

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

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901 NORTH 5TH STREET

KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

University of Kansas Medical Center)

3901 Rainbow Blvd.)

Kansas City, Kansas 66160)

Docket No. RCRA-07-2006-0261

EPA ID No. KSD076274737)

Respondent.)

COMPLAINANT'S PREHEARING EXCHANGE

The United States Environmental Protection Agency, Region VII ("Complainant" or "EPA") respectfully submits the following Prehearing Exchange pursuant to the March 19, 2007, Prehearing Scheduling Order issued by Administrative Law Judge Carl C. Charneski, and in accordance with the requirements of 40 C.F.R. § 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (40 C.F.R. Part 22).

A. COMPLAINANT'S EXPECTED FACT WITNESSES

EPA intends to call the following witnesses at hearing:

1. Dedriel Newsome. Ms. Newsome is an Environmental Engineer with the Environmental Services Division of Region VII of the U.S. Environmental Protection Agency. Her duties include conducting RCRA compliance evaluation inspections at facilities which may generate, treat, store and/or dispose of hazardous waste. At the request of the Environmental Services Division and the Air, RCRA & Toxics Division of EPA Region VII, Ms. Newsome conducted a RCRA compliance evaluation inspection of the Respondent's facility in Kansas City, Kansas on March 15-17, 2006. Ms. Newsome will testify about her observations and findings during the RCRA compliance evaluation inspection, and any statements made by Respondent's employees, contractors and representatives as a part of that inspection. She is also expected to testify regarding correspondence with the Respondent following the inspection.

2. Edwin G. Buckner. Mr. Buckner is an Environmental Engineer with the RCRA Enforcement and State Programs Branch of the Air, RCRA and Toxics Division at EPA Region VII. His duties include serving as a Compliance Officer in the follow-up to RCRA compliance evaluation inspections. He will testify as to his review of the evidence compiled as a result of EPA's regulatory oversight of Respondent's facility, and the factual basis for his determination that Respondent violated RCRA and the regulations promulgated thereunder. He will explain his record review and discuss correspondence between the EPA and Respondent.

Mr. Buckner will also testify regarding how the penalty proposed in EPA's Complaint, Compliance Order, and Notice of Opportunity for Hearing (Complaint) was calculated applying the statutory penalty factors set forth within Section 3008(a) of RCRA and EPA's RCRA Civil Penalty Policy (Complainant's Exhibit 2). He will offer his opinion regarding the appropriateness of the penalty proposed in the Complaint, considering the seriousness of the violations, any good faith efforts on the part of Respondent to comply with RCRA, the history of Respondent's noncompliance with RCRA, the economic benefit gained by Respondent as a result of its noncompliance with the applicable statutes and regulations, and the actual harm and potential for harm caused by the violations. Mr. Buckner is also expected to testify as to the purpose of RCRA and the role of EPA in its enforcement.

3. Donald Toensing. Mr. Toensing is the Chief of the RCRA Enforcement and State Programs Branch in the Air, RCRA and Toxics Division at EPA Region VII. Mr. Toensing will testify as to his role, as Branch Chief, in ensuring consistency in enforcement and penalty amounts proposed.

B. COMPLAINANT'S EXPECTED EXPERT WITNESSES

At this time, EPA does not intend to call any expert witnesses at hearing.

C. COMPLAINANT'S EXHIBITS

A copy of documents and exhibits which Complainant intends to introduce into evidence at the hearing are attached hereto as Complainant's Exhibits, and are numbered sequentially as CX - 1, CX - 2, etc. The following is a list of those documents and exhibits:

Complainant's Exhibit 1 (CX-1). RCRA Compliance Evaluation Inspection Report, with attachments and photographs, for a RCRA compliance evaluation inspection conducted at Respondent's facility on March 15-17, 2006, by Dedriel Newsome of EPA Region VII.

Complainant's Exhibit 2 (CX-2). EPA's RCRA Civil Penalty Policy, dated June 2003.

Complainant's Exhibit 3 (CX-3). EPA Memorandum from Thomas V. Skinner, *Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation*

Adjustment Rule (Pursuant to Debt Collection Improvement Act of 1996, Effective October 1, 2004), September 21, 2004.

Complainant's Exhibit 4 (CX-4). EPA's Penalty Computation Worksheets and Narrative for Counts I and II of the Complaint, by Edwin G. Buckner, P.E.

Complainant's Exhibit 5 (CX-5). Hazardous Waste Site Info Verification Report submitted by the University of Kansas Medical Center to the Kansas Department of Health and Environment, signed by Robert M. Bornkessel on January 31, 2005.

Complainant's Exhibit 6 (CX-6). Notification of Enforcement Action at the University of Kansas Medical Center, Kansas City, Kansas, sent to William Bider, Kansas Department of Health and Environment, dated September 15, 2006 and signed by Donald Toensing, Chief, RCRA Enforcement and State Programs Branch, Region VII.

Complainant's Exhibit 7 (CX-7). Letter and Attachments, from the University of Kansas Medical Center's Safety Office Director, Ms. Ruth Schukman-Dakotas, to Ms. Dedriel Newsome of EPA Region VII, dated March 30, 2006, in response to the March 17, 2006, EPA Notice of Violation (*see Attachment 6 to CX-1*).

Complainant's Exhibit 8 (CX-8). *Packing List for HW Disposals 3/23 – 3/31*, provided by the University of Kansas Medical Center, to Ms. Dedriel Newsome of EPA Region VII, dated April 4, 2006.

Complainant's Exhibit 9 (CX-9). Page 1 of the Notice of Violation issued to the University of Kansas Medical Center with notes by Ms. Dedriel Newsome documenting telephone conversations with Ms. Ruth Schukman-Dakotas on April 3, 2006, and with Mr. Gerald Brooks on April 3, 2006.

D. ESTIMATED TIME FOR PRESENTING CASE

Complainant estimates that it will require approximately sixteen (16) hours to present its case-in-chief.

E. LOCATION OF THE HEARING

Pursuant to 40 C.F.R. § 22.19(d), Complainant requests that the hearing in this matter be held in or near Kansas City, Kansas. Both Complainant's and Respondent's places of business are located in Kansas City, Kansas.

F. JUDICIAL NOTICE REQUESTED

Complainant hereby requests the Presiding Officer to take judicial notice of the following:

1. The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984 (RCRA), 42 United States Code (U.S.C.) § 6901 et seq., and the regulations promulgated thereunder.

2. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, found at 40 C.F.R. Part 22, as amended.

3. Adjustment of Civil Penalties for Inflation and implementing the Debt Collection Improvement, 40 C.F.R. Part 19.

4. Kansas Hazardous Waste Management Act, K.S.A. § 65-3430 et seq., and the regulations promulgated thereunder.

G. CALCULATION OF THE PROPOSED PENALTY

Pursuant to 40 C.F.R. § 22.19(a)(3), Complainant hereby offers this explanation of how the proposed penalty amount was calculated in accordance with the criteria set forth in RCRA.

Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), authorizes the imposition of a civil penalty of up to \$25,000 per day of noncompliance for each violation of a requirement of Subtitle C of RCRA and its implementing regulations. This figure has been adjusted upward pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, such that penalties of up to \$32,500 per day of noncompliance are authorized for violations occurring after March 15, 2004. Complainant has relied on the RCRA Civil Penalty Policy, dated June 2003 (Penalty Policy), in the calculation of the proposed penalty in this matter. The Penalty Policy is based on the statutory factors set forth in Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), which are “the seriousness of the violation and any good faith efforts to comply with applicable requirements.” In accordance with the Penalty Policy, a penalty is made up of four components: 1) gravity-based component; 2) multi-day component; 3) adjustments to the sum of gravity-based and multi-day components for case-specific circumstances, and 4) economic benefit of noncompliance component.

In this matter, Mr. Edwin Buckner made the penalty determinations for the Complainant. Mr. Donald Toensing reviewed the penalty determination to ensure that a fair, consistent, and appropriate application of the Penalty Policy took place in this matter. A limited description of the penalty calculation is given below. The reasoning is set forth in greater detail in Complainant's Exhibit 4.

Count I.

For Count I (Failure to Conduct a Hazardous Waste Determination), Mr. Buckner determined that the violation fell into the moderate potential for harm / major extent of deviation category, and selected a gravity based component of \$14,184. This amount reflects the top of the cell's range in the penalty policy and the upward adjustment of 17.23%, due to the Civil

Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19. See *Complainant's Exhibit 3*. This value was chosen based on the seriousness of the violation (relative to other violations falling within the same matrix cell), the size and sophistication of the violator, and the number of days of violation.

A multiple-day component was included in the penalty calculation, as the Penalty Policy directs that a multi-day component is presumed when the violation fits into the moderate potential for harm / major extent of deviation category. In this case, the multi-day component is based on the 52 waste streams for which Respondent failed to conduct a hazardous waste determination. The first day of violation is assessed using the gravity-based penalty matrix. The remaining days are assessed according to the multi-day penalty matrix. While each of the waste streams could be considered an individual occurrence and thus assessed a multi-occurrence penalty, EPA used its discretion under the policy to assess a multi-day penalty rather than a multi-occurrence penalty. *Penalty Policy*, pages 22-23. Assessing a multi-occurrence penalty would result in the initial gravity penalty being multiplied by the number of waste streams. Instead, EPA used the multi-day matrix, multiplying each of the waste streams by the top of the moderate / major multi-day penalty cell. When adjusted upward for inflation pursuant to 40 C.F.R. Part 19, a multi-day penalty of \$2,837 was assessed for days 2 through 52 to reach a total multi-day penalty of \$144,687. Therefore, the subtotal of the gravity-based and multi-day components is \$158,871.

No adjustment factors were applied to the initial gravity amount for Count I. Using EPA's BEN computer model, Mr. Buckner determined that the economic benefit for Count I was approximately \$768. Since the economic benefit for Counts I and II did not exceed \$5,000, no economic benefit recovery is being pursued against Respondent. See *the Penalty Policy* (Complainant's Exhibit 2), page 28.

The final penalty for Count I was calculated by adding all of the components: \$14,184 (gravity-based component) + \$144,687 (multi-day component) + \$0 (adjustment factors) + \$0 (economic benefit) = \$158,871.

Count II.

For Count II (Operating as a Treatment, Storage, or Disposal Facility without a RCRA Permit or RCRA Interim Status), Mr. Buckner determined that the violation fell into the moderate potential for harm / major extent of deviation category, and selected a gravity based component of \$14,184. This amount reflects a dollar value at the top of the cell, appropriately adjusted for inflation. The top of the cell was selected based on the seriousness of the violation (relative to other violations falling within the same matrix cell), the size and sophistication of the violator, and the number of days of violation.

The Penalty Policy states that a multi-day penalty for a violation in the moderate potential for harm / major extent of deviation category is presumed. For Count II, a multi-day penalty was assessed for 48 days. Mr. Buckner based this on Respondent's storage of hazardous waste for 58 days beyond the allowed 90 days and Respondent's failure to label and date five high hazard containers of hazardous waste for 48 days when selecting the multi-day component. The first day of violation is assessed using the gravity-based penalty matrix. The remaining days are

assessed according to the multi-day penalty matrix. The top of the moderate / major multi-day penalty cell was selected and adjusted upward by 17.23% pursuant to 40 C.F.R. Part 19. For days 2-48, a multi-day penalty of \$2,837 was assessed for a total multi-day component of \$133,339 (\$2,837 x (48-1)). Therefore, the subtotal of the gravity-based and multi-day components is \$147,523.

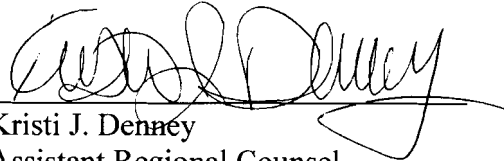
No adjustment factors were applied to the initial gravity amount for Count II. Using EPA's BEN computer model, Mr. Buckner determined that the economic benefit for Count II was approximately \$233. Since the economic benefit for Counts I and II did not exceed \$5,000, no economic benefit recovery is being pursued against Respondent. *See the Penalty Policy*, page 28.

The final penalty for Count II was calculated by adding all of the components: \$14,184 (gravity-based component) + \$133,339 (multi-day component) + \$0 (adjustment factors) + \$0 (economic benefit) = \$147,523.

H. RESERVATION OF RIGHTS

Complainant reserves the right to call all witnesses named by Respondent. Complainant further reserves the right to submit the names of additional witnesses and to submit additional exhibits prior to the hearing of this matter, upon timely notice to the Administrative Law Judge and to the Respondent, in accordance with 40 C.F.R. § 22.19(f).

Respectfully Submitted,



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Region VII
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ATTORNEY FOR COMPLAINANT

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand-delivered the original and one true copy of Complainant's Prehearing Exchange to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North 5th Street, Kansas City, Kansas 66101.

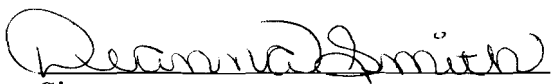
I further certify that on the date below I sent a true and correct copy of Complainant's Prehearing Exchange via certified mail, return receipt requested to:

The Honorable Susan L. Biro
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900L / Ariel Rios Building
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

And

Michael P. Comodeca
Spencer Fane Britt & Browne LLP
9401 Indian Creek Parkway, Suite 700
Overland Park, KS 66210-2005

Dated this 10th day of April, 2007.


Signature