



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

C-14J

**ATTACHMENTS TO THIS LETTER CONTAINING INFORMATION CLAIMED AS
CONFIDENTIAL BUSINESS INFORMATION ("CBI") HAVE BEEN REDACTED**

Marcy Toney
Regional Judicial Officer
U.S. EPA (C-14J)
Region 5
77 W. Jackson
Chicago, Illinois 60604

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

Re: JLM Chemicals, Inc.
Docket No. RCRA-05-2009-0017
Motion for Default Order, Finding of Liability and Penalty

Dear Ms. Toney:

Enclosed please find a Motion for Default Order, Finding of Liability and Penalty (Motion) for the above-mentioned matter. Pursuant to 40 C.F.R. § 2.203, a claim of Confidential Business Information (CBI) has been asserted for information included with the Motion. EPA has not made a CBI determination under 40 C.F.R. § 2.205 regarding that assertion. Therefore, the information asserted as CBI has been filed under seal pursuant to 40 C.F.R. § 22.5(d). If you have any questions, please contact me at (312) 353-4789.

Sincerely,

A handwritten signature in blue ink, appearing to read "Harriet Croke".

Harriet Croke
Assistant Regional Counsel

Enclosures

cc: Brenda Whitney (w/encl.)
Catherine Garypie (w/encl)
JLM Chemicals, Inc. (w/encl.)
c/o National Registered Agents, Inc.
Larry Hyman
Assignee of JLM Chemicals, Inc.
Michael Moecker & Associates, Inc.

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PROTECTION AGENCY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

_____)
IN THE MATTER OF:)
)
JLM Chemicals, Inc.) Docket No. RCRA-05-2009-0017
Blue Island, Illinois)
)
_____)

MOTION FOR DEFAULT ORDER, FINDING OF LIABILITY AND PENALTY

Pursuant to Sections 22.16 and 22.17 of the Rules of Practice (Rules), 40 C.F.R. Sections 22.16 and 22.17, Complainant, the United States Environmental Protection Agency, hereby moves this Court for a default Order against the Respondent, JLM Chemicals, Inc. ("JLM"), resulting in the admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. Complainant also moves for a finding that Respondent violated Sections 3002 and 3004 of RCRA, 42 U.S.C. §§ 6922 and 6924, as described in Counts 1-4 of the Complaint. Finally, Complainant moves for the issuance of an order assessing the penalty proposed in the Complaint. A Memorandum of Law supporting this Motion for Default Order, Finding of Liability, and Penalty is attached hereto.

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Respectfully Submitted,

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY.

4/27/10
Date



Harriet Croke
Assistant Regional Counsel
Office of Regional Counsel
U. S. Environmental Protection Agency, Region 5
77 West Jackson Blvd. (C-14J)
Chicago, Illinois 60604
Telephone: 312-353-4789
Facsimile: 312-385-5504
Email: croke.harriet@epa.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)
)
)

JLM Chemicals, Inc.)
Blue Island, Illinois)
)
_____)

Docket No. RCRA-05-2009-0017

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

**MEMORANDUM OF LAW SUPPORTING
MOTION FOR DEFAULT ORDER, FINDING OF LIABILITY, AND PENALTY**

The Respondent in this action has not filed an Answer to the Complaint. Therefore, Respondent should be found in default. Further, since a default means that the Respondent has admitted all facts alleged in the Complaint, Respondent should also be found liable for violating Sections 3002 and 3004 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6922 and 6924, as described in Counts 1-4 of the Complaint. Finally, Respondent should be ordered to pay a penalty in the amount assessed in the Complaint.

I. Respondent Should Be Found In Default

Section 22.17(a) of the Rules of Practice (Rules) (40 C.F.R. § 22.17(a)) provides that a party may be found in default. In re: Las Delicias Community, 2009 EPA App. LEXIS 22 (August 17, 2009)(the Environmental Appeals Board (EAB) exercised *sua sponte* review of the Regional Judicial Officer's (RJO's) decision regarding proper service of process of a complaint in a Safe Drinking Water Act (SDWA) matter – the EAB agreed with the RJO and upheld the RJO's Default Order and Initial Decision); In re: Ag-Air Flying Services, Inc., 2006 EPA App. LEXIS 40 (September 1, 2006)(EAB upheld the ALJ's Default Order for failure to comply with a

motion for additional discovery in a Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) matter); In re: Four Strong Builders, Inc., 2006 EPA App. LEXIS 31 (July 11, 2006)(EAB affirmed the ALJ's finding of default for failure to file a prehearing exchange and failure to respond to several orders in a Clean Air Act (CAA) matter); In the Matter of Frank J. Davis, 2008 EPA ALJ LEXIS 12 (March 31, 2008)(ALJ Nissen found respondent to be in default on a Toxic Substances Control Act (TSCA) matter for failing to comply with prehearing exchange orders); In the Matter of Keenhold Associates, et al., 2007 EPA ALJ LEXIS 34 (December 4, 2007)(Chief ALJ Biro found respondents to be in default on a TSCA matter for failing to comply with a prehearing exchange order and an order to show cause); In the Matter of NICO Hazardous Waste Management, Inc., 1992 EPA ALJ LEXIS 57 (February 20, 1992) (Chief ALJ Frazier found respondent in a TSCA matter to be in default for failure to file a prehearing exchange, despite respondent's letter stating it was no longer in business and was insolvent). Furthermore, many default decisions under Section 22.17(a), 40 C.F.R. § 22.17(a), are RCRA decisions. In the Matter of Blackinton Common, LLC, et al., 2009 EPA ALJ LEXIS 4 (April 23, 2009)(ALJ Gunning found respondents to be in default on a RCRA matter for failing to appear at a scheduled hearing); In the Matter of Century Oil Acquisition Corp., 2007 EPA ALJ LEXIS 22 (September 17, 2007)(ALJ Gunning found respondent to be in default on a RCRA matter for failing to appear at hearing); In the Matter of Municipality of Catano, 2007 EPA ALJ LEXIS 12 (April 17, 2007)(Chief ALJ Biro found respondent to be in default on a RCRA matter for failing to comply with a prehearing order); and In the Matter of Microdot, Inc., 1994 EPA ALJ LEXIS 26 (June 23, 1994)(Acting Chief ALJ Lotus found respondent in a RCRA matter not subject to the stay provision of the U.S. Bankruptcy Code, in default for failure to file a

prehearing exchange). In addition, a number of default decisions are for failure to file an answer.

In re: Gaskey Construction Corp., 2006 EPA App. LEXIS 57 (December 14, 2006)(EAB exercised *sua sponte* review of the first RJO's decision regarding default for failing to file an answer in a Clean Water Act (CWA) matter and the second RJO's decision regarding the penalty in the same matter); In the Matter of Michael McDonald, 2008 EPA ALJ LEXIS 2

(January 14, 2008)(Chief ALJ Biro noted that "failure to file an Answer may constitute grounds for default"); In the Matter of Bar Development Water User's Association, et al, 2006 EPA RJO Lexis 545 (January 10, 2006)(RJO found respondents to be in default in a SDWA matter for failing to file an answer to an Administrative Complaint for Penalty and Notice of Opportunity for Hearing). Finally, a number of the RCRA default decisions are for failure to file an answer.

In re: Pyramid Chemical Company, 2004 EPA App. LEXIS 32 (September 16, 2004) (EAB found the respondent to be in default and liable on all counts in a RCRA matter for failing to file an answer to a complaint), *motion for reconsideration denied*, In re: Pyramid Chemical Company, 2004 EPA App. LEXIS 50 (November 8, 2004); In the Matter of Silak Company, 1989 EPA ALJ LEXIS 13 (January 25, 1989) (ALJ Jones found respondents to be in default in a RCRA matter for failing to file an answer to a Complaint, Compliance Order and Notice of Opportunity for Hearing).

The Complaint in this matter was filed on September 14, 2009. A copy of the Complaint is attached as EPA 01. Service of the Complaint was complete on September 18, 2009, when the designated agent of Respondent received the Complaint. See EPA 036, 037 and 038. Pursuant to 40 C.F.R. § 22.15 and as specified in the Complaint (Complaint at 16), Respondent's Answer was required to be filed with the Regional Hearing Clerk within thirty (30) days after receipt, or

on (or before) October 19, 2009. According to the Regional Hearing Clerk for U.S. EPA Region 5, as of the date of this filing, Respondent has not filed an Answer. See EPA 039.

Accordingly, a finding of default is appropriate in this matter.

II. Respondent Violated Sections 3002 and 3004 of RCRA, as Described in Counts 1-4 of the Complaint

Under 40 C.F.R. §. 22.17(a), default by Respondent constitutes, for purposes of this proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's rights to contest such factual allegations. Because all the factual allegations of the Complaint are admitted and deemed true upon default, and such facts are legally sufficient to establish the violations alleged in the Complaint by a preponderance of the evidence, a Default Order should issue finding Respondent liable for the violations.

A. Count 1

Count 1 of the Complaint alleges that Respondent violated 35 IAC § 722.120(a) [40 C.F.R. § 262.20(a)(1)] when Respondent offered hazardous waste (K022) for transport, for off-site treatment, storage or disposal without a manifest on 141 occasions. The factual allegations of paragraphs 51 through 57 of the Complaint, which are deemed admitted upon default, establish the facts necessary for a finding that the violations occurred as alleged in Count 1.

B. Count 2

Count 2 of the Complaint alleges that Respondent violated 35 IAC § 725.271 [40 C.F.R. § 265.171] when Respondent failed to maintain containers holding hazardous waste (D019, D001, and U004) in good condition or manage the waste in some other way that complies with 35 IAC Part 725, Subpart I [40 C.F.R. Part 265, Subpart I], and failed to maintain and operate its facility to minimize the possibility of release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment in violation of 35 IAC § 725.131 [40 C.F.R. § 265.31]. The factual allegations of paragraphs 58 through 71 of the Complaint, which are deemed admitted upon default, establish the facts necessary for a finding that the violations occurred as alleged in Count 2.

C. Count 3

Count 3 of the Complaint alleges that Respondent violated 35 IAC § 725.273(a) [40 C.F.R. § 265.173(a)] when Respondent failed to keep containers holding hazardous waste closed during storage. The factual allegations of paragraphs 72 through 76 of the Complaint, which are deemed admitted upon default, establish the facts necessary for a finding that the violations occurred as alleged in Count 3.

D. Count 4

Count 4 of the Complaint alleges that Respondent violated 35 IAC § 725.134(a) [40 C.F.R.262.34(a)] when Respondent failed to have a hazardous waste operating permit or interim status, and failed to maintain a condition for exemption from 35 IAC § 725.134(c) [40 C.F.R.262.34(c)] when Respondent failed to label or mark each satellite container holding

hazardous waste clearly with the words "Hazardous Waste" or other words that correctly identify the contents of the containers. The factual allegations of paragraphs 77 through 86 of the Complaint, which are deemed admitted upon default, establish the facts necessary for a finding that the violations occurred as alleged in Count 4.

Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator of EPA may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program when the Administrator finds that the state program meets certain conditions. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Administrator of EPA granted the State of Illinois final authorization to administer a state hazardous waste program in lieu of the federal government's base RCRA program effective January 31, 1986. 51 Fed. Reg. 3778 (January 31, 1986). Any violation of regulations promulgated pursuant to Subtitle C (Sections 3001-3023 of RCRA, 42 U.S.C. §§ 6921-6939e) or any state provision authorized pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926 constitutes a violation of RCRA, subject to the assessment of civil penalties and issuance of compliance orders as provided in Section 3008 of RCRA, 42 U.S.C. § 6928.

Accordingly, the Presiding Officer should issue a Default Order finding the Respondent liable for the violations described in Counts 1, 2, 3, and 4.

III. A Penalty of \$1,086,900 Should Be Assessed For the Violations by the Respondent

Where liability is found in a default order, a penalty may also be assessed. In re: Gaskey Construction Corp., 2006 EPA App. LEXIS 57 (December 14, 2006)(EAB exercised *sua sponte* review of the first RJO's decision regarding default and the second RJO's decision regarding

penalty, finding that the second RJO followed the applicable CWA requirements for penalty assessment); In the Matter of Blackinton Common, LLC, et al., 2009 EPA ALJ LEXIS 4 (April 23, 2009)(ALJ Gunning found respondents to be in default on a RCRA matter and ordered the payment of a \$227,500 penalty); In the Matter of Century Oil Acquisition Corp., 2007 EPA ALJ LEXIS 22 (September 17, 2007)(ALJ Gunning found respondent to be in default on a RCRA matter and ordered the payment of a \$193,538 penalty); In the Matter of Rybond, Inc., 1995 ALJ WL 605641 (E.P.A.) (August 9, 1995)(ALJ Vanderheyden found respondent in a RCRA matter to be in default for failure to file a pre-hearing exchange and ordered a penalty of \$178,896); In the Matter of Microdot, Inc., 1994 EPA ALJ LEXIS 26 (June 23, 1994)(Acting Chief ALJ Lotus found respondent in a RCRA matter not subject to the stay provision of the U.S. Bankruptcy Code, in default for failure to file a pre-hearing exchange, and granted EPA's motion for the \$93,000 penalty proposed in the complaint); In the Matter of NICO Hazardous Waste Management, Inc., 1992 EPA ALJ LEXIS 57 (February 20, 1992)(Chief ALJ Frazier found respondent to be in default on a RCRA matter, despite respondent's letter stating it was no longer in business and was insolvent, and ordered payment of a \$60,000 penalty).

In assessing the penalty, the Presiding Officer must determine the amount of the penalty based on the evidence in the case, in accordance with the statutory criteria set forth in Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and considering any civil penalty guidelines issued under RCRA. 40 C.F.R. § 22.27(b). Based on the nature, circumstances, extent, and gravity of the violations described in Counts 1-4 of the Complaint, Complainant proposes a penalty of \$1,086,900 be assessed against Respondent. For a detailed explanation of the calculation of the

proposed penalty in accordance with Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), using EPA's June 2003 "RCRA Civil Penalty Policy" as guidance. See Attachment F.

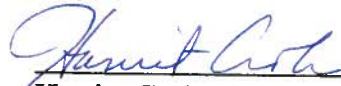
It should be noted that under Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), the Administrator of EPA may assess a civil penalty of up to \$25,000 per day for each violation of Subtitle C of RCRA according to Section 3008 of RCRA, 42 U.S.C. § 6928. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, requires EPA to adjust its penalties for inflation on a periodic basis. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, published at 40 C.F.R. Part 19, EPA may assess a civil penalty of up to \$32,500 per day for each violation of Subtitle C of RCRA that occurred after March 15, 2004 through January 12, 2009. The violations occurred from March 30, 2005 to July 31, 2007.

IV. Conclusion

Respondent has failed to answer the Complaint, and therefore pursuant to Sections 22.16 and 22.17 of the Rules of Practice (Rules), 40 C.F.R. Sec. 22.16 and Sec. 22.17, the Presiding Officer should issue a default Order against the Respondent, resulting in the admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. The Presiding Officer should also find that Respondent violated Sections 3002 and 3004 of RCRA, 42 U.S.C. §§ 6922 and 6924, as described in Counts 1-4 of the Complaint. Finally, the Presiding Officer should issue an order assessing the penalty proposed in the Complaint.

4/27/10

Date



Harriet Croke

Assistant Regional Counsel

Office of Regional Counsel

U. S. Environmental Protection Agency, Region 5

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CERTIFICATE OF SERVICE

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PROTECTION AGENCY.**

**In the Matter of JLM Chemicals, Inc.
Docket No. RCRA-05-2009-0017**

I hereby certify that on 2010, a copy of Complainant's Motion for Default Order, Finding of Liability and Penalty was filed by hand delivery to:

Regional Hearing Clerk
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

I further certify that on that date, I arranged for a copy of same to be sent via Certified Mail, to the Respondent by placement of it in the custody of the U.S. Postal Service, addressed as follows:

JLM Chemicals, Inc.
c/o National Registered Agents, Inc.
200 West Adams Street
Chicago, Illinois 60606-5208

I further certify that I hand-delivered a file-stamped copy of same to:

Marcy Toney
Regional Hearing Officer
U.S. EPA, Region 5
Mail Code C-14J
77 West Jackson Boulevard
Chicago, Illinois 60604

04/27/10
Date

Leanne Fountas
Leanne Fountas