



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 BEFORE THE ADMINISTRATOR

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 ENVIR. APPEALS BOARD

IN THE MATTER OF)	
)	
METRO METALS CORP. and)	
AVISTA RECYCLING, INC., ¹)	DOCKET NO. RCRA-10-2011-0040
)	
RESPONDENTS)	
)	

DEFAULT ORDER AND INITIAL DECISION

Respondent Avista Recycling, Inc. ("Respondent Avista") is hereby found in default for failure to submit a prehearing exchange or a statement electing only to conduct cross-examination of the Complainant's witnesses, as required by an Order of the undersigned. In addition, Respondent Avista has failed to respond to an Order to Show Cause issued against it on September 21, 2011.

The United States Environmental Protection Agency ("EPA" or "Complainant") filed the Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") against Respondents with the Regional Hearing Clerk on February 10, 2011. The Complaint alleges that Respondents Avista and Metro Metals violated Sections 3002 and 3017 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6922 and 6938, the regulations implementing RCRA Subtitle C at 40 C.F.R. Parts 261-62, and Minnesota's Agency-authorized hazardous waste management regulations, Minnesota Administrative Rules Chapter 7045. The violations allegedly occurred when Respondents Avista and Metro

¹ As discussed fully in the Prehearing Order entered July 1, 2011, Respondent Metro Metals Corp. ("Respondent Metro Metals") failed to file a response to the Complaint. As such, the Regional Judicial Officer retains jurisdiction over this matter, and the instant Order is directed solely to Respondent Avista. 40 C.F.R. § 22.4(b).

Metals collected, stored, and offered for transport 913 used computer monitors to Vietnam without first notifying the EPA or providing it with notice of Vietnam's consent. Complainant proposed a civil administrative penalty of \$31,600 and sought a compliance order concerning the alleged hazardous waste in question.

Respondent Avista filed an Answer and Request for Hearing with the Regional Hearing Clerk on March 10, 2011. However, Respondent Metro Metals never responded to the Complaint. Thus, on April 8, 2011, the Regional Judicial Officer gave notice that the Compliance Order automatically became a final order against Metro Metals on March 14, 2011.

On April 18, 2011, Complainant and Respondent Avista were offered the opportunity to participate in the Alternative Dispute Resolution ("ADR") process. Both parties agreed to participate; however, no agreement was reached and ADR was terminated on June 24, 2011.

On July 1, 2011, I issued a Prehearing Order that required Complainant to submit its prehearing exchange by August 5, 2011; Respondent Avista to submit its prehearing exchange by September 6, 2011; and Complainant to submit its rebuttal prehearing exchange by September 20, 2011. That Prehearing Order stated, in part:

If Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, then Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. Each party is hereby reminded that **failure to comply with the prehearing exchange requirements set forth herein, including Respondent's statement electing only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party.**

Prehearing Order at 4 (emphasis supplied).

Complainant timely filed its prehearing exchange on August 5, 2011. Respondent Avista, however, never filed its prehearing exchange. Thereafter, an Order to Show Cause was issued, requiring Respondent Avista to explain why it failed to meet the deadline set by the Prehearing Order and why a default order should not be entered against it. Respondent Avista was given until October 11, 2011 to respond. To date, no response has been received.

Section 22.17 of the Rules of Practice applicable to this proceeding, 40 C.F.R. § 22.17, provides, in pertinent part:

(a) *Default.* A party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

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

(d) *Payment of penalty, effective date of compliance . . .* 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 under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under §22.27(c).

40 C.F.R. § 22.17.

The Complaint in this case seeks a penalty of \$31,600, jointly and severally, against Respondents Avista and Metro Metals, which is less than the amount allowed pursuant to the regulations.² Complainant stated in its prehearing exchange that it took into account the following factors when calculating the

² Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Complainant may assess a penalty of \$25,000 per day of non-compliance for each violation. The rules for Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Part 19, provide that penalties under Section 3008(a) of RCRA that are effective after January 2009 are increased to \$37,500 per day of violation.

penalty: the gravity of the harm caused by the violation; the degree of willfulness and/or negligence in causing the violation; Respondents' good faith effort to comply with the applicable statute and regulations; Respondents' history of non-compliance; and the economic benefit incurred by Respondents by its non-compliance. C's Preh'g Exch. at Ex. 21. Complainant's Prehearing Exchange also states that Respondents' ability to pay may be factored into Complainant's penalty calculation. C's Preh'g Exch. at Ex. 21, p. 4.

Respondent Avista, in its Answer, did not raise the issue of ability to pay and there is no evidence in the record properly before me that it cannot pay the proposed penalty.³ A respondent's ability to pay may be presumed until it is put at issue by a respondent. See *In the Matter of New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (EAB 1994).

Additionally, the Prehearing Order specifically states that "[i]f Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, then Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns." Preh'g Order at 3. Respondent has furnished no such supporting documentation. Thus, Respondent is deemed to have waived any objection to the penalty based upon the factor of ability to pay. *Id.* Moreover, the Rules of Practice at Section 22.17(c), provide that when the Administrative Law Judge finds that default has occurred, the relief proposed in the complaint "shall be ordered unless the penalty requested is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c).

Accordingly, I find Respondent Avista to be in default for its failure to file a prehearing exchange as required by the July 1, 2011, Prehearing Order and its failure to respond to the September 21, 2011, Order to Show Cause. Default by Respondent Avista constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. See 40 C.F.R. § 22.17(a). The facts alleged in the instant Complaint establish Respondents'

³ Under Section 22.22(a)(1) of the Rules of Practice, 40 C.F.R. § 22.22(a)(1), evidence relating to settlement, which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence, Fed. R. Evid. 408, is not admissible. Any reference to the substance of the parties' settlement or alternative dispute resolution discussions is not properly before me.

violations of RCRA as charged. Upon review, I find that the penalty requested by Complainant is not "clearly inconsistent" with the record of the proceeding or the Act. See 40 C.F.R. § 22.17(c). Accordingly, a penalty of \$31,600 is assessed against Respondent Avista. Further, Respondent Avista is directed to comply with the Compliance Order contained in the Complaint. *Id.*

ORDER

- I. Respondent Avista Recycling, Inc. is found in default for failing to comply with the Prehearing Order and the Order to Show Cause of the Administrative Law Judge, and no good cause is shown why a default order should not be issued.
- II. Respondent Avista Recycling, Inc. is assessed a civil administrative penalty in the amount of \$31,600.
- III. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the effective date of the final order by submitting a cashier's check or a certified check in the amount of \$31,600, payable to "Treasurer, United States of America," and mailed to:

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

Contacts: Craig Steffen (513) 487-2091
Eric Volck (513) 487-2105⁴

⁴ Alternatively, Respondent may make payment of the penalty as follows:

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

- IV. A transmittal letter identifying the subject case and EPA docket number (RCRA-10-2011-0040), as well as Respondent Avista's name and address, must accompany the check.
- V. If Respondent Avista Recycling, Inc. fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.
- VI. The Compliance Order contained in the Complaint is incorporated by reference, and Respondent Avista Recycling, Inc. is ordered to comply with the Compliance Order.

(Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency")

OVERNIGHT MAIL:

U.S. Bank
Government Lockbox 979077
US EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

Contact: (314-418-1028)

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

U.S. Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account No. 310006
Environmental Protection Agency
CTX Format
Transaction Code 22 - checking
Contact: Jesse White (301-887-6548)

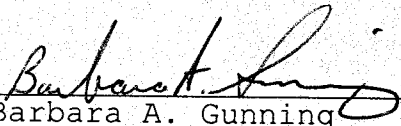
ON LINE PAYMENT:

This payment option can be accessed from the information below:

Visit <http://www.pay.gov>
Enter "sfo 1.1" in the search field.
Open form and complete required fields.

APPEAL RIGHTS

Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Default Order, which constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c), shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board ("EAB") within thirty (30) days after service of this Order, or the EAB elects, *sua sponte*, to review this decision.

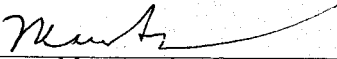

Barbara A. Gunning
Administrative Law Judge

Dated: November 18, 2011
Washington, D.C.

**In the Matter of Metro Metals Corp., and Avista Recycling, Inc., Respondents.
Docket No. RCRA-10-2011-0040**

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Default Order and Initial Decision**, issued by Barbara A. Gunning, Administrative Law Judge, in Docket No. RCRA-10-2011-0040, were sent to the following parties on this 18th day of November 2011, in the manner indicated:


Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Carol Kennedy
Regional Hearing Clerk
U.S. EPA, Region X
1200 Sixth Avenue, ORC-158
Seattle, WA 98101

Copy by Pouch Mail to:

Shirin Venus, Esq.
Assistant Regional Counsel
U.S. EPA, Region X
1200 Sixth Avenue, ORC-158
Seattle, WA 98101

Thomas M. Jahnke
Regional Judicial Officer
U.S. EPA, Region X
1200 Sixth Avenue, ORC-158
Seattle, WA 98101

Copy by Certified and Regular Mail to:
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John Nordwall, Esq.
Avista Recycling, Inc.
7900 Excelsior Blvd.
Ste. 700
Hopkins, MN 55343

Copy by Regular Mail to:
(For Metro Metals Corp.)

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Metro Metals Corporation
2343 Brimely Road, Suite 823
Toronto, Ontario M1S 3L6 Canada

Mr. Nat Levine, Registered Agent
Metro Metals Corporation
204 Woodbine Avenue
Northport, NY 11768

Copy by Interoffice Hand Delivery to

Eurika Durr
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building, Suite 600
1341 G Street, N.W.
Washington, DC 20005

**Dated: November 18, 2011
Washington, DC**