry out certain portions of the State hazardous waste program in lieu of the federal program set forth in RCRA. The requirements of the authorized State program are found in §§ 403.702 et seq., F.S., and Fla. Admin. Code R. 62-730 et seq.
7. Pursuant to Section 3006(g) of RCRA, 42 U.S.C. § 6926(g), the requirements established by the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. 98-616, are immediately effective in all states regardless of their authorization status and are implemented by EPA until the state is granted final authorization with respect to those requirements. On November 17, 2000, the State received authorization under HSWA.
8. Although EPA has granted the State authority to enforce its own hazardous waste program, EPA retains jurisdiction and authority to initiate an independent enforcement action, pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), to address violations of the authorized state program. This authority is exercised by EPA in the manner set forth in a Memorandum of Agreement between EPA and the State.
9. As the authorized provisions of Florida's hazardous waste program operate in lieu of the federal RCRA program, the citations for the violations of those authorized provisions alleged herein will be to the authorized Florida program, however, for ease of reference, the federal citations will follow in parentheses.
10. Pursuant to Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), Complainant gave written notice of this action to Florida before the issuance of this CAFO.
11. Section 403.721, F.S., (Section 3002(a) of RCRA, 42 U.S.C. § 6922(a)) requires the promulgation of standards applicable to generators of hazardous waste. The implementing regulations for these standards are found in Fla. Admin. Code R. 62-730.160 (40 C.F.R. Part 262).
12. Pursuant to Fla. Admin. Code R. 62-730.020 (40 C.F.R. § 260.10), a "person" includes a corporation.
13. Pursuant to Fla. Admin. Code R. 62-730.020 (40 C.F.R. § 260.10), a "generator" is defined as "any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation."

14. Pursuant to Fla. Admin. Code R. 62-730.020 (40 C.F.R. § 260.10), a "facility" includes all contiguous land and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste.
15. Pursuant to Fla. Admin. Code R. 62-730.020 (40 C.F.R. § 261.2), a "solid waste" is any discarded material that is not otherwise excluded by regulation.
16. Pursuant to Fla. Admin. Code R. 62-730.020 (40 C.F.R. § 261.3), a solid waste is a "hazardous waste" if it is not excluded from regulation as a hazardous waste under Fla. Admin. Code R. 62-730.030 (40 C.F.R. § 261.4(b)) and it meets any of the criteria set out in this section.
17. Pursuant to Fla. Admin. Code R. 62-730.030 (40 C.F.R. § 261.5(a)), a generator is a "conditionally exempt small quantity generator" if he generates no more than 100 kilograms of hazardous waste in a calendar month.
18. Pursuant to Fla. Admin. Code R. 62-730.030 (40 C.F.R. § 261.5(g)(1)), a conditionally exempt small quantity generator must comply with Fla. Admin. Code R. 62-730.160 (40 C.F.R. § 262.11), which requires a person who generates a solid waste as defined in Fla. Admin. Code Ann. R. 62-730.020 (40 C.F.R. § 261.2) to determine if that waste is a hazardous waste.
19. Pursuant to Fla. Admin. Code R. 62-730.030 (40 C.F.R. § 261.20), a solid waste that exhibits any of the characteristics identified in Fla. Admin. Code R. 62-730.030 (40 C.F.R. §§ 261.21 through 261.24), is a characteristic hazardous waste.
20. Pursuant to Fla. Admin. Code R. 62-730.030 (40 C.F.R. § 261.24), a solid waste that contains a concentration of silver greater than or equal to 5.0 mg/L is a hazardous waste with the EPA Hazardous Waste Number of D011.
21. Pursuant to EPA's Audit Policy, "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 65 Fed. Reg. 19618 (April 11, 2000), EPA will not seek gravity based penalties for violations of federal environmental requirements discovered and disclosed by a regulated entity if the entity establishes that it satisfies all nine Audit Policy conditions. EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where the entity meets all nine Audit Policy conditions.
22. In a letter dated May 12, 2009, Respondent voluntarily disclosed to the EPA that it had failed to make a hazardous waste determination on aerosol cans, photographic waste, used thinner, paint and stain.

IV. EPA ALLEGATIONS AND DETERMINATIONS

23. Respondent is a "person" as defined in Fla. Admin. Code R. 62-730.020 (40 C.F.R. § 260.10).
24. Respondent is a "generator" of hazardous waste as defined in Fla. Admin. Code R. 62-730.020 (40 C.F.R. § 260.10).
25. Respondent is the "owner" and "operator" of a "facility," as those terms are defined in Fla. Admin. Code R. 62-730.020 (40 C.F.R. § 260.10).

26. Respondent's facility at 11300 NE 2nd Avenue, Miami Shores, Florida 33161 has been assigned EPA ID number FL0000856393 by the Florida Department of Environment Protection (FDEP). Respondent's facility at 6441 East Colonial Drive, Orlando, Florida 32807 has not been assigned an EPA ID number by the FDEP.
27. Respondent generates wastes that are a "solid waste" as defined in Fla. Admin. Code R. 62-730.020 (40 C.F.R. § 261.2). These wastes include aerosol cans, photographic waste, used thinner, paint and stain.
28. Respondent failed to make a hazardous waste determination on aerosol cans, photographic waste, used thinner, paint and stain.
29. Respondent therefore has violated Fla. Admin. Code R. 62-730.160 (40 C.F.R. § 262.11).
30. As memorialized in the EPA's Notice of Determination (NOD) responding to Respondent's May 12, 2009, self-disclosure letter, EPA determined that it was appropriate to waive the gravity-based penalty associated with the above-described violation because Respondent's self-disclosure met all nine Audit Policy conditions for such waiver.
31. Though EPA agreed to waive the gravity-based penalty associated with Respondent's self-disclosed violation, EPA concluded that the economic benefit obtained from the self-disclosed violation was significant and warrants collection.
32. After consideration of the factors set forth in Section 3008 of RCRA, 42 U.S.C. § 6928(a)(3), the RCRA Civil Penalty Policy, and EPA's Audit Policy, EPA proposes to assess a total civil penalty of FIVE THOUSAND DOLLARS (\$5,000.00) against the Respondent for the economic benefit of the above-described violation.

V. TERMS OF AGREEMENT

Based on the foregoing Preliminary Statements, Allegations and Determinations, the parties agree to the following:

33. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out in the above paragraphs pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928.
34. The Respondent neither admits nor denies the factual allegations and determinations set out in this CAFO.
35. Respondent waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying the Consent Agreement.
36. Respondent waives its right to challenge the validity of this CAFO and the settlement of the matters addressed in this CAFO based on any issue related to the Paperwork Reduction Act.
37. Respondent waives any right pursuant to 40 C.F.R. § 22.8 to be present during any discussions with, or to be served with and reply to, any memorandum or communication addressed to EPA officials where the purpose of such discussion, memorandum, or communication is to persuade such official to accept and issue this CAFO.

38. The parties agree that the settlement of this matter is in the public interest and that this CAFO is consistent with the applicable requirements of RCRA and the Florida hazardous waste laws and regulations cited herein. The parties agree that compliance with the terms of this CAFO shall resolve all of Respondent's liability for civil penalties for the violations and facts alleged and stipulated to in this CAFO.

39. Each party will pay its own costs and attorney's fees.

VI. PAYMENT OF CIVIL PENALTY

40. Respondent consents to the payment of a civil penalty in the amount of FIVE THOUSAND DOLLARS (\$5,000.00) within thirty (30) calendar days of the effective date of this CAFO.

41. Payment shall be made by cashier's check, certified check, by electronic funds transfer (EFT), or by Automated Clearinghouse (ACH) (also known as REX or remittance express). If paying by check, the check shall be payable to: **Treasurer, United States of America**, and the facility name and docket number for this matter shall be referenced on the face of the check. If the Respondent sends payment by the United States Postal Service, the payment shall be addressed to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197

If the Respondent sends payment by non-United States Postal express mail delivery, the payment shall be sent to:

United States Bank
Government Lockbox 979077
United States Environmental Protection Agency
Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101

If paying by EFT, the Respondent shall transfer the payment to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

If paying by ACH, the Respondent shall remit payment to:

PNC Bank
ABA: 051036706
Account Number: 310006
CTX Format Transaction Code 22 – checking
United States Environmental Protection Agency
808 17th Street, N.W.
Washington, D.C. 20074
Contact: Jesse White, (301) 887-6548

Respondent shall submit a copy of the payment to the following addressees:

Regional Hearing Clerk
United States Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

and to:

Larry L. Lamberth, Chief
South Section, RCRA and OPA Enforcement and Compliance Branch
RCRA Division
United States Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

42. If Respondent fails to remit the civil penalty as agreed to herein, EPA is required to assess interest and penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest, at the statutory judgment rate provided for in 31 U.S.C. § 3717, will therefore begin to accrue on the civil penalty if not paid within 30 calendar days after the effective date of this Consent Agreement. Pursuant to 31 U.S.C. § 3717, Respondent must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty or stipulated penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c).
- b. Monthly Handling Charge. Respondent must pay a late payment handling charge of fifteen dollars (\$15.00) on any late payment, with an additional charge of fifteen dollars (\$15.00) for each subsequent thirty (30) calendar-day period over which an unpaid balance remains.
- c. Non-Payment Penalty. On any portion of a civil penalty or a stipulated penalty more than ninety (90) calendar days past due, Respondent must pay a non-payment penalty of six percent (6%) per annum, which will accrue from the date the penalty payment

became due and is not paid. This non-payment is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

43. Penalties paid pursuant to this CAFO are not deductible for federal purposes under 26 U.S.C. § 162(f).

VII. PARTIES BOUND

44. This CAFO shall be binding on Respondent and its successors and assigns. Respondent shall cause its officers, directors, employees, agents, and all persons, including independent contractors, contractors, and consultants acting under or for Respondent, to comply with the provisions hereof in connection with any activity subject to this CAFO.
45. No change in ownership, partnership, corporate or legal status relating to the facility will in any way alter Respondent's obligations and responsibilities under this CAFO.
46. The undersigned representative of Respondent hereby certifies that she or he is fully authorized to enter into this CAFO and to execute and legally bind Respondent to it.

VIII. RESERVATION OF RIGHTS

47. Notwithstanding any other provision of this CAFO, an enforcement action may be brought pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, or other statutory authority, should the EPA find that the handling, storage, treatment, transportation, or disposal of solid waste or hazardous waste at Respondent's facility may present an imminent and substantial endangerment to human health or the environment.
48. Complainant reserves the right to take enforcement action against Respondent for any future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.
49. Except as expressly provided herein, nothing in this CAFO shall constitute or be construed as a release from any civil or criminal claim, cause of action, or demand in law or equity for any liability Respondent may have arising out of, or relating in any way to, the transportation, release, or disposal of any hazardous constituents, hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from Respondent's facility.
50. This CAFO may be amended or modified only by written agreement executed by both the EPA and Respondent.

IX. OTHER APPLICABLE LAWS

51. All actions required to be taken pursuant to this CAFO shall be undertaken in accordance with the requirements of all applicable local, state, and Federal laws and regulations. Respondent shall obtain or cause its representatives to obtain all permits and approvals necessary under such laws and regulations.

X. SERVICE OF DOCUMENTS

52. A copy of any documents that Respondent files in this action shall be sent to the following attorney who represents EPA in this matter and who is authorized to receive service for EPA in the proceeding:

Elisa Roberts, Associate Regional Counsel
United States Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
(404) 562-9564

53. A copy of any documents that Complainant files in this action shall be sent to the following attorney who represents Respondent in this matter and who is authorized to receive service for Respondent in the proceedings:

David Losee, Esq.
Goldberg Segalla, LLP
100 Pearl Street/7th Floor
Hartford, CT 06103

XI. SEVERABILITY

54. It is the intent of the parties that the provisions of this CAFO are severable. If any provision or authority of this CAFO or the application of this CAFO to any party or circumstances is held by any judicial or administrative authority to be invalid or unenforceable, the application of such provisions to other parties or circumstances and the remainder of the CAFO shall remain in force and shall not be affected thereby.

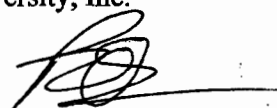
XII. EFFECTIVE DATE

55. The effective date of this CAFO shall be the date on which the CAFO is filed with the Regional Hearing Clerk.

AGREED AND CONSENTED TO:

Barry University, Inc.

By: _____



Dated: _____

9/21/12

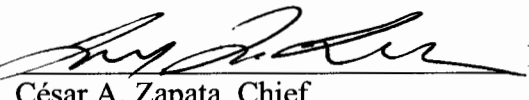
Print Title: _____

VP For Business and Finance



U. S. Environmental Protection Agency

for

By: 

Dated: 09/27/12

César A. Zapata, Chief
RCRA and OPA Enforcement and Compliance Branch
RCRA Division

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:) DOCKET NO.: RCRA-04-2008-9174
)
Barry University, Inc.)
11300 NE 2nd Avenue) PROCEEDING UNDER SECTION
Miami Shores, Florida) 3008(a) OF THE RESOURCE
33161) CONSERVATION AND RECOVERY
) ACT, 42 U.S.C. § 6928(a)
)
EPA ID NO.: FL0000856393)
)
RESPONDENT)
_____)

FINAL ORDER

The foregoing Consent Agreement is hereby approved, ratified and incorporated by reference into this Final Order in accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22. The Respondent is hereby ORDERED to comply with all of the terms of the foregoing Consent Agreement effective immediately upon filing of this Consent Agreement and Final Order with the Regional Hearing Clerk. This Order disposes of this matter pursuant to 40 C.F.R. §§ 22.18 and 22.31.

BEING AGREED, IT IS SO ORDERED this 1st day of Nov., 2012.

BY: Susan B. Schub
Susan B. Schub
Regional Judicial Officer

CERTIFICATE OF SERVICE

I certify that I have this day filed the original and a true and correct copy of the foregoing Consent Agreement and Final Order (CAFO), in the Matter of Barry University, Inc., Docket Number: RCRA-04-2008-9174, and served the parties listed below in the manner indicated:

Alan A. Annicella, Environmental Scientist (Via EPA Internal Mail)
RCRA and OPA Enforcement and Compliance Branch, RCRA Division
United States Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

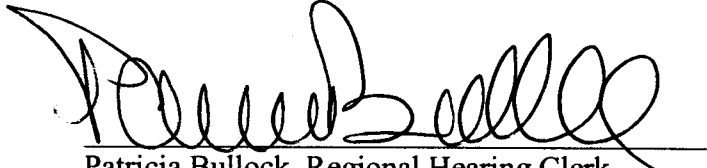
Quantindra Smith (Via the EPA Electronic Mail)
U.S. EPA – Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Elisa Roberts (Via EPA Internal Mail)
Associate Regional Counsel
United States Environmental Protection Agency, Region 4
61 Forsyth St., S.W.
Atlanta, Georgia 30303

(Via Certified Mail, Return Receipt Requested)

David Losee, Esq.
Goldberg Segalla, LLP
100 Pearl Street/7th Floor
Hartford, CT 06103

Date: 11-6-12


Patricia Bullock, Regional Hearing Clerk
United States Environmental Protection Agency,
Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, GA 30303
(404) 562-9686