

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

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U.S. Environmental Protection Agency

In The Matter of:

The City University of New York
Including Brooklyn College

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-02-2017-7102

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 United States Code (U.S.C.) §§ 6901-6991 (together hereafter the "Act" or "RCRA"), for injunctive relief and the assessment of civil penalties. The United States Environmental Protection Agency ("EPA") has promulgated regulations governing the handling and management of hazardous waste at 40 C.F.R. Parts 260 - 273 and 279.

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING ("Complaint") serves notice of EPA's preliminary determination that the City University of New York ("CUNY") which includes Brooklyn College ("BCollege")(collectively known as the "Respondent") has violated requirements of the authorized New York State 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), 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) 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.

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 upon information and belief:

General Allegations

Jurisdiction

1. This administrative Tribunal has jurisdiction over the subject matter of this action pursuant to Section 3008(a), 42 U.S.C. § 6928(a), and 40 C.F.R. § 22.1(a)(4).

Notice

2. In accordance with Section 3008(a)(2) of RCRA, 42 U.S.C § 6928(a)(2), EPA has given notice of this action to the State of New York.

Respondent's Background

3. CUNY is the public university system of the City of New York consisting of three types of institutions, senior colleges (four year colleges), community colleges and graduate or professional schools, providing higher education.

4. BCollege is a senior college and a branch of the CUNY university system.

5. Respondent is CUNY which includes BCollege.

6. The BCollege campus is located at 2900 Bedford Avenue in the Midwood section of Brooklyn, New York.

7. BCollege has occupied the above location since 1910.

8. BCollege has approximately 120 teaching and research laboratories primarily housed in the Ingersoll and old Ingersoll Buildings.

9. The location discussed in paragraph 8, above constitutes Respondent's "Facility" as that term is defined at Title 6 of the New York Codes, Rules and Regulations ("6 NYCRR") § 370.2(b).

10. Respondent is a "person," as that term is defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and 6 NYCRR § 370.2(b).¹
11. Respondent is and has been the "owner" of the Facility as that term is defined in 6 NYCRR § 370.2(b).
12. Respondent is and has been the "operator" of the Facility as that term is defined in 6 NYCRR § 370.2(b).

Respondent's Generation of Waste

13. BCollege, in carrying out its teaching and research activities, and in the course of conducting normal building maintenance operations, has been generating, and continues to generate, "solid waste" (within the meaning of 6 NYCRR § 371.1(c)) at its Facility.
14. In carrying out its teaching and research activities, and in the course of conducting normal building maintenance operations, BCollege has been generating, and continues to generate, hazardous waste, as defined in 6 NYCRR § 371.1(d), at its Facility.
15. Subsections 6 NYCRR 373-1.1(d) and 6 NYCRR 372.2(a)(8)(ii) provide, in part, that a generator may accumulate hazardous waste on-site for a period of 180 days or less without being subject to the permitting requirements [*i.e.* without having obtained a permit or without having interim status], provided such generator complies with the requirements of, *inter alia*, 6 NYCRR § 373-1.1(d)(1)(iii), (iv), (xix), and (xx).
16. The requirements for generators are set forth in 6 NYCRR §372.2. A small quantity generator may accumulate non-acute hazardous waste on-site for one hundred eighty (180) days or less without having a permit or interim status provided it complies with *all* applicable conditions set forth in 6 NYCRR §372.2(a)(8) including but not limited to 6 NYCRR §372.2(a)(8)(iii) - (v).
17. As of February 2016, and prior and subsequent thereto, BCollege has been a small quantity "generator" of hazardous waste at the Facility.
18. BCollege stores hazardous waste at its Facility for a finite period, at the end of which the hazardous waste is treated, disposed of or stored elsewhere.
19. Hazardous waste is and has been stored in the Facility's hazardous waste container storage area and in numerous accumulation areas located in the Ingersoll and old Ingersoll buildings.

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.

20. BCollege's Facility is and has been a "storage" facility as that term is defined in 6 NYCRR § 370.2(b).
21. Pursuant to 6 NYCRR § 373-3.1(a)(2) facilities in existence on or before November 19, 1980 are subject to the regulatory standards set forth in 6 NYCRR Subpart 373-3.
22. Respondent's Facility is an "existing hazardous waste management facility" (or "existing facility") within the meaning of 6 NYCRR § 370.2(b).

Regulatory Filings

23. Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, BCollege informed EPA that it generated hazardous waste through a notification (EPA form 8700-12) in July 1987.
24. In response to the Notification, EPA provided BCollege with the following EPA Identification Number: NYD074333501.

EPA Investigative and Initial Enforcement Activities

25. On or about February 10, 11, 17, and 28, 2016, a duly designated representative of EPA conducted an inspection of the Facility pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, to determine BCollege's compliance with Subtitle C of RCRA and New York's authorized hazardous waste regulations (the "Inspection").
26. On or about March 15, 2016, a duly authorized representative of BCollege submitted manifests and documentation to EPA.
27. Pursuant to Sections 3007 and 3008 of RCRA, 42 U.S.C. §§ 6927 and 6928, on or about June 28, 2016, EPA issued BCollege a combined Notice of Violation ("NOV") and Information Request Letter ("IRL").
28. The NOV, which was issued pursuant to Section 3008 of the Act, 42 U.S.C. § 6928, informed BCollege that EPA had identified a number of potential RCRA violations at its Facility and asked BCollege to provide EPA with detailed descriptions and documentation of any subsequent actions it had taken to correct such violations.
29. The IRL, which was issued pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, sought information and documentation relating to hazardous waste activities at the Facility and required that BCollege submit specific types of documentation relating to hazardous waste activities at its Facility.
30. On or about November 22, 2016, a duly authorized representative of BCollege submitted its certified Response to the combined NOV and IRL and attested that the information provided in the Response was true and accurate.

COUNTS

Count 1-Failure to Make Hazardous Waste Determinations

31. Complainant repeats and re-alleges each allegation contained in paragraphs 1 through 30, inclusive, with the same force and effect as if fully set forth below.
32. 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.
33. 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.
34. 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.
35. At the time of EPA's Inspection and prior thereto, BCollege generated and abandoned the following hazardous waste materials at its Facility:
- a. In the old Ingersoll Building, Room 027A:
 - i. twelve containers of unknown old chemicals stored in a box labeled with the date 11/10/14 and the words "to be identified"; and
 - ii. containers of old chemicals which were stored in a cabinet;
 - b. In the old Ingersoll Building, Room 136: ten 5 gallon containers of old Muriatic acid;
 - c. In the old Ingersoll Building, Room 4315: storage of old chemicals next to each other including:
 - i. five 500 milliliters ("ml"), one 4-liter and one 250 ml containers of hydrofluoric acid in the fume hood; and

2 Respondent's November 22, 2016 Response to Notice of Violation identified this room as new Ingersoll building room 026.

ii. one 1 pound (“lb”) container of sodium cyanide, two 1lb containers of sodium hydrosulfite, one 500 ml of potassium permanganate, three 1 pint containers of silver standard, four cardboard boxes (each containing six 25 ml containers of chromerge), one 250 ml container of perchloric acid, one 250 ml container of sulfuric acid, one 250 ml leaking container of old potassium chloride, and one 2.5-liter container of old hydrochloric acid, from an abandoned laboratory, on top of a counter;

d. In the Ingersoll Building, Room 4311: two cabinets storing old chemicals; and

e. In old Ingersoll Building-Room 5139: one 2.5-liter container of old nitric acid which had crystallized precipitate inside the bottle.

36. After the first days of EPA’s Inspection, BCollege confirmed that the wastes listed in the paragraph above were wastes and, that it had disposed of the wastes as hazardous waste:

a. old Ingersoll Building, Room 027A:

i. abandoned containers of unknown old chemicals, each labeled only with the date 11/10/14 and the words “to be identified”, were disposed of on or about February 17, 2016; and

ii. some of the containers of old chemicals stored a cabinet were disposed of on or about March 22, 2016;

b. old Ingersoll Building, Room 0136: ten abandoned 5 gallon containers of old muriatic acid were disposed of on or about February 19, 2016;

c. Ingersoll Building Room 4315: BCollege evaluated the chemicals listed in Paragraph 35(d) above and some of those chemicals were disposed of on or about February 19, 2016;

d. Ingersoll Building, Room 4311:

i. BCollege determined that all the old corrosive chemicals stored in the blue cabinet were unusable and disposed of such chemicals on February 19, 2016; and

ii. BCollege determined that some of the old flammable chemicals stored in the “flammable cabinet” were waste and disposed of such chemicals on February 19, 2016; and

e. Old Ingersoll Building-Room 5139 – the old nitric acid with crystallized precipitate inside the bottle was disposed of on or about February 19, 2016.

37. BCollege "abandoned" each of the materials identified in Paragraphs "35-36" by storing or accumulating such chemicals before or in lieu of their being disposed of.

38. Each of the materials identified in Paragraphs 35-36 above was a "discarded material" and "solid waste," as defined in 6 NYCRR §371.1(c).

39. As of the start of EPA's Inspection, BCollege had not determined if any of the materials identified in Paragraphs 35-36 above constituted a hazardous waste.

40. Respondent's failures to determine if each solid waste generated at its Facility constitutes a hazardous waste are violations of 6 NYCRR § 372.2(a)(2).

41. Respondent's failures to comply with 6 NYCRR § 372.2(a)(2) subjects it to injunctive relief and penalties pursuant to Section 3008 of the Act, 42 U.S.C. § 6928.

Count 2-Failure To Minimize Potential Releases

42. Complainant re-alleges each allegation contained in the above paragraphs 1 through 30 as if fully set forth herein.

43. Six NYCRR §373-3.3(b) requires, in part, that 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.

44. At the time of the Inspection and at times prior thereto, BCollege failed to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents through numerous actions or inactions including but not necessarily limited to the following situations:

- a. Respondent stored ten abandoned 5 gallon containers of old Muriatic Acid, two were open, with a 1 gallon heavily rusted container of old paint in the old Ingersoll Building, Room 0136. There was widespread corrosion around the metal floor under the containers of acid and on top of the can of paint which is indicative of leakage from such acid.
- b. BCollege stored together, in the old Ingersoll Building, Room 4315, abandoned containers of old chemicals including a leaking bottle of potassium chloride (evidenced by a large quantity of white crystal precipitate located around and on the sides of the bottle and on the wrapper of a nearby chemical).
- c. In the old Ingersoll Building, BCollege incompatibly stored the following chemicals:

- i. Room 4315: stored sodium cyanide with acids which if combined would create cyanide gas;
 - ii. Room 4315: stored oxidizer chemicals with other chemicals which if combined could possibly have caused an explosion; and
 - iii. Room 4311: stored at least 9 bottles of various types of acids with one 4-liter container of ammonia which if combined could possibly have caused a chemical reaction.
- d. At the time of the Inspection, BCollege stored abandoned old chemicals at the Facility, which was a potential fire or explosion hazard at the following locations:
 - i. old Ingersoll Building, Room 027A: carton of 12 unknown/unidentified old chemicals;
 - ii. Ingersoll building Room 0136; 10 five gallon containers of old muriatic acid;
 - iii. old Ingersoll Building- Room 5139: 2.5 liter of nitric acid with brownish crystal precipitate crust inside the bottle;
 - iv. old Ingersoll Building Room 4315: four boxes each containing six 25ml chromerge, one 250 ml container of perchloric, one 250 ml container of sulfuric acid, and one 2.5 liter of hydrochloric acid; and
 - v. old Ingersoll Building Room 4311: at least 9 bottles (six 4-liters, one five gallon, and two one gallon containers) of various types of acid including phosphoric acid, hydrochloric acid) and one 4-liter container of ammonia. The phosphoric acid and hydrochloric acid had a crystallized precipitate crust inside the bottles.
- e. In the Ingersoll Building, Room 4311, in a metal corrosive cabinet, BCollege stored old acids with precipitated crystal crust inside the containers, on the corroded/rusted metal cabinet floor. The corroded/rusted metal cabinet floor would indicate that the acids had been leaking.
- f. BCollege failed to conduct regular biannual peroxide testing to assess the stability of and prevent the potential explosion of one 4-liter container of ethyl ether (last testing date was July 7, 2015), in the old Ingersoll Building, Room 027A.
- g. In the Ingersoll Building, BCollege failed to conduct regular monthly inspections on at least two fire extinguishers, located in active hazardous waste accumulation areas, to determine if they were present and in good working order:
 - i. At the time of the Inspection, at least one fire extinguisher at the Facility not

been inspected for at least 14 months and had only two inspection dates, November 5, 2014 and February 17, 2016, written on the inspection tag.

- ii. At the time of the Inspection, at least one fire extinguisher at the Facility had not been inspected for at least 9 months and had only two inspection dates April 3, 2015 and February 2, 2016, written on the inspection tag.
- h. In the Ingersoll Building, BCollege failed to conduct monthly inspections (January 2016 inspection was not conducted) to ensure that the fire extinguishers were present and in good working order in the following active satellite accumulation areas where hazardous waste was being generated and accumulated:
 - i. Chemical Storage room
 - ii. Room 233
 - iii. Room 231
 - iv. Room 229
 - v. Room 241
 - vi. Room 349 NE
 - vii. Room 351
 - viii. Room 0150
 - ix. Room 027
 - x. Room 247
- i. BCollege stored fluorescent light bulbs loose and not in containers thereby failing to minimize the potential breakage of such bulbs which could lead to the release of mercury into the environment in the following locations:
 - i. Roosevelt-Room 023 R- Universal Waste Room;
 - ii. Art Dark Room.

45. Each action or inaction set forth in the Paragraph 44 above constitutes a failure by Respondent to maintain or operate its Facility in a manner minimizing 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, and each action or inaction constitutes a violation of 6 NYCRR 373-3.3(b).

46. Respondent's violation of 6 NYCRR § 373-3.3(b) subject it to injunctive relief and penalties pursuant to Section 3008 of the Act, 42 U.S.C. § 6928.

II. PROPOSED CIVIL PENALTY

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: <https://www.epa.gov/sites/production/files/documents/rcpp2003-fnl.pdf>. This 2003 RCRA Civil Penalty Policy 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 through 2015 (“Inflation Adjustment Act”), 28 U.S.C. § 246, required EPA to adjust its penalties for inflation on a periodic basis. Consistent with this, the penalty amounts in the 2003 RCRA Civil Penalty Policy have been amended to reflect inflation adjustments. The adjustments were made pursuant to the July 27, 2016 document entitled “Amendments to the U.S. Environmental Protection Agency’s Civil Penalty Policies to Account for Inflation (applicable to violations that occurred after November 2, 2015).”

Pursuant to the Inflation Adjustment Act, the maximum statutory civil penalty under Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), is \$37,500 per day for each violation occurring after January 12, 2009 through November 2, 2015; and \$95,284 per day for each violation occurring after November 2, 2015 (where the penalty is assessed on or after January 15, 2017). *See* 40 C.F.R. Part 19 and 82 Fed. Reg. 3633 (January 12, 2017.)

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 and multi-day penalties are also included in Attachment II.

Count 1: \$23,600

Count 2: \$40,800

Total Proposed Penalty for Counts 1 and 2 is rounded to the nearest hundredth and incorporates the July 2016 inflationary adjustment of the calculated penalty: \$64,400

III. COMPLIANCE ORDER

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

The Respondent shall, to the extent it has not already done so, immediately upon the effective date of this Order correct, to the extent possible, correct the past violations alleged in Counts 1 and 2 of this Complaint. Respondent shall thereafter maintain compliance at its Facility with the requirements cited in Counts 1 and 2.

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

All responses, documentation, and evidence submitted in response to this Compliance Order should be sent to:

Mr. Abdool Jabar
Environmental Engineer
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

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 Facilities. 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 **Inflation Adjustment Act**, a violator failing to take corrective action within the time specified in a compliance **order that has taken effect is liable for** a civil penalty of up to \$57,391 for each day of continued noncompliance 82 Fed. Reg. 3633 (January 12, 2017).

V. PROCEDURES GOVERNING THIS ADMINISTRATIVE 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. § 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. § 22.

The rules of procedure governing this civil administrative litigation were originally 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 (“Consolidated Rules of Practice”), and which are codified at 40 C.F.R. Part 22. These rules were recently amended to simplify the administrative processing of cases by expanding the availability of electronic filing and service procedures and eliminating inconsistencies. 82 *Fed. Reg.* 2230, January 9, 2017. These amendments became effective on May 22, 2017 and apply to all new case filings after that date. A copy of the current Consolidated Rules of Practice, incorporating these amendments, accompanies this Complaint.

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(s) to the Complaint, and such Answer(s) 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**

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

Respondent’s Answer(s) 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 lack knowledge of a particular factual allegation and so states in the Answer(s), the allegation is deemed denied. 40 C.F.R. § 22.15(b).

The Answer(s) 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(s) facts that constitute or that might constitute the grounds of its 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 do 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 request 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.

(NOTE: Except for compliance information sent to EPA to satisfy the requirements of the compliance Order in Section III, 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 lack 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 dispute (and thus intends to place at issue in the proceeding) and (3) whether Respondent request 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.

C. Failure To Answer

If Respondent fails in their Answer(s) 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(s) 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(s) 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
1200 Pennsylvania Avenue, N.W.
Mail Code 1900R
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 fail 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 request 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:

Jeannie M. Yu, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, Room 1635
New York, New York 10007-1866
212-637-3205

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 **JUL 10 2017**

To: William Kelly, Chancellor
Office of the Chancellor
City University of New York
230 West 41st Street
New York, New York 10036

cc. Jean Chen, Director
CUNY/Brooklyn College
2900 Bedford Avenue
Brooklyn, NY 11210

Kelly Lewandowski, Chief
Site Control Section
Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-7250

**In the Matter of the City University of New York
Docket Number RCRA-02-2017-7102**

CERTIFICATE OF SERVICE

This is to certify that on July 11, 2017, I served a true and correct copy of the foregoing "COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING," bearing Docket Number RCRA-02-2017-7102 hereinafter referred to as the "Complaint"), together with Attachments I and II 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 Chancellor William Kelly, Office of the Chancellor, The City University Of New York, 230 West 41st Street, New York, New York 10036. On said day, I hand carried the original and a copy of the Complaint, with the accompanying attachments, to the Office of the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2, 290 Broadway, 16th floor, New York, New York 10007-1866.

Name: 

Date: July 11, 2017

ATTACHMENT 1

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT
Penalty Computation Worksheet (Count 1)

Respondent: City University of New York

Facility Address: BCollege Campus
2900 Bedford Avenue
Brooklyn, New York 11210

Requirement Violated: 6 NYCRR § 372.2(a)(2)
Failure to make hazardous waste determinations

PENALTY AMOUNT FOR REFERRAL

1. Gravity based penalty from matrix	\$8,799	
(a) Potential for Harm.	MODERATE	
(b) Extent of Deviation.	MODERATE	
2. Select an amount from the appropriate multi-day matrix cell.		\$1,018
3. Multiply line 2 by number of waste streams in violation minus 1. (7)		\$7,126
4. Add line 1 and line 3.		\$15,925
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. Multiply line 4 by line 8.		Not applicable
10. Add lines 4, 9 and 10 for gravity penalty amount		\$15,925
11. Adjustment for inflation - multiply line 10 by a multiplier of 1.48287	\$23,600*	
12. Calculate economic benefit.		Not applicable
13. Penalty figure to be inserted in Complaint		\$23,600

* Penalties have been rounded to the nearest hundred.

**NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT
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 non-compliance 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 that the facility is generating hazardous waste, there is a much 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 MODERATE due to the relatively small quantity of wastes involved.
- b. Extent of Deviation - The extent of deviation present in this violation was determined to be MODERATE because of the relatively small amount of waste involved. The applicable cell ranges from \$5,500 to \$8,799. The high-point for the cell (\$8,799) was selected because although there was a relatively small quantity of wastes involved, eight different hazardous waste streams had not been characterized at the Facility.

- 2. Multiple Violations/Multi-day** - EPA used its discretion and used the multiday penalty matrix to assess the penalty for the Respondent's failures to make hazardous waste determinations for eight waste streams stored at the Facility. The same moderate/moderate cell (\$275 to \$1,760) was used and the mid-point of the cell (\$1,018) was selected.

3. Adjustment Factors

- a. Good Faith - Based upon Facility-specific factors and available information, and considering that BCollege did not identify the violation and take corrective action prior to the EPA Inspection, no adjustment has been made at this time.
- b. Willfulness/Negligence - Not applicable
- c. History of Compliance – Not Applicable
- d. Ability to Pay - Not applicable
- e. Environmental Project - Not applicable
- f. Other Unique Factors - Not applicable

- g. Economic Benefit - Amount is considered *de minimus* since Respondent could have used generator knowledge to perform hazardous waste determinations at minimal cost.
- h. Recalculation of Penalty Based on New Information: - Not applicable.

**NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT
Penalty Computation Worksheet (Counts 2)**

Respondent: City University of New York

Facility Address: BCollege Campus
2900 Bedford Avenue
Brooklyn, NY 11210

Requirements Violated: 6 NYCRR § 373-3.3(b)
Failure to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste

PENALTY AMOUNT FOR REFERRAL

1. Gravity based penalty from matrix	\$27,500
(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.	\$27,500
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. Multiply line 4 by line 8.	Not applicable
10. Add lines 4, 9 and 10 for gravity penalty amount	\$27,500
11. Adjustment for inflation - multiply line 10 by a multiplier of 1.48287	\$40,800*
12. Calculate economic benefit.	Not applicable
13. Penalty figure to be inserted in Complaint	\$40,800

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT
Penalty Computation Worksheet (Count 2)

1. Gravity Based Penalty

- a. Potential for Harm – The potential for harm was determined to be Major. BCollege failed to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents at the Facility by storing old abandoned unknown chemicals which created a fire hazard and a situation in which first responders and facility personnel would not know how to properly handle such chemicals; storing open containers of muriatic acid which appeared to be leaking; storing a leaking bottle of potassium chloride in which the exterior was heavily crystallized for an undetermined period of time; incompatibly storing chemicals which if accidentally combined could form a poisonous gas or cause an explosion; failing to conduct monthly inspections on many fire extinguishers to ensure that they were in good working order in the hazardous waste accumulation areas; and failing to conduct biannual stability peroxide testing on ethyl ether; failing to store mercury containing fluorescent light bulbs in containers which would minimize the incidence of breakage.
- b. Extent of Deviation - The extent of deviation present in this violation was determined to be Major. The applicable cell ranges from \$22,000 to \$27,500. The high-point of the range was selected because BCollege's failures to minimize the possibility of a fire, explosion, or any unplanned release of hazardous waste or hazardous waste or hazardous waste constituents into the environment occurred over an undetermined length of time (e.g. storage of old abandoned chemicals; incompatible storage of chemicals, failing to conduct fire extinguisher inspections etc.)

2. **Multiple Violations/Multi-day** – Based on information presently available to EPA, multi-day penalties are not being sought at this time.

3. Adjustment Factors

- a. Good Faith - Based upon Facility-specific factors and available information, and considering that BCollege did not identify the violation and take corrective action prior to the EPA Inspection, no adjustment has been made at this time.
- b. Willfulness/Negligence - Not applicable
- c. History of Compliance – Not Applicable
- d. Ability to Pay - Not applicable

- e. Environmental Project - Not applicable
- f. Other Unique Factors - Not applicable
- g. Economic Benefit - Amount is considered *de minimus* since Respondent could have conducted regular inspections and routine testing at the Facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste at minimal cost.
- h. Recalculation of Penalty Based on New Information - Not applicable.

ATTACHMENT II

2003 Gravity-Based Penalty Matrix

EXTENT OF DEVIATION FROM REQUIREMENT				
P O T E N T I A L F O R H A R M		MAJOR	MODERATE	MINOR
	MAJOR	\$27,500 to \$22,000	\$21,999 to \$16,500	\$16,499 to \$12,100
	MODERATE	\$12,099 to \$8,800	\$8,799 to \$5,500	\$5,499 to \$3,300
	MINOR	\$3,299 to \$1,650	\$1,649 to \$550	\$549 to \$110

2003 Multi-Day Matrix of Minimum Daily Penalties

		EXTENT OF DEVIATION FROM REQUIREMENT		
P O T E N T I A L F O R H A R M		Major	Moderate	Minor
	Major	\$5,500 to \$1,100	\$4,400 to \$825	\$3,300 to \$605
	Moderate	\$2,420 to \$440	\$1,760 to \$275	\$1,100 to \$165
	Minor	\$660 to \$110	\$330 to \$110	\$110