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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)	
)	
EMCO Chemical Distributors Inc.)	Docket No. RCRA-05-
2100 Commonwealth Avenue)	2007-0006
North Chicago, Illinois)	
)	Respondent Requests A
U.S. EPA ID No.: ILD 005 070 495)	Hearing
)	
Respondent.)	

ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT, COMPLIANCE ORDER, AND PROPOSED CIVIL PENALTY, AND RESPONDENT'S REQUEST FOR HEARING

NOW COMES Respondent, EMCO Chemical Distributors Inc. ("EMCO"), by its attorneys, and for its Answer to the United States Environmental Protection Agency's ("U.S. EPA") Complaint, Compliance Order, and Proposed Civil penalty, states as follows:

PRELIMINARY STATEMENT AND JURSDICTION

1.-12. Respondent incorporates paragraphs 1 through 13 [sic] of this Complaint as though set forth in full in this paragraph.

RESPONSE: Paragraphs 1 through 12 inclusive consist solely of legal conclusions for which no Answer is required. To the extent Paragraphs 1 through 12 purport to summarily restate statutory and regulatory provisions, Respondent states that such statutes and regulations speak for themselves. To the extent that 1 Paragraphs through 12 assert legal conclusions, no response is required. To the extent that 1 through 12 assert factual allegations, Respondent answers that it is without sufficient information to either admit or deny such allegations, and therefore said allegations are deemed denied.

13. U.S.EPA has provided notice of commencement of this action to the State of Illinois pursuant to Section 3008(a)(2) of RCRA, 42 USC Section 6928(a)(2).

RESPONSE: To the extent that Paragraph 13 asserts legal conclusions, no response is required. Respondent is without sufficient knowledge to admit or deny the factual allegations made in Paragraph 13, and therefore said allegations are deemed denied.

GENERAL ALLEGATIONS

14. Respondent is EMCO Chemical Distributors, Inc. (EMCO) which is and was at all times relevant to this Complaint a corporation incorporated under the laws of Illinois.

RESPONSE: EMCO admits the allegations of paragraph 14.

15. Respondent is a "person" as defined by 35 IAC § 720.110 [40 C.F.R. § 260.10] and Section 1004(15) of RCRA, 42 U.S.C. §6903(15).

RESPONSE: Paragraph 15 consists solely of legal conclusions for which no Answer is required.

16. On August 6 and 7, 2003, U.S. EPA conducted an inspection of the EMCO facility located at 2100 Commonwealth Avenue, in North Chicago, Illinois (the Facility).

RESPONSE: EMCO admits the allegations of paragraph 16.

17. At the time of the August 2003 inspection, Tina R. Levitt, EMCO's Director of Environment, Health and Safety, stated that EMCO had been in operation as a chemical distribution installation at the North Chicago Facility for approximately 25 years. EMCO is also a transporter of hazardous waste.

RESPONSE: EMCO admits the allegations of paragraph 17.

18. 35 IAC § 720.110 [40 C.F.R. § 260.110] defines "generator" as any person, by site, whose act or process produces hazardous waste identified or listed in 35 IAC Part 721 [40 C.F.R. Part 261] or whose act first causes a hazardous waste to become subject to regulation.

RESPONSE: Paragraph 18 consists solely of legal conclusions for which no Answer is required. To the extent Paragraph 18 purports to summarily restate statutory and regulatory provisions, Respondent states that such statutes and regulations speak for themselves.

19. At all times relevant to this Complaint, Respondent generated and stored wastes at its North Chicago Facility which were solid wastes, as defined in 35 IAC §721.12 [40 C.F.R. § 261.2].

RESPONSE: EMCO admits the allegations of paragraph 19.

20. At all times relevant to this Complaint, Respondent generated and stored wastes at its North Chicago Facility which were hazardous wastes within the meaning of 35 IACS § 721.13 [40 C.F.R. § 261.3].

RESPONSE: EMCO admits the allegations of paragraph 20.

21. At all times relevant to this Complaint, Respondent was a generator of hazardous waste within the meaning of 35 IAC § 720.110 [40 C.F.R. § 260.10].

RESPONSE: EMCO admits the allegations of paragraph 21.

22. At all times relevant to this Complaint, Respondent also stored hazardous waste at its North Chicago Facility which it had collected in its capacity as a transporter. 35 IAC § 720.10 [40 C.F.R. § 260.10] defines the term “transporter” as “a person engaged in the offsite transportation of hazardous waste by air, rail, highway, or water.”

RESPONSE: EMCO admits the allegations of paragraph 22. EMCO further states affirmatively that hazardous wastes it had collected from customers in its capacity as a transporter were stored on a transfer basis for up to 10 days.

SPECIFIC ALLEGATIONS

COUNT 1: STORAGE OF HAZARDOUS WASTE WITHOUT A PERMIT

23. Complainant incorporates paragraphs 1 through 22 of this Complaint as though set forth in full in this paragraph.

RESPONSE: Respondent incorporates its answers to paragraphs 1 through 22 inclusive of this Complaint as though set forth in full in this paragraph.

24. During calendar years 2002 and 2003, Respondent transported to its Facility the hazardous waste listed in the following twenty (20) manifests, and stored this hazardous waste at its Facility for more than ten (10) days:

- (01). IL 10186525 – four containers were stored for 18 days;
- (02). IL 10186535 – one container was stored for 15 days;
- (03). IL 10220758 – one container was stored for 16 days;
- (04). IL 10220767 – one container was stored for 15 days;
- (05). IL 10220794 – one container was stored for 14 days;
- (06). IL 10220966 – one container was stored for 114 days;
- (07). MI 8738240 – two containers were stored for 20 days;
- (08). MI 8738253 – one container was stored for 18 days;
- (09). MI 8738280 – five containers were stored for 14 days;
- (10). MI 9082610 – one container was stored for 13 days;
- (11). MI 9082929 – one container was stored for 18 days;
- (12). MI 9082930 – three containers were stored for 18 days;
- (13). 742736 (Missouri) – two containers were stored for 15 days;
- (14). 010777 0336 (Missouri) – 15 containers were stored for 20 days;
- (15). 028184 0021 (Missouri) – 13 containers were stored for 16 days;
- (16). 028184 2010 (Missouri) – five containers were stored for 18 days;
- (17). 036274 0606 (Missouri) – 23 containers were stored for 21 days;
- (18). 036274 0703 (Missouri) – 16 containers were stored for 12 days;
- (19). 10777 0329 (Missouri) – nine containers were stored for 15 days; and
- (20). 10777 0336 (Missouri) – nine containers were stored for 18 days.

RESPONSE: EMCO admits the allegations of paragraph 24.

25. Respondent's storage of the 119 containers of hazardous waste listed on these twenty (20) manifests at its Facility without a RCRA permit to store these wastes is in violation of Section 3005(a) of RCRA, 42 USC § 6925(a), and 35 IAC § 723.112[40 C.F.R. § 263.12], which subjects Respondent to a compliance order and civil penalties in accordance with section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

RESPONSE: Paragraph 25 asserts legal conclusions for which no response is required. EMCO further states affirmatively that following its inspection, USEPA reviewed all of the manifests for transfer wastes managed at EMCO for 2002 and 2003, and these 119 containers covered by 20 manifests were the only ones that were identified as being held over the 10 day transfer limit (not including the one additional grace day allowed by USEPA) out of a total of more than many thousands of containers covered that were collected by EMCO from customers in its capacity as a transporter and managed on site on a transfer basis during 2002 and 2003.

EMCO further states affirmatively that the transfer waste at issue was all in closed containers in good condition and was properly stored and managed at all times while present at the EMCO facility, and presented no risk or threat of risk to human health or the environment.

COUNT 2: STORAGE OF HAZARDOUS WASTE WITHOUT A PERMIT

26. Complainant incorporates paragraphs 1 through 22 of this Complaint as though set forth in full in this paragraph.

RESPONSE: Respondent incorporates its answers to paragraphs 1 through 22 inclusive of this Complaint as though set forth in full in this paragraph.

27. On July 25, 2003, Respondent accepted a shipment of hazardous waste for storage at its Facility, from Pollution Control Industries of East Chicago, Illinois (manifest No. IL 10690588), which had been generated by the North Shore Sanitary District of Gurnee, Illinois.

RESPONSE: EMCO admits the allegations of paragraph 27. Respondent further states affirmatively that: (a) this was a shipment that had been rejected by the Pollution Control Industries facility and should not have been sent back to EMCO, but should have been returned to North Shore Sanitary District of Gurnee; (b) personnel at EMCO

inadvertently signed off on the manifest as the final destination when the shipment should have been managed as a transfer waste for 10 days or less and transported back to North Shore Sanitary District of Gurnee; (c) the waste was properly stored and managed as a hazardous waste at all times while present at the EMCO facility and that the rejected load presented no risk or threat of risk to human health or the environment; (d) promptly after this item was brought to the attention of EMCO, new written procedures were prepared and implemented to properly identify rejected loads upon arrival at the facility and to assure that they are managed properly; and (e) copies of these updated written procedures have been furnished to USEPA.

28. On July 25, 2003, Respondent did not have a RCRA permit for its Facility to store the shipment of hazardous waste listed on manifest IL 10690588.

RESPONSE: EMCO admits the allegations of paragraph 28. EMCO incorporates the affirmative statements from its answer to paragraph 27 and further states affirmatively that: (a) the EMCO facility has not at any time acted or intended to act, nor has it presented itself to the public at any time as a RCRA treatment, storage, or disposal facility for third party hazardous wastes; (b) EMCO is not aware of any other third party load being inadvertently accepted at the EMCO facility as a final destination; (c) promptly after this item was brought to the attention of EMCO, new written procedures were prepared and implemented to properly identify rejected loads upon arrival at the facility and to assure that they are managed properly; and (e) copies these updated written procedures have been furnished to USEPA.

29. Respondent stored the hazardous waste listed on manifest IL 10690588 at its Facility for a period of thirteen (13) days.

RESPONSE: EMCO admits the allegations of paragraph 29. EMCO incorporates the affirmative statements from its answers to paragraphs 27 and 28, and further states affirmatively that: (a) the waste was properly stored and managed as a hazardous waste at all times while present at the EMCO facility and that the rejected load presented no risk or threat of risk to human health or the environment; (b) promptly after this item was brought to the attention of EMCO, new written procedures were prepared and implemented to properly identify rejected loads upon arrival at the facility and to assure that they are managed properly; and (c) copies of these updated written procedures have been furnished to USEPA.

30. Respondent's storage of the hazardous waste listed in manifest IL 10690588 at its Facility without a RCRA permit to store this waste is in violation of 35 IAC § 703.121(a)(1)[40 C.F.R. § 270.1(b)], which subjects Respondent to a compliance order and civil penalties in accordance with section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

RESPONSE: Paragraph 30 asserts legal conclusions for which no response is required. EMCO incorporates the affirmative statements from its answer to paragraph 27, 28, and 29, and further states affirmatively that: (a) the EMCO facility has not at any time acted or intended to act, nor has it presented itself to the public at any time as a RCRA treatment, storage, or disposal facility for third party hazardous wastes; (b) EMCO is not aware of any other third party load being inadvertently accepted at the EMCO facility as a final destination; (c) promptly after this item was brought to the attention of EMCO, new written procedures were prepared and implemented to properly identify rejected loads upon arrival at the facility and to assure that they are managed properly; and (e) copies of these updated written procedures have been furnished to USEPA.

**COUNT 3: FAILURE TO ENSURE THAT HAZARDOUS WASTE
CONTAINERS ARE PROPERLY LABELED**

31. Complainant incorporates paragraphs 1 through 22 (sic) of this Complaint as though set forth in full in this paragraph.

RESPONSE: Respondent incorporates its answers to paragraphs 1 through 22 inclusive of this Complaint as though set forth in full in this paragraph.

32. During the August 6 and 7, 2003 inspection, a U.S. EPA inspector photographed at least ten (10) containers (*i.e.* drums) of hazardous waste at Respondent's Facility, that Respondent generated and that were not marked with the date upon which each period of accumulation began, as required by 35 IAC § 722.134(a)(2)[40 C.F.R. § 262.34(a)(2)].

RESPONSE: EMCO admits that during the August 6 and 7, 2003 inspection, a U.S. EPA inspector photographed up to ten (10) containers (*i.e.* drums) of hazardous waste at Respondent's Facility, that Respondent generated and that were not marked with the date upon which each period of accumulation began. EMCO further states affirmatively that: (a) these drums had just been put into the 90 day EMCO generated waste storage area and were awaiting the correct labels to be affixed and accumulation start dates to be inserted at the time that they were photographed; (b) upon becoming aware of this issue, EMCO has revised its procedures to require affixation of proper labels on EMCO generated drums of waste immediately upon commencement of accumulation of wastes in satellite storage areas (before the drums are moved to the 90 day storage area), with the accumulation start dates inserted when waste accumulation begins in the satellite storage areas; (c) EMCO has also revised its labels and automated the process of pre-printing as much information on the label as possible, leaving only accumulation start dates to be inserted when the labels are affixed, to facilitate consistent RCRA compliance; and (d) EMCO has also revised its Waste Materials Handling

Procedure to assure that the Waste Manager inspects each drum daily to assure that each is labeled properly and that each label includes an accumulation start date's waste manager, and has provided a copy of this revised procedure to USEPA.

33. During the August 6 and 7, 2003 inspection, none of these ten (10) containers (*i.e.* drums) of hazardous waste that were photographed by the U.S. EPA inspector at Respondent's Facility were labeled or marked with the words, "Hazardous Waste," as required by 35 IAC § 722.134(a)(3)[40 C.F.R. § 262.34(9a)(2)].

RESPONSE: EMCO admits that during the August 6 and 7, 2003 inspection, a U.S. EPA inspector photographed up to ten (10) containers (*i.e.* drums) of hazardous waste at Respondent's Facility, that Respondent generated and that were not marked with the words "Hazardous Wastes." EMCO incorporates the affirmative statements from its answer to paragraph 32 and further states affirmatively that each of the drums in question had a wide yellow stripe around its middle center section that, in addition to labeling, identifies EMCO generated hazardous waste.

34. Respondent's failure to mark or label these ten (10) containers (*i.e.* drums) of hazardous waste with the accumulation start date or the words, "Hazardous Waste," as required by 35 IAC § 722.134(a)(2) and (3)[40 C.F.R. §§ 262.34(a)(2) and (3)], which subjects Respondent to a compliance order and civil penalties in accordance with section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

RESPONSE: Paragraph 34 asserts legal conclusions for which no response is required. EMCO incorporates the affirmative statements from its answer to paragraphs 32 and 33 and further states affirmatively that (a) the short gap in time between placement of the drums at issue into the EMCO generated waste 90 day storage area and placement of "Hazardous Waste" labels with accumulation start dates on those drums was a de minimis condition because EMCO personnel were all aware that each of the EMCO drums of waste in question contained hazardous waste, as each was marked with

a wide yellow stripe around its middle center section; (b) each of these drums of waste was properly stored and managed as a hazardous waste in closed containers in good condition in the EMCO 90 day generator waste storage area at all times while present at the EMCO facility, and (c) none of these drums presented any risk or threat of risk to human health or the environment.

II. PROPOSED CIVIL PENALTY

The U.S. EPA Administrator is authorized, pursuant to section 3008(a)(3) of RCRA, as amended, 42 U.S.C. § 6928(a)(3); and the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701; and the “Adjustment of Civil Monetary Penalties for Inflation” rule, 40 C.F.R. Part 19, to assess a civil penalty of up to \$27,500 per day for each violation of Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, that occurs or continues after January 30, 1997; and to assess a civil penalty of up to \$32,500 per day for each violation that occurs after March 15, 2004.

Based upon an evaluation of the facts alleged in the Complaint, the seriousness of the violations and any good faith efforts to comply with applicable requirements; and after considering the nature, circumstances, extent and gravity of the violations; Respondent’s ability to pay such a penalty; its prior history, if any, of such violations; its degree of culpability; any economic benefit or savings to Respondent resulting from the violations; and any other matters that justice requires; and subject to the receipt and evaluation of any additional relevant information from Respondent, Complainant proposes that Respondent be assessed the following civil penalty for the violations alleged in this Complaint:

Count 1	\$310,955
Count 2	\$ 27,610
Count 3	\$ 10,450
Total Civil Penalty.....	\$349,015

Complainant calculated this proposed civil penalty by evaluating the facts and circumstances of this case with specific reference to the “RCRA Civil Penalty Policy” (dated June 2003). A copy of this policy is available upon request.

RESPONSE: Subject to and without limitation of the various defenses and objections to the proposed penalty set forth in detail in the Respondent’s Affirmative Defenses, EMCO respectfully submits that the penalty sought in the Complaint is

arbitrary, capricious and without rationale basis. The arbitrary and capricious nature of the USEPA analysis that gives rise to this penalty claim is readily apparent when the penalty calculation worksheet attached to the Complaint is compared to the worksheet for the same alleged violations provided by USEPA during pre-filing discussions. That original worksheet, a true and correct copy of which is attached to this Answer as Exhibit A, assessed the following civil penalties for exactly the same violations alleged in this Complaint:

Count 1 (transfer violations)	\$ 90,410
Count 2 (storage of one load)	\$ 27,610
Count 3 (labeling violations)	\$ 10,450
Total Civil Penalty	\$128,470

While Respondent EMCO believes that the **\$128,470** penalty that had originally been proposed for the violations alleged was excessive, there is simply no rationale basis for USEPA to nearly triple the penalty it is proposing without any change in either the facts or the violations alleged. Either USEPA is seeking to be unduly coercive and is punishing EMCO for not accepting the first assessment, or USEPA's current penalty assessment is arbitrary, capricious and without rational basis – as there is no way USEPA can legitimately claim that penalties of **\$128,470 and \$349,015** are properly assessed for exactly the same alleged violations without any change in the underlying facts.

Respondent's objections and defenses to the claimed penalties are set forth in further detail in Respondent's Affirmative Defenses.

PAYMENT OF THE PROPOSED CIVIL PENALTY
[omitted]

III. COMPLIANCE ORDER

Based on the foregoing, Respondent is hereby ORDERED, pursuant to U.S. EPA's authority in section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and section 22.37(b) of the Consolidated Rules of Practice, 40 C.F.R. §22.37(b), to immediately comply with the following requirements:

1. Respondent shall not store hazardous waste at its Facility except for such storage which fully complies with all requirements and prohibitions governing the storage of hazardous waste applicable to generators, transporters and storage facilities, codified at or incorporated by 35 IAC Parts 722, 723, 725, 728, and 703 [40 C.F.R. parts 262, 263, 265, 268 and 270].

RESPONSE: Respondent respectfully submits that it is currently in compliance with all RCRA requirements and prohibitions governing the storage of hazardous waste applicable to generators and transporters; and that it is not subject to RCRA permitted storage facility requirements as it is not now and never has been a RCRA treatment storage or disposal facility.

2. Respondent shall, within ninety (90) calendar days from the effective date of this Order, submit a closure plan, pursuant to 35 IAC Part 725, Subpart G [40 C.F.R. Part 265, Subpart G], to the Illinois Environmental Protection Agency (IEPA), which shall address closure of the areas of Respondent's Facility at which the hazardous waste referenced in Counts 1, 2 and 3 of the Complaint were stored.

RESPONSE: Respondent respectfully submits that a RCRA closure plan is neither necessary or appropriate, nor is it legally required, because the EMCO facility is not subject to RCRA storage facility permitting requirements, as the EMCO facility has not at any time acted or intended to act, nor has it presented itself to the public at any time as a RCRA permitted treatment, storage, or disposal facility for hazardous wastes.

3. Respondent shall, within ninety (90) calendar days from the effective date of this Order, submit a corresponding closure cost estimate, pursuant to 35 IAC Part 725, Subpart G [40 C.F.R. Part 265, Subpart G], to the IEPA, which shall address the cost estimates of closure of the areas of Respondent's Facility at which the hazardous waste referenced in Counts 1, 2 and 3 of the Complaint were stored.

RESPONSE: Respondent respectfully submits that a RCRA closure cost estimate is neither necessary or appropriate, nor is it legally required, because the EMCO facility is not subject to RCRA storage facility permitting requirements, as the EMCO facility has not at any time acted or intended to act, nor has it presented itself to the public at any time as a RCRA permitted treatment, storage, or disposal facility for hazardous wastes.

4. Respondent shall, within ninety (90) calendar days from the effective date of this Order, submit evidence of financial responsibility for closure assurance, as required in 35 IAC Part 725, Subpart H [40 C.F.R. Part 265, Subpart H], for the areas of Respondent's Facility at which the hazardous waste referenced in Counts 1, 2 and 3 of the Complaint were stored.

RESPONSE: Respondent respectfully submits that evidence of financial responsibility for RCRA closure assurance is neither necessary or appropriate, nor is it legally required, because the EMCO facility is not subject to RCRA storage facility permitting requirements, as the EMCO facility has not at any time acted or intended to act, nor has it presented itself to the public at any time as a RCRA permitted treatment, storage, or disposal facility for hazardous wastes.

5. Respondent shall, within ninety (90) calendar days from the effective date of this Order, submit evidence of financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from the operations of the Respondent's Facility, as required in 35 IAC § 725.247 [40 C.F.R. § 265.147], for the areas of the Facility at which the hazardous waste referenced in Counts 1, 2 and 3 of the Complaint were stored.

RESPONSE: Respondent respectfully submits that evidence of financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from the operations of the Respondent's Facility is neither necessary or appropriate, nor is it legally required, because the EMCO facility is not subject to RCRA storage facility permitting requirements, as the EMCO facility has not at any time acted or intended to act, nor has it presented itself to the public at any time as a RCRA treatment, storage, or disposal facility for third party hazardous wastes.

Respondent further states affirmatively that although such insurance is not a legal requirement applicable to EMCO, Respondent does maintain such insurance and will provide a copy of the certificate of insurance to USEPA.

6. Respondent shall notify U.S. EPA in writing upon achieving compliance with this Order within fifteen (15) calendar days after the date it achieves compliance. If Respondent has not taken or completed any requirement of this Order, Respondent shall notify U.S. EPA of this failure to comply, its reasons for this failure, and the proposed date for compliance within ten (10) calendar days after the due date set forth in this Order.

RESPONSE: Respondent respectfully submits that based on the above and foregoing responses, it is currently in compliance with applicable legal requirements.

7. Respondent shall submit a copy of all reports, submissions, and notifications required by this Order to the:

Branch Chief
Enforcement and Compliance Assurance Branch
Waste, Pesticides & Toxics Division (DE-9J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604-3590

RESPONSE: No response required

8. This Order shall automatically become a final order and, therefore, effective, thirty (30) days after it is served upon Respondent requests a hearing pursuant to section 22.15 of the Consolidated Rules of Practice, 40 C.F.R. § 22.15 (also, see below).

RESPONSE: RESPONDENT EMCO HEREBY REQUESTS A HEARING.

IV. FILING AN ANSWER TO THIS COMPLAINT

[omitted]

V. NOTICE OF AN OPPORTUNITY TO REQUEST A HEARING

Respondent also has the right to request a hearing to contest any material fact in this Complaint, or to contest the amount or appropriateness of the proposed civil penalty, as provided in section 3008(b) of RCRA, 42 U.S.C. § 6928(b), and in accordance with the Consolidated Rules of Practice. To request such a hearing, a specific request must be made in the written Answer to this Complaint.

If Respondent requests a hearing, such hearing shall adjudicate and be limited to the issues raised in the Complaint and Answer, and shall be conducted in accordance with the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq.*. Also, the hearing will be held in a location determined pursuant to section 22.21(d) of the Consolidated Rules of Practice, 40 C.F.R. § 22.21(d).

RESPONSE: RESPONDENT EMCO HEREBY REQUESTS A HEARING .

**VI. NOTICE OF AN OPPORTUNITY FOR A SETTLEMENT
CONFERENCE**

Regardless as to whether a hearing is requested, Respondent may request an informal conference with U.S. EPA, Region 5 to discuss the facts of this case and possibly achieve a settlement without formal litigation. To request such an informal settlement conference, please contact Ms. Kriz as indicated above. Respondent's request for an informal settlement conference does not extend the 30-day period during which a written Answer, with or without a request for a hearing, must be submitted. However, the informal settlement conference procedure may be pursued simultaneously with the adjudicatory hearing procedure.

U.S. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement through an informal conference. However, U.S. EPA will not reduce the penalty proposed herein simply because the parties hold such a conference. Any settlement that the parties may reach as a result of an informal settlement conference will be embodied in a written Consent Agreement issued by the Director of the Waste, Pesticides and Toxics Division, U.S. EPA, Region 5. In addition, the Regional Administrator, U.S. EPA, Region 5, will issue a Final Order approving the terms of the Consent Agreement. This Final Order will formally dispose of this matter and shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated to in the Consent Agreement.

RESPONSE: RESPONDENT EMCO HAS PREVIOUSLY REQUESTED A SETTLEMENT CONFERENCE.

AFFIRMATIVE DEFENSES

Respondent EMCO, by and through its attorneys, for its affirmative defenses to USEPA's Complaint, states as follows:

FIRST AFFIRMATIVE DEFENSE

The penalties assessed by USEPA:

Count 1\$310,955

Count 2	\$ 27,610
Count 3	\$ 10,450
Total Civil Penalty.....	\$349,015

are arbitrary, capricious, irrational, and contrary to law. The arbitrary and capricious nature of the USEPA analysis that gives rise to this penalty claim is readily apparent when the penalty calculation worksheet attached to the Complaint is compared to the worksheet for the same alleged violations provided by USEPA during pre-filing discussions. That original worksheet, a true and correct copy of which is attached to this Answer as Exhibit A, assessed the following civil penalties for exactly the same violations alleged in this Complaint:

Count 1 (transfer violations)	\$ 90,410
Count 2 (storage of one load).....	\$ 27,610
Count 3 (labeling violations).....	\$ 10,450
Total Civil Penalty	\$128,470

While Respondent EMCO believes that the **\$128,470** penalty that had originally been proposed for the violations alleged was excessive, there is simply no rationale basis for USEPA to nearly triple the penalty it is proposing without any change in either the facts or the violations alleged. Either USEPA is seeking to be unduly coercive or to punish EMCO for not accepting the first assessment, or USEPA's current penalty assessment is arbitrary, capricious and without rational basis – as there is no way it can legitimately claim that penalties of **\$128,470 and \$349,015** are properly assessed for exactly the same alleged violations without any change in the underlying facts.

SECOND AFFIRMATIVE DEFENSE

Fundamental fairness requires that USEPA be estopped, by its own conduct, from assessing a penalty of \$349,015 in this case, and that USEPA be precluded from assessing and claiming a penalty of any more than \$128,470.

THIRD AFFIRMATIVE DEFENSE

The proposed penalty asserted in the Amended Complaint is excessive given the facts of this matter. Indeed, based on the facts of the case, under a proper application of the RCRA penalty policy, the **\$128,470** penalty that had originally been proposed for the violations alleged is excessive.

FOURTH AFFIRMATIVE DEFENSE

The transfer violations alleged in Count I should all be categorized as minor/minor (and not some moderate/minor, and some moderate/major), as: (a) the 119 containers covered by 20 manifests were the only ones that were identified as being held over the 10 day transfer limit (not including the one additional grace day allowed by USEPA) out of a total of many thousand of containers that were collected by EMCO from customers in its capacity as a transporter and managed on site on a transfer basis during 2002 and 2003; and (b) the transfer waste was properly stored and managed in closed containers in good condition at all times while present at the EMCO facility and presented no risk or threat of risk to human health or the environment.

FIFTH AFFIRMATIVE DEFENSE

The USEPA's claims of transfer violations in Count 1 are barred in whole or in part by the applicable five year statute of limitations.

SIXTH AFFIRMATIVE DEFENSE

The Respondent's erroneous acceptance of one load rejected by a TSD that should have been managed by EMCO as a transfer load, which was alleged to be a storage violation in Count II, should be categorized as moderate/minor at worst and not moderate/major, because: (a) the acceptance of this rejected load, as opposed to management of it as a transfer, was inadvertent, and to the knowledge of Respondent happened only this one time; (b) the rejected load was properly stored and managed at all times while present at the EMCO facility and presented no risk or threat of risk to human health or the environment. Promptly after this item was brought to the attention of EMCO, new written procedures were prepared and implemented to properly identify rejected loads upon arrival at the facility and to assure that they are managed properly; and copies of these updated written procedures have previously been furnished to USEPA.

Additionally, as the Agency alleges, this rejected load was only at the EMCO site for 13 days, and the Agency itself treated storage of transfer loads for 13 days as moderate/minor in its proposed penalty assessment for Count 1. (As noted in the Third Affirmative Defenses, EMCO proposes that these should be reduced to minor/minor.) There is no rationale basis for assigning a more serious and costly matrix to the alleged violation in Count 2 because the load was inadvertently accepted rather than held for

transfer. In each case, storage for 13 days presented no risk or threat of risk to human health or the environment.

SEVENTH AFFIRMATIVE DEFENSE

The labeling violations in Count 3 should be assigned to the moderate/minor matrix cell rather than moderate/major. While there was a short gap in time between placement of the drums at issue into the EMCO generated waste 90 day storage area and placement of “Hazardous Waste” labels with accumulation start dates on those drums: (a) EMCO personnel were all aware that each of the EMCO drums of waste in question contained hazardous waste because each was marked with a wide yellow stripe around its middle center section; (b) each of these drums of waste was properly stored and managed as a hazardous waste in the EMCO 90 day generator waste storage area at all times while present at the EMCO facility; and (c) none of these drums presented any risk or threat of risk to human health or the environment.

Additionally, upon becoming aware of this potential timing issue, (a) EMCO promptly revised its procedures to require affixation of proper labels on EMCO generated drums of waste immediately upon commencement of accumulation of wastes in satellite storage areas (before the drums are moved to the 90 day storage area), with the accumulation start dates inserted when waste accumulation begins in the satellite storage areas; (b) EMCO also revised its labels and automated the process of pre-printing as much information on the label as possible, leaving only accumulation start dates to be inserted when the labels are affixed, to facilitate consistent RCRA compliance; and (c) EMCO has also revised its Waste Materials Handling Procedure to assure that the Waste

Manger inspects each drum daily to assure that each is labeled properly and that each label includes an accumulation start date, and has provided a copy of this revised procedure to USEPA.

EIGHTH AFFIRMATIVE DEFENSE

The proposed multi-day penalties asserted in Count 1 of the Amended Complaint are not consistent with USEPA policy and guidance for, *inter alia*, the following reasons:

A. EMCO has proposed that the violations alleged in Count 1 should all be treated as minor/minor. The multi-day penalties assessed for minor/minor violations are wholly discretionary under the RCRA Penalty Policy. (See Page 26.) EMCO submits that based on the facts and circumstances of this case, as outlined in this Answer and the Affirmative Defenses, multi-day penalties should not be assessed for Count 1.

B. If the matrix assignment of moderate/minor is applied to all of the transfer violations alleged in Count 1, whether multi-day penalties should be assessed for such violations is still wholly discretionary under the RCRA Penalty Policy. (See Page 26.) EMCO submits that based on the facts and circumstances of this case, as outlined in this Answer and the Affirmative Defenses, multi-day penalties should not be assessed for Count 1.

C. If the Matrix assignment of moderate/minor is applied to some of the alleged violations in Count 1 and moderate/major to others, as proposed by USEPA, whether multi-day penalties should be assessed for the moderate/minor violations is still wholly discretionary under the RCRA Penalty Policy, and at most presumptive and not

mandatory for the moderate/major component. (See Page 26.) EMCO submits that based on the facts and circumstances of this case, as outlined in this Answer and the Affirmative Defenses, multi-day penalties should not be assessed for either the moderate/minor or moderate/major component of Count 1.

D. If multi-day penalties are assigned for the all of the violations counted by USEPA in the penalty calculation work sheet, EMCO submits that USEPA incorrectly counted the number of allowable days. For 1(A), USEPA appears to have counted a total of 105 days of transfer storage beyond 10 days for 19 loads. In fact, USEPA allows a customary 1 day grace period for transfer loads (i.e., eleven days), and multi-days are counted from the second day of violations, so the number of days should be reduced by at least 2 for each of the 19 loads, or by a total of 38 days to no more than 67 days total.

Moreover, the policy provides that the maximum multi-day penalty of 180 days per violation, and treating Count 1 as a single overall violation the 208 total days of multi- day penalties assessed by USEPA exceeds the allowed maximum.

E. If multi-day penalties are imposed for any of the violations alleged in Count 1, EMCO submits that, based on the facts and circumstances of this case, as outlined in this Answer and the Affirmative Defenses, and considering that the facility has no prior enforcement history, the number of days should be reduced from the maximum number for which USEPA has assessed penalties; and any multi-day penalties should be assessed at the low end of the range of the applicable matrix, and not the middle as proposed by USEPA.

NINTH AFFIRMATIVE DEFENSE

Respondent reserves the right to assert all other affirmative defenses as they are developed during this proceeding.

Respectfully Submitted,

EMCO Chemical Distributors Inc.

By: 

Bruce White

Bruce White
Barbara Magel
Karaganis, White & Magel Ltd.
414 North Orleans Street – Suite 810
Chicago, Illinois 60610
Phone: 312-836-1177
Fax: 312-836-9083
Email: BWhite@k-w.com

Harvey J. Barnett
Law Office of Harvey J. Barnett, Ltd.
55 West Monroe Street
Suite 3200
Chicago, Illinois 60603
Phone: 312-242-6280
Fax: 312-641-6492
Email: hbarnett@sperling-law.com

EXHIBIT A

PENALTY SUMMARY SHEETEmco Chemical Distributors, North Chicago, IL

NATURE OF VIOLATION DATE OF VIOLATION	CITATION OF REGULATION OR LAW	HARM/ DEVIATION	GRAVITY- BASED PENALTY	MULTI-DAY PENALTY	ECONOMIC BENEFIT	TOTAL PENALTY
COUNT 1: Storage of hazardous waste without a permit	40 CFR 270.1(c)	Moderate/Major	\$10,450	\$17,160	N/A	\$27,610
COUNT 2: Storage of hazardous waste at a transfer facility beyond the regulatory time limit	40 CFR 263.21	Moderate/Major	\$10,450	\$74,360	\$5,600	\$90,410
Count 3: Failure to ensure that hazardous waste containers are properly labeled	40 CFR 262.34(a)(2); 262.34(c)	Moderate/Major	\$10,450	\$0	\$0	\$10,450
						TOTAL: \$128,470

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REGIONAL HEARING CLERK

2007 APR 26 PM 3:03

CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true and correct copy of the foregoing **ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT, COMPLIANCE ORDER, AND PROPOSED CIVIL PENALTY, AND RESPONDENT'S REQUEST FOR HEARING** was served by messenger on this 26th day of April, 2007 to:

VIA HAND DELIVERY

Sonja Brooks
Regional Hearing Clerk
U.S. EPA, Region 5
77 West Jackson Blvd. (MFA-10J)
10th Floor
Chicago, Illinois 60604-3590

VIA HAND DELIVERY

Terence W Stanuch
Associate General Counsel (C-14J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590



Bruce White
Barbara Magel
Karaganis, White & Magel Ltd.
414 North Orleans Street
Suite 810
Chicago, IL 60610
(312)836-1177
Email: BWhite@k-w.com

Harvey J. Barnett
Law Office of Harvey J. Barnett, Ltd.
55 West Monroe Street
Suite 3200
Chicago, Illinois 60603
Phone: 312-242-6280
Fax: 312-641-6492
Email: hbarnett@sperling-law.com