UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.II
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REGIONAL HEARING CLERK

In the Matter of Aguakem Caribe, Inc. **Respondent**	Docket No. RCRA-02-2009-7110

COMPLAINANT'S POST HEARING BRIEF

INTRODUCTION

Pursuant to an "Order Setting Briefing Schedule" issued by Administrative Law Judge, Hon. Barbara A. Gunning, dated January 19, 2011 and 40 C.F.R. § 22.26, Complainant, the U.S. Environmental Protection Agency, Region 2 ("EPA" or "Complainant") submits the following Post-Hearing Brief. For the reasons set forth below, EPA asserts that Aguakem Caribe, Inc., ("Respondent") should be held liable for violating the requirements of RCRA and regulations implementing RCRA, concerning the management of hazardous waste at its former facility in Ponce, Puerto Rico, and that the proposed penalty of $332,963.00 should be assessed for the violations incurred by Respondent.

SUMMARY OF ARGUMENT

Respondent could have avoided the present action by complying with the hazardous waste requirements in 40 C.F.R. Parts 260 through 268 and 270 through 279, when it moved its operations to a new location. Respondent abandoned its former facility leaving behind chemical materials in such state that EPA had to conduct a Section 104 of CERCLA removal,[1] to address the release or threatened release of the abandoned material.

Respondent's liability is clear. Respondent admitted during the hearing held on this matter, that since at least the year 2000, the owner of the property, the Port of Ponce Authority ("PPA") had told Respondent that it would have to move from the property where the facility was located in Building 6, on the Port of Ponce, PR-12, Santiago de los Caballeros Avenue, Ponce, Puerto Rico (the "Facility"). In addition, Respondent's President Mr. Jorge Unanue testified that he told the PPA that he would move Aguakem's operation during the month of September 2006,

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1 Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604.

three months prior to his actual departure. Respondent had enough time to conduct an orderly move from the PPA location, and comply with all the hazardous waste management regulations. Respondent left abandoned hazardous waste and equipment without taking any consideration as to the threat or potential threat to human health or the environment. In addition, Respondent did not take any measures to secure the area where the abandoned containers containing hazardous wastes were located.

The record demonstrates Respondent's violations 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. (hereinafter referred to as "RCRA" or the "Act").

The proposed penalty of $332,963.00 was calculated using the statutory factors under RCRA with the guidance of EPA's 2003 RCRA Civil Penalty Policy ("Penalty Policy"). Respondent alleges it lacks the funds to pay the penalty. It was clear, however, during the hearing, that Respondent has the means to secure a loan or extend his line of credit in order to pay the penalty. EPA does not have to consider Respondent's ability to pay when calculating a penalty amount for RCRA violations, per RCRA Section 3008(a)(3). Respondent directly benefited from its actions, by avoiding the costs associated with the cleanup and disposal of the abandoned chemicals. Respondent showed no remorse for his actions, he summed it when he testified that his view of compliance with an administrative order meant stamping his signature on a piece of paper.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The administrative rules set forth in 40 C.F.R. Part 22 (the Rules) provide the procedural framework for administrative proceedings. Pursuant to Rule § 22.24(a) the Complainant, has the burden of presentation and persuasion that the alleged violations in the complaint occurred and that the relief sought, in this case administrative penalties, is appropriate. The Complainant must establish a prima facie case and the Respondent shall have the burden of presenting any defenses it may have. The matters in controversy shall be decided by the Presiding Judge upon a preponderance of the evidence. 40 C.F.R. § 22.24(b).

Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939(e) mandates a comprehensive "cradle-to-grave" regulation of hazardous wastes. Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1) provides in part, that on the basis of any information the EPA determines that any person has violated or is in violation of any

requirement of Subtitle C of RCRA, the Administrator may issue an order assessing a civil penalty for past violations.

Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) establishes a penalty amount of $25,000 per day of noncompliance for each violation of a requirement of Subtitle C of RCRA. Pursuant to the Federal Civil Penalties Adjustment Act of 1990, as amended, the maximum penalty amount for violations after March 15, 2004 is for $32,500. EPA developed the Penalty Policy, which is used as guidance to help implement this statutory provision.

Federal regulation of solid waste, hazardous waste and used oil are primarily based on RCRA. Key statutory provisions regarding the establishment of EPA's regulatory program and its related enforcement authorities are discussed below.

The term "hazardous waste" is defined as a solid waste or combination of solid wastes that because of its quantity, concentration or physical, chemical or infectious characteristics may, in part, pose a substantial present or potential hazard to human health or the environment when it is improperly treated, stored, transported, disposed or managed, RCRA Section 1004(5)(A), 42 U.S.C. § 6903(5)(A). Section 3001 of RCRA, 42 U.S.C. § 6921, directed the Administrator of EPA to promulgate further criteria for identifying and listing hazardous waste, taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue and other related factors such as flammability, corrosiveness and other hazardous characteristics.

Section 3002 of RCRA, 42 U.S.C. § 6922, directed the Administrator of EPA to promulgate regulations establishing standards applicable to generators of hazardous waste. EPA promulgated regulations which are codified in 40 C.F.R. Parts 260 through 266 and Parts 268, 270 through 279.

Section 3014 of RCRA, 42 U.S.C. § 6935, directed the Administrator to promulgate regulations regarding the management of used oil. These regulations are presently codified, as amended, in 40 C.F.R. Part 279.

Under Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), EPA may authorize a state or commonwealth to operate a hazardous waste program, if certain criteria are met. The Commonwealth of Puerto Rico is not authorized by EPA to conduct a hazardous waste management program. Therefore, EPA retains primary responsibility for the requirements promulgated pursuant to RCRA. As a result

all the requirements in 40 C.F.R. Parts 260 through 268 and 270 through 279 relating to hazardous waste are in effect in the Commonwealth of Puerto Rico and the EPA has the authority to implement and enforce these regulations.

Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), defines a "person" as, among others, a corporation. See also 40 C.F.R. § 260.10. The regulatory definition of "solid waste" is set forth in 40 C.F.R. § 261.2. Subject to certain exceptions not applicable to this action, a solid waste is any "discarded material" including "*abandoned*" "recycled" or "inherently waste-like materials" 40 C.F.R. § 261.3. Materials are solid wastes if they are "*abandoned*" by being "disposed of," "burned or incinerated" or "accumulated, stored, or treated before or in lieu of being abandoned by being disposed of, burned or incinerated." 40 C.F.R. § 261.2(b).

The regulations for the management of used oil are set forth in 40 C.F.R. Part 279. Pursuant to Section 3014 of RCRA, these regulations place restrictions on the recovery and recycling of used oil. The regulations "presume that used oil is to be recycled unless a used oil handler disposes of used oil or sends used oil for disposal." 40 C.F.R. § 279.10(a). Generators that dispose of used oil are also subject to the requirements set forth in Subpart I of Part 279 (Standards for … Disposal of Used Oil). Hazardous waste used oils that are disposed of rather than recycled are subject to all hazardous waste requirements contained in 40 C.F.R. Parts 260-270.

Through the Complaint, Prehearing Exchange, and at the Hearing, EPA established that Respondent a person who operated or owned a facility, generated "solid waste" at its facility and abandoned the solid waste thus it a) failed to make a hazardous waste determination for the abandoned solid waste, b) failed to minimize the risks of fire, explosion or release when he abandoned the solid waste at its facility, and c) failed to comply with the used oil requirements at its facility. Further, EPA established that it considered the statutory factors and properly applied the Penalty Policy when it calculated the proposed penalty, including, the seriousness of the violations and any good faith effort to comply. Section 3008 of RCRA, 42 U.S.C. § 6928.

B. Factual and Procedural Background

Mr. Jorge Unanue is the President and CEO of Respondent, Aguakem Caribe, Inc. 12-9-2010[3], Tr:56:19-21. In 1995, Respondent

3 Since the transcripts are divided by the 3 days of the hearing, when citing apart of a transcript, we will mention the name of the witness and the date he testified. Mr. Unanue's testimony is from December 9, 2010.

leased its former facility, from PPA, referred to as the Facility. Tr:58:15-25. Respondent operated a manufacturing facility that produced iron salts, specifically ferric sulfate, and also polymers. Tr:59:25, 60:1-3. Respondent's chemical products were used in private and public owned potable and wastewater treatment plants. CX-14, CX-3, and CX-9. The Facility consisted of the following areas: an office; a laboratory; a Tank farm; a secondary containment system; a process area; a storage area; and an unloading and loading dock. CX-1, CX-3 and CX-9. Since 2000 the Port of Ponce Authority had told Respondent that it would have to move its operations from its property. Tr:62:2-10. However, Respondent stayed in the property, and it wasn't until spring of 2006 when PPA again inquired as to when Respondent would definitely be moving out of the PPA local. Tr:65:15-25. Respondent told the PPA that it would be out by September 2006, but later changed the move for the month of November since Respondent did not have all the permits for its new facility. Respondent finally told PPA that it would move by December 2006. Tr:67:8-18.

Respondent began moving its operations from the Facility around December 16, 2006, right after Mr. Unanue closed the sale on the new property where he would move Aguakem's operations. Respondent moved its operations out of the Port of Ponce Facility, by December 28, 2006. Respondent left behind inside the Facility chemicals, stored in totes, tanks and drums. Tr:80:22-25; 81:1-2; 81:7-17; 82:23;139:21-22; 184:8-23); 185:1-5); 185:8-9; and 186:16-17 and CX-1 and CX3.

Respondent's products were left abandoned, in containers that were broken, opened and leaking on the floor. December 7, 2010[5], Tr:89:8-18 and CX-1, CX-3.

EPA conducted a RCRA Compliance Evaluation Inspection (CEI) of the former Facility on February 2, 2007. EPA identified that Respondent had failed to make a hazardous waste determination as an owner and/or operator, that the chemicals posed a risk of explosion, and that Respondent had failed to comply with the used oil requirements. CX-3, CX-1, Tr:84:6-25 and 85:1-4. December 8, 2010[6], Tr:42:2-25 and 43:1-23.

On June 27, 2007, EPA entered into an Administrative Order on Consent("AOC") with PPA and Respondent, under Section 104 of CERCLA, 42 U.S.C.§ 9604, to address the release and/or threatened release from the abandoned material, by conducting a removal action at Respondent's former Facility. CX-10 and CX-13.

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4 Complainant's Exhibit is referenced as CX.

5 Transcript of Mr. Eduardo Gonzalez' testimony.

6 Testimony of Mr. Jesse Aviles.

On May 18, 2008 EPA sent Respondent a RCRA Section 3007 Request for Information Letter, requiring the submission of certain information about the operations of its former Facility, CX-5. On or about November 6, 2008 Respondent submitted a partial response where he did not address the portion of the request about its former Facility at the Port of Ponce. CX-1,¶33. On May 6, 2009, EPA sent a Second Information Request to Respondent. CX-8. Respondent sent its response on June 30, 2009, signed by Mr. Jorge Unanue, CX-9.

On September 25, 2009 EPA filed the complaint in this case pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, proposing a civil penalty for violation of Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939(e) and the hazardous waste management regulations which are codified in 40 C.F.R. Parts 260 through 266 and Parts 268, 270 through 279. Specifically, EPA charged Respondent for failure to make a hazardous waste determination for the abandoned material at its Facility in the Port of Ponce, for its failure to properly maintain or operate its former Facility to minimize the possibility of fire, explosion or release, and its failure to comply with the used oil requirements. Complainant has proposed a penalty of $332,963.

The hearing on this matter began on December 7, 2010 until December 9, 2010. Complainant presented as witnesses, Mr. Eduardo Gonzalez, Mr. Jesse Aviles and Mr. Angel Rodriguez. Respondent presented the testimony of Mr. Edgardo Guzman and Mr. Jorge Unanue. Complainant introduced into evidence a total of ten exhibits.

ARGUMENT

I. RESPONDENT VIOLATED SUBPART C OF RCRA AND ITS IMPLEMENTING REGULATIONS CODIFIED AT 40 C.F.R. PARTS 260-268 AND 270-279

A) Respondent Failed to Make a Hazardous Waste Determination

Pursuant to RCRA, EPA promulgated regulations defining "hazardous waste." The regulations, like the statutory definition, define hazardous waste as a subset of solid waste. 42 U.S.C. § 6903(5) and 40 C.F.R. § 261.3. It is, therefore, necessary to define a "solid waste" in order to determine the parameters of EPA's Subtitle C jurisdiction.

The regulatory definition of "solid waste" is set forth in 40 C.F.R. § 261.2. Subject to certain exceptions not applicable to this action, a solid waste is any "discarded material" that

includes "abandoned" "recycled" or "inherently waste-like materials" 40 C.F.R. § 261.3. Materials are solid wastes if they are "abandoned" by being "disposed of," "burned or incinerated" or "accumulated, stored, or treated before or in lieu of being abandoned by being disposed of, burned or incinerated." 40 C.F.R. § 261.2(b).

A person is the owner or operator of a facility if it owns the facility or is responsible for the overall operation of a facility. See 40 C.F.R. § 260.10.

Pursuant to 40 C.F.R. § 260.10, a "generator" of hazardous waste is any person, by site, whose act or process produces hazardous waste identified or listed in 40 C.F.R. Part 261 or whose act first causes a hazardous waste to be subject to regulation. The requirements for generators of hazardous waste are set forth in 40 C.F.R. Part 262.

Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, persons who manage such waste are required to notify EPA of their hazardous waste activities.

Pursuant to 40 C.F.R. § 262.11, a person who generates "solid waste," as defined in 40 C.F.R. § 261.2, must determine if the solid waste is a hazardous waste using the procedures specified in that provision.

Respondent Aguakem Caribe, Inc., is a public corporation organized under the laws of the Commonwealth of Puerto Rico. Mr. Jorge J. Unanue is the President of Aguakem Caribe, Inc., Tr. 56:13-21. Respondent is a "person" (as that term is defined in Section 1004(15) of the Act, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10. Respondent's Former Facility, constitutes a "facility," within the meaning of 40 C.F.R. § 260.10.

Respondent has been in the chemical manufacturing industry since at least 1995. Tr.58:9-10, CX-9. As part of its operations, Respondent manufactures a variety of chemical products that are used in private and public owned potable and wastewater treatment plants. Since at least 1995 until at least December 28, 2006, in an uninterrupted manner, Respondent conducted its operations from Building 6, at the PPA property. Respondent abandoned its former Facility on December 28, 2006, Tr:58-67, CX-1, CX-3, and CX-9.

On or about January 29, 2007, EPA received a notification from PPA, regarding a former tenant, which they identified as Respondent, that had left abandoned chemical products and equipment at PPA's property, in Building 6, CX-1 and CX-3.

On or about February 2, 2007, EPA representatives, Mr.

Eduardo Gonzalez, Mr. Jesse Aviles and Ms. Zolymar Luna, conducted a compliance evaluation inspection (CEI) under 3007 of RCRA, 42 U.S.C. § 6927 (the "Inspection" or CEI). As part of the CEI, EPA inspectors took field notes and photos of what they saw at the Facility, Tr:31:6-10, 32:13-16, 33:3-9. (Mr. Gonzalez's testimony), Tr:9:7-11, Tr:12:9-13 (Mr. Aviles's Testimony)and CX-3.

Mr. Gonzalez's testimony addressed EPA's findings during the CEI, EPA's determination that Respondent had incurred in RCRA violations, the enforcement actions taken by EPA against the Respondent and the calculation of the proposed penalty. Mr. Gonzalez testified that the photos part of the CEI Report, CX-3, depict an accurate account of what EPA found at Respondent's Facility; that outside the building, the area marked as #3 in Appendice 4 of CX-3, was a container with a capacity of approximately 1040 liters, known as "totes"; placed on top of a water way; filled with what was labeled as "ferrous chloride"; the container was rusted, deteriorated, and opened. Tr.37:4-22. Mr. Gonzalez testified that the Photo identified as "Layout of the Facility" Appendice IV of CX-3, depicts the Facility layout and the areas of concerns. He stated that areas of concern are those areas where EPA found abandoned chemical materials that posed a potential risk to the environment or the public. Mr. Gonzalez indicated that the areas of concern reveal a potential RCRA violation. Tr:31:13-25, 32:3-9.

Mr. Gonzalez indicated that EPA also found stacks of "totes", identified under Photo #6 of CX-3. The "totes" were also corrosive and they were opened. The containers were abandoned, labeled as corrosive material, some of them were "bent" and some were leaking, Tr.43:5-15. Mr. Gonzalez also testified that EPA found a wood shed structure partially demolished, with spills and residuals on the floor surface, Tr.47:8-21. There was also an aboveground tank with a broken secondary containment area, granular material on the adjacent floor and some residual product inside. Tr.50:8-18. In general, the pictures taken during the CEI showed abandoned containers with chemical materials, in various levels of deterioration, rusted, broken, open and leaking. Tr.50:24-25, 51:1-3. Mr. Gonzalez testified that "abandoned" [under the RCRA regulations] means not under control of any person, owner or operator; without any type of supervision, Tr.51:6-10. EPA was able to identify the contents of some of the containers, since they were labeled, with corrosive chemicals, Tr.52:18-25, 53:1-20. Mr. Gonzalez indicated that he prepared the Information Request Letters, CX-5 and CX-8, sent to Respondent, Tr.60:1-19 and Tr.70:9-16. He also received Respondent's response to the second letter, Tr.72:2-13, CX-9.

Mr. Gonzalez testified that as part of the RCRA

requirements, when a person abandons, will not use or discards a product, and that product may contain hazardous ingredients, like chemicals, it is the responsibility of the owner or operator of those wastes to make a hazardous waste determination, in order to determine the hazard characteristics, Tr.87:19-25, 88:1-4. He testified that the wastes become hazardous wastes at the time the product is abandoned, discarded or not in use. Tr.88:22-25. As to what EPA found at the Facility, Mr. Gonzalez testified that there were abandoned materials or products in broken and/or opened [containers] with at least fifteen waste streams. The materials or products had different characteristics. The failure to make a hazardous waste determination is a violation of RCRA, Tr.89:8-23.

As part of his testimony, Mr. Jesse Aviles gave an account of the CEI, of the photos he took during the CEI and the findings that demonstrated that Respondent had violated RCRA and the hazardous waste management regulations, and how the proposed penalty was calculated following the RCRA requirements and using the RCRA penalty policy.

Mr. Aviles gave a description of Photo #10, which corresponds to item marked as #3 in Appendice 4 of CX-3. Mr. Aviles testified that the photo shows a "tote" of approximately 1040 liters, cut opened, with the metal frame completely rusted, almost full of liquid, Tr.13:9-25, 14:1-25, and 15:1-21.

Mr. Aviles testified that during the Inspection, EPA discovered the presence of numerous spills, opened and deteriorated containers (e.g. drums, tanks, totes) and broken dikes [secondary containment] Tr.16:3-9, Tr.17:6-9, CX-3. He also identified Photo #3, where a "tote" was located outside the building, on top of a storm water catch grill, used to convey water from a rain event to, usually a body of water, in this case, the Caribbean Sea, Tr.17:11-25, 18:19. Inside the Facility, Mr. Aviles identified the broken wooden shack with white powder residue, shown in Photo #11, Tr.18:20-25 and 19:1-19. He testified that a spill does not have to be liquid, it can be a solid or even a gas. He identified Photo #12, where he described the broken dike and spills, on the southern wall of the Facility close to the center, Tr. 20:5-18. As to Photo #6, he indicated it was taken at the center of the building, in order to have a wide view of the area, where you could see the totes, the containers stacked on part of the building, the stacked drums, the blue shed seen under Photo #11, the tank farm seen in Photo #13 and the laboratory behind the tank farm, Tr.21:1-17. Mr. Aviles indicated that the CEI Report, CX-3, reflects EPA's findings during the CEI and what EPA identified as violations, Tr.23:1-21.

Mr. Aviles testified as to the materials, containers and

condition of the Facility found during the CEI, in the north part of the outside of the Facility, Tr.24:6-25; in the north part inside the Facility, Tr.25:1-20; in the southeast part inside of the Facility, Tr.26:18-25, 27:1-25, 28:1-21; the east part inside of the Facility, Tr.28:14-25 and 29:1-4; northwest part inside the Facility Tr.29:5-24; at the entrance of the Facility, Tr. 30:1-21; and in the southwest area inside the Facility Tr.31:6-25, 32:1-25 and 33:1-2, CX-3.

Mr. Aviles also testified about Respondent's June 30, 2009 response to EPA's Second Request for Information, including Respondent's inventory as of December 31, 2006, Tr.35:1-25, 36:1-3. Mr. Aviles indicated that the product inventory provided by Respondent shows a consistency with what EPA found during the CEI. Specifically, the following products: APAK 4050, hydrochloric acid, Ferric Chloride, and Ferric Sulphate, Tr. 33:15-25 through 40:12, CX-3 and CX-9.

Asked if the materials and containers he described, found during the CEI, were in any condition that could be used [by Respondent], Mr. Aviles said no, since the containers were leaking, and you have to take care of any product you want to use, Tr.41:1-12. Mr. Aviles testified that what EPA found during the CEI, under the RCRA regulations is considered abandoned chemicals, therefore they become solid waste and the person [owner or operator] is required to make a hazardous waste determination, Tr.41:19-25, 42:1-8, 43:18-23.

Respondent failed to make the hazardous waste determination.

B. Respondent Failed to Minimize the Risks of a Fire, Explosion or Release

Respondent became a generator of hazardous waste as defined in § 260.10 on or about December 28, 2006, at the time it abandoned its former Facility.

Pursuant to 40 C.F.R. § 262.34(a)(4), a generator must comply with the requirements for owners or operators in Subparts C, 40 C.F.R Part 265. Pursuant to 40 C.F.R. § 265.31 (of Subpart C), a facility must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment.

After he abandoned his Former facility on December 28, 2006 and at least up to the time of EPA's CEI, Respondent failed to implement practices to satisfactorily maintain and operate its

former Facility to minimize the possibility of fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste.

EPA found outside the Facility a corroded container with a liquid identified as "FERROUS CHLORIDE," that was on top of a storm water catch basin. Mr. Gonzalez's Testimony, Tr.37:4-22; Mr. Aviles's Testimony, Tr.13:9-25, 14:1-25 and 15:1-21 and CX-3. The storm water at this area discharges directly into the Caribbean Sea, located at approximately 250 meters from the catch basin. Ferrous chloride, CAS No. 7758-97-3, the material safety data sheet (MSDS) describes it as a corrosive that dissolves in water to form an acidic solution (e.g. hydrogen chloride) of a pH less than two (<2). Ferrous chloride is used by the Respondent to manufacture a ferrous chloride solution identified as A-FERRIC 2000, CX-9.

During the CEI, EPA found inside the Facility (North Area) several stacks of 1-cubic yard containers labeled as "Sump Water-Low pH," APAK 4050 and A-Ferric, 55-gallon plastic and corroded metal drums labeled as "Sodium Aluminate", located from the west wall towards the center of the Facility, Mr. Aviles's testimony, Tr.25:3-20, CX-3. APAK-4050 is Respondent's brand name for a coagulant/flocculant product, CX-9. According to the product's MSDS, it has a pH of 1.5 to 2.5, it is incompatible with alkalis. On thermal decomposition it may release toxic gases such as aluminum, hydrochloric acid, and dichlorine. A-FERRIC is Respondent's brand name for a line of products, CX-9. According to the product's MSDS, its main ingredients are ferric chloride, hydrochloric acid and water. It has a pH of less than one (<1), and it may produce explosive hydrogen gas. Sodium Aluminate, CAS No. 1302-42-7, a corrosive and inorganic salt. Soluble in water to form strong alkaline solutions. According to the MSDS, containers of sodium aluminate must be kept in a ventilated area and away from ignition sources. In contact with metal it may evolve a flammable fume.

In the Southeast Area of the Facility EPA found several stacks of 1-yd^3 containers and 55-gallon plastic drums were placed on wood pallets on the east side of the Facility. Most of the drums were labeled as "Sodium Aluminate," two of them were leaking and one was uncovered, Mr. Aviles's Testimony, Tr.27:10-25, 28:1-13 and CX-3.

In the southwest Area of the Facility, EPA found during the CEI, five (5) 2,600-gallon above ground storage tanks and respective secondary containment units were located in this area. The tanks were identified as "Ferric Sulfate", "Ferrous Chloride," and as "Corrosive Solution". The level indicator of the tanks showed as being one-eighth (1/8) full. The floor of the secondary containment unit had a yellow powder material spread

all over its surface. In addition, within this area one (1), 30-gallon and 5-gallon containers were identified as "Sodium Benzoate" and the other contained an unidentified material. Ferric sulfate, CAS No. 10028-22-5, a ferric salt used as coagulant or flocculant, for odor control to minimize hydrogen sulfide release, for phosphorus removal, and as a sludge thickening, conditioning and dewatering agent. Sodium benzoate, CAS No. 532-32-4, organic solid, the MSDS indicates that it must be stored in a cool, dry, and ventilated area away from sources of heat, moisture and incompatibilities. It is incompatible with acids, ferric salts and strong oxidizers. Fire is possible at elevated temperatures or by contact with an ignition source.

EPA found spills of different substances (e.g. granular material, wet sediment) at various locations of the Facility. At the time of the Inspection, all accesses were unlocked and opened, exposing to the environment the scattered uncontained material and the vapors coming from the opened containers and spills. EPA also observed several chemicals spills, such as hydrochloric acid, sulfuric acid, low pH sump water, ferrous chloride, ferric sulfate, sodium aluminate, from corrosive containers, presenting a potential contamination to the soil surface and waterway in the area, specifically the Caribbean Sea, CX-3.

Respondent had failed to properly manage the contents of the containers, which contained hazardous waste, to protect the containers from deterioration, and to properly manage the spills. Respondent failed to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment. This failure constitutes a violation of 40 C.F.R. § 265.31 as referenced by § 262.34(d)(4).

C. Failure To Comply With Used Oil Requirements

Pursuant to 40 C.F.R. § 279.22(c)(1), containers used to store used oil at generator facilities must be labeled or marked clearly with the words "USED OIL." At the time of the Inspection, and, at times prior threreto, Respondent was storing at its Facility used oil in a 5-gallon drum. Respondent had failed to label or mark the used oil container with the words "USED OIL", CX-3.

Generators that dispose of used oil are also subject to the requirements set forth in Subpart I of Part 279 (Standards for … Disposal of Used Oil). Hazardous waste used oils that are disposed of rather than recycled are subject to all hazardous waste requirements, pursuant to 40 C.F.R. Parts 260-270.

Pursuant to 40 C.F.R. § 279.22(c)(1), containers used to store used oil at generator facilities must be labeled or marked clearly with the words "Used Oil." 40 C.F.R. § 279.1 defines "used oil" as "an oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities, and a "used oil generator" as any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation." The requirements for used oil generators are set forth in Subpart C of Part 279 (Standards for Used Oil Generators).

To fall within the definition of the term "used oil" a substance must meet the three following criteria:

- *Origin*: The substance must be derived from crude or synthetic oil,
- *Use*: The material must have been used as a lubricant, coolant, noncontact heat-transfer fluid, hydraulic fluid, buoyant, or other similar purpose (to be determined by authorized states or EPA regions) and
- *Contamination*: The oil must be contaminated with physical impurities (e.g., water, metal shavings, sawdust or dirt) and/or chemical impurities (e.g., lead, solvents, halogens, or other hazardous constituents) as a result of use." McCoy's RCRA Unraveled, Section 12.1.1, 2008 Edition, citing *Managing Used Oil-Advice for Small Businesses*, EPA/530/F96/004, November 1996.

II. **THE PRESIDING JUDGE SHOULD ASSESS THE FULL PROPOSED PENALTY OF $332,963.00.**

The burden of proof to establish liability is set forth under the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" (Rules), 40 C.F.R. Part 22, 64 Fed Reg. 40176 (July 1999) at section 22.24. Under said provision, "The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate". The Complainant has the obligation to establish a prima facie case.

The EPA Administrator has the authority to assess a civil penalty for violations. Once liability is established, the court is obligated to assess a penalty. *Chesapeake Bay Foundation v Gwaltney of Smithfield*, 890 F. 2nd 690, 697 (4th cir. 1989); *Atlantic States Legal Foundation v Tyson Foods*, 897 F. 2nd 1128,

1142 (11th Cir. 1990).

Under Section 3008 of RCRA, 42 U.S.C. § 6928, the seriousness of the violation and any good faith efforts to comply with applicable requirements are to be considered in assessing a penalty. Consistent with the statutory requirements, the EPA RCRA Penalty Policy consists of: 1) determining a gravity-based penalty for a particular violation, using a penalty assessment matrix, 2) adding a multi-day component, as appropriate, to account for the length of the violation, 3) adjusting the sum of the gravity based and multi-day components, up or down, for case specific circumstances and 4) adding to this amount the appropriate economic benefit gained through non-compliance.

In the Complaint, EPA proposed that Respondent be assessed a penalty in the amount of $332,963.00 for its fifty nine (59) violations of RCRA and its implementing regulations. Short of proposing a penalty that exceeds the statutory cap limiting the size of the assessable penalty or disregarding the mandatory penalty factors, Complainant has considerable discretion in proposing a penalty in the Complaint. *See, e.g., In re Donald Cutler*, EAJA App. No. 05-01, 2007 WL 38380 (EAB Jan. 4, 2007) (finding that a proposed penalty based on statutory penalty criteria and within the statutory maximum is not an excessive or unreasonable penalty). In support of the proposed penalty calculation, EPA produced a Penalty Computation Worksheet, CX-1, Attachment I, memorializing the statutory penalty factors Complainant considered based on Section 3008(a)(3) of RCRA and the penalty calculation prescribed by EPA's 2003 RCRA Civil Penalty Policy ("Penalty Policy"). In addition, during the hearing, Mr. Aviles provided detailed testimony regarding the calculation of the penalty in accordance with the statutory penalty factors and the Penalty Policy Mr. Aviles's Testimony, Tr.44-62. Similarly, the Rules of Practice direct the ALJ, in assessing penalties, to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The Rules further provide that the ALJ "shall consider any civil penalty guidelines issued under the [applicable] Act." *Id.; see also In re Envtl. Prot. Servs., Inc.*, 13 E.A.D. 506 (EAB 2008).

For Count I, according to the Penalty Calculation Worksheet, supported by Mr. Aviles' testimony, EPA calculated a gravity-based penalty of $86,666 for Respondent's fifteen (15) violations of 40 C.F.R. § 262.11, Failure to Make Hazardous Waste Determination. The penalty calculation was based on two factors: (1) the adverse impact of noncompliance on the regulatory program; and (2) the seriousness of the violations as measured by

the potential for human and/or environmental harm resulting from the violation. It cannot be contested that the RCRA regulatory program is undermined when the operator of a Facility abandons several streams of solid waste at a Facility. Doing so increases the likelihood that hazardous waste is managed as non-hazardous waste, in contravention of the RCRA regulatory scheme. Further, when hazardous waste is not properly managed under the RCRA, the risk of human and environmental exposure is increased. In the instant matter, the failure to make a hazardous waste determination may have resulted in illegal and/or improper disposal and may have also exposed investigators, technicians, and others, who had to deal with the waste Respondent abandoned. As a result, Complainant determined—by use of the penalty matrix contained in the Penalty Policy—that the potential for harm and extent of deviation from the regulatory requirements are both classified as major. See Mr. Aviles's Testimony, Tr.45-55 and CX-1, Attachment I.

Although EPA had the statutory authority assess a penalty of up to $32,500 for each of Respondent's fifteen (15) violations of 40 C.F.R. § 262.11, EPA had the discretion, under the Penalty Policy, to use the Multiple/Multi-day Matrix. EPA chose the latter approach, assigning $32,500 to the first violation and the mid-point of the MAJOR/MAJOR multi-day matrix ($3,869) to the remaining fourteen (14) violations, or $54, 166. As a result of such adjustment, the total gravity-based penalty component assessed equals $86,666. See Tr.53-54, CX1, Attachment I.

Since the gravity-based component of the violation was not at the statutory maximum—$32,500 for each of the fifteen (15) violations—EPA made an upward adjustment for Respondent's good faith efforts to comply/lack of good faith ($0), degree of willfulness and/or negligence (10% or $8,666.60), history of noncompliance ($0), and other factors discussed in the Penalty Policy. Respondent did not challenge EPA's upward adjustments to the gravity-based component of the penalty. In addition, EPA calculated that non-compliance with 40 C.F.R. § 262.11 resulted in an economic benefit to Respondent of $19,266. See CX-1, Attachment I. Respondent did not challenge EPA's calculation of the economic benefit at the Hearing.

For Count 2, according to the Penalty Calculation Worksheet, supported by Mr. Aviles' testimony, EPA calculated a gravity-based penalty of $194,998 for Respondent's forty three (43) violations of 40 C.F.R. § 264.31, Failure to Operate Facility so as to Minimize the Possibility of a Fire, Explosion, or Release. The gravity portion of the penalty calculation was based on two factors: (1) the adverse impact of noncompliance on the regulatory program; and (2) the seriousness of the violations as measured by the potential for human and/or environmental harm

resulting from the violation. It cannot be contested that the RCRA regulatory program is undermined when the operator of a Facility fails to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste, have equipment to control spills, designate an emergency coordinator and provide training to employees in the handling of hazardous waste. Here, Respondent abandoned hazardous and non-hazardous waste in open and deteriorated containers, several of which were leaking and spilling substances throughout the Facility. The risk of human and environmental exposure was grave due to the fact that the Facility is located at only 250 meters from the Caribbean Sea and people were working nearby. Thus, the Facility, as abandoned by Respondent, posed an immediate threat to human health and the environment. As a result, Complainant determined—by use of the penalty matrix contained in the Penalty Policy—that the potential for harm and extent of deviation from the regulatory requirements are both classified as major. See CX-1, Attachment I; Tr.56-60.

Although EPA had the statutory authority assess a penalty of up to $32,500 for each of Respondent's forty three(43) violations of 40 C.F.R. § 264.31, EPA had the discretion, under the Penalty Policy, to use the Multiple/Multi-day Matrix. EPA chose the latter approach, assigning $32,500 to the first violation and the mid-point of the MAJOR/MAJOR multi-day matrix ($3,869) to the remaining forty two (42) violations, or $162,998, Tr.59:1-16. As a result of such adjustment, the total gravity-based penalty component assessed equals $194,998. See CX-1, Attachment I.

Since the gravity-based component of the violation was not at the statutory maximum—$32,500 for each of the forty three(43) violations—EPA made an upward adjustment for Respondent's good faith efforts to comply/lack of good faith ($0), degree of willfulness and/or negligence (10% or $19,499.80),Tr. 60:11-18, history of noncompliance ($0), and other factors discussed in the Penalty Policy. Respondent did not challenge EPA's upward adjustments to the gravity-based component of the penalty. EPA did not make an upward adjustment for Respondent's economic benefit for non-compliance with 40 C.F.R. § 264.31. See CX-1, Attachment I. The total amount was for $214,497.00

For Count 3, according to the Penalty Calculation Worksheet, supported by Mr. Aviles' testimony, EPA calculated a gravity-based penalty of $3,868 for Respondent's violation of 40 C.F.R. § 279, Failure to Comply with Used Oil Requirements. The gravity portion of the penalty calculation was based on two factors: (1) the adverse impact of noncompliance on the regulatory program; and (2) the seriousness of the violations as measured by the potential for human and/or environmental harm resulting from the violation. It cannot be contested that the RCRA regulatory

program is undermined when the operator of a Facility fails to handle used oil in accordance to the regulations, which promote recycling of oil to avoid the generation of oil waste that might contaminate land and water resources, if not properly managed under the program. As a result, Complainant determined—by use of the penalty matrix contained in the Penalty Policy—that the potential for harm was minor, but that the extent of deviation from the regulatory requirements was major. See CX-1, Attachment I, Tr.60:22-25, 62:6.

Although EPA had the statutory authority assess a penalty of up to $32,500 Respondent's violation of 40 C.F.R. § 279, EPA had the discretion, under the Penalty Policy, to use penalty assessment gravity matrix. EPA chose the latter approach, assigning $3,868 to the violation, as it was deemed to be in the major/minor category. As a result of such adjustment, the total gravity-based penalty component assessed equals $3,868. See CX-1 Attachment I, Tr.62:1-6. EPA did not make any further upward adjustments to the penalty for Count 3.

Respondent did not prevail with the preponderance of evidence standard of 40 C.F.R. § 22.24(b). The "preponderance of evidence" is defined as that "'which is of greater weight or more convincing than the evidence which is offered in opposition to it" and "evidence which is more credible and convincing to the mind" Footnote 12 to *In the Matter of City of Salisbury, Maryland*, Docket No. CWA-III-219, Initial Decision, (February 8, 2000).

Complainant's application of the RCRA statutory factors and the RCRA Penalty Policy fully supports the proposed penalty of $332,963.00.

CONCLUSION

Complainant has provided a prima facie case against Respondent, Complainant respectfully requests that a Final Order be issued against Respondent ordering the payment of the proposed assessed penalty of $332,963.00.

Respectfully submitted, in San Juan, Puerto Rico, this 2nd day of March, 2011.

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CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing Complainant's Post Hearing Brief, dated March 2, 2011, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy by UPS to:

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

Copy by UPS to:

Attorney for Respondent:
Armando Llorens, Esq.
FURGANG & ADWAR
1325 Avenue of the Americas, 28th Floor
New York, New York 10019
[Phone: (212) 725-1818

Copy by UPS to:

Administrative Law Judge:

The Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Franklin Court Building
1099 14th Street, N.W., Suite 350
Washington, D.C. 20005
[Phone: (202) 564-6255 Att: Mary Angeles, Legal Staff Assistant]

3/1/2011
Date

Office of Regional Counsel – Caribbean Team