



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

SEP 30 2009

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

Article number: 7005 3110 0000 5926 4256

Arnold S. McHone
President
McHone Industries, Inc.
110 Elm Street
Salamanca, New York 14779

Re: **In the Matter of McHone Industries, Inc.**
Docket No. RCRA-02-2009-7108

Dear Mr. McHone:

Enclosed is the Complaint, Compliance Order and Opportunity for Hearing in the above-referenced proceeding. The Complaint alleges violations of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.*

You have the right to a formal hearing to contest any of the allegations in the Complaint and/or to contest the penalty proposed in the Complaint. If you wish to contest the allegations and/or the penalty proposed in the Complaint, you must file an Answer within **thirty (30)** days of your receipt of the enclosed Complaint with the Regional Hearing Clerk of the Environmental Protection Agency ("EPA"), Region 2, at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th floor
New York, New York 10007-1866

If you do not file an Answer within thirty (30) days of receipt of this Complaint or have not obtained a formal extension for filing an Answer from the Regional Judicial Officer of Region 2, a default order may be entered against you and the entire proposed penalty may be assessed.

Whether or not you request a formal hearing, you may request an informal conference with EPA to discuss any issue relating to the alleged violations and the amount of the proposed penalty. EPA encourages all parties against whom it files a Complaint to pursue the possibility of settlement and to have an informal conference with EPA. However, a request for an informal conference **does not** substitute for a written Answer, affect what you may choose to say in an Answer, or extend the thirty (30) days by which you must file an Answer requesting a hearing.

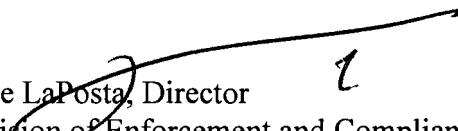
U.S. ENVIRONMENTAL
PROTECTION AGENCY
2009 OCT -2 11:10:04
REGIONAL HEARING
CLERK

You will find enclosed a copy of the "Consolidated Rules of Practice," which govern this proceeding. (A brief discussion of some of these rules appears in the later part of the Complaint.)

EPA encourages the use of Supplemental Environmental Projects, where appropriate, as part of any settlement. I am enclosing a brochure on "EPA's Supplemental Environmental Projects Policy." Please note that these are only available as part of a negotiated settlement and are not available if this case has to be resolved by a formal adjudication.

If you have any questions or wish to schedule an informal conference, please contact the attorney whose name is listed in the Complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "Dore LaPosta", is written over the typed name. A small handwritten number "1" is located to the right of the signature.
Dore LaPosta, Director
Division of Enforcement and Compliance Assistance

Enclosures

cc: Karen Maples, Regional Hearing Clerk (without enclosures)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGIONAL HEARING CLERK
2009 OCT -2 PM 10:34

In The Matter of:

McHone Industries, Inc.

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-02-2009-7108

I. 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 *et seq.* (referred to collectively as the "Act" or "RCRA") for injunctive relief and civil penalties.

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING ("Complaint") serves notice of EPA's preliminary determination that McHone Industries, Inc. has violated certain provisions of RCRA and its implementing regulations.

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 (Aug.1, 2002), and 70 Fed. Reg. 1825 (Jan. 11, 2005). The State of New York, however, is not authorized to operate in Indian country; EPA continues to implement and administer the RCRA program in Indian country. *See* 74 Fed. Reg. 31384 (July 1, 2009).

Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1), authorizes the Administrator of EPA to issue an order assessing a civil penalty and/or requiring compliance for any past or

current violation(s) of Subtitle C (Hazardous Waste Management) of RCRA, including its implementing regulations.

Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), any “penalty assessed in the order [issued under authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a)] shall not exceed \$25,000 per day of noncompliance for each violation of a requirement of [Subtitle C of RCRA].” Under authority of the Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, Public Law 101-410 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, 110 Stat.1321, Public Law 104-134 (codified at 31 U.S.C. 3701 note), EPA has promulgated regulations, codified at 40 C.F.R. Part 19, that, *inter alia*, increase the maximum penalty EPA may obtain pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) to \$32,500 per day for each violation occurring in the period from March 16, 2004 through January 12, 2009 and to \$37,500 per day for each violation occurring after January 12, 2009.

The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, Region 2 EPA, has been duly delegated the authority to institute this action. For all times relevant to this Complaint, Complainant hereby alleges:

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. EPA has given the State of New York and the Seneca Nation of Indians notice of this action prior to issuance of the Complaint.

RESPONDENT

3. Respondent is McHone Industries, Inc. (hereafter “Mchone” or “Respondent”).

4. Respondent is a “person” as that term is defined in Section 1004(15) of the Act, 42 U.S.C. § 6903(15), and in 40 C.F.R. § 260.10.

GENERAL ALLEGATIONS

5. Respondent specializes in the design, manufacture, fabrication and finishing of tubular products at a facility located at 110 Elm Street in Salamanca, New York. Respondent, or a predecessor, has been conducting such operations at this Salamanca location since approximately 1978.

6. Salamanca, New York is located on property owned by the Seneca Nation of Indians ("Nation"). According to a representative of the Nation, Respondent leases its Elm Street property from the Nation.
7. The Salamanca location where Respondent conducts its manufacturing operations constitutes a "Facility" as that term is defined in 40 C.F.R. § 260.10.
8. Respondent is the "owner" and/or "operator" of the Facility as those terms are defined in 40 C.F.R. § 260.10.
9. In or about 1982, Respondent's predecessor Bush Industries notified EPA that it generated hazardous waste at the Facility. In or about May 1987, Bush Industries notified EPA that it was no longer generating hazardous waste at the Facility.
10. In October 2008, Respondent notified EPA that it was a "generator" of "hazardous waste" at the Facility, as those terms are defined in 40 C.F.R. § 260.10. Respondent further indicated that it was a conditionally exempt small quantity generator, generating less than 100 kilograms (220 pounds) of non-acute hazardous waste a month. On or about January 5, 2009, EPA acknowledged Respondent's notification and assigned it EPA identification number NYD980648364.
11. Pursuant to 40 C.F.R. §§ 261.5(b) and (g), subject to certain inapplicable exceptions, conditionally exempt small quantity generators are not subject to regulation under 40 C.F.R. Parts 262 through 266, 268, and 270 provided they comply with certain specified requirements including making hazardous waste determinations pursuant to 40 C.F.R § 262.11.
12. Pursuant to 40 C.F.R. § 261.5(g)(2), conditionally exempt small quantity generators who accumulate more than 1000 kilograms (2,200 pounds) of their own hazardous waste are subject to regulation as small quantity generators ("SQGs").
13. On or about June 18, 2008, Respondent accumulated over 1000 kilograms of D007 hazardous waste, which was generated in the Facility's Laser Cutting Area.
14. Respondent's accumulation of more than at 1000 kilograms of its own hazardous waste subjected it to regulation as a SQG. The regulations for generators, including SQGs, are set forth in 40 C.F.R. Part 262.
15. On or about October 1, 2008, the Bureau of Hazardous Waste Regulation of the New York State Department of Environmental Conservation ("NYSDEC") notified Respondent that it was subject to regulation as a SQG since it stored greater than 1000 kilograms of hazardous waste.

16. Respondent stores and/or stored hazardous waste at its Facility as the term “storage” is defined in 40 C.F.R. § 260.10.

17. Neither Respondent, nor a predecessor, submitted Part A or Part B of a RCRA permit application to EPA regarding the Facility.

18. Respondent never qualified for interim status nor obtained a permit for the Facility pursuant to Section 3005 of RCRA and 40 C.F.R. Part 270.

EPA INVESTIGATIVE AND ENFORCEMENT ACTIVITIES

19. Pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, on or about December 8, 2008, a duly designated representative of EPA conducted a RCRA Compliance Evaluation Inspection of the Facility (“Inspection”).

20. Pursuant to Sections 3007 and 3008 of RCRA, 42 U.S.C. §§ 6927 and 6928, on or about March 25, 2009, EPA issued Respondent a Request for Information (“Information Request”) and a Notice of Violation (“NOV”) regarding Respondent’s management of hazardous waste at its Facility.

21. On or about May 29, 2009, Respondent submitted its response to EPA’s Information Request and NOV (“Response”). This Response was prepared by an employee or agent of Respondent in the course of carrying out his/her employment or duties.

COUNTS

Count 1

Failure to Make Hazardous Waste Determinations

22. Complainant re-alleges each allegation contained in the above paragraphs as if fully set forth herein.

23. Pursuant to 40 C.F.R. § 262.11, a person who generates “solid waste” must determine if the solid waste is a hazardous waste.

24. Pursuant to 40 C.F.R. § 261.2, subject to certain inapplicable exclusions, a “solid waste” is any “discarded material.” Among other things, a discarded material is any material which is “abandoned,” as that term is defined in 40 C.F.R. § 261.2(b).

25. Pursuant to 40 C.F.R. § 261.2(b)(i), materials are solid wastes if they are “abandoned” by being “disposed of ... or accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of....”
26. As of at least June 18, 2008, Respondent generated steel grinding fines from its laser cutting/etching processes. Respondent accumulated these grinding fines and then sent them off-site for disposal at a solid waste landfill.
27. Respondent “abandoned” the material identified in paragraph 26 by sending it off-site for disposal.
28. The material identified in paragraph 26 constitutes a “discarded material” and “solid waste,” as defined in 40 C.F.R. § 261.2.
29. As of at least June 18, 2008, Respondent had not determined if the solid waste identified in paragraph 26 constituted a hazardous waste.
30. Respondent’s failure to determine if a solid waste generated at its facility constitutes a hazardous waste is a violation of 40 C.F.R. § 262.11.
31. Respondent’s failure to comply with 40 C.F.R. § 262.11 subjects it to penalties pursuant to Section 3008 of the Act.

Count 2
Failure to Comply with Hazardous Waste Manifest Requirements

32. Complainant re-alleges each allegation contained in the above paragraphs as if fully set forth herein.
33. Pursuant to 40 C.F.R. § 262.20(a), a generator who transports, or offers for transportation, hazardous waste must prepare a manifest.
34. On or about June 18, 2008, Respondent shipped six 55 gallon drums of steel grinding fines off-site to Hyland Facility Associates (“Hyland”), located in Angelica, New York. The grinding fines were transported to Hyland by a third party - S.D.S. of Olean.
35. Hyland’s Angelica facility is a solid waste facility that does not have a permit or interim status authorizing it to treat, store or dispose of hazardous waste on site.

36. Hyland had composite samples of the steel grinding fines analyzed for metals using the toxic characteristic leaching procedure (“TCLP”) for metals. The analysis indicated that the steel grinding fines were toxic for chromium and constituted D007 hazardous waste.

37. Respondent failed to prepare a manifest for its June 18, 2008 shipment of D007 hazardous waste.

38. Respondent’s failure to prepare a manifest for its shipment of D007 hazardous waste off-site constitutes a violation of 40 C.F.R. § 262.20(a).

39. Respondent’s failure to comply with 40 C.F.R. § 262.20(a) subjects it to penalties pursuant to Section 3008 of the Act.

Count 3
Operation of Storage Facility Without a Permit

40. Complainant re-alleges each allegation contained in the above paragraphs, as if fully set forth herein.

41. Pursuant to 40 C.F.R. § 270.1(c) and Section 3005 of the Act, 42 U.S.C. § 6925, a RCRA permit is required for the “storage” of hazardous waste, as that term is defined in 40 C.F.R. § 260.10.

42. Pursuant to 40 C.F.R. §§ 261.5(b) and (g)(1), a conditionally exempt generator’s hazardous wastes are exempt from permitting requirements *if* they comply with certain criteria including making hazardous waste determinations.

43. As of at least June 18, 2008, Respondent failed to make a hazardous waste determination for solid waste generated at its facility. *See* Count 1.

44. As of at least June 18, 2008, Respondent did not comply with all of the conditions for conditionally exempt small quantity generators set forth in 40 C.F.R. § 261.5(g) which would have exempted its hazardous waste from the permitting requirements set forth in 40 C.F.R. Part 270. *See also* Paragraphs 12 -15 above.

45. Pursuant to 40 C.F.R. §§ 262.34(d) and (e), a small quantity generator may accumulate hazardous waste on-site for up to one hundred and eighty (180) days without having a permit or interim status *provided* the generator complies with the requirements specified therein, including but not limited to the following:

- Clearly marking hazardous waste containers with accumulation dates, visible for inspection, as required by 40 C.F.R. § 262.34(a)(2);

- Clearly marking each container used to accumulate hazardous waste with the words “Hazardous Waste,” as required by 40 C.F.R. § 262.34(a)(3);
- Conducting weekly inspections of areas where containers are stored looking for deterioration and corrosion of the containers, as required by 40 C.F.R. § 265.176;
- Attempting to familiarize police, fire departments and emergency response teams with the layout of the facility, properties of hazardous waste handled, places where employees would generally be working and possible evacuation routes, as required by 40 C.F.R. § 265.37(a)(1);
- Attempting to familiarize local hospitals with the properties of wastes handled at the facility and the types of illnesses or injuries that could result from fire, explosions or releases at the facility, as required by 40 C.F.R. § 265.37(a)(4); and
- Posting the name and telephone number of the emergency coordinator, and the location of fire extinguishers and spill control materials next to the telephone, as required by 40 C.F.R. § 262.34(d)(ii).

46. Pursuant to 40 C.F.R. § 262.34(f), a small quantity generator who accumulates hazardous waste for more than 180 days is an operator of a storage facility and is subject to the permitting requirements set forth in 40 C.F.R. Part 270.

47. As of at least June 18, 2008, Respondent accumulated hazardous waste for a period exceeding more than 180 days, subjecting it to the permitting requirements set forth in 40 C.F.R. Part 270.

48. As of at least June 18, 2008, Respondent failed to comply with some and/or all of the bulleted requirements set forth in paragraph 45 above.

49. As of at least June 18, 2008, Respondent had failed to satisfy all the requirements for generators specified in 40 C.F.R. § 262.34(d) – (e) which, if complied with, would have allowed Respondent to store hazardous waste without interim status or a permit for up to 180 days.

50. Respondent’s Facility never obtained interim status or a permit from EPA authorizing the storage of hazardous waste.

51. Respondent’s storage of hazardous waste at its Facility prior to at least June 18, 2008 without a permit is a violation of 40 C.F.R. § 270.1(c) and Section 3005 of the Act, 42 U.S.C. § 6925.

52. Respondent's failure to comply with 40 C.F.R. § 270.1(c) and Section 3005 of the Act, 42 U.S.C. § 6925, subjects it to penalties pursuant to Section 3008 of the Act.

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, Complainant has taken into account the particular facts and circumstances of this case and has used EPA’s 2003 RCRA Civil Penalty Policy. A copy of this penalty policy is available upon request or can be found on the Internet at www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf. The penalty amounts in the 2003 RCRA Civil Penalty Policy have been amended to reflect inflation adjustments. These adjustments were made pursuant to the following: the September 21, 2004 document entitled "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (pursuant to the Debt Collection Improvement Act of 1996, effective October 1, 2004)"; the January 11, 2005 document entitled "Revised Penalty Matrices for the RCRA Civil Penalty Policy"; and the December 29, 2008 document entitled "Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Penalty Monetary Penalty Inflation Adjustment Rule (effective January 12, 2009)." The RCRA Penalty Policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors to particular cases.

The Federal Civil Penalties 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 maximum civil penalty per violation per day under Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) is \$32,500 for any violation occurring between March 15, 2004 and January 12, 2009 and \$37,500 for any violation occurring after January 12, 2009. 40 C.F.R. Part 19.

The Complainant proposes, subject to receipt and evaluation of further relevant information from the Respondent, that 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 Attachments II and III, below.

In view of the above-cited violations, and pursuant to the authority of Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), and the RCRA Civil Penalty Policy, the Complainant herewith proposes the assessment of a civil penalty in the total amount of **thirty two thousand and five hundred dollars** (\$32,500) as follows:

Counts 1, 2 and 3: \$ 32,500

Total Proposed Penalty: \$ 32,500

III. COMPLIANCE ORDER

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

1. Within twenty (20) days of the effective date of this Compliance Order, to the extent it has not already done so, Respondent shall:
 - a. make hazardous waste determinations for each solid waste generated at its facility pursuant to 40 C.F.R. § 262.11:
 - b. comply with all applicable and appropriate provisions for generators including:
 - i. the conditions for conditionally exempt small quantity generators set forth in 40 C.F.R. § 261.5 during each calendar month in which the Respondent generates 100 kilograms or less of hazardous waste, provided Respondent does not accumulate more than 1000 kilograms of hazardous waste on-site (the rules for acute hazardous waste are more stringent and should be complied with if applicable); or
 - ii. the provisions for small quantity generators set forth in 40 C.F.R. § 262.34(d) during each calendar month in which the Respondent generates greater than 100 kilograms but less than 1000 kilograms of hazardous waste, provided Respondent neither accumulates hazardous waste in quantities exceeding more than 6000 kilograms nor accumulates hazardous waste for more than 180 days (the rules for acute hazardous waste are more stringent and should be complied with if applicable); or
 - iii. the provisions for large quantity generators set forth in 40 C.F.R. § 262.34(a), provided hazardous waste is accumulated on site for 90 days or less;
 - c. as an alternative to compliance with the generator provisions identified in Paragraph 1.b.i. – iii. of this Compliance Order, obtain and comply with a hazardous waste permit from EPA pursuant to applicable provisions set forth of 40 C.F.R. Part 270. However, Respondent must comply with the appropriate requirements cited in Paragraph 1 above until such permit is obtained.

2. Within thirty (30) calendar days of the effective date of this Compliance Order, Respondent shall submit to EPA: a) a written statement indicating if it intends to continue its operations as a conditionally exempt small quantity generator, a small quantity generator, a large quantity generator, or a permitted facility; and b) a statement indicating its compliance with this Compliance Order, and all documentation demonstrating such compliance. Respondent's submission may reference information already submitted to EPA. If Respondent is in noncompliance with a particular requirement, the notice shall state the reasons for noncompliance and shall provide a schedule for achieving prompt compliance with the requirement.

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

Ronald Voelkel
Environmental Scientist
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

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

Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise release Respondent from liability for any violations at the facility. Further, nothing herein waives, prejudices or otherwise affects EPA's right to enforce any applicable provisions of law regarding the facility.

IV. NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

Pursuant to the terms of Section 3008(c) of RCRA and the Debt Collection Improvement Act of 1996, a violator failing to take corrective action within the time specified in a compliance order is liable for a civil penalty of up to \$37,500 per day for each violation occurring after January 12, 2009. (This penalty amount may be increased in the future to take into account inflation.)

V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

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**

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 to affirmatively raise in the Answer facts that constitute or that might constitute the grounds of its 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.

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). Unless Respondent requests a hearing within thirty (30) days after the Compliance Order is served pursuant to 40 C.F.R. § 22.15, the Compliance Order in this complaint 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.

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. Exhaustion of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Agency's Environmental Appeals Board ("EAB") 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:

Amy R. Chester
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, New York 10007-1866
212-637-3213

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 herein.

Dated: SEPTEMBER 30, 2009
New York, New York

COMPLAINANT:

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

To: Mr. Arnold S. McHone
President
McHone Industries
110 Elm Street
Salamanca, New York 14779

cc: Thomas Killeen, Chief
Hazardous Waste Compliance Section
Bureau of Hazardous Waste Management
New York State Department of Environmental Conservation
625 Broadway, 5th Floor
Albany, New York 12233-7250

Adrian Stevens, Director
Environmental Protection Department
Seneca Indian Nation
84 Iroquois Drive
Irving, New York 14081

CERTIFICATE OF SERVICE

This is to certify that on the day of OCT - 2, 2009, 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-02-2009-7108, 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 Mr. Arnold S. McHone, President, McHone Industries, Inc., 110 Elm Street, Salamanca, New York 14779. 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: OCT - 2, 2009
New York, New York

Mildred N. Bae

ATTACHMENT 1

**NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT
Penalty Computation Worksheet (Counts 1, 2 and 3)**

Respondent: McHone Industries, Inc.

Facility Address: 110 Elm Street, Salamanca, New York 14779

Requirements Violated:

40 C.F.R. § 262.11 - Respondent failed to make a hazardous waste determination for solid waste generated at its Facility.

40 C.F.R. § 262.20 - Respondent failed to prepare a hazardous waste manifest for a waste shipment off-site.

42 U.S.C § 6925 and 40 C.F.R. § 270.1(c) - Operating a Hazardous Waste Storage Facility Without a Permit

PENALTY AMOUNT FOR REFERRAL

1. Gravity based penalty from matrix	\$32,500	
(a) Potential for Harm.	MAJOR	
(b) Extent of Deviation.	MAJOR	
2. Select an amount from the appropriate multi-day matrix cell.		Not applicable
3. Multiply line 2 by number of distinct wastes types minus 1.		Not applicable
4. Add line 1 and line 3.		Not applicable
5. Percent increase/decrease for good faith.		Not applicable
6. Percent increase for willfulness/negligence.		Not applicable
7. Percent increase for history of noncompliance.		Not applicable
8. Total lines 5 through 7.		Not applicable
9. Multiply line 4 by line 8.		Not applicable
10. Calculate economic benefit.		Not applicable

11. Add lines 4, 9 and 10 for penalty amount to be inserted into the complaint. \$32,500

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT
Penalty Computation Worksheet (Counts 1, 2 and 3)

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 noncompliance on the regulatory scheme. By failing to determine whether each solid waste stream constitutes a hazardous waste, an owner/operator increases the likelihood that a hazardous waste it generated will not be treated as such. In this instance, Respondent failed to determine if a waste stream generated at its facility constituted hazardous waste. Consequently, Respondent was unaware that its waste was subject to regulation and accumulated the waste on site for an extended period of time without instituting mandated managerial requirements intended to protect human health and the environment. Respondent also failed to prepare a manifest for a large shipment of hazardous waste off-site. Manifests ensure that a receiving facility is notified that it is receiving hazardous waste, including the type and quantity of waste. Failure to manifest waste off-site increases the likelihood that hazardous waste will not be properly managed as a hazardous waste by the receiving party, or other third parties such as transporters who come into contact with the waste. Finally, because Respondent failed to comply with the restrictions on storage and other rules for small quantity generators, it became the operator of a storage facility subject to RCRA's permitting requirements. These requirements are also intended to ensure the proper management of hazardous waste in order to protect both human health and the environment. By failing to operate with a permit or interim status, or within the rules for generators, Respondent potentially risked human health and the environment. The potential for harm for failure to perform a hazardous waste determination, prepare manifests and operate without a permit has been determined to be MAJOR since all of these steps are intended to ensure the continual proper management of generated hazardous waste streams.
- b. Extent of Deviation - The extent of deviation present in this violation was determined to be MAJOR since there was no compliance with these three regulatory requirements. In addition, most requirements that must be met by generators were violated, all of which led to the mismanagement of waste streams.

The applicable cell ranges from \$25,791 - \$32,500, since these violations took place after March 16, 2004 but prior to January 12, 2009. The high point for the cell matrix was selected to reflect the fact that this penalty calculation incorporates three distinct violations.

- c. Multiple/Multi-day – Based on information presently available to it, multi-day penalties are not being sought at this time.

2. Adjustment Factors

- a. Good Faith - Based upon facility specific factors and available information, 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

2. Economic Benefit – To be Determined. By failing to comply with these provisions, Respondent may have avoided hazardous waste disposal costs for the D007 waste sent off-site to Hyland. (This waste was ultimately properly disposed of at a hazardous waste landfill.) The economic benefit for these counts would include all costs related to the proper disposal of the D007, if a party other than Respondent paid for the final shipment and disposal of this material as a hazardous waste.

ATTACHMENT II

GRAVITY-BASED PENALTY MATRIX

For Violations Occurring From March 16, 2004 through January 12, 2009

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	\$32,500 To 25,791	\$25,790 To 19,343	\$19,342 To 14,185
	Moderate	\$14,184 To 10,316	\$10,315 To 6,448	\$6,447 To 3,869
	Minor	\$3,868 To 1,934	\$1,933 To 645	\$644 To 129

MULTI-DAY MATRIX

For Violations Occurring From March 16, 2004 through January 12, 2009

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	\$6,448 To 1,290	\$5,158 To 967	\$3,869 To 709
	Moderate	\$2,837 To 516	\$2,063 To 322	\$1,290 To 193
	Minor	\$774 To 129	\$387 To 129	\$129