



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

JUN 3 0 2010

The Honorable Byron Brown
Mayor of Buffalo
201 City Hall
65 Niagara Square
Buffalo, NY 14202

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. 2
2010 JUN - 8 AM 8:20
REGIONAL HEARING
CLERK

Re: **In the Matter of the City of Buffalo**
Docket Number RCRA-02-2010-7107

Dear Mayor Brown:

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

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

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

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

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

You will find enclosed a copy of the "Consolidated Rules of Practice," which govern this proceeding. (A brief discussion of some of these rules appears in the later part of the Complaint.)

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

Sincerely,

FOR
Dore LaPosta, Director 
Division of Enforcement and Compliance Assistance

Enclosures

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

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2**

In The Matter of:

City of Buffalo

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-02-2010-7107

U.S. ENVIRONMENTAL
PROTECTION AGENCY REGION 2
2010 JUL -8 PM 8:20
REGIONAL HEARING
CLERK

COMPLAINT

This is a civil administrative proceeding instituted pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. § 6901 *et seq.* (referred to collectively as the "Act" or "RCRA").

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING ("Complaint") serves notice of EPA's preliminary determination that the **City of Buffalo** has violated certain requirements of the authorized New York State hazardous waste program and the federal hazardous waste program.

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

Section 3008(a)(1) of RCRA, 42 U.S.C. §6928(a)(1), provides, in part, that "whenever on the basis of any information the Administrator [of EPA] determines that any person has violated or is in violation of any requirement of this subchapter [Subtitle C of RCRA], the Administrator may issue an order assessing a civil penalty for any past or current violation." Section 3008(a)(2) of RCRA, 42 U.S.C. 6928(a)(2) provides, in part, that "[i]n the case of a violation of any requirement of [Subtitle C of RCRA] where such violation occurs in a State which is authorized to carry out a hazardous waste program under [Section 3006 of RCRA, 42 U.S.C. 6926], the Administrator [of EPA] shall give notice to the State in which such violation has occurred prior to issuing an order."

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

Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), "any penalty assessed in the order [issued under authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a)] shall not exceed \$25,000 per day of noncompliance for each violation of a requirement of [Subtitle C of RCRA]."

Under authority of the Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, Public Law 101-410 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, 110 Stat. 1321, Public Law 104-134 (codified at 31 U.S.C. § 3701 note), EPA has promulgated regulations, codified at 40 C.F.R. Part 19, that, *inter alia*, increased the maximum penalty EPA might obtain pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) to \$32,500 for any violation occurring after March 15, 2004 and before January 12, 2009.

Prior to the issuance of this Complaint, notice in accordance with the requirements of Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), has been given to the State of New York.

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:

Background Allegations

1. Respondent is the City of Buffalo (hereinafter "City of Buffalo", "Buffalo" and/or "Respondent"). Buffalo's main administrative offices are located at 65 Niagara Square ("City Hall"), Buffalo, New York 14202.
2. Respondent is a city that occupies about 52.5 square miles in Erie County in the State of New York.
3. Respondent owns and/or operates approximately 200 buildings and facilities including but not limited to those operated and/or utilized by General Services Buildings, Department of Public Works, Parks, and Streets, Buffalo Police Precincts and Fire Departments, public libraries, public parks, hockey area, skating rinks, community centers, museums, theaters, a zoo, and a marina, located at various sites throughout the City; these buildings do not include those operated and utilized by the Buffalo Board of Education.
4. Respondent is a "person" as defined at Section 1004(15) of the Act, 42 U.S.C. § 6903(15), and Title 6 of the New York Codes, Rules, and Regulations ("6 NYCRR") § 370.2(b).

Hazardous Waste Generation

5. In the course of normal operations, Buffalo generates "solid waste," as that term is defined at 6 NYCRR § 371.1(c), through its various departmental entities.
6. In the course of normal operations, Buffalo generates "hazardous waste," as that term is defined at 6 NYCRR § 371.1(d), through its various departmental entities.

7. Buffalo generates spent lamps, a solid and potentially hazardous waste stream, at all or most of its municipal buildings.
8. Spent lamps may constitute "hazardous waste" as that term is defined in 42 U.S.C. § 6903. The Universal Waste Rules (part of the federal hazardous waste regulatory program) were initially published in 60 Federal Register ("Fed. Reg.") 25492, on May 11, 1995, and were amended at 64 Fed. Reg. 36466, on July 6, 1999, to include spent lamps.
9. Some of the spent lamps generated by buildings owned and/or operated by Buffalo, exhibit the toxicity characteristic under the Toxic Characteristic Leaching Procedure (TCLP) for metals, in particular mercury and/or lead, which would make such lamps hazardous waste.
10. Spent lamps may be handled under the less stringent standards provided under the Universal Waste Rules, codified in federal regulations at 40 C.F.R. Part 273 and in New York State regulations at 6 NYCRR Part 374-3.

Hazardous Waste Notification

11. Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, all persons conducting activities that generate or otherwise cause hazardous waste to be handled in other ways are required to notify EPA of their hazardous waste activities.
12. Approximately 27 sites denoting the City of Buffalo as the generator notified EPA that they generated hazardous waste and were assigned hazardous waste identification numbers.
13. Respondent, located at its City Hall office at 65 Niagara Square, Buffalo, New York, did not notify EPA that it was a generator of lead ("D008") and mercury ("D009") hazardous waste.

EPA Investigatory Activities

14. On or about September 24, 2008, a duly authorized representative of EPA conducted an inspection ("Inspection") of the offices of the City of Buffalo's Department of Public Works, Parks, and Streets ("DPW") and related offices at Buffalo's City Hall located at 65 Niagara Square, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927.
15. During the Inspection, Mr. Steven J. Stepniak, Commissioner of the Department of Public Works, Parks, and Streets, stated that he did not know the manner in which spent lamps were managed and referred the Inspector to the Office of Senior Electrical Engineer as the city entity that managed this waste.
16. During the Inspection, Mr. Dan Connors, Senior Electrical Engineer for the City of Buffalo, referring to spent lamps, stated that the City "used to crush them in boxes, then remove them from the boxes".
17. During the Inspection and in response to a request by the Inspector, the City of Buffalo was not able to provide documentation, such as purchase records, hazardous and non-hazardous waste manifests, Bills of Lading, recycling certificates, etc. which would provide information on the types, quantities, and final disposition of spent lamps.

Information Request Letter, Notices of Violation, and Respondent's Responses

18. On or about October 30, 2008, EPA issued to Respondent a RCRA Section 3007 Information Request Letter ("IRL") to the City of Buffalo.
19. The IRL requested from the City, among other things, information and documentation regarding the types and quantities of lamps purchased by the City of Buffalo, including copies of the Material Safety Data Sheet, for each type of bulb purchased during the period October 1, 2005 through September 30, 2008, all analytical results or specific knowledge used in determining whether or not any of these lamps, when used up or "spent" were hazardous waste when disposed of, and copies of any documentation for the treatment, disposal, or recycling of each of these spent lamps. The IRL also requested a narrative which details the procedure(s) used by the City to remove, transport, store, and dispose of spent lamps during the period October 1, 2005 through September 30, 2008.
20. In a telephone voice mail message left with EPA in mid-November 2008, Dr. David A. Hornung, the Principal Engineer for Buildings for Buffalo's Department of Public Works, Parks, and Streets, requested additional time to respond to the IRL. During the message, Dr. Hornung, in referring to spent lamps, stated "some of it was just thrown out."
21. In a letter dated November 13, 2008, Respondent requested additional time to submit a response to the IRL; the letter also stated that Buffalo's DPW Commissioner had issued an order "to stop any disposal pending a procedure review" and that the City needed "to obtain a term contract for the proper shipping and disposal" of spent lamps;
22. In two letters dated November 18, 2008 (one postmarked December 4, 2008), Respondent indicated that it had sent letters to various Buffalo "agencies/groups" to determine how they manage spent lamps and to "instruct them not to discard them anymore." However, the letters did not answer any of the questions EPA had asked in the IRL.
23. In a letter dated November 28, 2008, EPA granted Buffalo a sixty (60) day extension to respond to the IRL specifying that its response was due on or about February 1, 2009.
24. After not receiving a response from Respondent by February 1, 2009, as requested, EPA issued a Notice of Violation ("First NOV"), on or about February 13, 2009, informing Respondent that it was in violation of RCRA 3007 and requiring that Respondent immediately provide the information requested in Enclosure I of the October 30, 2008 IRL.
25. In a letter dated February 19, 2009, Respondent described the progress ("strides") in "rectifying the violation concerning the disposal of various light bulbs and other electrical components." However, this submittal did not answer any of the questions requested in the IRL.
26. In its letter dated February 24, 2009, Respondent stated that Buffalo is "currently putting the last piece of the solution into place and entering into an agreement with Northeast Lamp Recycling" to dispose of Buffalo's spent lamps. However, this submittal did not answer any of the questions requested in the IRL.

27. In a letter dated March 18, 2009, Respondent indicated that Buffalo had a contract in place with Northeast Lamp Recycling. However, this submittal did not answer any of the questions requested in the IRL.
28. On or about March 18, 2009, EPA issued a second Notice of Violation (“Second NOV”) informing Respondent that it was in continued violation of RCRA 3007 and requiring that Respondent immediately provide the information requested in Enclosure I of the October 30, 2008 IRL.
29. In a telephone call with EPA on April 8, 2009, and in response to being told that Buffalo’s IRL response was overdue, Dr. David A. Hornung stated that he “will submit the information requested a.s.a.p.”; he further stated “I won’t lie to you... we put a lot of the bulbs in the dumpster.”
30. In a letter dated April 14, 2009 sent by email on April 27, 2009, Respondent stated that it “did not have a comprehensive plan to handle various universal wastes, primarily lighting products, in place” and this mismanagement of these wastes was “based on a lack of knowledge of the nature of these wastes”. The letter further stated that Respondent was attaching requested copies of various Material Safety Data Sheets (MSDS) from its lamp supplier and purchase orders for the previous year from Buffalo’s Purchasing Department for light bulbs; however, none of these documents were attached to the letter.
31. In an email message by the EPA dated April 30, 2009 in response to an email message by Dr. Hornung dated April 27, 2009 referred to in paragraph 30 above, Respondent was informed that its responses, including the April 14, 2009 letter, have not adequately answered the questions contained in the IRL, did not include the attachments, and that the “City of Buffalo remains in violation of RCRA 3007.”
32. In a letter dated June 30, 2009, Respondent stated that “the City did not have a comprehensive plan to handle various universal waste, primarily lighting products, in place; this was based on a lack of knowledge of the nature of these wastes”.
33. The June 30, 2009 letter contained Material Safety Data Sheets (“MSDS”) for some of the lamps used by the City; the MSDS for three types of lamps used by the City indicate that these lamps would fail the Toxic Characteristic Leachate Procedure test and would be considered hazardous waste. All of the lamps for which MSDS were submitted contained mercury and/or lead.

COUNT 1 – Failure to Make a Hazardous Waste Determination

34. Complainant realleges each allegation contained above in paragraphs 1 through 33 with the same force and effect as if fully set forth below.
35. Pursuant to 6 NYCRR § 372.2(a)(2), a person who generates a solid waste must determine whether that solid waste is a hazardous waste, using the procedures specified in that provision (hereinafter a “hazardous waste determination”).
36. In accordance with 6 NYCRR § 371.1(c), subject to certain inapplicable exclusions, a “solid waste” is defined as any “discarded material” which includes materials which are “abandoned”, “recycled”, or “considered inherently waste-like” as further defined therein. In accordance with the same provision, materials are “abandoned” by being “disposed of, burned or incinerated”.

37. Prior to, on the date of, and subsequent to the Inspection, Respondent used incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps to illuminate the interior and exterior of Respondent's approximately two hundred (200) buildings and facilities, including cultural and sports buildings, police and fire departments, park lighting, and other sites.
38. At various times prior to the Inspection, Respondent had taken out of service and disposed of spent incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps as non-hazardous solid waste.
39. Each of the spent lamps listed in paragraph 38 above is a "discarded material" and, as such, meets the definition of a "solid waste", as that term is defined at 6 NYCRR § 371.1(c).
40. Prior to the Inspection, Respondent had not determined prior to disposal, whether its spent incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps were hazardous waste.
41. Respondent's failures to have made a hazardous waste determination for its spent incandescent, fluorescent, high pressure sodium vapor, and mercury and metal halide lamps constitute violations of 6 NYCRR § 372.2(a)(2).
42. Six NYCRR 372.2(a)(2) constitutes a requirement of Subtitle C of RCRA for purposes of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

COUNT 2 - Failure to Prevent and/or Minimize Releases

43. Complainant realleges each allegation contained above in paragraphs 1 through 33, with the same force and effect as if fully set forth below.
44. Pursuant to 6 NYCRR § 371.1(f), a person who generates 100 kilograms or less of non-acute hazardous waste in a calendar month may accumulate hazardous waste on-site without being subject to full regulation under 6 NYCRR §§ 370 through 376, and the notification requirements of § 3010 of RCRA, 42 U.S.C. §6930, provided that it, inter alia, determines whether each solid waste generated at its facility is a hazardous waste as required by 6 NYCRR § 372.2(a)(2) in accordance with procedures set forth in 6 NYCRR § 371.1(f)(6)(i). A person who generates in excess of this amount is subject to full regulation regardless of whether a hazardous determination is made.
45. At the time of the Inspection, at most if not all of the various sites where Respondent generated spent fluorescent, incandescent, high pressure sodium vapor, mercury and metal halide lamps, Respondent was generating less than 100 kilograms of hazardous waste per calendar month.
46. As of the time of the Inspection, Respondent had failed to make hazardous waste determinations on the spent fluorescent, incandescent, high pressure sodium vapor, mercury and metal halide lamps it generated before it disposed of them in the trash.
47. Some of the spent incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps generated by the Respondent contained mercury and/or lead in a concentration that would classify these spent lamps as hazardous waste under 6 NYCRR 371.3(e).

48. Because Respondent failed to make hazardous waste determinations on the spent hazardous waste lamps it generated and failed to manage the spent lamps it generated as universal waste, Respondent was subject to full regulation under 6 NYCRR §§ 370 through 376.
49. Pursuant to 6 NYCRR §§ 373-2.3(b) and 373-3.3(b), facilities must be maintained and operated to minimize the possibility of any unplanned sudden or non-sudden releases of hazardous waste or hazardous waste constituents to the air, soil, or surface water which could threaten human health or the environment.
50. As of the time of the Inspection, Respondent had managed and disposed of spent incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps as non-regulated waste. The improper handling and management of the spent lamps would likely have caused a release to the air and/or other media of the hazardous constituents which could threaten human health or the environment.
51. Pursuant to 6 NYCRR § 372.2(a)(2)(iv), a generator of hazardous waste may refer to 6 NYCRR § 374-3 for alternate waste management standards for universal wastes which include lamps as defined in 6 NYCRR § 374-3.1(i). A used lamp becomes a waste on the date it is discarded. An unused lamp becomes a waste on the date the handler decides to discard it. 6 NYCRR § 374-3.1(e)(3).
52. 6 NYCRR § 374-3.2(d)(4) (applicable to a "Small Quantity Handler of Universal Waste") requires that lamps be managed in a way (specified in the regulations) that prevents releases of any universal waste or component of universal waste to the environment.
53. Upon information and belief, Respondent was not containing its spent lamps in containers or packages that were (a) structurally sound, (b) adequate to prevent breakage, and (c) closed, as required by 6 NYCRR § 374-3.2(d)(4)(i).
54. Upon information and belief, Respondent did not immediately clean up and place in a closed and structurally sound container any lamp that was broken, as required by 6 NYCRR § 374-3.2(d)(4)(ii).
55. At the time of the Inspection, and at times prior thereto, Respondent did not manage its spent incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps as Universal Waste pursuant to 6 NYCRR § 374-3.2(d)(4).
56. Respondent's failures to ensure that spent lamps were managed in a way (as specified in the regulation) that prevented releases to the environment constitute violations of 6 NYCRR § 374-3.2(d)(4).
57. In the alternative, Respondent's failures to maintain and operate its facilities to minimize the possibility of any unplanned sudden or non-sudden releases of hazardous waste or hazardous waste constituents to the air, soil, or surface water which could threaten human health or the environment constitute violations of 6 NYCRR § 373-2.3(b) and/or 6 NYCRR § 373-3.3(b)

COMPLIANCE ORDER

Based upon the foregoing, and pursuant to the authority of Section 3008 of the Act, Complainant issues Respondent the following Compliance Order. To the extent it has not already done so, the City of Buffalo shall:

- a. commencing on the effective date of this Compliance Order, determine whether or not any and all solid wastes (including spent lamps) generated as part of its municipal activities, are or are not hazardous waste; and
- b. within thirty (30) calendar days of the effective date of this Compliance Order, comply with all applicable federal and state regulatory requirements for the management of hazardous waste by generators and universal waste handlers.

The City of Buffalo shall:

- a. within thirty (30) calendar days of the effective date of this Compliance Order shall submit to EPA written notice of its compliance (accompanied by a copy of all appropriate supporting documentation) or noncompliance for each of the requirements set forth herein. If Respondent is in noncompliance with a particular requirement, the notice shall state the reasons for noncompliance and shall provide a schedule for achieving expeditious compliance with the requirement;
- b. by the effective date of this Compliance Order, provide EPA with a copy of its contract with National Lamp Recycling and any other entities contracted for the removal and/or disposal of hazardous waste lamps;
- c. by the effective date of this Compliance Order, provide EPA with documentation (e.g., shipping papers, bills of lading, receipts, etc.) indicating the number and types of lamps removed, and whether they were disposed of or recycled, since at least March 18, 2009; and
- d. submit the above required information and notices to:

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

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

EPA reserves its right (and the right of the United States acting on behalf of the EPA) to seek a civil penalty and additional injunctive relief at a later date for any violations of the Act including those alleged in this Complaint.

Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise release Respondent from liability for any violations occurring or existing at facilities owned and/or operated by the City of Buffalo. Further, nothing herein waives, prejudices or otherwise affects the EPA's right (or the right of the United States on behalf of the EPA) to enforce any applicable provisions of law regarding Respondent.

NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

Pursuant to the terms of Section 3008(c) of RCRA and the Debt Collection Improvement Act of 1996, a violator failing to take corrective action within the time specified in a compliance order that has taken effect is liable for a civil penalty of up to \$37,500 for each day of continued noncompliance (73 Fed. Reg. 75340, December 11, 2008). Such continued noncompliance may also result in suspension or revocation of any permits issued to the violator whether issued by the EPA or the State of New York.

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 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." These rules are codified at 40 C.F.R. Part 22. A copy of these rules 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 are 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 lacks 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 dispute (and thus intend 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(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(s), a hearing upon the issues raised by the Complaint and Answer(s) may be held. 40 C.F.R. § 22.15(c). If, however, Respondent requests a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer(s) raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c). With regard to the Compliance Order in the Complaint, unless either Respondent requests a hearing pursuant to 40 C.F.R. § 22.15 within 30 days after the Compliance Order is served, the Compliance Order shall automatically become final. 40 C.F.R. § 22.37

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

C. Failure To Answer

If Respondent fails in 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 therefor 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(s) 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(s), and to collect the assessed penalty amount, in federal court. Any default order requiring compliance action shall be effective and enforceable against Respondent(s) 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. Exhaustion of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board 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 the right to judicial review. 40 C.F.R. § 22.27(d).

To appeal an initial decision to the Agency's Environmental Appeals Board ("EAB"), Respondent must do so "[w]ithin 30 days after the initial decision is served upon the parties." 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is affected 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.

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in the Complaint, and Respondent may also provide whatever additional information that they believe 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 financial or economic impact the proposed penalty would have on Respondent 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:

Stuart N. Keith Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, NY 10007-1866
Phone: 212-637-3217

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 request for 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(s) 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 shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives the right to contest the allegations in the Complaint and waives the 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).

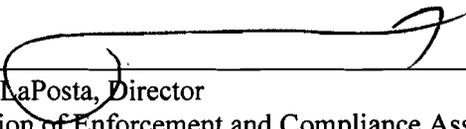
Respondent entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in the such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent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

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

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

Dated: JUNE 30, 2010
New York, New York

COMPLAINANT:



Dore LaPosta, Director
Division of Enforcement and Compliance Assistance
Environmental Protection Agency, Region 2
290 Broadway, 21st floor
New York, NY 10007-1866

To: The Honorable Byron Brown
Mayor of Buffalo
201 City Hall
65 Niagara Square
Buffalo, NY 14202

cc: Thomas Killeen, Chief
Hazardous Waste Compliance Section
Bureau of Hazardous Waste Management
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-7251

In re: the City of Buffalo
Docket Number RCRA-02-2010-7107

CERTIFICATE OF SERVICE

This is to certify that on JUL - 7, 2010, I served a true and correct copy of the foregoing "COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING," bearing Docket Number RCRA-02-2010-7107 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 The Honorable Bryon Brown, Mayor of Buffalo at the address set forth on the prior page . 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.

Dated: JUL - 7, 2010
New York, New York

Mildred N. Bay