

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.11
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REGIONAL HEARING
CLERK

In the Matter of

Aguakem Caribe, Inc.

Respondent

Docket No. RCRA-02-2009-71

COMPLAINANT'S POST HEARING REPLY

INTRODUCTION

Pursuant to the "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 Reply. For the reasons set forth herein, 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 asserted in the Complaint.

ARGUMENT

Respondent's Post-Hearing submission (hereinafter referred to as "Respondent's Brief", (Respondent failed to give its submission any title) discusses bits and pieces of alleged facts, taken out of context and misrepresenting the evidence submitted in the present case.

Respondent's arguments are outside the pale. Respondent's Brief proposes findings of fact and conclusions of law based on the predicament that Respondent did not generate a solid waste, since it did not abandon any chemicals at his Former Facility, located in Building 6, on the Port of Ponce, PR-12, Santiago de los Caballeros Avenue, Ponce, Puerto Rico (the "Facility".) In order to support its argument that it did not generate any "solid wastes", Respondent relies on its interpretation

of the facts by blaming the Port of Ponce Authority ("PPA"), owner of the property where the Facility was located, and concocting this plan as to why and how Respondent left the property.

Respondent is nothing more than a victim of its' own poor planning. In order to "justify" or try to find some "ground" on which to base its allegation as to why it had to leave the PPA property, Respondent argues that the Facility "was contaminated with lead" (page 3 of Respondent's Brief, see also Respondent's Proposed Findings of Material Facts, paragraphs (k)-(m) and (t)) and it had "suspended the removal process of the materials located at the Facility until such time as the lead contamination was abated" (Id.) [In its own Brief Respondent contradicts its position by stating that it "was required to relinquish possession of the former Facility" Page 3 of Respondent's Brief].

For example, the following proposed finding of fact, submitted by Respondent in its Brief is either incorrect, not supported by the evidence or has little or no probative value:

- Paragraph (f): that the Municipality of Ponce sought to forcibly remove Respondent from their property, including sending marshals to effectuate the removal - the truth is that there was an eviction order against Respondent

Mr. Jorge Unanue, President of Aguakem Caribe, Inc., testified during the hearing that since 2000 the Port of Ponce Authority had told him that it would have to move Aguakem's operations from its property. Transcript of Mr. Jorge Unanue's testimony: 62:2-10. However, Respondent stayed in the PPA 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. Transcript of Mr. Jorge Unanue's testimony: 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. Transcript of Mr. Jorge Unanue's testimony: 67:8-18.

Respondent took over a year and a half to move from the PPA property.

- Paragraphs (j)-(m): that activities being conducted by contractors "were releasing harmful substances" into the Facility - the truth is that there was no detection of any substance at levels that posed an actual threat to human health or the environment

Complainant's Exhibit 3, "RCRA Compliance Evaluation Inspection Report ("CEI Report"), indicates that PPA's representative informed EPA that they conducted a lead based paint and asbestos containing material survey, and found that the asbestos did not pose an actual threat. Mr. Unanue testified that he knew before December 2006, about the alleged dust problems at the Port of Ponce, and that he saw a communication where an asbestos removal was mentioned. Conveniently, Mr. Unanue could not indicate the exact month he became aware of such information. Transcript of Mr. Jorge Unanue's testimony: 150-152. Although Mr. Unanue had prior knowledge (before the December 28, 2006 move) he admitted he did not take any specific measures regarding his employees. Transcript of Mr. Jorge Unanue's testimony: pages 152-153. As to Respondent's Exhibit 3, generated by Envirorecycling, Inc., Respondent was asked to read from the document, specifically the following statement: "Samples number one through seven. Result for these white samples do not meet EPA standards for sample matrix and are not recognized under the NLLAP accreditation program" Transcript of Mr. Jorge Unanue's testimony: page 166. Mr. Unanue also testified that he did not ask the company what this paragraph meant nor was he concerned. Transcript of Mr. Jorge Unanue's testimony: page 170. In addition, Respondent was not concerned about his employees' health. It should be noted that Mr. Unanue admitted that he never contacted OSHA. Transcript of Mr. Jorge Unanue's testimony: pages 192-193.

- Paragraph (u): that the Municipio de Ponce confirmed to EPA inspectors that the Facility was "contaminated with lead" - the truth is that EPA was told that the Facility "contained" lead based paint and asbestos containing material, but posed no threat to the working environment

During the inspection conducted at the Facility, EPA met with Mr. Jose A. Quiñones and talked via conference call with Mr. Jorge A. Hernandez both of the PPA. Mr. Hernandez told EPA inspectors that PPA conducted its own lead based paint and asbestos containing material survey which revealed the presence of lead and asbestos, but they did not pose an actual harm. Complainant's Exhibit 3, page 4.

- Paragraphs (y) and (ii): that the EPA did not allow Respondent to "complete its removal process" - the truth is that Respondent had no intention to continue with any removal

Respondent had no intention to remove the containers and material left behind on December 28, 2006. Respondent was aware since mid 2005 that he had to vacate the PPA property. However, Respondent ignored PPA's request and PPA had to go to court in order to get an eviction order. Complainant's Exhibit 3, page 3. Mr. Unanue admitted that he was asked once more by PPA to vacate its property around spring 2006 and he told them first around September and then he kept giving excuses, until he moved out on December 28, 2006. Transcript of Mr. Jorge Unanue's testimony: pages 65-67. On February 9, 2007, EPA issued to Respondent a "Notice to Responsible Party" under the Comprehensive Environmental Response, Compensation, And Liability Act ("CERCLA") 42 U.S.C. §§ 9601 to 9675 notifying Respondent that it may be liable for the release and/or threatened releases of pollutants, contaminants and/or hazardous substances from its former Facility. Complainant's Exhibit 11. When EPA performed a CERCLA Emergency response Program inspection and assessment of the Facility on February 7, 2007, EPA found:

"The assessment revealed the presence of a laboratory containing chemical reagents and unknown chemical releases in the vicinity of approximately fifty 55-gallon drums, four tanks of various sizes, and one hundred 1 cubic yard containers, referred to as totes. Many of the containers were observed in deteriorated condition, and spills were observed around them." Complainant's Exhibit 11.

EPA inspector Mr. Jesse Aviles testified during the hearing, when asked if the materials or the containers he had previously described were in such condition to be able to use them, that he had to say no since the containers were leaking, the materials were spilled over the floor of the Facility, which meant that Respondent did not take care of them. Transcript of Mr. Jesse Aviles's testimony: page 41. In addition, the photos taken by Mr. Aviles of Respondent's Facility during the RCRA CEI, are, as the saying goes, "a picture is worth a thousand words." Complainant's Exhibit 3.

- Paragraph (ee): that Respondent fully complied with the CERCLA Administrative Order on Consent - the truth is that Respondent did not comply with the AOC

On July 27, 2007, EPA entered an Administrative Order on Consent under CERCLA, Complainant's Exhibit 13, with Respondent and the Municipality of Ponce. The only thing that Respondent did regarding the AOC was sign it. Respondent testified that the communications with EPA regarding the AOC were done through his attorney [Mr. Armando Llorens], Transcript of Mr. Jorge Unanue's testimony: page 128; when asked what he [Mr. Unanue] did to comply with the AOC, Mr. Unanue responded; "I signed the document" Transcript of Mr. Jorge Unanue's testimony: page 198; asked if after he [Mr. Unanue] signed the AOC he understood he had to do anything, Mr. Unanue testified he did not have any money and was not responsible since it was "a moving train and the best thing was for me to sign it", he further admitted that the only person he told that "I was not going to do anything. I signed it. I agreed to it" was to his attorney, Mr. Armando Llorens. Transcript of Mr. Jorge Unanue's testimony: pages 199-200. Respondent did not communicate EPA its real intentions.

The following proposed conclusions of law in Respondent's Brief, are not supported by the facts of the case, as presented by Complainant during the hearing.

- Aquakem did not Produce Hazardous Waste

Respondent argues that that it was not a generator of hazardous waste since it did not abandon its materials at the Facility. Respondent states that it suspended its relocation activities because the Facility was "contaminated" with lead. In Respondent's Brief, it argues that the samples taken by Envirorecycling, Inc. revealed "illegal levels of lead," page 10. There is no evidence to support such claim. If Respondent was so convinced of the results of the samples that were taken at the Facility Respondent had the opportunity to call as a witness the individual who generated the report. However, he chose not to do so, he has to adhere to the fact that the samples did not show any "illegal levels of lead." As we discussed above, there was no contamination at the Facility that posed any threat to Respondent's employees, Respondent was not concerned about its employees' health, Respondent had to admit he never contacted EPA or OSHA.

Respondent provides a second reason for leaving the Facility, that Respondent "was required to relinquish possession of the former Facility" Respondent's allegation should be given no probative value. Complainant demonstrated that PPA had informed Respondent in 2000 that it had to vacate its property; that again in mid 2005 PPA told Respondent to move; that Respondent kept giving PPA different dates as to when it would move, first September, then November and finally December 2006. It is more than obvious from the evidence presented during the hearing that Respondent moved when it was beneficial to Respondent, not when it had to. Had he "completed" its move, he would have had to address the disposal of numerous broken and deteriorated containers, and the spills present all over the Facility. Hence, leaving them there was nothing more than a cost saving measure.

Complainant met the burden of presentation and persuasion by presenting evidence that showed that 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.

- Aguakem Made a Determination of Hazardous Waste

Respondent gives a new twist to the definition of making a hazardous waste determination. Respondent indicates in its Brief, that it made a determination that it did not generate "solid wastes" since it did not believe it had discarded or abandoned materials.

EPA demonstrated during the hearing that Respondent failed to make a hazardous waste determination.

In order to avoid being repetitive, we submit for consideration by this Honorable Court, our discussion in Complainant's Post-Hearing Brief.

- EPA did Not Provide Evidence That Materials at the Former Facility were "Hazardous"

Respondent argues that Complainant did not present evidence that the materials found at the facility were "hazardous." However, Respondent does not provide any insight in its Brief as to what it considers as "hazardous."

Complainant presented the testimony of three of its enforcement officers who gave an account of the inspections conducted at the Facility, the findings of the RCRA and CERCLA inspections and how the findings lead them to determine that Respondent had violated both statutes.

- The Evidence Demonstrates That Any Danger Related To The Materials At The Former Facility Resulted From Actions Unrelated To Aguakem

Respondent takes the easy way out and blames the Municipio de Ponce for the conditions found at the Facility. The classic "finger-pointing" excuse. Respondent does not provide any reference as to evidence to support such statement. This Honorable Court should not consider Respondent's allegation.

- Aguakem Established That It Is Unable To Pay The Fine Proposed By The EPA

Respondent argues that the testimony of an independent auditor, Mr. Eduardo Guzman indicates that Respondent cannot pay the proposed penalty or even a fraction of it. Mr. Guzman testified that he had been Respondent's auditor since it began operations, around thirteen to fourteen years. Transcript of Mr. Guzman's testimony: page 7. Mr. Guzman testified that Respondent had a cash flow generated by its operational activities of \$297,000, Transcript of Mr. Guzman's testimony: page 28; that it spent money investing in the manufacturing operations and its line of products, page 29; that the financial statements do not include a budget for environmental compliance, pages 31-32; that he does not know if Respondent actually has expenses for environmental compliance, pages 32-35. We wish to bring to this Court's attention that when asked about the actual liabilities of Respondent, Mr. Guzman testified that of a \$320,000 amount reflected in the Financial Statements, \$128,000 have to be paid in a 12-month period and \$191,000 in the future, Transcript of Mr. Guzman's testimony: pages: 49-51. At times Mr. Guzman was vague in his testimony. When asked if Respondent was in good standing with its main bank, Banco Popular, Mr. Guzman indicated he was not aware of the standing that Respondent had with the bank, although he had been Respondent's accountant for over 13 years. Transcript of Mr. Guzman's testimony: pages 53-54.

Mr. Guzman's testimony reveals that Respondent has money for investments, for paying its liabilities and has a credit line with a major bank. Respondent very well can ask for an increase in its line of credit and pay the proposed penalty.

- The Penalty EPA Seeks Is Inappropriate And Not In Conformance With EPA Policy

In order to avoid being repetitive, we submit for consideration by this Honorable Court, our discussion in Complainant's Post-Hearing Brief. However, we need to point out certain items mentioned by Respondent in its Brief that may lead to error.

Respondent distorts the facts when it discusses the gravity component of the calculated penalty. Regarding Count 2 of the Complaint, Respondent argues that there was no potential for harm, that Complainant did not explain why the violation was major instead of moderate or minor, that multi-day calculation was not appropriate. Respondent tries to support its interpretation of the RCRA Penalty Policy and Complainant's penalty calculation by alleging overall that the Facility was not under its control. However, it fails to recognize that Respondent was the one responsible for the condition at the Facility when it abandoned the materials and deteriorated containers and when it did not address the spills all over the floor of the Facility. Complainant presented the testimony of Mr. Gonzalez and Mr. Aviles who went over how Complainant calculated each of the three counts of the present complaint. In addition, before they discussed the specifics of the calculation each one described the factors to be considered under the RCRA Penalty Policy. See Transcript of testimony of Mr. Gonzalez at pages: 79-118 and Transcript of testimony of Mr. Aviles at pages: 44-62, and Complainant's Exhibit 1.

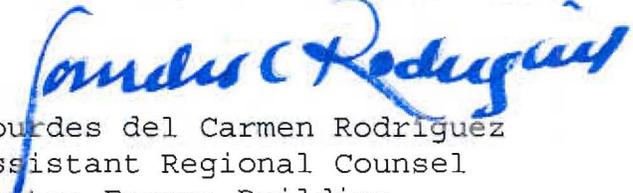
Aguakem argues that Complainant calculated an economic benefit of \$19,266 when it should have considered that "value of the lost material to Aguakem was upwards of \$75,000.00" (Respondent's Brief at page 22) Respondent failed to raise this defense in his response to the Complaint, and he did not present any evidence to support this statement at the Hearing, and, should therefore, not be considered by this Honorable Court, since it lacks any probative value.

Respondent's unsupported arguments are without merit.

CONCLUSION

Respondent's Brief has failed to raise any arguments that undermine either the liability or penalty portions of EPA's case. Many of the arguments are unsupported by the record, or mischaracterize statements by the witnesses. Respondent has failed to rebut the conclusion to be drawn from this record: that Respondent failed to comply with the requirements of the RCRA and the hazardous waste management regulations. Complainant's application of the RCRA

Respectfully submitted, in San Juan, Puerto Rico, this
16th 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 Reply, dated March 16, 2011, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy for filing, by UPS to:

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2/14/2011

SCR

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