**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **IN THE MATTER OF:** | ) | |
| | ) | |
| **PUERTO RICO PORTS AUTHORITY,** | ) | **Docket No. TSCA-02-2001-9301** |
| | ) | |
| **Respondent** | ) | |

# DEFAULT ORDER AS TO LIABILITY AND ORDER SETTING PREHEARING PROCEDURES AS TO THE PENALTY

## I. Default Order

The Complaint in this matter, filed by the Acting Director, Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency Region 2 on March 30, 2001, alleges in one count that Respondent, Puerto Rico Ports Authority, violated Section 15(1)(C) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2614(a)(C), for failure to comply with Federal regulations governing the disposal of polychlorinated biphenyls (PCBs). Complainant proposes a civil penalty of $151,800 for the alleged violations.

Upon motion for extension of time, Respondent was granted until May 31, 2001 to file an Answer. Respondent, through counsel, submitted an Answer, dated May 31, 2001, which was filed on June 7, 2001. In the Answer, Respondent admitted Paragraphs 1 through 3 of the Complaint,[1] but did not admit or deny factual allegations in the remaining 35 paragraphs of the Complaint. Respondent alleged in its Answer that it "has commenced and is in the process of cleaning up the affected area" and disposing of all contaminated materials. Respondent requested, in view of such actions, that an informal settlement conference be held "to discuss the appropriateness of the proposed time." The Answer did not include a request for a hearing.

Rule 22.15(b) of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.15(b), sets forth the requirements for an answer as follows:

The answer shall clearly and directly admit, deny, or explain each of the factual

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[1]The first three paragraphs provide the statutory authority for filing the Complaint, identify the Complainant, and state that the Complaint serves as notice of Complainant's preliminary determination of Respondent's violation of Federal regulations concerning PCBs.

> allegations contained in the complaint with regard to which respondent has any knowledge. . . .
> The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and (3) whether a hearing is requested.

The Rules also state that "[f]ailure of respondent to admit, deny or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." 40 C.F.R. § 22.15(d). The Complaint set forth the provisions of Section 22.15(b) and (d), and enclosed a copy of the Rules.

Because Respondent did not admit, deny or explain the factual allegations in the Complaint, it was not clear that issues appropriate for adjudication were raised from Respondent's mere assertion that it has commenced clean up and disposal of contaminated material. Consequently, by Order dated July 12, 2001, Respondent was ordered to file a written statement on or before July 27, 2001, showing cause for holding a hearing in this matter, stating reasons why the Answer filed on June 7, 2001, should not constitute an admission of all of the factual allegations in the Complaint, and clearly and directly admitting, denying or explaining each of the factual allegations contained in the Complaint, as required by 40 C.F.R. § 22.15(b). The Order stated that the failure of Respondent to file such statement by that date shall constitute grounds for deeming the factual allegations in the Complaint as admitted.

To date, Respondent has not responded to the Order to Show Cause. The Rules provide, at 40 C.F.R. § 22.17(a), in pertinent part:

> A party may be found to be in default . . . upon failure to comply with . . . an order of the Presiding Officer . . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of Respondent's right to contest such factual allegations.

Because Respondent has failed to comply with the Order to Show Cause, Respondent is hereby found in default. Therefore, and as warned in the Order, Respondent is deemed to have admitted all of the facts alleged in the Complaint.

The Rules state at 40 C.F.R. § 22.17(c) as follows, in pertinent part:

> 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. . . . . The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

The record does not show such good cause. However, as to whether a default order should be

issued as to any or all parts of this proceeding, Complainant has not requested a default order assessing the proposed penalty. The prehearing exchange has not yet commenced, and thus no evidence or detailed explanation of the proposed penalty assessment exists in the case file to support the proposed penalty of $151,800. Therefore, there is no basis upon which to determine whether the proposed penalty is clearly inconsistent with the record of the proceeding or the Act.

Accordingly, the issue of the penalty is reserved for further proceedings.

In sum, Respondent is found to be in default under 40 C.F.R. § 22.17 and is liable for the violations alleged in the Complaint. The following Prehearing Order will initiate the hearing process as to the issue of the penalty.

## II. Prehearing Order

Agency policy strongly supports settlement and the procedures regarding documenting settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. §22.18. If settlement discussions in this proceeding already have been undertaken, the parties are commended for taking the initiative to resolve this matter informally and expeditiously. Each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. The parties should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. A settlement allows the parties to control the outcome of the case, whereas a judicial decision takes such control away. With such thoughts in mind the parties are directed to engage in a settlement conference on or before **August 17, 2001**, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **August 24, 2001**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **September 7, 2001**, with a copy sent to the undersigned.

Should a Consent Agreement not be finalized on or before the latter date, the parties must prepare for hearing, solely on the issue of the penalty to assess in this matter, and shall strictly comply with the prehearing requirements of this Order.

This Order is issued pursuant to Section 22.19(a) of the Rules. Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Pursuant to Section 22.19(a) of the Rules, each party shall file with the Regional Hearing Clerk and shall serve on the opposing party and on the Presiding Judge:

(A) the names of the expert and other witnesses intended to be called at hearing to testify with respect to the penalty, with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called;

(B) copies of all documents and exhibits intended to be introduced into evidence

in regard to the penalty. Included among the documents produced shall be a curriculum vita or resume for each identified expert witness. The documents and exhibits shall be identified as "Complainant's" or "Respondent's" exhibit, as appropriate, and numbered with Arabic numerals (e.g., Complainant's Ex. 1); and

(C) a statement as to its views as to the appropriate place of hearing and estimate the time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules.

2. In addition, the Complainant shall submit the following as part of its Initial Prehearing Exchange:

(A) a copy of any documents in support of the assessment of the proposed penalty;

(B) a copy of any penalty policies or guidelines relied upon by Complainant in calculating the proposed penalty, including the April 9, 1990 PCB Penalty Policy; and

(C) a narrative statement explaining in detail the calculation of the proposed penalty, addressing each factor listed in Section 16 of the Toxic Substances Control Act.

3. The Respondent shall also submit the following as part of its Prehearing Exchange:

(A) if Respondent takes the position that Respondent is unable to pay the proposed penalty, a copy of any and all documents it intends to rely upon in support of such position.

The prehearing exchanges called for above shall be filed in seriatim fashion, pursuant to the following schedule:

**September 7, 2001** - Complainant's Initial Prehearing Exchange

**September28, 2001** - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence

Section 22.19(a) of the Rules of Practice provides that, except in accordance with Section 22.22(a), any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify. Therefore, each party should thoughtfully prepare its prehearing exchange. Any supplements to prehearing exchanges shall be filed with

an accompanying motion to supplement the prehearing exchange.

The Complaint herein gave the Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. Section 554(c)(2) of the APA sets out that a hearing be conducted under Section 556 of the APA. Section 556(d) provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, the Respondent has the right to defend itself against the assessment of Complainant's proposed penalty by way of direct evidence, rebuttal evidence or through cross-examination of the Complainant's witnesses. Respondent is entitled to elect any or all three means to pursue its defenses. If the Respondent intends to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. **The Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of the Complainant's witnesses, can result in the entry of a default judgment assessing the penalty proposed in the Complaint. THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS OR EVEN THE EXISTENCE OF A SETTLEMENT IN PRINCIPLE DOES NOT CONSTITUTE A BASIS FOR FAILING TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS. ONLY THE FILING WITH THE HEARING CLERK OF A FULLY EXECUTED CONSENT AGREEMENT AND FINAL ORDER, OR AN ORDER OF THE JUDGE, EXCUSES NONCOMPLIANCE WITH FILING DEADLINES.**

Prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, if sent by mail, shall be addressed as follows:

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900**L**
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

Hand-delivered packages transported by Federal Express or another delivery service which x-rays their packages as part of their routine security procedures, may be delivered directly to the Offices of the Administrative Law Judges at 1099 14th Street, N.W., Suite 350, Washington, D.C. 20005.

Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 or my staff attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number is (202) 565-0044.

If any party wishes to receive, by e-mail or by facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for expedited courtesy copies by letter addressed to Maria Whiting-Beale, Legal Staff Assistant, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Mail Code 1900**L,** 1200 Pennsylvania Ave. N.W., Washington, D.C. 20460. The letter shall include the case docket number, the e-mail address or facsimile number to which the copies are to be sent, and a statement as to whether the party requests: (A) expedited courtesy copies of the initial decision and/or any orders on motion for accelerated decision or dismissal, or (B) expedited courtesy copies of all decisions and substantive orders. The undersigned's office will endeavor to comply with such requests, but does not guarantee the party's receipt of expedited courtesy copies.

Prior to filing any motion, the moving party is directed to contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion. The motion shall then state the position of the other party or parties. The mere consent of the other parties to the relief sought does not assure that the motion will be granted and no reliance should be placed on the granting of an unopposed motion. Furthermore, all motions which do not state that the other party has no objection to the relief sought must be submitted in sufficient time to permit the filing of a response by that party and the issuance of a ruling on the motion, before any relevant deadline set by this or any subsequent order. Sections 22.16(b) and 22.7(c) of the Rules of Practice, 40 C.F.R. §§22.16(b) and 22.7(c), allow a fifteen-day response period for motions with an additional five days added thereto if the pleading is served by mail. Motions not filed in a timely manner will not be considered. In this regard, if either party intends to file any motion for accelerated decision as to the penalty under 40 C.F.R. § 22.20(a), it shall be filed **within thirty days after the due date for Respondent's Prehearing Exchange.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: August 3, 2001
Washington, D.C.