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U.S. EPA REGION IX
REGIONAL HEARING CLERK

8 UNITED STATES
9 ENVIRONMENTAL PROTECTION AGENCY
10 REGION 9

11 IN RE: FLUORESCO LIGHTING AND
SIGNS
12 EPA ID NO. AZR000045757,

U.S. EPA Docket Nos. RCRA-09-2011-0012
and TSCA-09-2011-0014

13 Respondent.

**ANSWER TO DETERMINATION OF
VIOLATION AND COMPLIANCE
ORDER; RESPONDENT'S REQUEST
FOR HEARING**

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17 Respondent Fluoresco Lighting and Signs ("Fluoresco"), for its Answer to the United
18 States Environmental Protection Agency's Determination of Violation, Compliance Order, and
19 Notice of Right to Request a Hearing (hereinafter, the "Complaint"), hereby admits, denies, and
20 alleges as follows:

21
22 **I. DETERMINATION OF VIOLATION**

23
24 **A. INTRODUCTION**

25 1. Fluoresco admits that Complainant is the United States Environmental Protection
26 Agency, Region IX ("EPA") and further admits that Fluoresco is the Respondent. Fluoresco
27 admits that EPA is using Section 3008(a)(1) of the Resource Conservation and Recovery Act
28 ("RCRA"), Section 15 of the Toxic Substances Control Act, and the Consolidated Rules of

1 Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or
2 Corrective Action Orders, and the Revocation, Termination or Suspension of Permits as the basis
3 for its civil enforcement action. However, Fluoresco is without sufficient information and
4 knowledge to form a belief as to whether these provisions are a proper basis for issuing a civil
5 enforcement action in this instance, and therefore denies same.

6 2. Fluoresco denies EPA's characterization that it "manages" hazardous waste,
7 polychlorinated biphenyl waste, and non-hazardous industrial wastes. Fluoresco admits the
8 remaining allegations in Paragraph 2 of EPA's Complaint.

9 3. Fluoresco generally denies all the allegations against it contained in Paragraph 3 of
10 EPA's Complaint. Specifically, Fluoresco denies that it committed the following alleged
11 violations of RCRA: (1) storage of hazardous waste without a permit as allegedly required by
12 A.A.C. § R18-8-270.A, (2) treatment of hazardous waste without a permit as allegedly required
13 by A.A.C. § R18-8-270.A, (3) failure to close containers of hazardous waste as allegedly required
14 by A.A.C. § R18-8-265.A, (4) failure to make a hazardous waste determination as allegedly
15 required by A.A.C. § R18-8-262.A, (5) failure to provide required aisle space in the hazardous
16 waste storage area as allegedly required by A.A.C. § R18-8-265.A, and (6) failure to perform
17 weekly inspections of containers storing hazardous waste as allegedly required by A.A.C. § R18-
18 8-265.A. Fluoresco further denies that it violated Section 15 of TSCA, 15 U.S.C. § 2614, by
19 allegedly failing to provide a manifest to accompany a shipment of waste containing PCBs as
20 allegedly required by 40 C.F.R. § 761.

21 Fluoresco is without sufficient information to determine whether the Complaint
22 constitutes proper notice of EPA's determination that the alleged violations occurred. Fluoresco
23 admits that the Complaint seeks to assess a civil penalty against Fluoresco and seeks compliance
24 with the tasks described within the Complaint. Fluoresco incorporates by reference the below
25 responses as though fully set forth herein.

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1 **B. JURISDICTION**

2 4. Fluoresco is without information to confirm or deny whether EPA has authority to
3 enforce Arizona’s hazardous waste management program requirements, and therefore denies
4 same. Fluoresco admits the remaining allegations in Paragraph 4 of EPA’s Complaint.

5 4.[sic]. Admit.

6 5. Admit.

7 6. Admit.

8 7. Fluoresco admits that some hazardous waste manifests indicate that it generated
9 more than 100 kilograms and less than 1000 kilograms of hazardous waste in a month. EPA’s
10 statement that Fluoresco is a small quantity “generator” of hazardous waste is a legal conclusion
11 that does not require a response.

12 8. Fluoresco admits that at certain times in the past, it engaged in “storage” of
13 hazardous waste as defined by A.A.C. § R18-8-260 and PCBs as defined in 40 C.F.R. § 761.3.

14 9. Fluoresco admits that at certain times in the past, it generated or accumulated
15 materials defined as “solid waste.”

16 10. Fluoresco denies that hazardous waste is defined in A.A.C. § R18-8-261.3 because
17 this provision does not exist. Similarly, Fluoresco denies that used oil is defined by 40 C.F.R. §
18 761.3. Fluoresco is without sufficient information and knowledge to form a belief as to whether
19 the paint waste, solvents, and waste and/or broken fluorescent lamps constitute hazardous waste,
20 and therefore denies same. Fluoresco admits that at certain times in the past, it generated or
21 accumulated “hazardous waste” as defined in A.A.C. § R18-8-260.10.

22 11. Fluoresco admits that EPA conducted an unannounced inspection on February 24,
23 2010. Fluoresco denies that the purpose of the inspection was to determine Fluoresco’s
24 compliance with 40 C.F.R. Subtitle C, Part 273 or “the regulations adopted by the Arizona
25 authorized program.” EPA’s Inspection Report states that the purpose of the investigation was to
26 determine compliance with “Code of Federal Regulations . . . , Chapter 40, Parts 261–265, 268
27 and 279, and Arizona’s authorized hazardous waste program in the Arizona Revised Statutes,
28 Title 49 and the Arizona Administrative Code, Title 18, Chapter 8, Article 2.” Fluoresco admits

1 that EPA has determined that Fluoresco violated portions of the Arizona Hazardous Waste
2 Management Act, but denies that EPA's findings were correct from the inspection and further
3 denies that EPA's determination based on the findings was correct.

4 12. Section 3006 of RCRA, 42 U.S.C. § 6926 speaks for itself. EPA's statement that a
5 violation of the law under an authorized state hazardous waste program is a violation of a
6 requirement of Subtitle C of RCRA is a legal conclusion that does not require a response.

7 13. Paragraph 13 of EPA's Complaint constitutes a legal conclusion that does not
8 require a response.

9 14. Paragraph 14 of EPA's Complaint constitutes a legal conclusion that does not
10 require a response. Section 3008 of RCRA, 42 U.S.C. § 6928 speaks for itself.

11 15. Fluoresco is without sufficient information and knowledge to form a belief as to
12 the truth of Paragraph 15 of EPA's Complaint, and therefore denies same.

13 16. Fluoresco is without sufficient information and knowledge to form a belief as to
14 the truth of Paragraph 16 of EPA's Complaint, and therefore denies same.

15 17. Paragraph 17 of EPA's Complaint constitutes a legal conclusion that does not
16 require a response. 40 C.F.R. Part 761 speaks for itself.

17 18. Paragraph 18 of EPA's Complaint constitutes a legal conclusion that does not
18 require a response. 40 C.F.R. § 761.3 speaks for itself.

19 19. Paragraph 19 of EPA's Complaint constitutes a legal conclusion that does not
20 require a response. 40 C.F.R. § 761.3 speaks for itself.

21 20. Paragraph 20 of EPA's Complaint constitutes a legal conclusion that does not
22 require a response. Section 16(a) of TSCA, 15 U.S.C. § 2615(a) speaks for itself.

23 21. Fluoresco is without sufficient information and knowledge to form a belief as to
24 the truth of Paragraph 21 of EPA's Complaint, and therefore denies same.

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1 C. ALLEGED VIOLATIONS

2 COUNT I

3 *Storage of Hazardous Waste Without a Permit*

4 22. Fluoresco incorporates by reference all of its preceding responses in this Answer
5 as though fully set forth herein.

6 23. Fluoresco denies that A.A.C. § R18-8-262(A) states that a generator who generates
7 greater than 100 kg but less than 1000 kg of hazardous waste in a calendar month without a
8 permit is subject to a condition that it only accumulate as much as 55 gallons of hazardous waste
9 or one quart of acutely hazardous waste at or near any point of generation. A.A.C. § R18-8-
10 262(A) speaks for itself.

11 24. Fluoresco denies that the inspection occurred on February 23, 2010 and therefore
12 denies the remaining allegations in Paragraph 24 of EPA's Complaint.

13 25. Deny.

14 26. Fluoresco denies that the inspection occurred on February 23, 2010 and therefore
15 denies the remaining allegations in Paragraph 26 of EPA's Complaint. Contrary to EPA's
16 allegation that the "third drum had a faded label that appeared to be dated September 2007,"
17 EPA's Inspection Report actually states: "[a]ccumulation start date of 9/07 or 9/09."

18 27. Deny.

19 28. Deny.

20 29. Deny.

21 30. Deny.

22 31. Deny.

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24 COUNT II

25 *Treatment of Hazardous Waste Without a Permit*

26 32. Fluoresco incorporates by reference all of its preceding responses in this Answer
27 as though fully set forth herein.

28 33. A.A.C. § R18-8-270A speaks for itself.

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COUNT IV

Failure to Make a Hazardous Waste Determination

46. Fluoresco incorporates by reference all of its preceding responses in this Answer as though fully set forth herein.

47. A.A.C. § R18-8-262 speaks for itself.

48. Fluoresco denies that the inspection occurred on February 23, 2010 and therefore denies the remaining allegations in Paragraph 48 of EPA's Complaint. Further, Fluoresco's Paint Manager was attending a RCRA seminar at the time of the February 24, 2010 inspection. Upon his return, the Paint Manager identified the contents of each container.

49. Fluoresco denies that the inspection occurred on February 23, 2010 and therefore denies the remaining allegations in Paragraph 49 of EPA's Complaint. Fluoresco further incorporates by reference its response to Paragraph 48.

50. Deny.

COUNT V

Failure to Provide Required Aisle Space

51. Fluoresco incorporates by reference all of its preceding responses in this Answer as though fully set forth herein.

52. A.A.C. § R18-9-265 speaks for itself. Further, EPA has not alleged that the aisle space is needed for the stated purposes.

53. Fluoresco denies that the inspection occurred on February 23, 2010 and therefore denies the remaining allegations in Paragraph 53 of EPA's Complaint.

54. Deny.

COUNT VI

Failure to Perform Weekly Inspections

55. Fluoresco incorporates by reference all of its preceding responses in this Answer as though fully set forth herein.

1 56. A.A.C. § R18-9-265 speaks for itself.

2 57. Deny.

3 58. Deny.

4 59. Fluoresco denies that the inspection occurred on February 23, 2010 and therefore
5 denies the remaining allegations in Paragraph 59 of EPA's Complaint.

6 60. Deny.

7

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COUNT VII

9

Failure to Manifest PCB Waste

10 61. Fluoresco incorporates by reference all of its preceding responses in this Answer
11 as though fully set forth herein.

12 62. Admit.

13 63. Fluoresco is without sufficient information and knowledge to form a belief as to
14 the truth of Paragraph 63 of EPA's Complaint, and therefore denies same.

15 64. Fluoresco is without sufficient information and knowledge to form a belief as to
16 the truth of Paragraph 64 of EPA's Complaint, and therefore denies same.

17 65. 40 C.F.R. § 761.207 speaks for itself.

18 66. Fluoresco is without sufficient information and knowledge to form a belief as to
19 the truth of Paragraph 66 of EPA's Complaint, and therefore denies same.

20 67. Paragraph 67 of EPA's Complaint constitutes a legal conclusion that does not
21 require a response.

22

23 **D. CIVIL PENALTY**

24 68. EPA's imposition of a penalty is improper under the circumstances because
25 Fluoresco's alleged violations were unintentional, promptly remediated, and Fluoresco has no
26 history of prior environmental violations. More importantly, EPA is not required to impose a
27 civil monetary penalty and, here, Fluoresco's first alleged violation of environmental law does not
28 justify the penalty EPA seeks.

1 69. EPA’s imposition of a penalty is improper under the circumstances because
2 Fluoresco’s alleged violation was unintentional and Fluoresco has no history of prior
3 environmental violations. EPA has the authority to remit any proposed penalty and, here,
4 Fluoresco’s first alleged violation of environmental law does not justify the penalty EPA seeks.

5 *Assessment of the Maximum Total Civil Penalty Is Unwarranted Given*
6 *Fluoresco’s History of Environmental Compliance and Its Prompt Remediation*
7 *of the Alleged Violations.*

8 Fluoresco objects to the requested relief because EPA cannot justify the proposed penalty
9 in light of Fluoresco’s history of regulatory compliance.

10 The basis of EPA’s Complaint, 42 U.S.C. § 6928(a)(1), does not require EPA to assess a
11 civil penalty against Fluoresco, let alone a civil monetary penalty. Instead issuance of a civil
12 penalty is permissive. Because EPA is not required to assess a civil monetary penalty, its
13 proposed penalty is unreasonable given that Fluoresco has no prior history of noncompliance.
14 This facility—and Fluoresco as a whole—have never been cited for federal, state, or local
15 environmental violations. Furthermore, Fluoresco remediated each and every alleged violation in
16 less than ten weeks following EPA’s Notice of Violation.

17 Despite Fluoresco’s history of regulatory compliance and expedited remediation efforts,
18 EPA nevertheless seeks the maximum civil monetary penalty and an exorbitant multi-day penalty
19 for alleged violations occurring in an industrial area that resulted in no harm to the environment.
20 EPA’s requested relief is not justified under the circumstances.

21 *EPA’s Proposed Penalty Is Inequitable In Violation of EPA’s Penalty Policies.*

22 Fluoresco objects to EPA’s proposed maximum penalty as radically higher than the
23 penalty amounts issued in reported RCRA cases in Region IX and nationwide—particularly those
24 assessed for an entity’s failure to obtain a permit for the treatment, storage, or disposal of
25 hazardous waste. The imposition of such an inconsistent penalty is contrary to an essential
26 purpose of the RCRA Penalty Policy, which is “to ensure that . . . penalties are assessed in a fair
27 and consistent manner.” Environmental Protection Agency, Office of Regulatory Enforcement,
28 RCRA Enforcement Div., RCRA Civil Penalty Policy, at 5 (June 2003) [hereinafter, the “RCRA
Penalty Policy”].

1 For example, in *AAA Plating & Inspection Co.*, Case No. 09-2010-5056, Region IX
2 assessed a penalty of \$19,800 for violations that include the storage of hazardous waste without a
3 permit, the existence of open containers of hazardous waste, lack of container access, and failure
4 to conduct weekly inspections. Here, however, EPA proposes a penalty for similar violations that
5 is more than thirteen times higher than *AAA Plating*. Similarly, *MRI Manufacturing and*
6 *Research* assessed a penalty of \$30,000 for comparable violations. Given this discrepancy in the
7 proposed penalty and those granted in similar cases, EPA's proposal is inequitable.

8 Likewise, EPA's proposal is significantly higher than penalties for similar violations in
9 other regions, including \$1,548 in *Gardner, Berry Painting, Inc.*, Case No. 07-2009-0104, \$2,715
10 in *D&J Plating, Inc.*, Case No. 07-2006-0272, \$19,103 in *Big Dog Motorcycles, LLC*, Case No.
11 07-2009-0290, and \$40,269 in *General Motors Automotive – North America*, Case No. 07-2009-
12 0136. This inequitable and inconsistent treatment of Fluoresco contravenes EPA's penalty
13 policies. RCRA Penalty Policy, at 5.

14 Similarly, the proposed penalty is inequitable given Fluoresco's continued cooperation
15 with EPA throughout the inspection and enforcement process. Fluoresco has been entirely
16 cooperative and responsive to EPA's questions, requests for information, and directives. The
17 RCRA Penalty Policy permits the reduction of the penalty for such cooperation. RCRA Penalty
18 Policy, at 41 (stating that a reduction can occur in the gravity-based penalty for the "degree of
19 cooperation and preparedness during the inspection, provision of access to records,
20 responsiveness and expeditious provision of supporting documentation requested by EPA during
21 or after the inspection"). This cooperation is not reflected in the proposed penalty. Accordingly,
22 the proposed penalty must be substantially reduced, if not eliminated entirely.

23 **Fluoresco Did Not Receive an Economic Benefit from Its Alleged**
24 **Noncompliance.**

25 Fluoresco further objects to the maximum proposed civil penalty because Fluoresco did
26 not receive an economic benefit from non-compliance. A primary purpose of the RCRA Penalty
27 Policy is to ensure that "economic incentives for noncompliance . . . are eliminated." *Id.* at 5.
28 There is no evidence that Fluoresco received any benefit from noncompliance. In fact, Fluoresco

1 spent at least \$30,526 to immediately remediate the alleged violations. Despite incurring these
2 remediation costs, Fluoresco has received no reduction or offset in the proposed penalty.
3 Consequently, the requested relief is inappropriate.

4 **Fluoresco's Alleged Violations Were Not Willful.**

5 The proposed penalty is further objectionable because Fluoresco's alleged inaction was
6 neither willful nor knowing. The alleged violations occurred despite Fluoresco's best efforts to
7 comply with all applicable laws. Fluoresco's alleged non-compliance was not intentional, nor the
8 result of deliberate indifference.

9
10 **Count I – Storage of Hazardous Waste Without a Permit**

11 Fluoresco objects to EPA's request for multi-day penalties and its characterization of the
12 alleged violation as a "major" deviation from the regulatory requirement because the alleged
13 failure to obtain a permit was a single event rather than a repeated, multi-day occurrence.
14 Fluoresco did not affirmatively repeat its alleged failure to obtain a permit, but at most, merely
15 continued the one-time violation over the course of a few months. Thus, it is unreasonable to
16 assess a multi-day penalty for this one-time violation. Similarly, categorization of a one-time
17 failure as a "major" deviation from the regulatory requirement unfairly penalizes Fluoresco for a
18 minor one-time mistake.

19 Fluoresco also objects because the requested \$37,500 per day penalty is higher than the
20 maximum \$5,500 multi-day penalty established in the RCRA Penalty Policy. There is no basis in
21 EPA's policy for assessing a \$37,500 penalty per day. Regardless, a maximum multi-day penalty
22 is beyond excessive.

23 Likewise, Fluoresco disputes EPA's assessment that the potential for harm was "major"
24 given that no release occurred and that the facility is located in an industrial area distant from
25 sensitive or protected environmental areas, thereby minimizing any possibility of negatively
26 impacting the environment. Fluoresco never released hazardous waste into the soil or
27 groundwater. Furthermore, its facility is located in an industrial area surrounded by train tracks to
28 the east and a tire shop to the south. There are no adjacent surface waters, sensitive

1 environmental areas, or wildlife habitats that would have been impacted by a potential release. In
2 fact, the only hazardous material in the containers was small amounts of dried paint residue—not
3 large quantities of highly toxic material. Thus, the potential for harm was minimal and
4 necessitates that the proposed penalty be eliminated or substantially reduced.

5 Finally, Fluoresco disputes EPA’s request for separate penalties under Counts I and II
6 because these violations are duplicative. EPA’s RCRA Penalty Policy states that “[w]here a
7 claim derives from or merely restates another claim, a separate penalty may not be warranted.”
8 RCRA Penalty Policy, at 21 (emphasis added). Here, EPA proposes a separate penalty in Count
9 II for the alleged treatment of hazardous waste without a permit. This “treatment” allegedly is the
10 drying of hazardous waste during storage. At the same time, EPA proposes a penalty for the
11 storage of hazardous waste. Thus, storage without a permit (Count I) and drying during storage
12 (Count II) are substantively the same action. Accordingly, elimination or, at least, compression
13 of these proposed penalties is proper.

14
15 **Count II – Treatment of Hazardous Waste Without a Permit**

16 Fluoresco incorporates by reference all of its preceding penalty arguments as though fully
17 set forth herein.

18 Fluoresco objects to EPA’s proposed penalty because the potential for harm was minimal
19 given that no release occurred, the property is located in an industrial area distant from sensitive
20 environmental areas, and the violation only involved small quantities of hazardous waste.
21 Likewise, Counts I and II are indistinguishable and thus duplicative such that assessment of
22 separate penalties for each alleged violation is improper.

23 Fluoresco further objects because the requested penalty is higher than the penalty
24 established in the RCRA Penalty Policy for violations that are deemed a “moderate” potential for
25 harm and a “minor” deviation from the regulatory requirement. RCRA Penalty Policy, at 2 (as
26 adjusted by 69 Fed. Reg. 69360, 69 Fed. Reg. 7121, and 73 Fed. Reg. 75340).

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1 **Count III – Failure to Close Containers of Hazardous Waste**

2 Fluoresco incorporates by reference all of its preceding penalty arguments as though fully
3 set forth herein.

4 Fluoresco objects to EPA’s proposed penalty because the potential for harm was minimal
5 given that no release occurred, the property is located in an industrial area distant from sensitive
6 environmental areas, and the violation only involved small quantities of hazardous waste.

7 Fluoresco further objects because the requested penalty is higher than the penalty
8 established in the RCRA Penalty Policy for violations that are deemed a “moderate” potential for
9 harm and a “minor” deviation from the regulatory requirement. *Id.* (as adjusted by 69 Fed. Reg.
10 69360, 69 Fed. Reg. 7121, and 73 Fed. Reg. 75340).

11
12 **Count IV – Failure to Make a Hazardous Waste Determination**

13 Fluoresco incorporates by reference all of its preceding penalty arguments as though fully
14 set forth herein.

15 Fluoresco objects to EPA’s proposed penalty because the potential for harm was minimal
16 given that no release occurred, the property is located in an industrial area distant from sensitive
17 environmental areas, and the violation only involved small quantities of hazardous waste.

18 Fluoresco further objects because the requested penalty is higher than the penalty
19 established in the RCRA Penalty Policy for violations that are deemed a “moderate” potential for
20 harm and a “moderate” deviation from the regulatory requirement. *Id.* (as adjusted by 69 Fed.
21 Reg. 69360, 69 Fed. Reg. 7121, and 73 Fed. Reg. 75340).

22
23 **Count V – Failure to Provide Required Aisle Space**

24 Fluoresco incorporates by reference all of its preceding penalty arguments as though fully
25 set forth herein.

26 Fluoresco objects to EPA’s proposed penalty because the potential for harm was minimal
27 given that no release occurred, the property is located in an industrial area distant from sensitive
28 environmental areas, and the violation only involved small quantities of hazardous waste.

1 Moreover, there is no deviation from the regulatory requirement given that aisle space is not a
2 requirement for all facilities. *See* 40 C.F.R. § 265.35.

3 Fluoresco further objects because the requested penalty is higher than the penalty
4 established in the RCRA Penalty Policy for violations that are deemed a “moderate” potential for
5 harm and a “moderate” deviation from the regulatory requirement. RCRA Penalty Policy, at 2 (as
6 adjusted by 69 Fed. Reg. 69360, 69 Fed. Reg. 7121, and 73 Fed. Reg. 75340).

7 8 **Count VI – Failure to Perform Weekly Inspections**

9 Fluoresco incorporates by reference all of its preceding penalty arguments as though fully
10 set forth herein.

11 Fluoresco objects to EPA’s proposed penalty because the potential for harm was minimal
12 given that no release occurred, the property is located in an industrial area distant from sensitive
13 environmental areas, and the violation only involved small quantities of hazardous waste.
14 Moreover, there was no deviation from the regulatory requirement given that hazardous waste
15 inspections occurred weekly as required.

16 Fluoresco further objects because the requested penalty is higher than the penalty
17 established in the RCRA Penalty Policy for violations that are deemed a “moderate” potential for
18 harm and a “moderate” deviation from the regulatory requirement. *Id.* (as adjusted by 69 Fed.
19 Reg. 69360, 69 Fed. Reg. 7121, and 73 Fed. Reg. 75340).

20 21 **Count VII – Failure to Manifest PCB Waste**

22 Fluoresco objects to the proposed penalty for Count VII because it is contrary to the
23 Polychlorinated Biphenyls Penalty Policy. This penalty policy states that a “fair penalty for
24 violating the non-disposal requirements *can be based on the cost of proper disposal of PCBs or*
25 *PCB Items.*” Environmental Protection Agency, Polychlorinated Biphenyls (PCB) Penalty
26 Policy, at 3 (Apr. 9, 1990) (emphasis added). Here, the requested \$37,500 penalty is not
27 comparable to the cost of disposal of a drum of fluorescent light ballasts. Consequently, the
28 requested penalty should be denied.

1 E. COMPLIANCE ORDER

2 70. Fluoresco has cooperated with EPA and the Arizona Department of Environmental
3 Quality and understands that it is and has been in compliance with Sections 3002, 3004, 3005,
4 3007, and 3010 of RCRA, 42 U.S.C. §§ 6922, 6924, 6925, 6927, and 6930. Fluoresco is without
5 sufficient information to respond to EPA's request in Paragraph 70 to comply with "22 C.C.R.
6 §662610, et seq," and therefore denies that compliance with it is warranted or required.

7
8 II. NOTICE OF RIGHT TO REQUEST A HEARING

9
10 A. PUBLIC HEARING

11 71-76. Pursuant to 44 C.F.R. § 22.15(c), Fluoresco respectfully requests a hearing upon
12 the issues raised by EPA's Complaint and Fluoresco's Answer. However, before such a hearing
13 is set, Fluoresco respectfully requests the opportunity for an informal settlement conference.

14
15 B. INFORMAL SETTLEMENT

16 77-80. Fluoresco respectfully requests an informal settlement conference pursuant to
17 Paragraph 80. Fluoresco has contacted Karen Goldberg, Esq., Office of Regional Counsel, U.S.
18 EPA, Region IX to discuss this possibility.

19
20 III. EFFECTIVE DATE

21 81. 40 C.F.R. §§ 22.5(b) and 22.7 speak for themselves.

22 IV. GROUNDS FOR DEFENSE

23 82. FIRST DEFENSE:

24 EPA is without jurisdiction to enforce Arizona hazardous waste law.

25 83. SECOND DEFENSE:

26 EPA cannot issue a compliance order under 42 U.S.C. § 6928 because it failed to provide
27 prior notice to the State of Arizona prior to issuance of an order as required by 42 U.S.C. §
28 6928(a)(2).

1 84. THIRD DEFENSE:

2 EPA waited an unreasonable period of time before asserting its claims and therefore such
3 actions are barred by the doctrine of laches.

4 85. FOURTH DEFENSE:

5 Fluoresco has given its full cooperation to EPA in the investigation of this matter. EPA
6 has never had to resort to legal process to compel disclosure of any information from Fluoresco.
7 The penalty, if any, assessed to Fluoresco should be adjusted downward accordingly.

8 86. FIFTH DEFENSE:

9 Fluoresco has made every effort to come into and stay in compliance with all applicable
10 environmental laws. The penalty, if any, assessed to Fluoresco should be adjusted downward
11 accordingly.

12 87. SIXTH DEFENSE:

13 No harm has resulted from the conduct alleged by EPA in the Complaint. Fluoresco has
14 addressed any alleged deficiencies. The penalty, if any, assessed to Fluoresco should be adjusted
15 downward accordingly.

16 88. SEVENTH DEFENSE:

17 As its investigation of the Complaint continues, Fluoresco reserves the right to add
18 additional defenses.

19

20 **V. FACTS DISPUTED BY FLUORESCO**

21 89. Fluoresco incorporates by reference all of its preceding responses to this Answer
22 as though fully set forth herein.

23 90. Fluoresco disputes that it was required to obtain a permit for the storage of
24 hazardous waste.

25 91. Fluoresco disputes that it failed to properly label containers at the facility.

26 92. Fluoresco disputes that it failed to label containers at the facility.

27 93. Fluoresco disputes that its facility had up to three containers that contained
28 accumulation dates in excess of 180 days from the time of inspection. In particular, Fluoresco

1 disputes EPA's allegation that three drums contained accumulation dates of October 1, 2008,
2 November 1, 2008, and September, 2007.

3 94. Fluoresco disputes that the two containers that were labeled "waste oil" or "old
4 oil" contained used oil.

5 95. Fluoresco disputes that the drying of paint constitutes "treatment" for purposes of
6 40 C.F.R. § 260.10.

7 96. Fluoresco disputes that it "treated" hazardous waste.

8 97. Fluoresco disputes that it failed to close containers of hazardous waste.

9 98. Fluoresco disputes that it failed to make required hazardous waste determinations.

10 99. Fluoresco disputes that aisle space was needed for the purposes outlined in 40
11 C.F.R. § 265.35.

12 100. Fluoresco disputes EPA's allegations that it failed to conduct weekly inspections
13 as required by law.

14 101. Fluoresco disputes that a "facility representative informed the inspectors that
15 inspections were performed twice a month in 2008 and 2009, not weekly."

16 102. Fluoresco disputes that it failed to manifest PCB waste.

17 DATED this 4th day of November, 2011.

18 SNELL & WILMER LLP.

19
20 By



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