



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

SEP 26 2013

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2013 OCT 18 P 4: 09
REGIONAL HEARING
CLERK

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Article No. 7005 3110 0000 5939 5868

Ely Fisch
Vice President, General Manager
T. C. Dunham Paint Company, Inc.
581 Saw Mill River Road
Yonkers, New York 10701

Re: **In the Matter of T. C. Dunham Paint Company, Inc.**
Docket Number RCRA-02-2013-7105

Dear Mr. Fisch:

Enclosed is the Complaint, Compliance Order and Opportunity for Hearing in the above-referenced proceeding. The Complaint alleges violations of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.*

You have the right to a formal hearing to contest any of the allegations in the Complaint and/or to contest the penalty proposed in the Complaint. If you wish to contest the allegations and/or the penalty proposed in the Complaint, you must file an Answer within **thirty (30)** days of your receipt of the enclosed Complaint with the Regional Hearing Clerk of the Environmental Protection Agency ("EPA"), Region 2, at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

If you do not file an Answer within thirty (30) days of receipt of this Complaint and have not obtained a formal extension for filing an Answer from the Regional Judicial Officer of Region 2, a default order may be entered against you and the entire proposed penalty may be assessed.

Whether or not you request a formal hearing, you may request an informal conference with EPA to discuss any issue relating to the alleged violations and the amount of the proposed penalty.

EPA encourages all parties against whom it files a Complaint to pursue the possibility of settlement and to have an informal conference with EPA. However, a request for an informal conference **does not** substitute for a written Answer, affect what you may choose to say in an Answer, or extend the thirty (30) days by which you must file an Answer requesting a hearing.

You will find enclosed a copy of the "Consolidated Rules of Practice" which govern this proceeding. (A brief discussion of some of these rules appears in the later part of the Complaint.) For your general information and use, I also enclose both an "Information Sheet for U.S. EPA Small Business Resources" and a "Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings" which may apply to you depending on the size of the proposed penalty and the nature of your company.

EPA encourages the use of Supplemental Environmental Projects, where appropriate, as part of any settlement. I am enclosing a brochure on "EPA's Supplemental Environmental Projects Policy." Please note that these are only available as part of a negotiated settlement and are not available if this case has to be resolved by a formal adjudication.

If you have any questions or wish to schedule an informal conference, please contact the attorney whose name is listed in the Complaint.

Sincerely yours,



Dore LaPosta, Director
Division of Enforcement and Compliance Assistance

Enclosures

cc: Karen Maples, Regional Hearing Clerk (without enclosures)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 2

In the matter of:

T.C. Dunham Paint Company, Inc.

Respondent.

Proceeding Under Section 3008 of the Solid Waste Disposal Act, as amended

COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING

Docket No. RCRA-02-2013-7105

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
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I. COMPLAINT

This is a civil administrative proceeding instituted pursuant to Section 3008 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.* (referred to collectively as the "Act" or "RCRA").

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING ("Complaint") serves notice of EPA's preliminary determination that the **T.C. Dunham Paint Company, Inc.** has violated certain requirements of the authorized New York State hazardous waste program and the federal hazardous waste program.

Section 3006(b) of the Act, 42 U.S.C. § 6926(b), provides that EPA's Administrator may, if certain criteria are met, authorize a state to operate a hazardous waste program (within the meaning of Section 3006 of the Act, 42 U.S.C. § 6926) in lieu of the regulations comprising the federal hazardous waste program (the Federal Program). The State of New York received final authorization to administer its base hazardous waste program on May 29, 1986. Since 1986, New York State has been authorized for many other hazardous waste requirements promulgated by EPA pursuant to RCRA, See 67 Fed. Reg. 49864 (August 1, 2002), and 70 Fed. Reg. 1825 (January 11, 2005), 74 Fed. Reg. 31380 (July 1, 2009) and 78 Fed. Reg. 15299 (March 11, 2013). New York is authorized for most hazardous waste regulations issued by EPA as of January 22, 2002 and the Uniform Hazardous Waste Manifest Amendments issued by EPA on March 4, 2005 and June 16, 2005.

Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1), provides, in part, that "whenever on the basis of any information the Administrator [of EPA] determines that any person has violated or

is in violation of any requirement of this subchapter [Subtitle C of RCRA], the Administrator may issue an order assessing a civil penalty for any past or current violation.” Section 3008(a)(2) of RCRA, 42 U.S.C. 6928(a)(2) provides, in part, that “[i]n the case of a violation of any requirement of [Subtitle C of RCRA] where such violation occurs in a State which is authorized to carry out a hazardous waste program under [Section 3006 of RCRA, 42 U.S.C. 6926], the Administrator [of EPA] shall give notice to the State in which such violation has occurred prior to issuing an order.”

Section 3008(a) of the Act, 42 U.S.C. § 6928(a), authorizes EPA to enforce the regulations constituting the authorized State program and EPA retains primary responsibility for the enforcement of certain requirements promulgated pursuant to HSWA for which the State has not yet been authorized.

The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2, who has been duly delegated the authority to institute this action, hereby alleges:

Jurisdiction

1. This Tribunal has jurisdiction over the subject matter of this action pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and 40 C.F.R. § 22.1(a)(4).
2. In accordance with Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), EPA has given the State of New York prior notice of this action.

Respondent's background

3. Respondent is T.C. Dunham Paint Company, Inc. (“Respondent”), a manufacturer of paint products located at 581 Saw Mill River Road in Yonkers, New York (“Facility”).
4. The Facility is located next to the Saw Mill River.
5. Respondent is a for-profit corporation organized pursuant to the laws of the State of New York in 1989. Respondent is a “person” as that term is defined in Section 1004(15) of the Act, 42 U.S.C. § 6903(15), and in Title 6 of the New York Codes, Rules, and Regulations (“6 NYCRR”) § 370.2(b).¹
6. Respondent manufactures oil-based and latex paints using batch-mixing operations at its Facility.
7. Operations by the Respondent at its Facility began after November 1980.

¹ All words or phrases that have been defined in reference to statutory and/or regulatory provisions are used throughout the Complaint as so defined.

Notification of Hazardous Waste Generation

8. Respondent did not inform EPA, through a notification, that it generated hazardous waste at its Facility.
9. For the off-site disposal of hazardous waste, Respondent assumed the EPA identification number NYD013417902 previously assigned to the site.

Respondent's Generation of Solid Waste and Hazardous Waste

10. Hazardous wastes generated by Respondent through its paint batch mixing/blending, repackaging, and storage and handling activities, and in the course of normal building maintenance have included but are not limited to paint waste (listed on manifests as D035), ignitable waste (listed on manifests as D001), toxic waste (listed on manifests as D011), off-specification lacquers and resins, and spent mercury lamps.

EPA Investigation Activities

11. On or about May 24, 2012, a duly designated representative of EPA ("Inspector") conducted a RCRA Compliance Evaluation Inspection of Respondent at its Facility ("Inspection").
12. The Inspection was conducted in response to information from a federal Occupational Safety and Health Administration ("OSHA") inspector that a fire at the Facility's warehouse occurred on or about May 17, 2012, and that, during fire fighting operations, a large number of drums were observed haphazardly stored outdoors on the Respondent's property, in poor condition, generally unlabeled, and suspected to contain paint and related hazardous waste.
13. At the time of the Inspection, about one hundred (100) drums and numerous other containers were haphazardly stacked on bare ground, in an old truck trailer, and in two adjacent outdoor locations at the Facility.
14. At the time of the Inspection, many of the containers referred to in paragraph 12 were extremely corroded and some had leaked their contents; several of the drums were extensively deformed.
15. At the time of the Inspection, most of the containers referred to in paragraph 12 were unlabeled and their contents could not be specifically identified by the Respondent.
16. At the time of the Inspection, labels on some of the containers referred to in paragraph 12 indicated that they contained lacquers, and oil based paints and solvents; at least one drum contained cuttings from well drilling operations conducted in the mid-1990s.

17. At the time of the Inspection, a representative of the Respondent stated that these containers had “stood outside” for “about 20 years”.
18. At the time of the Inspection, and in reference to the drums and other containers referred to in paragraph 12, there were no aisle spaces between drums so that all the containers in poor condition could not be readily observed and assessed as to their potential for leaks and/or whether or not releases had already occurred. The lack of aisle space precluded the unobstructed movement of personnel, fire protection equipment, and/or spill control equipment, in an emergency.
19. At the time of the Inspection, three extensively corroded and unlabeled 55-gallon drums, whose contents could not be identified by the Respondent, were located in an outdoor area north of the two other outdoor hazardous waste storage areas.

Request for Information

20. On or about August 31, 2012, EPA issued to Respondent an Information Request Letter (“IRL”).
21. The IRL was issued pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, and sought, in part, information and documentation relating to Respondent’s management of the significant number of containers of waste and waste-like material being accumulated or stored, many of which had been observed to be corroded, leaking, or otherwise in poor condition, and many which were unlabeled; this information was needed to assist EPA in fully evaluating the Respondent’s compliance with RCRA regulations.
22. In a letter dated September 19, 2012, Respondent requested additional time of thirty (30) days to respond to the IRL.
23. In a letter dated September 24, 2012, EPA granted Respondent until November 7, 2012 to respond to the IRL.
24. On November 13, 2012, Respondent submitted its Response to the IRL (“Response”).
25. In its Response, Respondent provided an inventory (“Inventory”) listing one hundred thirty one (131) 55-gallon “Non Fire Related Drums” that were on site at the time of the Inspection.
26. The Inventory submitted by the Respondent denoted those drums which contained either re-usable material and those that had been determined to contain either hazardous waste or non-hazardous waste.
27. Of the 131 drums denoted on the Inventory, 87 drums were determined by the Respondent to contain ignitable (D001) hazardous waste and one drum was determined to contain corrosive hazardous waste; these were specifically described as containing “dirty

solvents”, “rubbery, sticky cement like liquid”, “paint sludge”, “gasoline”, “old oil based paint”, “mixed old varnish/lacquer sealer/thinners”, “initially thought to be Dirty Solvents but upon 2nd review are paint-related liquids”, “Marked TBA”, “Amber color Resin”, and “acidic”.

28. In its Response, Respondent provided copies of hazardous waste manifests for its off-site shipment of about 16,000 lbs of hazardous waste, and denoted an additional approximately 13,600 lbs (32 drums) of hazardous waste that were “awaiting proper offsite disposal”.

COUNT 1 – Failure to Make Hazardous Waste Determinations

29. Complainant repeats and realleges each allegation contained in paragraphs “1” through “28”, inclusive, with the same force and effect as if fully set forth below.
30. Pursuant to 6 NYCRR § 372.2(a)(2), a person who generates a solid waste must determine if that waste is a hazardous waste using the procedures specified in that provision.
31. Pursuant to 6 NYCRR § 371.1(c), subject to certain inapplicable exclusions, a “solid waste” is any “discarded material” that includes “abandoned”, “recycled” or “inherently waste-like materials” as those terms are further defined therein.
32. Pursuant to 6 NYCRR § 371.1(c)(3) materials are solid wastes if they are abandoned by being:
- a. disposed of;
 - b. burned or incinerated; or
 - c. accumulated, stored, or treated before or in lieu of being abandoned by being disposed of, burned or incinerated.
33. Upon information and belief, in the course of its operations, both prior to and as of the date of the Inspection, Respondent has generated materials which: (a) are waste or waste-like due to their being stored in corroded, leaking, and/or crushed containers; and/or (b), were unlabeled; and/or (c) have been stored for an extensive period of time without reasonable prospects of being used or sold as a product or product ingredient; and/or (d) are being stored in lieu of disposal at its Facility.
34. Upon information and belief, as a result of the aforementioned activities, Respondent has generated waste at its Facility, including but not limited to ignitable, corrosive, and toxic wastes which were “discarded material” and a “solid waste” as defined in 6 NYCRR § 371.1(c).
35. Upon information and belief, in the course of its operations, both prior to and as of the date of the Inspection, Respondent had not determined whether its wastes, including those denoted in paragraph “32”, above, constituted hazardous waste.

36. Respondent's failures to have made, or have a third-party make on its behalf, hazardous waste determinations for the aforementioned wastes at its Facility, constitute multiple violations of 6 NYCRR § 372.2(a)(2).

COUNT 2 - Failure to Minimize Risks of Fire, Explosion and Releases

37. Complainant repeats and realleges each allegation contained in paragraphs "1" through "28", inclusive, with the same force and effect as if fully set forth herein.
38. Pursuant to 6 NYCRR § 373-2.3(b), and 6 NYCRR § 373-3.3(b), 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.
39. For at least one hundred and eighty (180) days prior to and at the time of the Inspection, Respondent failed to maintain and operate its Facility 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 the air, soil or surface water through numerous actions or inactions at its Facility including the following:
- a. The haphazard manner in which containers of hazardous waste were stored (see paragraphs 12 and 13 above);
 - b. The prolonged outdoor storage of containers of hazardous waste, allowing their deterioration over time (see paragraphs 16 and 17 above);
 - c. The lack of aisle spaces between hazardous waste containers, preventing their inspection and preventative measures to minimize releases (see paragraph 18 above); and,
 - d. The failure to label and identify the contents of individual drums to allow their proper management (see paragraphs 15 and 19 above).
40. Respondent's aforementioned failures to maintain and operate its Facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents into the air, soil or surface water which could threaten human health or the environment, constitute multiple violations of 6 NYCRR § 373-2.3(b) or 6 NYCRR § 373-3.3(b).

COUNT 3 - Failure to Keep Containers in Good Condition

41. Complainant repeats and realleges each allegation contained in paragraphs "1" through "28", inclusive, with the same force and effect as if fully set forth herein.

42. Pursuant to 6 NYCRR § 373-2.9(b) and 6 NYCRR § 373-3.9(b) generators are required to keep containers in good condition and to transfer hazardous waste from a leaking container to a container that is in good condition.
43. Both prior to and at the time of the Inspection, Respondent stored hazardous waste in containers that were corroded or had already breached and released their contents at its Facility.
44. Respondent's failures to keep containers in good condition and to transfer hazardous waste from a leaking container to a container that is in good condition at its Facility, constitute multiple violations of 6 NYCRR § 373-2.9(b) or 6 NYCRR § 373-3.9(b).

II. PROPOSED CIVIL PENALTY

The Complainant, subject to the receipt and evaluation of further relevant information, proposes that Respondent be assessed the following civil penalty for the violations alleged in this Complaint:

Count 1:	\$ 37,500
Counts 2 and 3:	\$ 219,860

Total Proposed Penalty: \$ 257,360

The proposed civil penalty has been determined in accordance with Section 3008(a)(3) of the Act, 42 U.S.C. § 6928(a)(3). For purposes of determining the amount of any penalty assessed, Section 3008(a)(3) requires EPA to "take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." To develop the proposed penalty in this complaint, the Complainant has taken into account the particular facts and circumstances of this case and used EPA's 2003 RCRA Civil Penalty Policy, a copy of which is available upon request or can be found on the Internet at the following address: <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf>. This policy, which has been amended to take inflation into account, provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors to particular cases.

The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, required EPA to adjust its penalties for inflation on a periodic basis. The penalty amounts were amended for violations occurring on or after January 31, 1997. The maximum civil penalty under Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), for violations occurring after January 12, 2009 is \$37,500 per day of violation. 40 C.F.R. Part 19.

The Complainant proposes, subject to receipt and evaluation of further relevant information from the Respondent, that the Respondent be assessed the following civil penalty for the violations alleged in this Complaint. A penalty calculation worksheet and narrative explanation to support the penalty figure for each violation cited in this Complaint are included

in Attachment I, below. Matrices employed in the determination of individual penalties are included as Attachment II, below.

III. COMPLIANCE ORDER

Based upon the foregoing, and pursuant to the authority of Section 3008 of the Act, Complainant herewith issues the following Compliance Order to Respondent:

1. Commencing on the effective date of this Compliance Order, Respondent shall make any required determinations whether any and/or all of the solid wastes generated and/or stored at its Facility are hazardous wastes.
2. Commencing on the effective date of this Compliance Order, Respondent shall maintain and operate its facility 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 the air, soil or surface water which could threaten human health or the environment.
3. Commencing on the effective date of this Compliance Order, Respondent shall store hazardous waste only in containers that are in good condition.
4. Within thirty (30) calendar days of the effective date of this Compliance Order, Respondent shall comply with all other applicable federal and state regulatory requirements for hazardous waste generators, including those provisions for the short-term on-site storage of hazardous waste by the generator of such waste, at its Facility.
5. All responses, documentation, and evidence submitted in response to this Compliance Order should be sent to:

Ronald Voelkel
Environmental Scientist
RCRA Compliance Branch
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency - Region 2
290 Broadway, 21st Floor
New York, New York 10007-1866

This Compliance Order shall take effect thirty (30) days after service of this Order, unless by that date Respondent has requested a hearing pursuant to 40 C.F.R. § 22.15. *See* 42 U.S.C. § 6928(b) and 40 C.F.R. §§ 22.37(b) and 22.7(c).

Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all other applicable RCRA statutory or regulatory (federal and/or state) provisions, nor does such compliance release Respondent from liability for any violations at its Facility. In addition, nothing herein waives, prejudices or otherwise affects EPA's right to enforce any applicable provision of law, and to seek and obtain

any appropriate penalty or remedy under any such law, regarding Respondent's generation, handling and/or management of hazardous waste at its Facility.

IV. NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

Pursuant to the terms of Section 3008(c) of RCRA and the Debt Collection Improvement Act of 1996, a violator failing to take corrective action within the time specified in a compliance order regarding hazardous waste violations is liable for a civil penalty of up to \$37,500 for each day of continued noncompliance (73 Fed. Reg. 75340, December 11, 2008).

V. PROCEDURES GOVERNING THIS LITIGATION

Upon receipt of a compliance order issued under RCRA section 3008(a), Respondent may seek administrative review in accordance with 40 C.F.R. Part 22. The Respondent may seek judicial review of the compliance order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701 – 706, once it is final and reviewable pursuant to RCRA Section 3008(b) and 40 C.F.R. Part 22.

The rules of procedure governing civil administrative litigation have been set forth in 64 *Fed. Reg.* 40138 (July 23, 1999), entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS" and which are codified at 40 C.F.R. Part 22. A copy of these rules accompanies this "Complaint, Compliance Order and Notice of Opportunity for Hearing."

A. Answering The Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty and/or the Compliance Order is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within 30 days after service of the Complaint. 40 C.F.R. §§ 22.15(a) and 22.7(c). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866**

(NOTE: Any documents that are filed after the Answer has been filed should be filed as specified in "D" below.)

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b).

The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of their defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity To Request A Hearing

If requested by Respondent, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c). With regard to the Compliance Order in the Complaint, unless Respondent requests a hearing pursuant to 40 C.F.R. § 22.15 within thirty (30) days after the Compliance Order is served, the Compliance Order shall automatically become final. 40 C.F.R. § 22.37

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

C. Failure To Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). 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. 40 C.F.R. § 22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. §

22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court. Any default order requiring compliance action shall be effective and enforceable against Respondent without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d).

D. Filing of Documents Filed After the Answer

Unless otherwise ordered by the Presiding Officer for this proceeding, all documents filed after Respondent has filed an Answer should be filed with the Headquarters Hearing Clerk acting on behalf of the Regional Hearing Clerk, addressed as follows:

If filing by the United States Postal Service:

Sybil Anderson
Headquarters Hearing Clerk
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900R
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

If filing by UPS, FedEx, DHL or other courier or personal delivery, address to:

Sybil Anderson
Headquarters Hearing Clerk
Office of the Administrative Law Judges
Ronald Reagan Building, Room M1200
U.S. Environmental Protection Agency
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

E. Exhaustion Of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Agency's Environmental Appeals Board ("EAB"; see 40 C.F.R. § 1.25(e)) pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

To appeal an initial decision to the EAB, Respondent must do so "[w]ithin thirty (30) days after the initial decision is served." 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, "five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document." Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to

or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

VI. INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in the Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this complaint should be directed to:

Carl R. Howard, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, Room 1623
New York, New York 10007-1866
212-637-3216

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.


Any settlement that may be reached as a result of an informal settlement conference will be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waive its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). To conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

**VII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR
CONFERENCE**

If, instead of filing an Answer, Respondent wishes not to contest the Compliance Order in the Complaint and wants to pay the total amount of the proposed penalty within thirty (30) days after receipt of the Complaint, Respondent should promptly contact the Assistant Regional Counsel identified on the previous page.

Complainant:


Dore LaPosta, Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency, Region 2

Date SEPTEMBER 26, 2013

To: Mr. Ely Fisch
Vice President and General Manager
T.C. Dunham Paint Company, Inc.
581 Saw Mill River Road
Yonkers, New York 10701

cc: Russ Brauksieck, Chief
Facility Compliance Section
New York State Department of Environmental Conservation
Bureau of Technical Support
625 Broadway, 11th Floor
Albany, New York 12233-7250

CERTIFICATE OF SERVICE

This is to certify that on the day of OCT 18, 2013, I caused to be mailed a true and correct copy of the foregoing "COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING," bearing Docket Number RCRA-02-2013-7105, together with Attachments I and II (collectively henceforth referred to as the "Complaint"), and with a copy of the "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS," 40 C.F.R. Part 22, by certified mail, return receipt requested, to Mr. Ely Fisch, Vice President and General Manager, T.C. Dunham Paint Company, Inc., 581 Saw Mill River Road, Yonkers 10701, New York. I hand carried the original and a copy of the Complaint to the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2, 290 Broadway, 16th floor, New York, New York 10007-1866.

Dated: OCT 18, 2013
New York, New York

Mildred T. Bag

ATTACHMENT 1

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

Penalty Computation Worksheet (Count 1)

Respondent: T.C. Dunham Paint Company, Inc.

Facility Address: 581 Saw Mill River Road, Yonkers, New York

Requirement Violated:

6 NYCRR § 372.2(a)(2), a person who generates a solid waste must determine if that waste is a hazardous waste using the procedures specified in that provision.

PENALTY AMOUNT FOR COMPLAINT

- | | |
|---|----------------|
| 1. Gravity based penalty from matrix | \$37,500 |
| (a) Potential for harm. | MAJOR |
| (b) Extent of Deviation. | MAJOR |
| 2. Select an amount from the appropriate multi-day matrix cell. | Not applicable |
| 3. Multiply line 2 by number of days of violation minus 1. | Not applicable |
| 4. Add line 1 and line 3 | \$37,500 |
| 5. Percent increase/decrease for good faith. | Not applicable |
| 6. Percent increase for willfulness/negligence. | Not applicable |
| 7. Percent increase for history of noncompliance. | Not applicable |
| 8. Total lines 5 through 7 | Not applicable |
| 9. Calculate economic benefit. | Not applicable |
| 10. Add lines 4, 8, and 9 for penalty amount to be inserted into the complaint. | \$37,500 |

Penalty Computation Worksheet (Count 1)

1. Gravity Based Penalty

- a. Potential for Harm - The RCRA Civil Penalty Policy provides that the potential for harm should be based on two factors: the risk of human or environmental exposure and the adverse impact of the noncompliance on the regulatory scheme. Where an owner/operator of a facility generating solid waste fails to perform the required hazardous waste determination, the adverse impact on the regulatory scheme is maximized. This follows because, if the owner/operator is unaware the facility is generating hazardous waste, or decides not to attempt to identify its solid wastes as hazardous waste and to store those waste in lieu of disposal, there is a greater likelihood that the owner/operator will not comply with the applicable provisions of the regulatory scheme. In this case, the Potential for Harm was determined to be MAJOR because of the significant quantity and the number of containers not identified by the Respondent as being hazardous waste.
- b. Extent of Deviation - The extent of deviation present in this violation was determined to be MAJOR given the large number of containers and various types of wastes that were being stored, and due to the fact that the Respondent did not attempt to make *any* hazardous waste determinations.

The applicable cell ranges from \$28,330 to \$37,500. The high-point for the cell matrix was selected due to the scale of the noncompliance.

- c. Multiple/Multi-day – Multi-day penalties are not being sought at this time.

2. Adjustment Factors

Good Faith - Based upon facility specific factors and available information that Respondent did not identify the violation and take corrective action prior to the EPA Inspection, no adjustment has been made at this time.

- a. Willfulness/Negligence - Not applicable
- b. History of Compliance - Not applicable
- c. Ability to Pay - Not applicable
- d. Environmental Project - Not applicable
- e. Other Unique Factors - Not applicable

3. Economic Benefit - At this time, EPA is not seeking to recover the economic benefit, because it is believed to be under the level considered to be significant under the 2003 RCRA Civil Penalty Policy. Although some economic benefit was gained, the Facility ultimately incurred a lot of the expenses that had been deferred.

Penalty Computation Worksheet (Counts 2 and 3)

Respondent: T.C. Dunham Paint Company, Inc.

Facility Address: 581 Saw Mill River Road, Yonkers, New York

Requirements Violated:

6 NYCRR § 373-2.3(b) or 6 NYCRR § 373-3.3(b). Respondent failed to maintain and operate the Facility 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 at its Facility.

6 NYCRR § 373-2.9(b) or 6 NYCRR § 373-3.9(b). Respondent failed to keep containers in good condition and to transfer hazardous waste from leaking containers to containers that are in good condition.

1. Gravity based penalty from matrix	\$ 28,330
(a) Potential for Harm.	MAJOR
(b) Extent of Deviation.	MODERATE
2. Select an amount from the appropriate multi-day matrix cell.	Not applicable
3. Multiply line 2 by number of days of violation minus 1.	\$191,530
4. Add line 1 and line 3	\$219,860
5. Percent increase/decrease for good faith.	Not applicable
6. Percent increase for willfulness/negligence.	Not applicable
7. Percent increase for history of noncompliance.	Not applicable
8. Total lines 5 through 7	Not applicable
9. Calculate economic benefit.	Not applicable
10. Add lines 4, 8, and 9 for penalty amount to be inserted into the complaint.	\$219,860

Narrative Explanation in Support of Penalty Figure (Counts 2 and 3)

1. Gravity Based Penalty

- a. Potential for Harm - The potential for harm present in these violations was determined to be MAJOR. The Respondent at its Facility handled and stored a large numbers of containers and multiple types of hazardous chemicals, in lieu of disposal. The way Respondent handled these chemicals resulted in many of them being stored in containers which were crushed, extremely corroded and/or where these chemicals had already breached their containers, there had been uncontrolled releases of these chemicals into the environment. The haphazard organization of the containers and the lack of adequate aisle space between them aggravated the situation. The maintenance and operation of the Facility were of particular concern given that the Facility is located next to the Saw Mill River making the river subject to potential contamination by releases from these containers. Had these conditions not been discovered by emergency responders to the Facility's warehouse fire, the scenario may have been worse.
- b. Extent of Deviation - The extent of deviation present in this violation was determined to be MODERATE. A large number of containers of multiple types of solid and hazardous waste were being stored at various outside locations at Respondent's Facility for considerable lengths of time. The condition of many containers and the manner in which they were stored departed significantly from regulatory requirements. However, some of the containers were labeled and in relatively good condition.

The applicable cell ranges from \$ 21,250 to \$ 28,330. The high point of the cell range was selected consistent with the above.

- c. Multiple/Multi-day - From the extremely corroded condition of many of the containers, and from statements made by a Facility contractor at the time of the Inspection, it was clear that these containers had been stored for considerable lengths of time in a manner that contributed to the deterioration of the containers and that resulted in releases and the potential for additional releases into the environment. Therefore, it is deemed appropriate that a multi-day component be added to the penalty. The Agency will use its enforcement discretion to limit the multi-day component to 180 days.

The applicable multi-day matrix cell ranges from \$1,070 to \$5,670. The low point of the cell matrix was selected given that some of the containers were labeled and in good condition, and some containers stored product for manufacturing operations.

2. Adjustment Factors

Good Faith - Based upon Facility specific factors and available information, that Respondent did not identify the violation and take corrective action prior to the EPA Inspection, no adjustment has been made at this time.

- f. Willfulness/Negligence - Not applicable
- g. History of Compliance - Not applicable
- h. Ability to Pay - Not applicable
- i. Environmental Project - Not applicable
- j. Other Unique Factors - Not applicable

3. Economic Benefit - At this time, EPA is not seeking to recover the economic benefit, because it is believed to be under the level considered to be significant under the 2003 RCRA Civil Penalty Policy. Although some economic benefit was gained, the Facility ultimately incurred a lot of the expenses that had been deferred.

ATTACHMENT II

GRAVITY-BASED PENALTY MATRIX

P O T E N T I A L F O R H A R M	EXTENT OF DEVIATION FROM REQUIREMENT			
		Major	Moderate	Minor
	Major	\$37,500 to \$28,330	\$28,330 to \$21,250	\$21,250 to \$15,580
	Moderate	\$15,580 to \$11,330	\$11,330 to \$7,090	\$7,090 to \$4,250
	Minor	\$4,250 to \$2,130	\$2,130 to \$710	\$710 to \$150

MULTI-DAY MATRIX

P O T E N T I A L F O R H A R M	EXTENT OF DEVIATION FROM REQUIREMENT			
		Major	Moderate	Minor
	Major	\$7,090 To 1,420	\$5,670 To \$1,070	\$4,250 To 780
	Moderate	\$3,120 To 570	\$2,230 To 360	\$1,420 To 220
	Minor	\$850 To 150	\$430 To 150	\$150