

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2011 OCT 28 A 11: 29
REGIONAL HEARING
CLERK

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In the Matter of :
: Hon. Barbara A. Gunning
: Presiding Officer
:
: **INITIAL PREHEARING EXCHANGE**
Cycle Chem Inc. :
Respondent :
: Docket Number RCRA-02-2011-7101
Proceeding under Section 3008 of the :
Solid Waste Disposal Act, as amended. :
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PRE-HEARING EXCHANGE

PRELIMINARY STATEMENT

Complainant herein, the Director of the Division of Enforcement and Compliance Assistance (“DECA”) of the United States Environmental Protection Agency (“EPA”), Region 2, herewith submits the following initial prehearing exchange pursuant to the “Prehearing Order,” dated August 26, 2011 and October 22, 2003, and 40 C.F.R. § 22.19(a).

Complainant commenced this civil administrative action pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by, *inter alia*, the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984 (“HSWA”), 42 U.S.C. §§ 6908 (referred to collectively as the “Act” or “RCRA”). The Complaint, Compliance Order and Notice of Opportunity for Hearing (the “Complaint”), was served on June 29, 2011, asserting four separate violations against Respondent Cycle Chem Inc. (hereinafter “Respondent” or “Cycle Chem”). These counts allege: Count 1, Respondent’s failure to offer hazardous waste to a transporter that has received an EPA Identification Number (four instances); Count 2, Respondent’s failure to offer hazardous waste to a Treatment Storage & Disposal Facility

("TSD") that has received an EPA Identification Number (four instances); Count 3, Respondent's failure to use a manifest when offering hazardous waste for transport (four instances); and Count 4, Respondent's failure to use a manifest when offering hazardous waste for transport (three instances). Solely for purposes of penalty calculations, these four counts were compressed or merged together because they derived from the same or similar types of transactions. EPA seeks a proposed total penalty of \$67,438 for these four violations. The Complaint includes as an attachment a three page detailed penalty calculation/explanation sheet for the penalty sought for these four violations. The Complaint also included a Compliance Order addressing the claims alleged in the Complaint to the extent that the Respondent has not already come into compliance.

Cycle Chem filed its Answer on or about August 15, 2011. While admitting some of the preliminary facts underlying EPA's investigations such as the fact Respondent is a TSD and the owner and operator of the Elizabeth facility, the Answer denies and disputes many of the material allegations comprising the four counts alleged in the Complaint. Respondent's Answer also sets forth various "so-captioned" Affirmative Defenses and "requests an informal settlement conference and requests an evidentiary hearing on all matters placed in issue by the pleadings."

The parties, as directed by your prehearing order, met for an informal settlement conference on September 15, 2011. While settlement discussions remain ongoing, to date an agreement as to an appropriate penalty has not been reached. Although Complainant and Respondent still believe that this case may settle without the need for a hearing, a fully executed Consent Agreement/Final Order ("CA/FO") with this Respondent cannot be filed, "on or before October 28, 2011." Therefore, Complainant now provides the following information in

accordance with the August 26, 2011 Order setting forth the criteria for prehearing exchanges pursuant to 40 C.F.R. § 22.19(b).

COMPLAINANT'S WITNESSES

EPA anticipates that it will call all (or some of) the following witnesses:

1. Susan Cosgrove, environmental specialist 3 and a hazardous waste inspector with the New Jersey Department of Environmental Protection (“DEP”). Ms. Cosgrove is expected to give evidence as to New Jersey’s adoption of the Universal Waste Rule regulations as they apply to the proper management and disposal of fluorescent lamps/bulbs. She will state the New Jersey’s Universal Waste Rule regulations became effective on December 17, 2002. She will testify that under the New Jersey Universal Waste Rule, a generator of hazardous waste lamps *cannot* crush such lamps and still manage and handle those “crushed lamps” as a universal waste. Instead, she will state that the “crushing” of such lamps is considered “treatment” and “crushed lamps” *must* be managed as a hazardous waste in accordance with the New Jersey Hazardous Waste Regulations set forth at N.J.A.C. 7:26G.¹ Ms. Cosgrove will also give evidence that by at least October 2005, the DEP had placed such information on its website and that such information was readily accessible to the public at <http://www.nj.gov/dep/enforcement/advisories/2005-13.pdf>. In addition, Ms. Cosgrove will indicate that the DEP had developed a Hazardous Waste Lamp Factsheet that was last updated August 30, 2007 which stated that crushed lamps cannot be handled as universal waste. This Hazardous Waste Lamp Factsheet similarly was placed on the DEP website and can be accessed

¹ In an April 2009 Compliance Advisory Warning, which is subsequent to the violations alleged in the Complaint, the DEP has advised the regulated community that even “broken bulbs” can *no* longer be handled as universal waste and must be handled as hazardous waste. (emphasis added) This advisory is also readily accessible to the public and can be found at <http://www.nj.gov/dep/enforcement/advisories/2009-04.pdf>

at <http://www.state.nj.us/dep/dshw/1rm/uwaste/umerc.lamps.htm>. Ms. Cosgrove will also give evidence as to her April 8, 2008 bi-weekly inspection of Cycle Chem and her notification to Respondent, at the conclusion of her inspection, that “fluorescent lamps that have been crushed intentionally are considered hazardous waste and therefore cannot be received or shipped from the site as universal waste.”

2. Abdool Jabar, environmental engineer and enforcement officer in the RCRA Compliance Branch of DECA, EPA, Region 2, on the 21st floor at 290 Broadway in New York City.² The expected testimony of Mr. Jabar, should include the following matters, specifically embracing his personal involvement and participation in each of the following: his October 2008 inspection of SCER-Supreme Inc. (“Supreme”) and the drums of crushed light bulbs that were observed at Supreme’s facility; his October 2008 inspection of Respondent’s Elizabeth facility and his understanding that Cycle Chem received shipments of crushed light bulbs that had been sent to it on uniform hazardous waste manifests and Cycle Chem then sent some drums of those crushed light bulbs off-site with Bills of Lading identifying those drums of crushed light bulbs as universal wastes; the Notice of Violation (“NOV”) and RCRA Section 3007 information request letter EPA sent to Respondent relating, among others, to Cycle Chem’s receipt of and shipping off-site of drums of crushed light bulbs; his review and analysis of documents Respondent provided to EPA in response to EPA’s NOV/Section 3007 information request letter; the factual allegations contained in the Complaint and its accompanying compliance order; the calculation of the penalty amounts set forth in the Complaint (including use of the 2003 RCRA Civil Penalty Policy (“RCPP”) in developing the penalty amounts sought); and his overall role in EPA’s

² **Error! Main Document Only.**All listed witnesses who are employed by EPA have the same business address: the 21st^d floor at 290 Broadway in New York City.

investigation of Respondent's hazardous waste activities as well as the development of the instant case and the issuance of the complaint.

3. Sam Kerns, environmental engineer and enforcement officer in the RCRA Compliance Branch of DECA, EPA, Region 2. The expected testimony of Mr. Kerns should include his personal involvement and participation in the inspection of Respondent's Elizabeth facility.

4. Leonard Voo, chief of the Hazardous Waste Compliance section of the RCRA Compliance Branch of DECA, EPA, Region 2. Mr. Voo is expected to testify as to the statutory maximum penalty that EPA could have sought for the violations contained in the instant Complaint pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). In addition Mr. Voo will testify as to the penalties EPA sought, utilizing the RCPP and its provisions, as guidance, to determine the appropriate penalty for the violations alleged in the Complaint. Mr. Voo's expected testimony should also include how he reviewed and assessed the proposed penalty for this matter in light of the RCPP. Mr. Voo is also expected to testify as to his supervisory role regarding the efforts prior, and subsequent, to the inspections of Cycle Chem; the various EPA reports on those inspections; and the NOV/RCRA Section 3007 information request letter EPA sent to Respondent. This testimony may also address the proper handling of crushed lightbulbs

In addition, EPA reserves the right to call or not to call any of the aforementioned potential witnesses. The listing of the expected scope of the testimony of each witness is not intended to limit EPA's right to modify or otherwise expand upon the scope and extent of the testimony of each such witness, where appropriate.

COMPLAINANT'S EXHIBITS

EPA incorporates by reference the RCPP which can be accessed at <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf>. (If the Court or Respondent requests a copy of this document, Complainant will supply it.). Similar, EPA incorporates by reference copies of the Complaint and Answer which were served on the parties and have not been reproduced below. (If the Court or Respondent requests a copy of these documents, Complainant will supply them.)

In addition to these items, EPA anticipates offering into evidence the following documents and records, copies of which are annexed hereto (unless stated otherwise) and will be identified as "Complainant's Exhibit," with each exhibit numbered with the following Arabic numerals:

1. New Jersey Department of Environmental Protection ("DEP") 2005 Compliance Advisory warning regarding "Proper disposal of fluorescent lamp/bulbs and the use of bulb crushing machines.
2. DEP 2007 Hazardous Waste Lamp Factsheet.
3. DEP 2009 Compliance Advisory Warning Improper Disposal of Fluorescent Bulbs Result in Penalties.
4. April 10, 1996 Universal Waste Rule-Implementation. Memo from Steven Herman and Elliot P. Laws to Regional Administrators.
5. Notification of Hazardous Waste Activities submitted by SCER-Supreme Inc.
6. SCER-Supreme Inc. – Recycling Center Approval for Class D Universal Waste Permit issued by DEP on August 2, 2006.
7. DEP's April 8, 2008, bi-weekly inspection of Cycle Chem.
8. Both EPA's sampling results and SCER's sampling results from the split samples that were taken from drums contained crushed light bulbs found at SCER-Supreme Inc. in October 2008.

9. RCRA Inspection Report, Cycle Chem and the underlying notes relating to that inspection.
10. Notice of Violation and/RCRA 3007 Information Request sent to Cycle Chem dated December 1, 2008. (A copy is not being provided to Respondent because the original was previously sent to Respondent in December 2008. If Respondent requests a copy of this document, Complainant will provide one.)
11. Cycle Chem's Response to EPA's NOV and/RCRA 3007 Information Request sent to EPA dated December 22, 2008 relating to universal wastes and crushed bulbs shipped to Cycle Chem. (Attachment II) and universal wastes and crushed bulbs shipped off-site from Cycle Chem. (Attachment III) .(A copy is not being provided to Respondent because the original was generated by the Respondent and sent to EPA in December 2008. If the Respondent requests a copy of this document, Complainant will provide one.)
12. Emails from EPA to DEP and from DEP to EPA relating to EPA's notification to the State as to its issuance of a Complaint against Cycle Chem dated Dec. 1, 2010 and June 21, 2011 (partially redacted to eliminate references to another potential case that EPA was notifying DEP of).
13. Modifications to EPA's Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (pursuant to the Debt Collection Improvement Act of 1996 (effective October 1, 2004)), dated September 21, 2004.
14. D & B Business Information Report on Cycle Chem. Inc. printed on October 24, 2011.

Complainant may request this Court to take judicial notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f).

LOCATION AND LENGTH OF COMPLAINANT'S CASE

Pursuant to paragraph 1(C) of the August 26, 2011 order and 40 C.F.R. §§ 22.19(d) and 22.21(d), Complainant requests that the hearing be held in New York City (New York County), where EPA, Region 2, is located and where three of its four proposed witnesses are based. Respondent's main headquarters is located in Elizabeth, New Jersey which is only a relatively short commute from New York City. Thus, Respondent would not be prejudiced or burdened

by the expense of having to defend itself and to present witnesses on its behalf in New York City.

As to the length of Complainant's case-in-chief, Complainant anticipates that EPA should be able to present its direct case in approximately one to one and half days.

STATEMENT AS TO CALCULATION OF THE PROPOSED PENALTY

As part of the complaint, EPA has provided for a "NARRATIVE EXPLANATION TO SUPPORT PENALTY COMPUTATION: Penalty Computation Worksheet –Counts 1 - 4."

This three page documentation, along with a gravity based matrix and a multi-day matrix, was attached to and incorporated into the Complaint. For each of the counts (which were consolidated for purposes of penalty calculation), the narrative and penalty computation worksheet explain how EPA developed the penalty, specifically the methodology used in developing the penalty and how various adjustment factors and circumstances were evaluated in determining an appropriate amount. As previously noted, EPA incorporates by reference into this initial prehearing exchange the Complaint, and thus incorporates by reference the Attachment thereto. EPA deems such documentation as complying with the provisions of 40 C.F.R. § 22.19(a)(3).

Section 3008(a) of RCRA, 42 U.S.C. § 6928(a)(3), provides that in assessing a penalty for any RCRA violation EPA must "take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." That provision authorizes a penalty of up to \$25,000 per day for each such violation. Congress has subsequently authorized EPA to increase the amount of the statutory maximum to \$32,500, and EPA has promulgated regulations doing so. In addition, EPA has adjusted the penalties set out in the RCPP to take account of inflation. In determining how much to assess for each violation, EPA relies upon the

guidance set forth in RCPP. The RCPP provides a method, consistent with the statute, for EPA to calculate penalties in a rational and equitable manner; the RCPP provides a consistent framework for calculating penalties in individual cases. The guidance set forth in the RCPP was relied upon in determining the penalty assessments sought in this case.

The RCPP breaks down the seriousness of the violation into two factors: the potential for harm resulting from the violation and the violation's extent of deviation from the applicable requirements, *i.e.* "the degree to which the violation renders inoperative the requirement violated." Page 16 of the RCPP. For potential for harm, see pages 12 through 16; for extent of deviation, pages 16 through 17. The level of each of the potential for harm and extent of deviation is classified as minor, moderate or major. These two factors are then used in a penalty matrix to derive a gravity-based penalty. The penalty matrix is included as an attachment to the complaint. The penalty matrix is discussed at pages 18 through 19 of the RCPP. In appropriate instances, under the RCPP, EPA may assess separate penalties for multiple violations including multiple violations of the same requirement, compress penalties for related violations, or treat multiple violations as multi-day violations. Penalties for multiple violations and penalties for multi-day violations are discussed in the RCPP at pages 20 through 27. Once an appropriate amount of penalty for a violation has been determined based upon its seriousness, that amount may (or may not) be adjusted depending upon the second statutory factor, the violator's good faith efforts to comply with the requirements. Consistent with this, the RCPP lists a number of potential adjustment factors, including the degree of willfulness and/or negligence of the violator, the history of noncompliance, the violator's ability to pay a penalty, any environmental projects undertaken by the violator and any other unique factors. The RCPP discusses these adjustment factors at pages 33 through 42. The RCPP also takes into account the economic

benefit of noncompliance (“EBN”) that accrues to a violator from noncompliance with the affected regulations. EBN is discussed at pages 28 through 33 of the RCPP. The Court is respectfully directed to Complainant’s Penalty Computation worksheet Counts 1 - 4 attached to and incorporated into the Complaint which discusses each of the factors described above.

PAPERWORK REDUCTION ACT

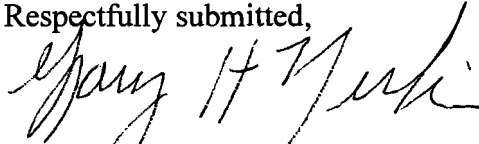
The Paperwork Reduction Act of 1980, as amended, 44 U.S.C. § 3501 *et seq.* (the “PRA”), does not bar EPA’s prosecution of this action.

With respect to counts 1 and 2 (failures to offer hazardous waste to a transporter and to a TSD that received an EPA Identification Number), alleging a violation of 40 C.F.R. § 262.12(c)(1993) (N.J.A.C. 7:26G-6.1(a)), for purposes of the PRA analysis, has a federal regulatory analog in 40 C.F.R. § 262.12(c). The Office of Management & Budget (“OMB”) control number associated with this federal regulation is 2050-0028 and its Information Collection Request (“ICR”) number is 0261. The OMB control number was previously approved on June 6, 2006 and expired on June 30, 2009. (71 Fed. Reg. 44026). Prior to expiration of that OMB control number, EPA, submitted a request to renew an existing approved collection. (74 Fed. Reg. 31028). OMB granted temporary extensions for two months until that OMB control number was approved on August 20, 2009 with a new expiration date of August 31, 2012. (74 Fed. Reg. 46424). Thus, this PRA subject regulation had a valid OMB control number and was properly approved and displayed at 40 C.F.R. Part 9 for the times corresponding to those encompassing Cycle Chem’s offering, on at least four occasions, of hazardous waste to a transporter and TSD that had not received EPA Identification numbers; at the time of the inspection; and at the time the Complaint was issued. Similarly, at this time, there is no bar to the injunctive relief being sought in this case

As to counts 3 and 4 (failure to use a manifest when offering hazardous waste for transport), alleging a violation of 40 C.F.R. § 262.20(a)(1993)(N.J.A.C. 7:26G-6.1(a)), for purposes of the PRA analysis, has a federal regulatory in 40 C.F.R. § 262.20(a). The relevant OMB control number for these subject regulations is 2050-0039, and the relevant ICR number is 0801. This OMB control number was approved on May 20, 2005 and expired on May 31, 2008. (70 Fed. Reg. 36382). EPA, prior to the expiration of the approval of this OMB control number, submitted a request to OMB to renew the approval. (73 Fed. Reg. 30614). Once the request to renew an existing collection was submitted to OMB, that office granted month-to-month extensions of the approval of the ICR until the ICR for that OMB control number was finally approved. OMB approved (or renewed) OMB control number 2050-0039 on Feb. 24, 2009 and that control number is now set to expire on Feb. 29, 2012. (74 Fed. Reg. 10911). Thus, this PRA subject regulation had a valid OMB control number and was properly approved and displayed at 40 C.F.R. Part 9 for the times corresponding to those encompassing Cycle Chem's failure, on at least seven occasions, to use uniform hazardous waste manifests when shipping off-site drums of "crushed light bulbs;" at the time of the inspection; and at the time the Complaint

was issued. Similarly, at this time, there is no bar to the injunctive relief being sought in this case.

Respectfully submitted,



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OCT 28 2011

