**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION 2**
290 Broadway
New York, NY 10007

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| **IN THE MATTER OF:**<br><br>**Commonwealth Battery Development, Inc.,**<br><br>PR Road 2, Kilometer 11.2<br>Mora Ward<br>Isabela, Puerto Rico 00662<br><br>Respondent. | Docket No. **CAA-02-2006-1222**<br><br>Proceeding under 42 U.S.C. § 7413(d), Section 113(d) of the Clean Air Act |

## INITIAL DECISION AND DEFAULT ORDER

By Motion for Entry of Default ("Motion for Default"), the Complainant, the Director of the Caribbean Environmental Protection Division for Region 2 ("Region") of the United States Environmental Protection Agency ("EPA"), had moved for a default order and the assessment of civil penalties. That Motion sought a finding that the Respondent, Commonwealth Battery Development, Inc.("CBDI"), was liable for the violations of Sections 111 and 114 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7411 and 7414, and the New Source Performance Standards (NSPS) for Lead-Acid Battery Manufacturing Plants, 40 C.F.R. Part 60, Subpart KK, 40 C.F.R. § § 60.370-374 ("Lead-Acid Battery NSPS") and the general NSPS provisions, 40 C.F.R. Part 60, Subpart A, 40 C.F.R. §§ 60.1 et. seq. The Complainant requested assessment of a civil penalty in the amount of One Hundred Fifty Four Thousand Seven Hundred and Sixty Five Dollars ($154,765), as

proposed in the Complaint.

On July 11, 2012, the Undersigned issued an Order on Default as to Liability, in part granting the Region's Motion for Default by finding that CBDI was liable for the violations alleged in the Complaint and Motion for Default. However, the Undersigned declined to assess a penalty in that Order, instead requesting additional information from both parties regarding the penalty calculation generally, and, more specifically, certain factors that the Region cited in adjusting the proposed penalty in the Motion for Default. As the parties provided no additional information, I issue this Initial Decision and Default Order, including the following penalty assessment, based on the information before me when I issued the Order on Default of Liability, a copy of which is attached and incorporated herein.

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules"), 40 C.F.R. Part 22, and based upon the record in this matter, the Order on Default as to Liability and the following Findings of Fact, Conclusions of Law and Determination of Penalty, a civil penalty is hereby assessed against the Respondent in the amount of One Hundred Fourteen Thousand Five Hundred and Seventy Two Dollars ($114,572).

## BACKGROUND

This is a proceeding under Section 113(d) of the CAA, 42 U.S.C. § 7413(d), governed by the Consolidated Rules. The Region initiated this proceeding by issuing a Complaint and Notice of Opportunity to Request a Hearing ("Complaint") on September 25, 2006, against CBDI. In its Complaint, the Region alleged that CBDI had: failed to provide to EPA notice of the date of commencement of construction of an affected facility, postmarked no later than thirty (30) days after commencement; failed to furnish to EPA notification of

the actual date of initial startup of an affected facility postmarked no later than thirty (30) days after the date of initial startup; failed to conduct initial performance testing within sixty (60) days after achieving the maximum production rate, but not later than one hundred and eighty (180) days after startup operations; and, failed to determine the lead concentration, the volumetric flow rate of the effluent gas and the average lead feed rate. CBDI further failed to establish, monitor and record the appropriate pressure drop across the scrubbing system.

The Complaint stated on page 11 that:

> Your Answer should, clearly and directly, admit, deny or explain each factual allegation contained in this Complaint with regard to which you have knowledge. If you have no knowledge of a particular factual allegation of the Complaint, you must so state and the allegation will be deemed to be denied. The Answer shall also state: (1) the circumstances or arguments which you allege constitute the grounds of a defense; (2) whether a hearing is requested; and, (3) a concise statement of the facts which you intend to place at issue in the hearing.
>
> If you fail to serve and file an Answer to this Complaint within thirty (30) days of its receipt, Complainant may file a motion for default. A finding of default constitutes an admission of the facts alleged in the Complaint and a waiver of your right to a hearing. The total proposed penalty becomes due and payable without further proceedings thirty (30) days after the issue date of the Default Order.

CBDI did not file an Answer, and on July 18, 2007, the Region filed a Motion for Default. After a brief appearance by Counsel for CBDI and the filing of subsequent motions and orders, as described in more detail in the Findings of Fact, below, the Region filed a Second Motion for Entry of Default ("Second Motion for Default") on September 27, 2007. After additional orders and motions were filed, the Undersigned, as stated above, issued an

Order on Default as to Liability. To date, the CBDI has not filed an Answer to the Complaint or otherwise responded to any of the motions or orders discussed herein.

## FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17(c) and based upon the entire record, I make the following findings of fact, many of which are reiterated from the Order on Default as to Liability:

1. CBDI is a corporation duly organized pursuant to the laws of the Commonwealth of Puerto Rico, engaged in lead-acid battery manufacturing, located at PR Road 2, kilometer 111.2 at Mora Ward in the Municipality of Isabela, Puerto Rico.
2. On January 25, 2005, an EPA Enforcement Officer inspected CBDI's lead-acid battery manufacturing plant.
3. During the inspection, the EPA Enforcement Officer spoke with CBDI's Technical Director, who indicated to EPA's Enforcement Officer that CBDI's lead-acid battery manufacturing plant produces or has the design capacity to produce, in one day, batteries containing an amount of lead equal to or greater than 5.9 Mg (6.5 tons).
4. During the inspection, CBDI's Technical Director indicated to EPA's Enforcement Officer that construction of CBDI's lead-acid battery manufacturing plant commenced after January 14, 1980 and was completed on or about May 2002.
5. The affected facility at CBDI's lead-acid battery manufacturing plant is subject to the provisions of the Lead-Acid Battery New Source Performance Standards (NSPS).
6. During the inspection, CBDI's Technical Director indicated to EPA's Enforcement Officer that the actual date of initial startup of CBDI's lead-acid battery manufacturing plant was on or about October 2002.

7. During the inspection, the EPA Enforcement Officer asked for, but was not provided with evidence that:

a. CBDI had furnished EPA with notification of the date of commencement of construction of the Facility, postmarked no later than thirty (30) days after such date;

b. CBDI had furnished EPA with notification of the actual date of initial startup of the Facility, postmarked within fifteen (15) days after such date;

c. CBDI had conducted performance tests, within sixty (60) days after achieving the maximum production rate at which it will be operated, but not later than one hundred and eighty (180) days after the initial startup of the Facility;

d. CBDI had furnished EPA with a written report of the results of such performance tests;

e. CBDI had conducted opacity observations at the facility concurrent with the initial performance test;

f. CBDI had established operating parameters during performance testing which correlate with compliance as established during performance testing; and,

g. CBDI was operating using parameters which correlate with compliance as established during performance testing.

8. On December 29, 2005, the Region issued to CBDI a Compliance Order, CAA-02-2006-1004, ordering CBDI to submit the notification of date of construction and notification of the date of initial operation and to conduct the performance tests for

lead and opacity.

9. In February 2006, CBDI informed the Region that in August 2005 it had ceased operation of its facility and all facility equipment would be relocated to its corporate facilities on the mainland by the summer of 2006.

10. On September 25, 2006, pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), the Region filed a Complaint against CBDI[1], appended to the Motion for Default as Exhibit 1.

11. The Complaint alleged that CBDI violated Sections 111 and 114 of the Act, the New Source Performance Standards (NSPS) for Lead-Acid Battery Manufacturing Plants, 40 C.F.R. Part 60, Subpart KK, 40 C.F.R. § § 60.370-374, and the general NSPS provisions, 40 C.F.R. Part 60, Subpart A, 40 C.F.R. §§ 60.1 et. seq. The Complaint proposed a penalty of One Hundred Fifty Four Thousand Seven Hundred and Sixty Five dollars ($154,765).

12. On September 25, 2006, service of the Complaint, directed to Mr. John Odwen Wirtz at PMB 468, Isabela, Puerto Rico 00662, was attempted but not completed (Motion for Default, Exhibit 2).

13. On February 17, 2007, CBDI was served with the Complaint, by certified mail return receipt requested, at the following address: Mr. John Odwen Wirtz, Wirtz Mfg Co., Inc. Headquarters, P.O. Box 5006, 1105 Twenty-Fourth Street, Port Huron, MI

1 The September 2006 complaint alleged violations that occurred beginning in May 2002, some fifty two (52) months prior to the initiation of this action. Although section 113(d) of the CAA generally limits the authority of the Agency to prosecute violations by means of an administrative penalty action to those circumstances where the first alleged date of violation occurred no more than twelve months prior to the initiation of an administrative action, a longer period of violation is authorized where EPA and the Department of Justice (DOJ) jointly determine that such longer period is appropriate. EPA sought and obtained a waiver form DOJ to the time limitation to initiate this administrative action. This waiver was granted and EPA's Office of Enforcement and Compliance concurred (See paragraph 3of Complaint, page 2).

48061-5006 (Motion for Default, Exhibit 3).

14. Commonwealth Battery is a subsidiary of Wirtz Manufacturing (Motion for Default, Exhibit 4).

15. The return receipt was signed and returned on February 21, 2007 by an individual other than John Odwen Wirtz, President of CBDI.

16. On July 18, 2007, the Region filed a Motion for Default. It was served on CBDI via certified mail return receipt requested.

17. On August 1, 2007, CBDI, through Counsel, filed a Notice of Appearance and Request for an Extension of Time to Answer or Otherwise Plead, requesting an extension of fifteen (15) days within which to "answer the complaint."

18. On August 7, 2007, the request was granted by Order Granting an Extension of Time to Respond to Complainant's Motion for Default.

19. On August 21, 2007, CBDI filed a Motion in Connection with Order, stating inter alia that "CBDI is not in a position to responsibly respond to this agency's order" and requesting "that the imposed sanction be reduced."

20. On September 27, 2007, the Region filed a Second Motion for Default, incorporating by reference the first Motion and pointing out that despite a second opportunity, CBDI had failed to file an Answer to the Complaint. It was served on CBDI via certified mail return receipt requested.

21. On the advice of M. Lisa Knight, Senior Staff Attorney at the Office of Administrative Law Judges (OALJ), the Undersigned forwarded the file in this matter to Ms. Knight for a determination as to whether CBDI's response constituted an answer.

22. Ms. Knight returned the file, stating that the OALJ determined that an answer had not been filed. Therefore, the Undersigned remains the Presiding Officer in this matter.

23. On April 23, 2009, the Undersigned issued an Order to Supplement the Record, requesting additional information as to the Region's calculation of size of the violator component of the proposed penalty.

24. On May 21, 2009, the Region filed a Motion in Compliance with Order to Supplement the Record, setting forth more detail as to when and how its information as to the net worth of CBDI was gathered.

25. On May 27, 2009, Counsel for CBDI filed a Motion to Withdrawal[sic] as Counsel for Commonwealth Battery Development, Inc., citing the fact that the law firm had lost all communication with CBDI, as well as the former president and CEO of CBDI, and that the entity had no current presence in Puerto Rico. In the motion, Counsel provided an address where they believed CBDI could be reached for purposes of addressing future orders, motions and correspondence.

26. On March 22, 2012, an Order to Supplement the Record was issued, directing the parties to provide information as to the identity and address of attorneys, if any, representing each party and any new information which each party wanted included in the record. This Order was revised on March 27, 2012 to reflect what the Undersigned believed were the current addresses for the parties.

27. On March 29, 2012, the Complaint, by its newly appointed Attorney Carolina Jorden-Garcia, filed a Motion in Compliance with Order to Supplement the Record, incorporating by reference the allegations made in the prior motions for default and asking for additional time to file a motion supporting the Region's previous motions

for default.

28. On May 9, 2012, an Order Granting Additional Time to Supplement the Record was issued, directing the parties to supplement the record no later than June 1, 2012 with any information they want included in the record.

29. No further information was filed by either party.

30. On July 11, 2012, an Order on Default as to Liability was issued, partially granting the Complainant's motion by finding CBDI liable for the violations alleged in the Complaint and the Motions for Default, but declining to assess a penalty, and requesting additional information from both parties regarding the calculation of the penalty.

31. To date, no further information was filed by either party.

30. To date, CBDI has not filed an Answer to the Complaint or a response to the orders and motions issued in this matter.

## CONCLUSIONS OF LAW

1. Jurisdiction is conferred by Section 113 of the CAA, 42 U.S.C. § 7413.
2. CBDI is an owner or operator within the meaning of 40 C.F.R. § 60.2.
3. The lead-acid battery manufacturing plant operated by CBDI is a "stationary source" within the meaning of 40 C.F.R. § 60.2.
4. CBDI's lead-acid battery manufacturing plant was constructed after April 16, 1982, the date on which EPA promulgated the Lead-Acid Battery NSPS.
5. CBDI's lead-acid battery manufacturing plant is a "new source," within the meaning of 40 C.F.R. § 60.2.
6. CBDI operates a grid casting facility, a paste mixing facility, a three-process

operation facility and a lead oxide manufacturing facility.

7. The lead-acid battery manufacturing plant operated by CBDI contains an "affected facility" within the meaning of 40 C.F.R. § 60.2.

8. The provisions of 40 C.F.R. Part 60 apply to CBDI, who is an owner or operator of a lead-acid battery manufacturing plant, which is a stationary source that contains an affected facility, the construction of which commenced after the date on which EPA promulgated the Lead-Acid Battery NSPS.

9. Based on the Findings of Fact and Conclusions of Law set forth above, CBDI's failure to furnish to EPA notification of the date of commencement of construction of an affected facility, postmarked no later than thirty (30) days after commencement, constitutes a violation of 40 C.F.R. § 60.7 (a) (1), a regulation promulgated pursuant to Sections 111 and 114 of the Act.

10. Based on the Findings of Fact and Conclusions of Law set forth above, CBDI's failure to furnish to EPA notification of the actual date of initial startup of an affected facility postmarked no later than thirty (30) days after the date of initial startup constitutes a violation of 40 C.F.R. § 60.7 (a) (3), a regulation promulgated pursuant to Sections 111 and 114 of the Act.

11. Based on the Findings of Fact and Conclusions of Law set forth above, CBDI's failure to conduct initial performance testing within sixty (60) days after achieving the maximum production rate, but not later than one hundred and eighty (180) days after startup operations, constitutes a violation of 40 C.F.R. § 60.8(a), a regulation promulgated pursuant to Sections 111 and 114 of the Act.

12. Based on the Findings of Fact and Conclusions of Law set forth above, CBDI's

failure to conduct opacity observations concurrent with the initial performance test required by 40 C.F.R. § 60.8(a) constitutes a violation of 40 C.F.R. §§ 60.11(e)(1) and 60.11(d), regulations promulgated pursuant to Sections 111 and 114 of the Act.

13. Based on the Findings of Fact and Conclusions of Law set forth above, CBDI's failure to use the test methods and procedures contained in the Lead Acid Battery NSPS to determine the lead concentration, the volumetric flow rate of the effluent gas and the average lead feed rate in accordance with 40 C.F.R. § 60.374 constitutes a violation of 40 C.F.R. § 60.8(b), a regulation promulgated pursuant to Sections 111 and 114 of the Act.

14. Based on the Findings of Fact and Conclusions of Law set forth above, CBDI's failure to establish, during a performance test conducted in accordance with 40 C.F.R. § 60.8, the pressure drop across the scrubbing system so that it could monitor and record the appropriate pressure drop across the scrubbing system in accordance with 40 C.F.R. § 60.373, to demonstrate and maintain compliance with 40 C.F.R. § 60.372 on an ongoing basis, constitutes a violation of 40 C.F.R. § 60.11(d), a regulation promulgated pursuant to Sections 111 and 114 of the Act.

15. Based on the Findings of Fact and Conclusions of Law set forth above, CBDI's failure to comply with the general NSPS regulations and the Lead Acid Battery NSPS constitute violations of Sections 111 and 113 of the Act, which result in CBDI being subject to the assessment of administrative penalties pursuant to Section 113(d) of the Act.

16. CBDI is a "person" as defined in Section 302(e) of the Act, and is therefore subject to the assessment of administrative penalties under Section 113(d) of the Act.

17. Section 113(d) of the Act provides that EPA may assess a civil administrative penalty of up to Twenty-Five Thousand Dollars ($25,000) per day for each violation of the Act. The Debt Collection Improvement Act of 1996 (DCIA) requires EPA to periodically adjust its civil monetary penalties for inflation. On December 31, 1996 and February 13, 2004, EPA adopted regulations entitled "Adjustment of Civil Monetary Penalties for Inflation", 40 C.F.R. Part 19, which provide that the maximum civil penalty should be adjusted up to $27,500 for each violation that occurred on or after January 30, 1997 and up to $32,500 for violations which occurred on or after March 15, 2004 but before January 12, 2009.

18. The Complaint in this action was served upon CBDI in accordance with 40 C.F.R. § 22.5(b)(1).

19. CBDI's failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes a default by CBDI pursuant to 40 C.F.R. § 22.17(a).

20. CBDI's default constitutes an admission of the allegations set forth in the Complaint and a waiver of CBDI's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a) and 22.15(d).

21. CBDI has failed to comply with the provisions of Compliance Orders issued pursuant to Section 113(d) of the Act.

22. Pursuant to 40 C.F.R. § 22.17(a), CBDI's failure to file a timely Answer or otherwise respond to the Complaint is grounds for the entry of a default order against CBDI. A default order that does not determine remedy along with liability is not an initial decision unless it resolves "all issues and claims in the proceeding." Hence, the Order on Default as to Liability issued in this matter did not constitute an initial

decision in accordance with 40 C.F.R. §22.17(c). Based upon a reading of the regulations, where the initial default motion requested assessment of a civil penalty and included a penalty calculation, there is an expectation that an Order on Default as to Liability will be followed by a determination of penalty and issuance of an Initial Decision and Default Order assessing such penalty.

**DETERMINATION OF PENALTY**

Pursuant to Section 22.17(c) of the Consolidated Rules, the relief proposed in the complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the statute under which the action is brought. The EPA's proposed civil penalty is $154,765. As more fully set out below, I have adjusted the penalty downward to $114,572. Given the facts of this proceeding, I believe this adjustment is fair and consistent with the statutory factors under CAA Section 113(e), 42 U.S.C. § 7413(e), and the Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991) ("CAA Penalty Policy").[2]

As stated above, Section 113(d) of the Act provides that EPA may assess a civil administrative penalty of up to Twenty-Five Thousand Dollars ($25,000) per day for each violation of the Act. The DCIA requires EPA to periodically adjust its civil monetary penalties for inflation. On December 31, 1996 and February 13, 2004, EPA adopted regulations entitled "Adjustment of Civil Monetary Penalties for Inflation", 40 C.F.R. Part 19, which provide that the maximum civil penalty should be adjusted up to $27,500 for each violation that occurred on or after January 30, 1997 and up to $32,500 for violations which occurred on or after March 15, 2004 but before January 12, 2009.

[2] 40 C.F.R. § 22.27(b) directs that the Presiding Officer consider, in addition to any factors enumerated in the statute, any civil penalty guidelines issued under the statute.

In both its Complaint and its Motions for Default, EPA seeks a civil penalty of $154,765, based upon the statutory factors in Section 113(e) of the CAA, 42 U.S.C. § 7413(e) and the guidance provided in the CAA Penalty Policy. The statutory factors under Section 113(e) of the CAA include the size of the violator's business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, the payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation and other factors as justice may require.

The Penalty Calculation, attached to the Motion for Default as Exhibit 5, discussed the criteria set forth in the statute and the CAA Penalty Policy, setting forth a detailed explanation of the penalty calculations, and together with the section of the Complaint entitled Proposed Civil Penalty (Complaint at page 8) is summarized and evaluated herein.

In assessing a penalty of $114,572, I took the following findings into consideration:

1. As stated above and set forth as Count 1 in the Complaint, CBDI, as owner or operator of a stationary source, failed to notify EPA of the date of commencement of construction of an affected facility by notice postmarked no later than 30 days after the date of commencement of construction, as required by 40 C.F.R. § 60.7(a)(1). EPA's CAA Penalty Policy provides that a penalty of $15,000 be proposed for a failure to report or notify. CBDI's failure to notify EPA of the date of commencement of construction occurred on or about May 2002 and prior to March 15, 2004. Therefore, pursuant to the DCIA and 40 C.F.R. Part 19, EPA adjusted the proposed penalty 10% for inflation. Accordingly, EPA proposed an inflation adjusted penalty of $16,500 for the failure to furnish EPA with the required notification. I

concur with the Region's analysis and assess a penalty for this violation of $16,500.

2. CBDI failed to furnish EPA with notification of the actual date of initial startup of an affected facility, postmarked no later than 30 days after the date of initial startup, as required by 40 C.F.R. § 60.7(a)(3) (Count 2 of the Complaint). EPA's CAA Penalty Policy provides that a penalty of $15,000 be proposed for a failure to report or notify. CBDI's failure to notify EPA of the date of startup occurred on or about October 2002 and prior to March 15, 2004. Therefore, pursuant to the DCIA and 40 C.F.R. Part 19, EPA increased the proposed penalty by 10% for inflation. Accordingly, EPA proposed an inflation adjusted gravity component of $16,500 for the failure to furnish EPA with the required notification. I concur with the Region's analysis and assess a penalty for this violation of $16,500.

3. Subpart A provides, at 40 C.F.R. § 60.8(a), that within 60 days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after initial startup of such facility and at such other times as may be required by the EPA under Section 114 of the Act, the owner or operator of such facility shall conduct performance test(s) and furnish the EPA a written report of the results of such performance test(s). As discussed above at paragraph 7 of the Findings of Fact, CBDI did not conduct the required tests (Count 3 of the Complaint). EPA's CAA Penalty Policy provides that a $15,000 penalty should be proposed for each of the following failures: failure to conduct performance testing, failure to perform a required test method, failure to submit reports, and failure to perform a work practice requirement.

However, the Region found that these work practice, reporting and testing

violations that resulted from CBDI's failure to conduct an initial performance test were not mutually exclusive. Therefore, EPA proposed that a penalty of $15,000 be assessed for the importance to the regulatory scheme portion of the gravity component of the penalty for Count 3. I concur with the Region's analysis and find that the appropriate penalty for the importance to the regulatory scheme of this violation is $15,000.

In addition, because this violation resulted in a failure to demonstrate and were therefore likely to result in a failure to maintain compliance with the standard, EPA found that there was an ongoing violation of the NSPS. Therefore, the Region proposed that a penalty be assessed for the length of time that the violation persisted. The violation alleged in Count 3 of the Complaint extended from April 2002 up to August 2005, for a total of 29 months. Pursuant to the CAA Penalty Policy, a penalty of $30,000 should be proposed for a violation that persists for a period of 25 to 30 months; therefore, EPA proposed an additional penalty of $30,000 for the length of time of CBDI's violations. I concur with the Region's analysis, agreeing that it is appropriate to an increase in penalty of $30,000 to reflect the fact that CBDI's violation was ongoing.

The period of time this violation extended into was both before and after March 15, 2004. Therefore, pursuant to the DCIA and 40 C.F.R. Part 19, EPA adjusted for inflation the proposed gravity component ($45,000) as follows: 10% for the months of violation that occurred before March 2004 and 28.95% for the months of violation that occurred after March 2004. I agree that this adjustment to reflect inflation was appropriate, for a subtotal of $63,975 for the violations set forth in

Count 3.

The Region also took into consideration the toxicity of the violation. Because the violations alleged in the Complaint involved lead compounds, a hazardous air pollutant listed in Section 112(b)(1) of the Act, EPA proposed a penalty of $15,000 be assessed for actual or possible harm for toxicity of the pollutant. I concur with the Region's analysis that the appropriate penalty for toxicity is $15,000.

EPA calculated a total of $78,975 for the proposed gravity component for Count 3. I agree with that calculation and assess a penalty of $78,975.

4. As provided by the CAA Penalty Policy, the Region also considered the size of the violator, based on the violator's net worth. Relying on information gathered from the Commonwealth of Puerto Rico's State Department Corporation Registry, the Region "estimated" that CBDI's net worth was approximately $5,564,569, which falls within the range for which the policy directs a $20,000 upward adjustment to the penalty. Pursuant to 40 C.F.R. Part 19, EPA adjusted this component of the penalty by 28.95% for inflation, which resulted in a total proposed size of violator penalty increase of $25,790.

In the Order on Default as to Liability, based on my belief that the information supporting this proposed increase was insufficient, I requested further documentation and information regarding the size of violator as follows:

> 2. On or before **July 27, 2012**, Complainant is to file and serve a document supplementing the record by providing the following information to support the proposed penalty, in accordance with 40 C.F.R. §§ 22.5 and 22.16....
>
> b. Explanation of the size of

violator calculation of $25,790 ($20,000 plus $5,790 for inflation), set forth in the Penalty Calculation. While I understand that the Commonwealth of Puerto Rico's State Department Corporation Registry listed the Respondents net worth as 5.54 million dollars as of September 19, 2006, I am seeking further assurance that this figure is accurate given that "the information gathered from the State department pertained only to the Commonwealth Battery Isabela Facility and it was gathered approximately a year after the company ceased operation" (Complainant's Motion in Compliance with Order to Supplement the Record, May 21, 2009).

3. Respondent shall file a response no later than **fifteen (15) days**

The Region did not respond to Paragraph 2b of the Order, and no further information was provided by either party concerning the size of violator. Therefore, I hereby lower the amount attributed to the size of the violator to $2,000, which is the lowest amount provided for in the CAA Penalty Policy and is usually applicable to violators with a net worth of less than $100,000.

As stated above, I believe more definitive documentation of CBDI's net worth was necessary to justify an increase of $20,000, especially in light of the fact that the Region acknowledges that the information it relied on for the estimate pertained only to the Puerto Rico facility and CBDI had closed that facility a year before the information was gathered. In addition, in a letter to EPA dated February 27, 2006, John Wirtz, President of Respondent CBDI, as well as the parent company of Wirtz Manufacturing Company Inc., stated that CBDI had ceased operations in Puerto Rico as of August 2005, and had either sold assets or moved them to the head

offices of CBDI in Port Huron, Michigan. Therefore, while recognizing that the CBDI may have continued to do business in the United States, I feel additional information was needed concerning CBDI's net worth once the Puerto Rico facility ceased operations.

The regulations require that if a Presiding Officer assesses a penalty different than that proposed in the Complaint, the Presiding Officer shall explain his reasoning in the Initial Decision. The case law is clear that the Presiding Officer may adjust a penalty proposed in a complaint or default motion based upon the factors enumerated in the statute if the adjustment is adequately explained and justified. 40 C.F.R. § 22.27(b). *See, e.g., In re CDT Landfill Corporation*, 11 E.A.D. 88 (EAB 2003); *In re City of Wilkes-Barre, A.R. Popple, Inc., & Wyoming S. & P.*, 13 E.A.D. 332 (EAB 2007). The Environmental Appeals Board ("EAB" or "Board") has stated that it applies a deferential standard of review to the penalty determination of a Presiding Officer and will not substitute its judgment for that of the Presiding Officer when he or she assigns a penalty within a range of guidelines provided in the penalty policy and has not committed an abuse of discretion or made a clear error in rendering the determination. *CDT Landfill Corporation*, 11 E.A.D. at 117; *City of Wilkes-Barre*, 13 E.A.D. at 346; *In re Willie P. Burrell & The Willie P. Burrell Trust*, TSCA Appeal No. 11-05, slip op. at 20 (EAB August 21, 2012), 15 E.A.D. at ___.

The Board has also held that the Presiding Officer may depart from the penalty policy as long as the Presiding Officer considered EPA's penalty policy and the reasons for departure from that policy are adequately explained. *In re EK Associates, L.P., d/b/a Ekco/Glaco, and EK Management Corp.*, 8 E.A.D. 458 (EAB

1999).

Specifically, there are precedents supporting a Presiding Officer's adjustment of the size of the violator determination made by EPA in cases where the Presiding Officer believes that the information presented by EPA in support of the proposed increase in a complaint or default motion was inconclusive or incorrect. In considering an EPA appeal of an Initial Decision issued by the Presiding Officer, the EAB found that the respondent had provided enough information, including testimony as to the fact that the respondent had gone out of business, was in debt and had few assets, to support a determination that the size of respondent company had significantly decreased since the filing of the complaint. This decrease in size necessitated an adjustment downward in the size of the penalty which had been assessed by EPA. *In re Commercial Cartage Company*, 7 E.A.D. 784 (EAB 1998).

When a Presiding Officer lacked any definitive information as to the size of the violator, she upheld the EPA's assessment of the lowest adjustment for this factor. *In the Matter of David L. Stergion d/b/a Stergion Automotive,* Docket No. CAA-07-2001-0014 (RJO, Sept. 27, 2001).

The EAB upheld an increase in the size of penalty factor made by the Presiding Officer based on tax returns provided by the respondent with its answer. In this case, EPA's expert had testified that he had assessed the lowest increase in the proposed penalty based on the size of the violator factor because he did not have much information at the time he calculated the proposed penalty. *In re Chippewa Hazardous Waste Remediation & Energy, Inc., d/b/a/ Chippewa Hazardous Waste, Inc.*, 12 E.A.D. 346 (EAB 2005).

The CAA Penalty Policy is clear that the size of the violator is based on the company's entire operation, not just the violating facility. The policy also states that only the net worth of the respondent corporation should be considered for this calculation; gross revenues of subsidiaries or parent companies should not be considered (CAA Penalty Policy, p. 13).

As stated above, I believe the inquiry made by the Region as to the size of the violator in this case was insufficient and that the information it ultimately relied on to justify a substantial penalty increase was inconclusive. By Order to Supplement the Record dated April 2003, 2009, I specifically set forth my numerous concerns regarding the Region's size of violator estimate and requested that both parties provide more information. While the Region did respond to this first order, the only additional information given regarding the size of the violator estimate was that the information was gathered on or about September 6, 2006, the estimate pertained only to the Puerto Rico facility which had ceased operations by that time, the size of the parent company, Wirtz Manufacturing Company Inc, was not considered in calculating the size of the violator, and the Region could provide no further information. See Motion in Compliance with Order to Supplement the Record, May 21, 2009.

Despite three additional requests for more information (Order to Supplement the Record dated March 21, 2012, Order Granting Additional Time to Supplement the Record, dated May 9, 2012, and Order on Default as to Liability dated July 11, 2012) no further definitive documentation to support the estimate of CBDI's net worth as over $5,000,000 was provided by the Region. I find that a $20,000 upward

adjustment for the size of the violator component of the policy is not supported by the record, and determine that a $2,000 adjustment is appropriate in this case. Because $2,000 is the lowest size of violator increase provided for under the CAA Penalty Policy and is applicable when the net worth of a respondent is less than $100,000, it may appear that I am deviating from the penalty policy by making the adjustment. However, based on the record before me, including the fact that the Region's estimate of CBDI's net worth was not supported by updated and adequate documentation, I conclude that this determination is advisable under the applicable statutory scheme and the CAA Penalty Policy.

Pursuant to 40 C.F.R. Part 19, the $2,000 penalty adjustment is increased by 28.95%, the percentage the Region added to certain components of the proposed penalty to reflect inflation, which results in an inflation adjusted increase of $2,579. Therefore, the penalty assessed for the gravity component including inflation adjusted penalties for each count ($16,500, $16,500 and $78,975), and the penalty for the size of the violator ($2,597) is $114,572.

5. The CAA Penalty Policy also provides that in addition to proposing a penalty for the gravity component, the total penalty should include an increase to reflect any economic benefit realized by the respondent as a result of its noncompliance. The Region determined that the amount saved by CBDI by failing to conduct the required tests was $17,000 and proposed a penalty increase in that amount. However, I find that the calculation of this component as set forth in the Region's Penalty Calculation is vague and contradictory. After listing the violations revealed by the Region's inspection of CBDI's facility, the relevant section of the calculations on the second

page of the Penalty Calculation provides as follows:

> EPA's records show that stack tests on a dust collector for particulate matter (lead) *normally* costs $10,000 and that a contractor *could charge up to* $5,000 to conduct the face velocity measures at the different points where fugitive emissions could be released if such collection is not efficient. Additionally, a contractor *could charge up to* $2000 for VE readings during a normal stack test.
>
> To determine the economic benefit the CBD attained, by not conducting the tests at representative conditions, EPA's enforcement team assumed that the total cost for testing amount to $17,000. (Emphasis added).

After setting forth the required the protocol, the Region continues:

> Using the BEN model, the estimated economic benefit, assuming that CBD was required to hire a contractor for the baghouse and the hoods at a cost of $17,000 per performance test, amounts to $187.00 for the initial performance tests.
>
> Since the estimated amount falls below $5,000.00, EPA's Penalty policy allows the Agency to disregard such amount. However, EPA may decide to estimate the economic benefit by the non expended total amount of $17,000. Since the facility permanently closed its operations EPA's enforcement team concluded that the maximum allowable economic penalty amount, $17.000.00, was appropriate under the Penalty Policy.

I am assuming that the Region proposed a $17,000 economic benefit increase based on the fact that the subject facility was closed and CBDI would never have to conduct the testing. Therefore, CBDI saved the full cost of all testing as opposed to the estimated economic benefit of avoiding only the cost of the initial test as calculated by the Region using the Ben model. However, I find the Region's analysis to be

unpersuasive.

The Order on Default as to Liability issued in this matter requested that the record be supplemented, giving the Region opportunity to clarify and support the statements made in the Penalty Calculation as to economic benefit as follows:

> 2. On or before **July 27, 2012**, Complainant is to file and serve a document supplementing the record by providing the following information to support the proposed penalty, in accordance with 40 C.F.R. §§ 22.5 and 22.16:....
>
> a. Clarification and justification of the calculation of the $17,000 economic benefit component of the penalty as set forth in Complainant's Penalty Calculation, Exhibit 5 to Complainant's Motion for Entry of Default. I assume that this figure represents the economic benefit of avoided, as opposed to delayed, costs, based on the fact that the Respondent ceased operations at is facility and never had to perform the required tests, give the required notice, etc. However, I believe further explanation of how the $17,000 figure was calculated, and what the phrase "$187.00 for the initial performance tests" refers to, is warranted.
>
> 3. Respondent shall file a response no later than **fifteen (15) days** after service of the Complainant's filing.

There are precedents for a Presiding Officer to adjust the economic benefit component proposed in a complaint or a default motion. In considering Region 5's default motion in *In the Matter of JLM Chemicals, Inc.*, the Presiding Officer did not dispute that there may have been an economic benefit that had accrued to the respondent as a result of its noncompliance. However, EPA did not provide a specific basis for the calculation of the economic benefit it assessed and the Presiding Officer could not

definitively determine the actual amount of the economic benefit based on the record. As a result, the Presiding Officer did not assess an economic benefit component in the Default Order and Initial Decision which she issued. *In the Matter of JLM Chemicals, Inc.*, Docket No. RCRA-05-2009-0017 (RJO, March 24, 2011)

EAB, in its *sua sponte* review of an Initial Decision and Default Order, noted that the Presiding Officer stated that the he felt the economic benefit in this case was insignificant but he, without explanation, adopted the amount proposed by EPA for economic benefit in his penalty assessment. The EAB remanded the decision to the Presiding Officer for clarification of the penalty assessment, including the basis of the economic benefit determination. *In re Gaskey Construction Corp.*, CWA Appeal No. 06-02 (EAB, March 21, 2006).

I made it clear that I believed that the Region's justification for the increase it proposed to reflect the statutory factor of economic benefit increase warranted that the record be supplemented. However, the record regarding any economic benefit realized by CBDI was never supplemented and without such clarification, the Undersigned finds that the Region's statements did not support the proposed economic benefit increase of $17,000.

As stated in my discussion of the size of violator, the case law provides that a Presiding Officer can decrease the penalty as proposed in a complaint or default motion where the adjustment takes into consideration the statutes and penalty policies, and the decrease is adequately explained and justified. *See In re CDT Landfill Corporation*, 11 E.A.D. 88 (EAB 2003); *In re City of Wilkes-Barre, A.R. Popple, Inc., & Wyoming S. & P.*, 13 E.A.D. 332 (EAB 2007). Based on the foregoing explanation, I determine that an

increase in penalty to reflect economic benefit should not be assessed against the CBDI.

I decline to assess the amount of $183, representing the economic benefit of avoiding the initial test as calculated by the Region using the Ben model, because the case law holds that an economic benefit can be added to the gravity based penalty component when the violation results in a "*significant*" economic benefit to the respondent. *See JLM Chemicals*, Docket No. RCRA-05-2009-0017 at 11. Moreover, the CAA Penalty Policy gives EPA the discretion not to seek an economic benefit component of less than $5,000. (CAA Penalty Policy, page 7). As a result the penalty proposed in the Complaint is hereby decreased by $17,000.

Based on the analysis of the proposed gravity components and economic benefit component presented herein, I assess of total penalty of $114,572.

6. Before concluding my analysis of each factor considered in the Region's Penalty Calculation, I believe it would be in the best interest of the parties to briefly address the statutory factor of the economic impact of the penalty on CBDI's business. The case law is consistent in finding that an analysis of the factor of "economic impact" under Section 113(e) of the CAA is equivalent to the analysis of the "ability to pay factor" under other statutes and the terms are treated as interchangeable. *In the Matter of B&L Plating, Inc.*, Docket No. CAA-05-2000-012 (ALJ, April 5, 2002); *In the Matter of Wisconsin Plating Works of Racine, Inc.*, Docket No. CAA-05-2008-0037 (ALJ, April 30, 2009). In addition, the CAA penalty policy, in listing the factors to be considered under Section 113(e) of the CAA, includes the "economic impact of the penalty on the business," on page 2 of the guidance, but on page 20 of the policy, the section further elaborating on that factor is entitled *Ability to Pay.*

The default motions before me do not specifically address this factor, and CBDI's attorneys filed a motion which merely requested that the "sanction be reduced." See Motion in Connection with Order, August 21, 2007. By my April 23, 2009 Order to Supplement the Record, I requested that parties provide information addressing *inter alia*, CBDI's attorneys request that a lower penalty be assessed. The Region responded by Motion in Compliance with Order to Supplement the Record, May 21, 2009, stating that CBDI's attorneys' request to have its sanction reduced was unsupported, and CBDI's attorney responded by motion stating that they lost all communication with CBDI and requesting to withdraw as counsel for CBDI. See Motion to Withdrawal [sic] as Counsel for Commonwealth Battery Development, Inc., May 27, 2009. I also requested further information to support the penalty calculation by the Order to Supplement the Record dated March 21, 2012, revised March 27, 2012, Order Granting Additional Time to Supplement the Record dated May 9, 2012, and Order on Default as to Liability. The Region did not submit supplemental information in response to either Order. CBDI did not respond to either order and has not provided any specific information supporting an inability to pay argument to date.

As stated above, I recognize that CBDI has ceased operations in Puerto Rico and may in fact be out of business altogether. In addition, I decreased the proposed size of violator increase based on my finding that the information from the Commonwealth of Puerto Rico's State Department Corporate Registry which was relied on by the Region in proposing a $20,000 increase was inconclusive. I acknowledge that, given that this case presents the issue of default based on failure to answer the compliant, it is not surprising that the CBDI would not raise its inability to pay or provide supporting documentation. It

was only during the brief period of time that CBDI was represented by counsel that this request to reduce sanctions was made, without any justification or explanation.

It is well established that the burden of persuasion and presentation is on the complainant to prove that the relief sought is appropriate, with each matter in controversy adjudged under the preponderance of the evidence standard. 40 C.F.R. § 22.24. *See also In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994).

According to the CAA Penalty Policy, as well as a number of precedents, EPA is required to present evidence specifically addressing that factor only if the issue of economic impact is raised by the respondent. *See In re CDT Landfill Corporation*, 11 E.A.D. 88 (EAB 2003); *In re City of Wilkes-Barre, A.R. Popple, Inc., & Wyoming S. & P.*, 13 E.A.D. 332 (EAB 2007); *In re JHNY, Inc., a/k/a Quin-T Technical Papers and Boards*, 12 E.A.D. 372 (EAB 2005). Respondent must come forward with information that it is unable to pay the penalty or that the penalty will negatively impact the respondent's ability to stay in business. If a respondent does come forward with the information, it is then incumbent on EPA to respond to any information supporting an inability to pay claim, but absent a documented claim, EPA can assume that the respondent has the ability to pay. *CDT Landfill Corporation*, 11 E.A.D. at 122; *JHNY, 12* E.A.D. at 397.

As stated in many precedents, once the ability to pay is raised as an issue, EPA needs to present general financial information touching upon that factor. *Wisconsin Plating Works,* Docket No. CAA-05-2008-0037 at 8. If the respondent presents specific evidence, then EPA must either introduce additional evidence to rebut the inability to pay claim or discredit that claim. *In re Willie P. Burrell & The*

*Willie P. Burrell Trust*, TSCA Appeal No. 11-05, slip op. at 20, 24, 15 E.A.D. at ___.

The issue is not whether a respondent can pay the proposed penalty but whether the proposed penalty is appropriate taking all the factors into account. The complainant's burden of proof is to show the appropriateness of the penalty considering all factors; there is not a specific burden of proof as to any penalty factor. *See New Waterbury,* 5 E.A.D. at 540; *B&L Plating*, Docket No. CAA-05-2000-012 at 8. Inability to pay more appropriately serves as a mitigating factor in assessing a penalty. *B&L Plating,* Docket No. CAA-05-2000-012 at 8.

In the *Chippewa* case, the penalty calculation appended to the complaint and the default motion did not specifically refer to the issue of ability to pay. However, EAB, in considering respondent's appeal of an Initial Decision, noted that complainant had stated that it would consider any information respondent presented regarding ability to pay in adjusting the proposed penalty. The Presiding Officer also asked for documentation supporting the inability to pay argument before issuing the Initial Decision. The Board, in affirming the Presiding Officer's Initial Decision, noted that respondent never submitted additional information as requested and provided no direct evidence in support of its inability to pay claim. *In re Chippewa Hazardous Waste Remediation & Energy, Inc., d/b/a/ Chippewa Hazardous Waste, Inc.*, 12 E.A.D. 346 (EAB 2005).

Generally, it must be noted that, in a default proceeding, a respondent is actually admitting all facts and waiving the right to contest these factual allegations. 40 C.F.R. § 22.17(a). *See also In the Matter of David L. Stergion d/b/a Stergion Automotive,* Docket

CAA-07-2001-0014 (RJO Sept. 27, 2001). While doubts should always be resolved in the defaulting party's favor, in failing to respond to a motion for default, a respondent is deemed to have waived objections to all requested relief pursuant to 40 C.F.R. § 22.16(b).

In ruling on a default motion, the Presiding Officer noted that, while EPA is still is required to make a *prima facie* case in regard to the appropriateness of the proposed penalty in a default matter, its burden of presentation and persuasion is reduced. *B&L Plating*, Docket No. CAA-05-2000-012 at 6. Had that case gone to hearing, the Presiding Officer points out that EPA would have had to present some evidence of respondent's general financial status from which it could be inferred that respondent's ability to pay should not negatively impact the penalty amount. However, in the *B&L Plating* case, where respondent never presented evidence that the penalty should be mitigated despite prompts and opportunities, the Presiding Officer did not reduce the proposed penalty based on respondent's alleged inability to pay. See *id.,* Docket No. CAA-05-2000-012 at 9.

In *JHNY, Inc.*, the Board reviewed a Default Order which was issued based on respondent's failure to comply with a prehearing exchange order. The EAB stated that it would accord substantial deference to the Presiding Officer's findings, which were based in part on EAB precedent regarding evidentiary burdens with respect to ability to pay. EPA only assessed the minimum increase in the penalty for the size of violator despite the size of the violator being estimated at over 10 million dollars, and there were indications of significant financial difficulties and net losses, including records in support of respondent's claim. However, the Board held that, while the respondent may have

placed inability to pay at issue, it did not meet its burden of providing specific information to rebut EPA's *prima facie* case that the proposed penalty was appropriate based on ability to pay considerations. *JHNY, Inc.*, 12 E.A.D. at 401.

In applying the precedents cited above to the record before me, I note that where a party is found liable, as in the Order on Default as to Liability which was issued in this matter, the relief proposed in the Complaint and the motions for default shall be ordered unless the requested relief is clearly inconsistent with the record or the relevant statutes, regulations and policy. 40 C.F.R. § 22.17(c).

To contrast the present case from many of the cases cited above, wherein financial documentation was in fact provided but was deemed inadequate to support an inability to pay argument, CBDI's counsel, after their brief appearance by motion, gave no further information in response to the Orders dated April 23, 2009, March 27, 2012, May 9, 2012, and July 11, 2012, discussed above. By these Orders, I reminded CBDI of its obligation to produce this information.

I note that the President of CBDI, in his January 2006 letter, discussed above, indicated that CBDI had ceased operations in Puerto Rico but he did not state that CBDI had ceased operations altogether, and referred to the fact that at assets of the Puerto Rico facility were either sold or moved to the site of its head offices in the United States. No information whatsoever was given by CBDI regarding any income currently earned by CBDI's operations in the United States or elsewhere, or the value of equipment, land or other assets which CBDI may hold. It bears emphasizing that, other than asking that the penalty be reduced, CBDI had not specifically raised a claim that it was unable to pay the penalty and offered no information to support its inability to pay.

When a respondent fails to produce evidence to support a claim of inability to pay once the respondent is apprised of his obligation to do so, the Presiding Officer may consider the ability to pay arguments to have been waived. *See New Waterbury,* 5 E.A.D. at 542; *JHNY, Inc.,* 12 E.A.D. at 401; *B&L Plating*, Docket No. CAA-05-2000-012 at 8. Therefore, EPA was not required to present any further information to document CBDI's ability to pay the proposed penalty.

It is clear, based on the information set forth herein, that there is no evidence of an inability to pay in the record before me. Based on the record and the precedents cited herein, I believe no further inquiry is necessary as to whether the penalty should be further reduced because of any financial difficulties of CBDI.

I believe, as discussed in detail above and explained further below, that the totality of the circumstances, as discussed by the Board in the *Willie P. Burrell* Final Decision and Order, support both the determination of liability in the Order on Default as to Liability and the penalty analysis set forth above. *Willie P. Burrell*, slip op. at 11, 15 E.A.D. at ___. *See also JHNY, Inc.,* 12 E.A.D. at 391. The procedural omission that prompted the Order on Default as to Liability, CBDI's failure to file an answer to date despite a Complaint, two default motions, and numerous orders issued over the years, is proper grounds for a default order. In addition, no valid excuse or justification for failing to comply with the procedural requirement to file an Answer was ever provided by CBDI.

Also, as set forth in the Order on Default as to Liability, attached and incorporated herein, it does not appear that the CBDI would have succeeded on the substantive merits if a hearing was in fact held. *Willie P. Burrell*, slip op. at 12, 15 E.A.D.

at ___. Finally, it appears that the penalty assessed herein is reasonable based on the facts and the precedents cited herein.

There has been a delay, after the Order on Default as to Liability was issued, in issuing this Initial Decision and Default Order. However, the Undersigned did attempt to give both parties every opportunity to provide more information, and, more importantly, I do not believe the delay prejudiced CBDI in any way, as CBDI did not answer or otherwise attempt to provide a response to the Complaint or subsequent motions and orders.

This was not a case in which the passage of time may have hampered respondent's attempts to challenge the determination of liability or the proposed penalty. In contrast to the facts in the *Hagerstown Aircraft* case in which the Board recently issued a Final Order, CBDI did not present any challenges to the default motions or the Order on Default as to Liability issued in this case. *See In re Hagerstown Aircraft Services, Inc.*, RCRA (3008) Appeal No. 14-01 (EAB, October 8, 2014).

The penalty assessed in the amount of $114,572 is fully supported by the application of the statutory factors for determining a civil penalty in Section 113(d) of the CAA, the CAA Penalty Policy and the record. Therefore, a penalty of $114,572 is hereby imposed against Respondent.

**DEFAULT ORDER**

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, a Default Order and Initial Decision are hereby ISSUED and Respondent is ordered to comply with all the terms of this Order:

(1) Respondent is assessed and ordered to pay a civil penalty in the amount of One

Hundred Fourteen Thousand Five Hundred and Seventy Two Dollars ($114,572).

(2) Respondent shall pay the civil penalty by certified or cashier's check payable to the "Treasurer of the United States of America" within thirty (30) days after this default order has become a final order pursuant to 40 C.F.R. § 22.27(c). The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document. Such payment shall be remitted to:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

A copy of the payment shall be mailed to:

Regional Hearing Clerk
EPA Region 2
290 Broadway, 16th Floor
New York, New York 10007

(3) This Default Order constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c). Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties unless (1) a party moves to reopen the hearing, (2) a party appeals the initial decision to the Environmental Appeals Board, (3) a party moves to set aside the default order, or (4) the Environmental Appeals Board chooses to review the initial decision sua sponte.

**IT IS SO ORDERED.**

Dated: November 25, 2014

Helen S. Ferrara
Presiding Officer

## ***CERTIFICATE OF SERVICE***

*I hereby certify that the* ***Default Order and Initial Decision*** *by Regional Judicial Officer Helen S. Ferrara in the matter of* ***Commonwealth Battery Development, Inc., Docket No. CAA-02-2006-1222****, was served on the parties as indicated below:*

| | |
|---|---|
| *Certified Mail – Return Receipt Requested And Regular Mail* | *Mr. John O. Wirtz.*<br>*P.O. Box 5006*<br>*Port Huron, MI 48061-5006* |
| *Federal Express -* | *Environmental Appeals Board*<br>*U.S. Environmental Protection Agency*<br>*William Jefferson Clinton East Building*<br>*1201 Constitution Avenue, N.W..*<br>*Washington, D.C. 20004* |
| *Pouch Mail -* | *Assistant Administrator for*<br>*Enforcement & Compliance Assurance*<br>*U.S. Environmental Protection Agency*<br>*1200 Pennsylvania Avenue, NW (2201A)*<br>*Washington, D.C. 20460* |
| *First Class Mail -* | *Carolina Jordan-Garcia, Esq.*<br>*Assistant Regional Counsel*<br>*USEPA - Region II*<br>*City View Plaza II - Suite 7000*<br>*#48 Rd. 165 km 1.2*<br>*Guaynabo, Puerto Rico 00968-8069* |

Karen Maples

*Karen Maples*
*Regional Hearing Clerk*
*USEPA - Region II*

*Dated: November 26, 2014*