UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

DEFAULT ORDER AND INITIAL DECISION

This is an administrative action instituted under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a). Complainant is the Director of the Land and Chemicals Division, United States Environmental Protection Agency (EPA) Region 5. Respondent is JLM Chemicals, Inc. (JLM), a corporation incorporated in the State of Delaware and doing business in the State of Illinois. Complainant filed a Complaint and Compliance Order on September 14, 2009, alleging that Respondent violated RCRA and its implementing regulations and seeking the imposition of a civil administrative penalty in the amount of $1,086,900.[1] This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules).

The Complaint in this matter alleges four counts: (1) the transport or offer of transport of hazardous waste for off-site treatment, storage or disposal without a manifest in violation of 31 IAC § 722.120(a) (40 C.F.R. § 262.20(a)(1)) (141 violations); (2) failure to maintain containers holding hazardous waste in good condition in violation of 31 IAC § 725.271 (40 C.F.R. § 265.171) (one violation); (3) failure to keep containers holding hazardous waste closed during storage in violation of 35 IAC § 725.273(a) (40 C.F.R. § 265.173(a) (one violation); and (4) failure to satisfy a condition for maintaining an exemption from the requirements for generators of hazardous waste in violation of 35 IAC § 722.134(a) (40 C.F.R. § 262.34(a)) (one violation).

Complainant has filed a Motion for Default Order requesting that the Presiding Officer find the Respondent liable for the violations alleged in the Complaint and assess the civil penalty as proposed. The Consolidated Rules address the default situation at section 22.17(a) which provides in part:

> (a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the

[1] While the Complaint is entitled "Complaint and Compliance Order," it contains no language ordering Respondent to comply with any RCRA requirements. It seeks only the imposition of civil penalties. I will refer to it herein as the "Complaint."

> complaint and a waiver of respondent's right to contest such factual allegations . . . . (c) *Default order.* When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

Pursuant to the Consolidated Rules and based upon the record in this matter and the following Findings of Fact and Conclusions of Law and Recommended Civil Penalty Assessment, Complainant's Motion for Default Order is hereby GRANTED and Respondent is assessed a civil penalty in the amount of $1,066,782.

I. Statutory and Regulatory Background

U.S. EPA has promulgated regulations, codified at 40 C.F.R. Parts 260 through 279, governing generators and transporters of hazardous waste and facilities that treat, store and dispose of hazardous waste, pursuant to sections 3002, 3003 and 3005 of RCRA, 42 U.S.C. §§ 6922, 6923 and 6925. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator of U.S. 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. Any violation of regulations promulgated pursuant to Subtitle C (Sections 3001-3023 of RCRA) or any state provision authorized pursuant to Section 3006 of RCRA, 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. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Administrator of U.S. EPA granted the State of Illinois final authorization to administer a state hazardous waste program lieu of the federal government's base RCRA program effective January 31, 1986. 51 Fed. Reg. 3778 (Jan. 31, 1986). U.S. EPA may issue an order assessing a civil penalty for any past or current violation requiring compliance. 42 U.S.C. § 6928(a). The Administrator of U.S. EPA may assess a civil penalty of up to $32,500 per day for each violation of Subtitle C.[2]

II. Findings of Fact and Conclusions of Law

1. Respondent JLM is a corporation incorporated in the State of Delaware and doing business in

---

[2] Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), provides that the Administrator of EPA may assess a civil penalty of up to $25,000 per day for each violation of Subtitle C of RCRA. 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 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 RCRA Subtitle C that occurred after March 15, 2004 through January 12, 2009. The violations alleged in this Complaint occurred from March 30, 2005 to July 31, 2007.

the State of Illinois. JLM is accordingly a "person" as that term is defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 35 IAC § 720.110 [40 C.F.R. § 260.10].

2. At all times relevant to the Complaint, JLM was an "owner" or "operator" of a facility located at 13100 South Homan Avenue, Alsip, Illinois ("Facility") as those terms are defined at 35 IAC § 720.110 [40 C.F.R. § 260.10].

3. At all times relevant to the Complaint, JLM's facility consisted of land and structures, other appurtenances, and improvements on the land, used for treating, storing or disposing of hazardous waste.

4. At all times relevant to the Complaint, JLM's facility was a "facility" as that term is defined at 35 IAC § 720.110 [40 C.F.R. § 260.10].

5. At all times relevant to the Complaint, JLM used propylene and benzene to produce cumene (the cumene unit) and then used cumene to produce phenol and acetone (the phenol unit).

6. Respondent generated wastes from the process identified in paragraph 5 including distillation bottom tars, benzene waste, ignitable waste and acetophenone waste.

7. Distillation bottom tars from the production of phenol or acetone from cumene are listed as EPA hazardous waste K022. 35 IAC § 721.132(a) [40 C.F.R. § 261.32].

8. Waste exhibiting the characteristic of toxicity has the EPA Hazardous Waste Number D018. 35 IAC § 721.124(b) [40 C.F.R. § 261.24(b)].

9. Waste exhibiting the characteristic of ignitability has the EPA Hazardous Waste Number D001. 35 IAC § 721.121(b) [40 C.F.R. § 261.21(b)].

10. Waste exhibiting the characteristic of toxicity due to acetophenone content carries the EPA hazardous waste number U004. 35 IAC § 721.133(f) [40 C.F.R. § 261.33(f)].

11. At all times relevant to this Complaint, Respondent held distillation bottom tars, a discarded material, for temporary periods in tanks 34 and 36 before the material was transported from the Facility for treatment, storage, disposal, burning or incineration elsewhere.

12. At all times relevant to his Complaint, Respondent's distillation bottom tars were a "solid waste" as that term is defined under 35 IAC § 721.102 [40 C.F.R. § 261.2].

13. At all times relevant to this Complaint, Respondent's distillation bottom tars were a "hazardous waste" as that term is defined under 35 IAC § 721.103 [40 C.F.R. § 261.3].

14. At all times relevant to this Complaint, Respondent's acts or processes produced distillation bottom tars (K022).

15. At all times relevant to this Complaint, Respondent's benzene was "solid waste" as that term is defined under 35 IAC § 721.102 [40 C.F.R. § 2612.].

16. At all times relevant to this Complaint, Respondent's benzene was a "hazardous waste" as that term is defined under 35 IAC § 721.103 [40 C.F.R. § 261.3].

17. At all times relevant to this Complaint, Respondent's acts or processes produced benzene waste (D018).

18. At all times relevant to his Complaint, Respondent's ignitable waste was "solid waste" as that term is defined under 35 IAC § 721.102 [40 C.F.R. § 261.2].

19. At all times relevant to this Complaint, Respondent's ignitable waste was "hazardous waste" as that term is defined under 35 IAC § 721.103 [40 C.F.R. § 261.3].

20. At all times relevant to this Complaint, Respondent's acts or processes produced ignitable waste (D001).

21. At all times relevant to his Complaint, Respondent's acetophenone waste was a "solid waste" as that term is defined under 35 IAC § 721.102 [40 C.F.R. § 261.2].

22. At all times relevant to this Complaint, Respondent's acetophenone waste was a "hazardous waste" as that term is defined under 35 IAC § 721.103 [40 C.F.R. § 261.3].

23. At all times relevant to this Complaint, Respondent's acts or processes produced acetophenone waste (U004).

24. Respondents tanks, which store, treat, dispose of or otherwise handle hazardous waste are "tanks" as that term is defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

25. Respondents's drums, buckets and tub which store, treat, dispose of, or otherwise handle hazardous waste are "containers" as that term is defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

26. At all times relevant to this Complaint, Respondent's holding of distillation bottom tars (K022) in tanks, buckets and a tub constituted "storage" of hazardous waste as that term is defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

27. At all times relevant to this Complaint, Respondent's holding of benzene waste (D018) and ignitable waste (D001) in drums constituted "storage" of hazardous waste as

that terms is defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

28. At all times relevant to this Complaint, Respondent's holding of acetophenone waste in a drum constitute "storage" of hazardous waste as that term is defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

29. Respondent is a "generator" as that term is defined under 35 IAC § 720.110 [40 C.F.R. § 260.10].

30. The Facility was generating and managing hazardous waste on or before November 19, 1980.

31. The accumulation areas at the Facility include: (1) a tank storage area, consisting of tanks 34, 36 and 39 (12,000, 12,000 and 14,000 gallon capacity, respectively) on the west side of the Facility where tanks 34 and 36 were used to store distillation bottom tars, (K022); (2) a scrap yard located in the northwest portion of the Facility including one drum that contained absorbent pads containing benzene waste (D018) and other waste on a pallet; (3) a 90-day hazardous waste accumulation area, including three hazardous waste containers (55-gallon drums) containing benzene waste (D018) and/or ignitable waste (D001); (4) a satellite area west of the cumene plant, consisting of one drum containing acetophenone waste (U004); and (5) a satellite area near the API Oil/Water Separator, including a 55-gallon drum which included absorbent pads containing benzene waste (D018), and two buckets and a tub containing distillation bottom tars (K022).

32. Respondent identified itself as a large quantity generator in its Biennial Report submissions.

33. At all times relevant to this Complaint, Respondent generated during each calendar month more than 1000 kg of hazardous waste at the Facility.

34. A generator who transports, or offers for transport, hazardous waste for off-site treatment, storage, or disposal, must prepare a manifest. 35 IAC § 722.120(a) [40 C.F.R. § 262.20(a)(1)].

35. From approximately March 30, 2005, to July 31, 2007, Respondent offered hazardous waste (K022) for transport off-site without a manifest from the Facility for treatment, storage or disposal on 141 occasions in violation of 35 IAC § 722.120(a) [40 C.F.R. § 262.20(a)(1)].

36. A generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status provided that the waste is placed in containers and the generator complies with the applicable requirements of the interim status standards for owners and operators of hazardous waste treatment, storage and disposal facilities. 35

IAC § 725.134(a)(1)(A) [40 C.F.R. § 262.34(a)(1)(i)].

37. The interim status standards for owners and operators of hazardous waste treatment, storage and disposal facilities require that if a container holding hazardous waste is not in good condition, or if it begins to leak, the owner or operator must transfer the hazardous waste from this container to a container that is in good condition, or manage the waste in some other way that complies with 35 IAC Part 725. 35 IAC § 725.271 [40 C.F.R. § 265.171].

38. The interim status standards for owners and operators of hazardous waste treatment, storage and disposal facilities also require that facilities be maintained and operated so as 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. 35 IAC § 725.131 [40 C.F.R. § 265.31].

39. At the March 19, 2007, inspection of the Facility, hazardous waste (D001 and/or D018) was leaking from a container in the 90-Day Hazardous Waste Accumulation Area.

40. At the March 19, 2007, inspection of the Facility, hazardous waste (U004) was leaking from a container at the Satellite Area west of the Cumene Plant.

41. At the March 19, 2007, inspection of the Facility, hazardous waste (D001) from the leaking 90-Day Hazardous Waste Accumulation Area was on a cracked slab under a hole in the drum.

42. At the March 19, 2007, inspection of the Facility, hazardous waste (U004) from the Satellite Area west of the Cumene Plant was on a cracked slab under the drum.

43. At the March 19, 2007, inspection of the Facility, hazardous waste (K022) was on the ground in the area of the API Oil/Water Separator.

44. At the March 19, 2007, inspection of the facility, a container in the scrap yard holding hazardous waste (D018) was visibly rusted.

45. On March 19, 2007, Respondent failed to maintain the containers holding D018, D001 and U004 hazardous waste in good condition.

46. Respondent's failure to maintain the containers holding D018, D001 and U004 hazardous waste in good condition on March 19, 2007, violated 35 IAC § 725.271 [40 C.F.R. 265.171].

47. On March 19, 2007, Respondent failed to maintain and operate the Facility to

minimize the possibility of a 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].

48. A generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status provided that the waste is placed in containers and the generator complies with the applicable requirements of the interim status standards for owners and operators of hazardous waste treatment, storage and disposal facilities. 35 IAC § 722.134(a)(1)(A) [40 C.F.R. § 262.34(a)].

49. The interim status standards for owners and operators of hazardous waste treatment, storage and disposal facilities require that a container holding hazardous waste must be closed during storage, except when adding or removing waste. 35 IAC § 725.273(a) [40 C.F.R. § 265.173(a)].

50. At the March 19, 2007, inspection of the Facility, Respondent failed to keep the following containers closed during storage while waste was not being added to or removed from the containers: one drum containing hazardous waste (U004) located in the Satellite Area west of the Cumene Plant; one drum containing hazardous waste (D018) located in the Scrap Yard; and two buckets and a tub containing hazardous waste (K022) located near the API Oil/Water Separator.

51. Respondent's failure to keep the containers holding hazardous waste closed during storage violated 35 IAC § 725.273(a) [40 C.F.R. § 265.173(a)].

52. Except as otherwise provided, a large quantity generator may, for ninety days or less, accumulate hazardous waste that is generated on-site without an Illinois hazardous waste permit, provided that the conditions of 35 IAC § 722.134 [40 C.F.R. § 262.34] are met.

53. If the conditions of 35 IAC § 722.134 [40 C.F.R. § 262.34] are not met, then the generator must apply for an operating permit under 35 IAC § 703.180 [40 C.F.R. Part 264, 40 C.F.R. §§ 270.1(c), 270.10(a) and (d), 270.13.]

54. Pursuant to 35 IAC § 722.134(c) [40 C.F.R. § 262.34(c)], a generator may accumulate as much as 55 gallons of hazardous waste at or near any point of generation where wastes initially accumulate without a permit or without having interim status and without complying with 35 IAC § 722.134(a) [40 C.F.R. § 262.34(a)], provided that the generator complies with all applicable conditions set forth in 35 IAC § 722.134(c) [40 C.F.R. § 262.34(c)] including but not limited to, marking containers either with the words "Hazardous Waste" or with other words that correctly identify the contents of the containers.

55. Pursuant to 35 IAC § 722.134(a) [40 C.F.R. § 262.34(a)], in order for a generator of

hazardous waste to maintain its exemption from the requirement to have an operating permit or interim status, the generator must comply with the specific condition set forth in 35 IAC § 722.134(a)(3) [40 C.F.R. § 262.34(a)(3)] that it label or mark each container holding hazardous waste clearly with the words "Hazardous Waste."

56. Respondent failed to satisfy one of the conditions for complying with 35 IAC § 722.134(c) [40 C.F.R. § 262.34(c)] when it failed to mark its containers with the words "Hazardous Waste" or with other words that would have correctly identified the contents of the containers.

57. Accordingly, Respondent was required to comply with 35 IAC § 722.134(a) [40 C.F.R. § 262.34(a)].

58. Respondent, therefore, stored hazardous waste without a permit or interim status in violation of Section 3005 of RCRA, 42 U.S.C. § 6925(a), and became an operator of a hazardous waste storage facility subject to the requirements of 35 IAC Part 724, 35 IAC §§ 703.121, 702.120, and 702.123 [40 C.F.R. Part 264, 40 C.F.R. §§ 270.1(c), 270.10(a) and (d), 270.13].

59. The record establishes that service of the Complaint upon Respondent was accomplished by service upon its authorized representative.[3]

60. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

61. Respondent was required to file an answer to the Complaint within thirty days of service of the Complaint. 40 C.F.R. § 22.15(a).

62. Since it failed to file an answer, Respondent is in default in this proceeding and has waived its right to contest the factual allegations in the Complaint. 40 C.F.R. § 22.17(a).

63. The record in this matter shows no good cause why a default order should not be issued. 40 C.F.R. § 22.17(c).

64. Respondent is liable for a civil penalty as set forth below.

IV. Recommended Civil Penalty Assessment

RCRA enumerates specific factors that the Agency shall consider when assessing an administrative penalty pursuant to section 3008. Those factors are: (1) the seriousness

[3] See Complainant's Memorandum of Law Supporting Motion for Default Order, Finding of Liability, and Penalty, filed April 27, 2010, at Attachment B and C.

of the violation; and (2) any good faith efforts to comply with applicable requirements. 42 U.S.C. § 6928(a)(3). In addition, in 2003 the Agency issued a revised RCRA Civil Penalty Policy ("Penalty Policy") to ensure that RCRA civil penalties are assessed in a manner that is consistent with Section 3008, that the penalties are assessed in a fair and consistent manner, that they are appropriate for the gravity of the violation, and that economic benefit is eliminated and deterrence and compliance are achieved.

In addition, in assessing a civil penalty, the Presiding Officer should look to the Consolidated Rules, which provide in part:

> (b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall 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. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

Complainant seeks a penalty of $1,086,900 in this matter and submits the Declaration of Brenda Whitney, a Region 5 environmental engineer, in support of its penalty calculation. Ms. Whitney reviewed documents in the EPA files pertaining to Respondent and participated in the preparation of the Complaint, including the calculation of an appropriate penalty. In doing so, she relied on the RCRA statutory penalty factors at 42 U.S.C. § 6928(a)(3), the 2003 RCRA Civil Penalty Policy and 2005 revisions to that policy.[4] In accordance with the Penalty Policy, Ms. Whitney's calculation consists of: (1) a determination of a gravity-based penalty for each particular violation from a penalty assessment matrix; (2) the addition of a "multi-day" component, as appropriate, to account for a violation's duration; (3) an adjustment of the sum of the gravity-based and multi-day components for case specific circumstances;[5] and (4) the addition of this amount to the appropriate economic benefit gained through noncompliance. She considered two factors for the gravity-based component as set forth by the Penalty Policy: potential for

---

[4] Declaration of Brenda Whitney, dated April 26, 2010 (Attachment F to Complainant's Memorandum of Law Supporting Motion for Default Order, Finding of Liability and Penalty) at ¶¶ 5-7.

[5] These circumstances include the degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors. See Penalty Policy at 33.

harm and extent of deviation from a statutory or regulatory requirement. She calculated an amount for the economic benefit gained by Respondent on the basis of its noncompliance, reviewed its history of noncompliance and considered Respondent's ability to pay, and made some adjustments to the calculation on the basis of those factors.

In consideration of the RCRA statutory penalty factors and the RCRA 2003 Civil Penalty Policy (as revised), I calculate the penalty to be assessed against Respondent as follows:

A. Count I

As alleged in the Complaint and admitted by Respondent by virtue of its default, during the approximate time period March 30, 2005, to July 31, 2007, Respondent offered the hazardous waste known as distillation bottom tars (K022) for transport off-site without a manifest from the Facility for treatment, storage or disposal on 141 occasions. Distillation bottom tars from the production of phenol/acetone from cumene are a listed toxic hazardous waste. See 40 C.F.R. § 261.32. In addition, with respect to the gravity of the violation, the record establishes that: Respondent shipped a large volume (more than 6 million pounds) of K022 hazardous waste over 300 miles without the required manifest designed to provide safety information to handlers and ensure proper management; and at least one recipient injected the material into an industrial furnace that did not have a RCRA hazardous waste combustion permit.[6] Respondent's K022 waste contained polycyclic aromatic hydrocarbons (PAHs) and chromium, some of which have been found to be causally related to cancer in humans.[7]

Failure to comply with RCRA's requirement to prepare a manifest for hazardous waste being shipped offsite constitutes a substantial harm to the integrity of the RCRA regulatory program which relies on careful tracking of hazardous waste from "cradle to grave." The RCRA Penalty Policy specifically lists "failure to prepare or maintain a manifest" as resulting in the type of regulatory harm that can have serious implications and merits a substantial penalty.[8] The requirement to prepare a manifest for the shipment of hazardous waste is fundamental to the overall goals of RCRA to handle wastes in a safe and responsible manner. Based upon the facts set forth in the record, I conclude that the potential for harm and the extent of deviation from the regulatory requirement for these 141 manifest violations compel a "major-major" designation in the penalty matrix.[9] In addition, as permitted by the Penalty Policy, I will treat these multiple violations as multi-day violations as they are all based on similar acts by the violator.

---

[6] See Declaration of Brenda Whitney at ¶ 12.

[7] See Declaration of Brenda Whitney at ¶ 12.

[8] RCRA Penalty Policy at 14.

[9] The RCRA Penalty Policy includes a penalty matrix which sets forth penalty amounts to be assigned to a specific violation depending upon whether the potential for harm and extent of deviation are minor, moderate or major. See RCRA Penalty Policy at 2.

The RCRA Civil Penalty Policy requires that an "economic benefit" component be calculated and added to the gravity-based penalty component when a violation results in "significant" economic benefit to the violator. An economic benefit may accrue to a violator in the form of an illegal competitive advantage, or financial gain that the violator would not otherwise have realized if the violation had not occurred. In this case, the Agency assessed a $23,400 economic benefit component alleging that "Respondent was paid more per gallon for K022 shipped without a manifest than for the same material shipped with a manifest."[10] While that may be true, I am unable to determine, or even make a fair estimate of, the amount of economic benefit the Respondent gained from its illegal shipments on the basis of this record. Complainant provides no specific basis for its calculation of a $23,400 economic benefit component. Thus, I decline to assess an economic benefit component for this violation.

The Agency next considered certain case-specific circumstances that warrant the adjustment of the penalty. The record demonstrates that state and federal environmental agencies specifically informed Respondent of its obligation to manage the K022 was as hazardous waste and to ship it off-site only to a RCRA permitted hazardous waste treatment, storage or disposal facility, and that Respondent ignored those obligations. Respondent's petition to the Illinois Pollution Control Board seeking a determination that the byproduct from its phenol production unit was not K022 hazardous waste, or alternatively, a variance from the hazardous waste regulations, was denied in September 1995.[11] In 2005, Respondent was advised by EPA's Office of Solid Waste that its K022 waste was a RCRA listed hazardous waste and must be handled as such.[12] Thus, I concur in the Agency's determination that a 10% upward adjustment of the penalty for willfulness is appropriate.

Unlike other environmental statutes, RCRA does not include ability to pay as one of the factors the Agency must consider in assessing a penalty, and therefore it is not an element of the Agency's proof. The Penalty Policy, however, allows the Agency to consider a company's inability to pay if the issue is raised by respondent. "If the respondent fails to fully provide sufficient information, then enforcement personnel should disregard this factor in adjusting the penalty."[13] Respondent has provided no information to support a claim of inability to pay in this proceeding, and I concur in the Agency's decision not to adjust the penalty on that basis.[14] Finally, I agree that the record presents

---

[10] Declaration of Brenda Whitney at ¶ 15.

[11] See EPA Exhibit P at EPA 1194-1201.

[12] See EPA Exhibit U at EPA 1220-1222.

[13] RCRA Penalty Policy at 39.

[14] Complainant has submitted documentation that indicates that Respondent has filed a Petition for Assignment for Benefit of Creditors in state court in Florida. See EPA Exhibit D at EPA 0188-0218. This submission, however, does not contain the financial data required to calculate a violator's ability to pay. As the Environmental Appeals Board has noted, in order to be considered as a factor in assessing a penalty under RCRA, "ability to pay" must be raised and proved as an affirmative defense by respondent. See *In re Carroll Oil Co.*, 10 E.A.D. 635, 663 (EAB 2002).

no evidence of any good faith efforts on the part of Respondent to comply and, similarly, I make no adjustment to the penalty on this basis.

In sum, I calculate the penalty to be assessed against Respondent for the 141 violations alleged in Count I as follows:

Gravity-based penalty for first violation:	$	32,500
Gravity-based penalty for multi-day violations:		
(140 x $6448)		902,720
10% adjustment for willfulness		93,522
Total	$	1,028,742

B. Count II

In Count II of its Complaint, Complainant alleges, and by virtue of its default Respondent admits, that during a March 2007 inspection of Respondent's facility, hazardous waste containers were determined to be in poor condition and releases of hazardous waste were observed. Containers of hazardous waste were leaking and surfaces under them were stained and cracked. At least some hazardous waste containers were outside, exposed to the elements, increasing the likelihood of released waste being transported by the elements. Thus, the potential for harm to human health or the environment was major. The extent of deviation from the regulations was moderate, as three out of nine hazardous waste containers were leaking or in poor condition. I concur with Complainant that the appropriate penalty for this violation under the RCRA Penalty Policy is $25,790.

C. Count III

In Count III of its Complaint, Complainant alleges, and by virtue of its default, Respondent admits, that during the March 2007 inspection of the Facility, Respondent failed to keep five containers closed during storage, when waste was not being added to or removed from them. The potential for harm was moderate and the extent of deviation from the regulations was minor. Accordingly, I concur with the Agency's analysis that the appropriate penalty for this violation under the RCRA Penalty Policy is $6447.

D. Count IV

In Count IV of its Complaint, Complainant alleges, and by virtue of its default, Respondent admits, that Respondent failed to properly label or mark containers containing hazardous waste, and thus failed to satisfy one of the conditions for maintaining its exemption from the requirement that it have a RCRA operating permit or interim status. The potential for harm from this violation was moderate and the extent of deviation from

the regulations was minor. Accordingly, I concur with the Agency's analysis that the appropriate penalty for this violation under the RCRA Penalty Policy is $5803.

The total penalty to be assessed against Respondent is:

Count I	$ 1,028,742
Count II	25,790
Count III	6,447
Count IV	5,803
	$ 1,066,782

DEFAULT ORDER

Respondent is hereby ORDERED, as follows:

1. Respondent is assessed a civil penalty in the amount of $1,066,762.

2. Respondent shall, within thirty calendar days after this Default Order has become final, forward a cashier's or certified check, in the amount of $1,066,762 payable to the order of the "Treasurer, United States Of America." Respondent shall mail the check to the following address:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondent must simultaneously send copies of the check and transmittal letter to the Regional Hearing Clerk and to Catherine Garypie, Assistant Regional Counsel at the following address:

U.S. EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3590

In addition, Respondent shall mail a copy of the check and transmittal letter to:

Brenda Whitney (LR-8J)
Land and Chemicals Division

U.S. EPA Region 5
77 W. Jackson Blvd.
Chicago, IL 60604-3590

3. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless: (1) an appeal to the Environmental Appeals Board is taken from it by any part to the proceedings within thirty (30) days from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order; or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Date: March 24, 2011

Marcy A. Toney
Regional Judicial Officer
Region 5

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

CERTIFICATE OF SERVICE

I certify that the foregoing Default Order and Initial Decision, dated March 24, 2011, was sent this day in the following manner:

Original hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

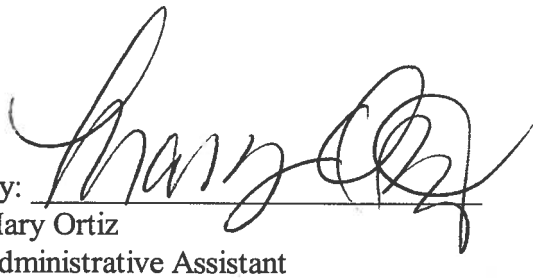
Copy hand delivered to
Attorney for Complainant:

Catherine Garypie
U. S. Environmental Protection
Agency, Region 5
Office of Regional Counsel
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy by U.S. Certified Mail
Return Receipt Requested to:

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

Dated: March 24, 2011

By: 
Mary Ortiz
Administrative Assistant