



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

JUN 29 2012

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U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2012 JUL 19 P 3:00
REGIONAL HEARING
CLERK

Nolan D. Archibald
President-CEO
Black & Decker (US) Inc.
701 E. Joppa Road
Towson, Maryland 21286

Re: **In the Matter of Black & Decker (US) Inc.**
Docket Number RCRA-02-2012-7105

Dear Mr. Archibald:

Enclosed are 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 and/or to contest the penalty proposed 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 and 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 and the entire proposed penalty may be assessed.

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 and the amount of the proposed penalty. 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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In The Matter of:

Black & Decker (US) Inc.,
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-02-2012-7105

REGIONAL HEARING
CLERK
2012 JUL 19 P 3:01
U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II

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") for injunctive relief and civil penalties.

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING ("Complaint") serves notice of the United States Environmental Protection Agency's ("EPA's") preliminary determination that the Black & Decker (US) Inc. (hereinafter "B&D" or "Respondent") has violated RCRA and the federally authorized New York State regulations concerning hazardous waste management.

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 (Aug.1, 2002), 70 Fed. Reg. 1825 (Jan. 11, 2005) and 75 Fed. Reg. 45489 (August 3, 2010). 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), authorizes the Administrator of EPA to issue an order assessing a civil penalty and/or requiring compliance for any past or current violation(s) of Subtitle C (Hazardous Waste Management) of RCRA. Section 3008(a) of the Act, 42 U.S.C. § 6928 (a), authorizes EPA to enforce the regulations constituting the authorized State program. EPA retains primary responsibility for the enforcement of certain requirements promulgated pursuant to HSWA.

Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(2)(3), any person is subject to a civil penalty not to exceed \$25,000 per day for each violation of any requirement of Subtitle C of RCRA occurring prior to January 31, 1997 and, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461, a civil penalty not to exceed \$32,500 per day for each such violation occurring after March 15, 2004 through January 12, 2009, and not to exceed \$37,500 per day for each violation occurring after January 12, 2009. 40 C.F.R. Part 19.

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:

I. General Allegations

Jurisdiction

1. This Tribunal has jurisdiction over the subject matter of this action pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).
2. In accordance with Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), EPA has given the State of New York prior notice of this action.

Respondent's Background

3. Respondent is a corporation.
4. Respondent is a "person" as that term is defined in 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).
5. Respondent is an "owner" and/or "operator" of a "facility" located at 200 State St., Brockport, New York (the "Facility") (EPA ID No. NYD002221919), as those terms are defined in 6 NYCRR § 370.2(b).
6. Respondent is the wholly owned subsidiary of The Black & Decker Corporation located in Towson, MD (hereafter referred to as "B&D Parent").
7. The Black & Decker Corporation is the wholly owned subsidiary of Stanley Black & Decker, Inc, which is located in New Britain, Connecticut (hereafter referred to as "Stanley B&D").

Past Regulatory Filings/Change of Ownership

8. Respondent's Facility was formerly owned and operated by General Electric Corporation ("GE").

9. On or about August 18, 1980, pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, GE notified EPA that it managed hazardous waste at the Facility.
10. On November 19, 1980, pursuant to 40 C.F.R. § 270.13, GE submitted a Part A hazardous waste permit application to EPA for the Facility.
11. Pursuant to Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), the Facility received interim status based on GE's submission of a Section 3010 Notification and Part A permit application.
12. On or about October 1, 1984, Respondent submitted a revised Part A application to EPA indicating that B&D was the new owner and operator of the interim status Facility as of September 1, 1984.
13. The corporate address of B&D and B&D Parent is 701 E. Joppa Road, Towson, Maryland 21286.
14. The hazardous waste units at the Facility include six surface impoundments and one sludge drying bed.
15. Closure of the units described in Paragraph 14 was completed in August 1987 in accordance with a New York State ("NYS") approved closure plan.
16. Respondent and JMT Properties were jointly issued a NYS Part 373 Post-Closure Permit (the "NYS Permit") in 1994 for the post-closure care of the units described in Paragraph 14.
17. JMT Properties ("JMT") is a nonresidential building operator.
18. JMT is located at 200 State St., Brockport, NY 14420.
19. Since the issuance of the Permit described in Paragraph 16, New York State Department of Environmental Protection ("NYSDEC") has dealt exclusively with Respondent or B&D Parent concerning financial assurance issues under the NYS Permit.
20. The NYS Permit described in Paragraph 16 is currently in effect.
21. The NYS Permit described in Paragraph 16 was in effect from 2008 to 2011, during the time period relevant to the alleged violations in Counts 1 - 4 set forth below.
22. Module I – Standard Conditions, section (A), page I-1, (hereafter "Module I") of the NYS Permit described in Paragraph 16 states that "the Permittee must comply with all terms and conditions of this Permit. This Permit consists of the condition contained herein.....and the applicable regulations contained in 6 NYCRR Parts 370 through 374, 621 and 624."
23. Module II – General Facility Conditions, section (H), page II-2, (hereafter called "Module II") of the NYS Permit described in Paragraph 16 sets forth financial assurance requirements for Post-Closure Care.

24. Module II states that the Permittee shall demonstrate continuous compliance with 6 NYCRR § 373-2.8(f) for post-closure care by providing documentation of financial assurance to the Commissioner, in accordance with the wording in 6 NYCRR § 373-2.8(j) in at least the amount of the Permittee's most recent post-closure cost estimate, prepared in accordance with 6 NYCRR §373-2.8(e)(1).
25. On or about March 25, 2008, pursuant to 6 NYCRR § 373-2.8, B &D Parent submitted a corporate guarantee for B&D, drafted in accordance with 6 NYCRR 373-2.8(j), including financial test information, (the "2008 submittal") to NYSDEC as financial assurance for post-closure care at Respondent's Facility for the fiscal year ending December 31, 2008.
26. On or about March 24, 2009, pursuant to 6 NYCRR § 373-2.8, B &D Parent submitted a corporate guarantee for B&D, drafted in accordance with in 6 NYCRR 373-2.8(j), including financial test information, (the "2009 submittal") to NYSDEC as financial assurance for post-closure care at Respondent's Facility for the fiscal year ending December 31, 2009.
27. In the 2008 and 2009 submittals, the letter from the chief financial officer ("CFO") of B&D Parent specifies that B&D's tangible net worth figure was derived from B&D Parent's independently audited, year-end financial statements for the latest fiscal year.
28. On May 28, 2009, NYSDEC sent a Notice: Request for Information letter to B&D Parent requesting additional information in order to determine B&D's compliance with the financial assurance requirements.
29. NYSDEC's letter requested further information on the Respondent's March 2009 submittal with respect to how B&D calculated a positive number when the Department calculated a negative \$98.4 million for B&D's Tangible Net Worth.
30. In its Response to NYSDEC's request for information, dated October 7, 2009, B&D Parent did not provide specific information on how it calculated its positive tangible net worth, and the company reiterated its claim that its tangible net worth was a positive \$124,460,681.
31. On or about March 12, 2010, the B&D Parent became the wholly-owned subsidiary of Stanley Works and Stanley Works changed its name to Stanley Black & Decker, Inc.
32. On or about June 25, 2010, pursuant to 6 NYCRR § 373-2.8, B &D Parent submitted a corporate guarantee for B&D, drafted in accordance with 6 NYCRR 373-2.8(j), including financial information, (the "2010 submittal") to NYSDEC as financial assurance for post-closure care at Respondent's Facility for the fiscal year ending December 31, 2010.
33. On or about August 5, 2011, Respondent commenced using a letter of credit for \$1,128,000 to satisfy its requirements for financial assurance.

Relevant Regulatory Obligations

34. New York State's final status standards for owners and operators of hazardous waste facilities are set forth in 6 NYCRR Subpart 373-2.

35. Module I of the NYS Permit incorporates by reference the requirements of 6 NYCRR § 373-2.8. which incorporates the requirements

36. Module II of the NYS Permit incorporates by reference the requirements of 6 NYCRR § 373-2.8.

37. 6 NYCRR § 373-2.8 requires owners and operators of final status facilities to maintain financial assurance for post-closure for each hazardous waste management unit using one or more of the financial mechanisms specified therein. These mechanisms include the submission of a financial test and corporate guarantee for post-closure care, in accordance with the requirements set forth in 6 NYCRR § 373-2.8(f)(5).

38. Pursuant to 6 NYCRR § 373-2.8(f)(5), whose terms are defined in 6 NYCRR § 373-2.8(b), an owner or operator of a facility may satisfy financial requirements by demonstrating that the owner or operator passes a financial test. To pass this test, the owner or operator must meet the criteria set forth in either (a) or (b) as follows:

(a) The owner or operator must have:

- (1) two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5;
- (2) net working capital and tangible net worth each at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates;
- (3) tangible net worth of at least \$10 million; and assets in the United States amounting to at least 90 percent of the total assets or at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates.

(b) The owner or operator must have:

- (1) a current rating for their most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's;
- (2) tangible net worth at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment costs;
- (3) tangible net worth of at least \$10 million; and
- (4) assets located in the United States amounting to at least 90 percent of the total assets or at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment costs.

39. Pursuant to 6 NYCRR § 373-2.8(f)(5)(iii) to demonstrate that he or she meets the [financial] test, the owner or operator must submit the following items to the Commissioner [of NYSDEC]:

- (a) A letter signed by the owner's or operator's chief financial officer and worded as specified in paragraph (j)(5) of this section [6 NYCRR § 373-2.8(j)(5)];
- (b) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and
- (c) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:
 - 1. The accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and
 - 2. in connection with that procedure, no matters came to the accountant's attention which caused the accountant to believe that the specified data should be adjusted.

40. 6 NYCRR § 373-2.8(b) sets forth definitions for the following financial terms:

- (a) "Assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity.
- (b) "Current plugging and abandonment cost estimate" means the most recent of the estimates prepared in accordance with 40 CFR 144.62.
- (c) "Independently audited" refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.
- (d) "Liabilities" means probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.
- (e) "Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets do not include intangibles such as good-will and rights to patents or royalties.

41. The "current plugging and abandonment cost estimate" discussed in the above paragraph refers to estimates for the cost of plugging an injection well prepared in accordance with 40 CFR 144.62.

42. Respondent did not have injection wells at its facility; therefore current plugging and abandonment cost estimate is not relevant to this case and would be zero.
43. Form 10Ks are independently audited, year-end financial statement for publicly held companies filed with the Securities and Exchange Commission (SEC).
44. B&D did not file a Form 10K with the SEC for the 2008-2011 financial years.
45. Upon information and belief, B&D does not have its own independently audited, year-end financial statements.

Prior EPA Financial Assurance Related Communications

46. On or about December 1, 2009, EPA issued the Respondent a combined Notice of Violation (“NOV”) and Information Request Letter (“IRL”).
47. On or about February 25, 2010, a duly authorized representative of the Respondent submitted its Response to the combined NOV and IRL and Respondent supplemented its Response at various times thereafter.
48. EPA issued a Complaint, Docket Number RCRA-02-2011-7104, to the Respondent on June 30, 2011.
49. In the Complaint, EPA alleged two counts of Respondent’s violation of Subtitle C of RCRA by failing to submit, as required by the NYS Permit, updated financial information concerning Respondent’s financial test and corporate guarantee to NYSDEC within 90 days after the close of B&D’s fiscal years 2009 and 2010.
50. Respondent has not filed an Answer.
51. On or about July 28, 2011, EPA sent Respondent an Information for Request Letter (EPA’s IRL) requesting additional detailed information regarding the company’s calculation of its Tangible Net Worth.
52. On or about October 5, 2011, a duly authorized representative of the Respondent submitted its response to the EPA’s IRL.
53. Respondent’s October 2011 response provided working papers for its calculations of tangible net worth for fiscal years 2008 through 2010.
54. Upon information and belief, such working papers relied on unaudited and /or audited comparative balance sheets and/or other financial statements of B&D Parent and/or Respondent to make the calculations discussed in the previous paragraph.

Count 1
Failure to Maintain Requisite Financial Assurance for Fiscal Year 2008

55. Complainant realleges each allegation contained in paragraphs “1” through “54”, inclusive, as if fully set forth herein
56. B&D’s 2008 submittal stated a post-closure estimate of \$1,551,000 for Respondent’s Brockport facility.
57. B&D’s 2008 submittal stated that its tangible net worth is positive \$128,693,798.
58. B&D used some of B&D Parent’s financial statements to derive the numbers set forth in its 2008 submittal.
59. B&D Parent’s Form 10-K, filed with the SEC, for the fiscal year ending December 31, 2007 provided the following line items:
- (a) Total Assets - \$5,410,900,000;
 - (b) Liabilities - (which includes all of the following):
 - 1. Total Current Liabilities – \$1,880,800,000
 - 2. Long –Term Debt – \$1,179,100,000
 - 3. Postretirement benefits – \$311,300,000
 - 4. Other Long-Term Liabilities – \$581,000,000;Sum of Total Liabilities is \$3,952,200,000
 - (c) Goodwill - \$ 1,212,900,000; and
 - (d) Net Intangibles - \$275,600,000.
60. Pursuant to 6 NYCRR § 373-2.8(b) Tangible net worth is calculated by subtracting Liabilities, Goodwill and Net Intangibles from Total Assets.
61. Using the line items from paragraph 59 and plugging them into the formula in paragraph 60 [\$5,410,900,000 (Total Assets) minus \$3,952,200,000 (Total Liabilities) minus \$1,212,900,000 (Goodwill) minus \$275,600,000 (Net Intangibles)], the Respondent’s Tangible Net Worth is *negative* \$29,800,000.
62. For the fiscal year ending December 31, 2008, B&D Parent and/or Respondent did not have tangible net worth at least six times the sum of the current post-closure cost estimates and current plugging and abandonment cost estimates as required by 6 NYCRR § 373-2.8(f)(5)(a)&(b).
63. Respondent and/or B&D Parent failed to have tangible net worth of at least \$10 million as required by 6 NYCRR § 373-2.8(f)(5)(a)&(b).
64. In its 2008 submittal submitted pursuant to 6 NYCRR § 373-2.8(f)(5), Respondent did not use financial data from B&D Parent’s independently audited year-end financial statements in

calculating its tangible net worth and total assets figures to fill out the Alternative II section for the “Letter from the Chief Financial Officer” as set forth in NYCRR § 373-2.8(j)(9).

65. In its 2008 submittal, the CFO of B&D Parent did not provide NYSDEC with a tangible net worth and total assets figure calculated using data derived only from independently audited year- end financial statements for the latest year.

66. In a letter accompanying the 2008 submittal, Respondent’s accountant, Ernst & Young stated that “we compare[d] the amount presented [total assets in the United States and Tangible Net Worth] to a schedule prepared by the parent company noting them to be in agreement. The schedule prepared by the parent company added the individual amounts for total assets in the United States and total assets not in the United States, the total of which we compared to total assets in the parent company’s accounting records noting them to be in agreement.”

67. The figures used in computing net worth as described in Paragraph 66 were not derived solely from independently audited, year-end financial statements for the latest fiscal year.

68. Respondent’s accountant did not compare the financial information provided in the letter from the CFO of B&D Parent with the amounts in independently audited, year-end financial statements for the latest fiscal year as set forth in 6 NYCRR § 373-2.8(f)(5).

69. For the fiscal year ending December 31, 2008, Respondent did not solely use figures derived from independently audited, year-end financial statements in its calculation of Tangible Net Worth as specified in 6 NYCRR § 373-2.8(f)(5).

70. For the fiscal year ending December 31, 2008, Respondent did not pass the financial test as specified 6 NYCRR § 373-2.8(f)(5).

71. Respondent’s failure to satisfy the requirements for financial assurance for the fiscal year ending December 31, 2008, constitutes a violation of Module II of the Permit which incorporates the requirements of 6 NYCRR § 373-2.8(f).

Count 2

Failure to Maintain Requisite Financial Assurance for Fiscal Year 2009

72. Complainant realleges each allegation contained in paragraphs “1” through “54”, inclusive, as if fully set forth herein

73. B&D’s 2009 submittal stated a post-closure estimate of \$1,410,000 for Respondent’s Brockport facility.

74. B&D’s 2009 submittal stated that its tangible net worth is positive \$124,460,681.

75. B&D used some of B&D Parent’s financial statements to derive the numbers set forth in its 2009 submittal.

76. B&D Parent’s Form 10-K, filed with the SEC, for the fiscal year ending December 31, 2008 provided the following line items:

- (a) Total Assets - \$5,183,300,000;
- (b) Liabilities (which includes the following):
 - 1. Total Current Liabilities – \$1,483,900,000
 - 2. Long –Term Debt – \$1,444,700,000
 - 3. Postretirement benefits – \$460,500,000
 - 4. Other Long-Term Liabilities – \$581,000,000Sum of Total Liabilities is \$4,058,500,000;
- (c) Goodwill - \$1,223,200,000; and
- (d) Net Intangibles - \$277,600,000.

77. Pursuant to 6 NYCRR § 373-2.8(b) Tangible net worth is calculated by subtracting Liabilities, Goodwill and Net Intangibles from Total Assets.

78. Using the line items from paragraph 76 and plugging them into the formula in paragraph 77 [\$5,183,300,000 (Total Assets) minus \$4,058,500,000 (Total Liabilities) minus \$1,223,200,000 (Goodwill) minus \$277,600,000 (Net Intangibles)], the Respondent’s Tangible Net Worth is *negative* \$376,000,000.00.

79. For the fiscal year ending December 31, 2009, B&D Parent and/or Respondent did not have tangible net worth at least six times the sum of the current post-closure cost estimates and current plugging and abandonment cost estimates as required by 6 NYCRR § 373-2.8(f)(5)(a)&(b).

80. Respondent and/or B&D Parent failed to have tangible net worth of at least \$10 million as required by 6 NYCRR § 373-2.8(f)(5)(a)&(b).

81. In its 2009 submittal submitted pursuant to 6 NYCRR § 373-2.8(f)(5), Respondent did not use financial data from B&D Parent’s independently audited year-end financial statements in calculating its tangible net worth and total assets figures to fill out the Alternative II section for the “Letter from the Chief Financial Officer” as set forth in NYCRR § 373-2.8(j)(9).

82. In its 2009 submittal, the CFO of B&D Parent did not provide NYSDEC with a tangible net worth and total assets figure calculated using data derived only from independently audited year- end financial statements for the latest fiscal year.

83. In a letter accompanying the 2009 submittal, Respondent’s accountant, Ernst & Young stated that “we compare[d] the amount presented [total assets in the United States and Tangible Net Worth] to a schedule prepared by the parent company noting them to be in agreement. The schedule prepared by the parent company added the individual amounts for total assets in the United States and total assets not in the United States, the total of which we compared to total assets in the parent company’s accounting records noting them to be in agreement.”

84. The figures used in computing net worth as described in Paragraph 83 were not derived solely from independently audited, year-end financial statements for the latest fiscal year.

85. Respondent's accountant did not compare the financial information provided in the letter from the CFO of B&D Parent with the amounts in the independently audited, year-end financial statements for the latest fiscal year as set forth in 6 NYCRR § 373-2.8(f)(5).

86. For the fiscal year ending December 31, 2009, Respondent did not solely use figures derived from independently audited, year-end financial statements in its calculation of Tangible Net Worth as specified in 6 NYCRR § 373-2.8(f)(5)(iii).

87. For the fiscal year ending December 31, 2009, Respondent did not pass the financial test as specified in 6 NYCRR § 373-2.8(f)(5).

88. Respondent's failure to satisfy the requirements for financial assurance for the fiscal year ending December 31, 2009, constitutes a violation of Module II of the Permit which incorporates the requirements of 6 NYCRR § 373-2.8(f).

Count 3

Failure to Maintain Requisite Financial Assurance for Fiscal Year 2010

89. Complainant realleges each allegation contained in paragraphs "1" through "54", inclusive, as if fully set forth herein.

90. B&D's 2010 submittal stated a post-closure estimate of \$1,269,000 for Respondent's Brockport facility.

91. B&D's 2010 submittal stated that its tangible net worth is positive \$55,972,555.

92. B&D used some of B&D Parent's financial statements to derive the numbers set forth in its 2009 submittal.

93. B&D Parent's 10-K, filed with the SEC, for the fiscal year ending December 31, 2009 provided the following line items:

(a) Total Assets - \$5,495,200,000;

(b) Liabilities (which includes the following):

1. Total Current Liabilities – \$1,195,900,000
 2. Long –Term Debt – \$1,715,000,000
 3. Postretirement benefits – \$760,400,000
 4. Other Long-Term Liabilities – \$524,800,000
- Sum of Total Liabilities is \$4,196,100,000;

(c) Goodwill - \$1,230,000,000; and

(d) Net Intangibles - \$261,000,000.

94. Pursuant to 6 NYCRR § 373-2.8(b) Tangible net worth is calculated by subtracting Liabilities, Goodwill and Net Intangibles from Total Assets.

95. Using the line items from paragraph 93 and plugging them into the formula in paragraph 94 [\$5,495,200,000 (Total Assets) minus \$4,196,100,000 (Total Liabilities) minus \$1,230,000,000 (Goodwill) minus \$261,000,000 (Net Intangibles)], the Respondent's Tangible Net Worth is *negative* \$191,900,000.00.

96. For the fiscal year ending December 31, 2010, B&D Parent and/or Respondent did not have tangible net worth at least six times the sum of the current post-closure cost estimates and current plugging and abandonment cost estimates as required by 6 NYCRR § 373-2.8(f)(5)(a)&(b).

97. Respondent and/or B&D Parent failed to have tangible net worth of at least \$10 million as required by 6 NYCRR § 373-2.8(f)(5)(a)&(b).

98. In its 2010 submittal submitted pursuant to 6 NYCRR § 373-2.8(f)(5), Respondent did not use financial data from B&D Parent's independently audited year-end financial statements in calculating its tangible net worth and total assets figures to fill out the Alternative II section for the "Letter from the Chief Financial Officer" as set forth in NYCRR § 373-2.8(j)(9).

99. In its 2010 submittal, the CFO of B&D Parent did not provide NYSDEC with a tangible net worth and total assets figure calculated using data derived only from independently audited year- end financial statements for the latest year.

100. In a letter accompanying the 2010 submittal, Respondent's accountant, Ernst & Young stated that "we compare[d] the amount presented [total assets in the United States and Tangible Net Worth] to a schedule prepared by the parent company noting them to be in agreement. The schedule prepared by the parent company added the individual amounts for total assets in the United States and total assets not in the United States, the total of which we compared to total assets in the parent company's accounting records noting them to be in agreement."

101. The figures used in computing net worth as described in Paragraph 100 were not derived solely from independently audited, year-end financial statements for the latest fiscal year.

102. Respondent's accountant did not compare the financial information provided in the letter from the CFO of B&D Parent with the amounts in independently audited, year-end financial statements for the latest fiscal year as set forth in 6 NYCRR § 373-2.8(f)(5).

103. For the fiscal year ending December 31, 2010, Respondent did not solely use figures from independently audited, year-end financial statements as specified in 6 NYCRR § 373-2.8(f)(5) in its calculation of Tangible Net Worth as specified in 6 NYCRR § 373-2.8(f)(5)(iii)..

104. For the fiscal year ending December 31, 2010, Respondent did not pass the financial test as specified in 6 NYCRR § 373-2.8(f)(5).

105. Respondent's failure to satisfy the requirements for financial assurance for the fiscal year ending December 31, 2010, constitutes a violation of Module II of the Permit which incorporates the requirements of 6 NYCRR § 373-2.8(f).

Count 4
Failure to Maintain Requisite Financial Assurance for Fiscal Year 2011

106. Complainant realleges each allegation contained in paragraphs “1” through “54”, inclusive, as if fully set forth herein.
107. Pursuant to 6 NYCRR § 373-2.8(f)(5)(v), owners or operators using the financial test and corporate guarantee must submit updated financial information with the items specified in 6 NYCRR § 373-2.8(f)(iii) to NYSDEC within 90 days after the close of each succeeding fiscal year.
108. The 2010 fiscal year of the Respondent and its parent corporation closed on December 31, 2010.
109. Respondent was required to submit updated information on its financial test and corporate guarantee to NYSDEC by March 31, 2011, ninety days after the end of its fiscal year on December 31, 2010.
110. In August 2, 2011, Respondent substituted a letter of credit in place of the financial test and corporate guarantee in order to satisfy its financial assurance requirements.
111. Respondent did not submit updated information on its financial test and corporate guarantee to NYSDEC for fiscal year ending December 31, 2011.
112. Respondent did not demonstrate continuous compliance with Module II of the Permit which cross references 6 NYCRR §373-2.8(f) for post-closure care by providing documentation of financial assurance for the fiscal year ending December 31, 2011.
113. Respondent’s failure to satisfy the requirements for financial assurance for the fiscal year ending December 31, 2011, constitutes a violation of the Module II of the Permit which cross references 6 NYCRR § 373-2.8(f).

II. PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 3008(a)(3) of the Act, 42 U.S.C. § 6928(a)(3). For purposes of determining the amount of any penalty assessed, Section 3008(a)(3) requires EPA to “take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.”

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case and has used EPA’s 2003 RCRA Civil Penalty Policy. A copy of this penalty policy is available upon request or can be found on the Internet at www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf. The penalty amounts in the 2003 RCRA Civil Penalty Policy have been amended to reflect inflation adjustments. These adjustments were made pursuant to the following: the September 21, 2004 document entitled Modifications to EPA Penalty Policies to Implement the Civil Monetary

Penalty Inflation Rule (pursuant to the Debt Collection Improvement Act of 1996, effective October 1, 2004); the January 11, 2005 document entitled Revised Penalty Matrices for the RCRA Civil Penalty Policy; the December 29, 2008 document entitled Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Penalty Monetary Penalty Inflation Adjustment Rule (effective January 12, 2009); and the November 16, 2009 document entitled Adjusted Penalty Policy Matrices based on the 2008 Civil Monetary Inflation Rule. The RCRA Penalty Policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors to particular cases.

The Federal Civil Penalties Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, required EPA to adjust its penalties for inflation on a periodic basis. The maximum civil penalty per violation per day under Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) is \$32,500 for any violation occurring from March 16, 2004 through January 12, 2009, and \$37,500 for any violation occurring after January 12, 2009. 40 C.F.R. Part 19.

The Complainant proposes, subject to receipt and evaluation of further relevant information from the Respondent, that Respondent be assessed the following civil penalty for the violation alleged in this Complaint. A penalty calculation worksheet and narrative explanation to support the penalty figure for the violation cited in this Complaint are included in Attachment I-IV below. Matrices employed in the determination of individual and any multi-day penalties are included as Attachment V and VI, below.

Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), the Complainant proposes a civil penalty of Two Hundred Eleven Thousand Eight Hundred Fifty-Five dollars (\$211,855) as follows:

Counts 1:	\$50,028
Counts 2:	\$52,983
Counts 3:	\$58,599
Counts 4:	\$53,995
Total Proposed Penalty:	<u>\$215,605</u>

Further details regarding the assessment of this proposed penalty are set forth in Attachments I-IV.

III. COMPLIANCE ORDER

Based upon the foregoing and pursuant to the authority of Section 3008 of the Act, Complainant hereby Orders Respondent to:

Maintain valid financial assurance for post-closure care at the Brockport Facility as required by Module II-H of the NYS Permit which requires compliance with 6 NYCRR § 373-2.8(f).

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).

Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all other applicable RCRA statutory or regulatory (federal and/or state) provisions, nor does such compliance release Respondent from liability for any violations at the Facility. In addition, nothing herein waives, prejudices or otherwise affects EPA's right to enforce any applicable provision of law, and to seek and obtain any appropriate penalty or remedy under any such law.

IV. 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 once it has taken effect is liable for a civil penalty of up to \$37,500 per day for each violation occurring after January 12, 2009. (This penalty amount may be increased in the future to take into account inflation.)

V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS, and which are codified at 40 C.F.R. Part 22. A copy of these rules accompanies this "Complaint, Compliance Order and Notice of Opportunity for Hearing.

A. Answering The Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty and/or the Compliance Order is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within thirty (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 to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b).

The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of their defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity To Request A Hearing

If requested by Respondent, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c). With regard to the Compliance Order in the Complaint, unless Respondent requests a hearing pursuant to 40 C.F.R. § 22.15 within thirty (30) days after the Compliance Order is served, the Compliance Order shall automatically become final. 40 C.F.R. § 22.37

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

C. Failure To Answer

If Respondent fails in its Answer 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 thirty (30) day period set forth in 40 C.F.R. § 22.15(a)) Answer 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 to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings thirty (30) days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court.

Any default order requiring compliance action shall be effective and enforceable against Respondent without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d).

D. Exhaustion of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Agency's Environmental Appeals Board ("EAB") pursuant to 40 C.F.R. § 22.30, and the initial decision becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

To appeal an initial decision to the EAB, Respondent must do so within thirty (30) days after the initial decision is served. 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document. Note that the forty-five (45) day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

VI. INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent 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 it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this complaint should be directed to:

Jeannie M. Yu, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866
212-637-3205

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

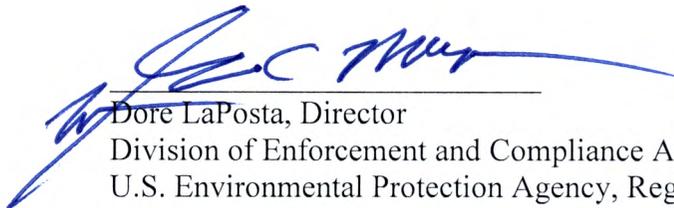
Any settlement that may be reached as a result of an informal settlement conference will be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waive its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). To conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

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

**VII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR
CONFERENCE**

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

Complainant:


Dore LaPosta, Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency, Region 2

Date 6/29/12

To: Nolan D. Archibald, President-CEO
Black & Decker (US) Inc.
701 E. Joppa Road
Towson, MD 21286

cc: Russ Brauksieck, Chief
Facility Compliance Section
New York State Department of Environmental Conservation
625 Broadway- 11th Floor
Albany, NY 12233-7020

CERTIFICATE OF SERVICE

This is to certify that on the day of **JUL 17 2012**, I caused to be mailed a true and correct copy of the foregoing: COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING, bearing Docket Number **RCRA-02-2012-7105** with Attachments I, II and III (collectively henceforth referred to as the "Complaint"), 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: Nolan D. Archibald, President-CEO, Black & Decker (US) Inc., 701 E. Joppa Rd., Towson, MD 21286. I hand carried the original and a copy of the Complaint to the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2, 290 Broadway, New York, New York 10007-1866.

Dated: **JUL 17 2012**
New York, New York

Smildred N. Bag

ATTACHMENT I

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

Penalty Computation Worksheet (2008)

Respondent: The Black & Decker Corporation

Facility Address: 200 State St
Brockport, New York 14218

Requirement Violated:

Count 1: 6 NYCRR § 373-2.8: Failure to maintain the requisite financial assurance for post-closure care for the fiscal year ending December 31, 2008.

PENALTY AMOUNT FOR COMPLAINT:

1. Gravity based penalty from matrix	\$26,000
(a) Potential for harm.	MAJOR
(b) Extent of Deviation.	MAJOR
2. Select an amount from the appropriate multi-day matrix cell.	N/A
3. Multiply line 2 by number of days of violation	N/A at this time
4. Add line 1 and line 3	\$26,000
5. Percent increase/decrease for good faith.	N/A
6. Percent increase for willfulness/negligence.	N/A
7. Percent increase for history of noncompliance.	N/A
8. Total lines 5 through 7.	N/A
9. Multiply line 4 by line 8.	N/A
10. Calculate economic benefit.	\$24,028
11. Add lines 4 and 10 for penalty amount inserted into the complaint.	<u>\$50,028</u>

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

Penalty Computation Worksheet

1. Gravity Based Penalty:

- a. Potential for Harm - The "Potential for Harm" is MAJOR. Financial responsibility requirements are important components of the RCRA program. Financial assurance for post-closure care ensures the existence of adequate funding to properly address regulated areas and help protect human health and the environment. The failure by a company to meet the financial metrics of the corporate guarantee and financial test, or to submit an alternative financial assurance mechanism, means the financial resources needed to complete post-closure care requirements at hazardous waste management units could be deficient, thereby substantially increasing the potential risk to human health and the environment. Failure to properly maintain financial assurance undermines and adversely impacts the purposes and procedures of the RCRA program.
- b. Extent of Deviation - The extent of deviation is MAJOR. The requirements of the corporate guarantee and financial test were not met.
- c. The applicable cell range is \$26,000 to \$32,500. Since the violation alleged in this Count occurred in 2008, EPA used the penalty matrix for violations which occurred during March 16, 2004 through January 12, 2009. The low point of the range was selected because this was the first year in which Respondent is alleged to have violated this requirement.
- d. Multiple/Multi-day: EPA has not presently applied a multi day penalty to this violation.

2. Adjustment Factors

Good Faith: EPA at this time has made no adjustment for this factor in the penalty determination since EPA has no information concerning any mitigating factors; if EPA receives such information, it will then evaluate it and consider making an appropriate adjustment.

Willfulness/Negligence: N/A

History of Compliance: N/A

Ability to Pay: As this time, EPA has not made any adjustments based on ability to pay.

Other Unique Factors: N/A

3. **Economic Benefit**: The economic benefit was calculated in the following manner: the cost of obtaining a Letter of Credit (LOC) equals 1.25% multiplied by \$1,551,000 (the estimated post-closure cost for that year) which equals \$19,388 plus the calculated time value of the LOC's cost as per EPA's BEN Model (or \$4,640) resulting in an economic benefit totaling \$24,028.

ATTACHMENT II

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

Penalty Computation Worksheet (2009)

Respondent: The Black & Decker Corporation

Facility Address: 200 State St
 Brockport, New York 14218

Requirement Violated:

Count 2: 6 NYCRR § 373-2.8: Failure to maintain the requisite financial assurance for post-closure care for the fiscal year ending December 31, 2009.

PENALTY AMOUNT FOR COMPLAINT:

1. Gravity based penalty from matrix	\$32,500
(a) Potential for harm.	MAJOR
(b) Extent of Deviation.	MAJOR
2. Select an amount from the appropriate multi-day matrix cell.	N/A
3. Multiply line 2 by number of days of violation	N/A at this time
4. Add line 1 and line 3	\$32,500
5. Percent increase/decrease for good faith.	N/A
6. Percent increase for willfulness/negligence.	N/A
7. Percent increase for history of noncompliance.	N/A
8. Total lines 5 through 7.	N/A
9. Multiply line 4 by line 8.	N/A
10. Calculate economic benefit.	\$20,483
11. Add lines 4 and 10 for penalty amount inserted into the complaint.	<u>\$52,983</u>

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

Penalty Computation Worksheet

1. **Gravity Based Penalty:**

- a. Potential for Harm - The "Potential for Harm" is MAJOR. Financial responsibility requirements are important components of the RCRA program. Financial assurance for post-closure care ensures the existence of adequate funding to properly address regulated areas and helps protect human health and the environment. The failure by a company to meet the financial metrics of the corporate guarantee and financial test, or to submit an alternative financial assurance mechanism, means the financial resources needed to complete post-closure care requirements at hazardous waste management units could be deficient, thereby substantially increasing the potential risk to human health and the environment. Failure to properly maintain financial assurance undermines and adversely impacts the purposes and procedures of the RCRA program.
- b. Extent of Deviation - The extent of deviation is MAJOR. The metrics of the corporate guarantee and financial test were not met.
- c. The applicable cell range is \$26,000 to \$32,500. Since the violation alleged in this Count occurred in 2009, EPA used the matrix for violations which occurred during March 16, 2004 through January 12, 2009. The high point of the range was selected because this was the second alleged violation of this requirement.
- d. Multiple/Multi-day: EPA has not presently applied a multi day penalty to this violation.

2. **Adjustment Factors**

Good Faith: EPA at this time has made no adjustment for this factor in the penalty determination since EPA has no information concerning any mitigating factors; if EPA receives such information, it will then evaluate it and consider making an appropriate adjustment.

Willfulness/Negligence: N/A

History of Compliance: N/A

Ability to Pay: As this time, EPA has not made any adjustments based on ability to pay.

Other Unique Factors: N/A

3. **Economic Benefit:** The economic benefit for this amount is deemed significant and reflected in the penalty calculation. The economic benefit was calculated in the following manner: the cost of obtaining a Letter of Credit (LOC) equals 1.25%

multiplied by \$1,410,000 (the estimated post-closure cost) which equals \$17,625 plus the calculated time value of the LOC's cost as per EPA's BEN Model (or \$2,858) resulting in an economic benefit totaling \$20,483.

ATTACHMENT III

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

Penalty Computation Worksheet (2010)

Respondent: The Black & Decker Corporation

Facility Address: 200 State St
Brockport, New York 14218

Requirement Violated:

Count 3: 6 NYCRR § 373-2.8: Failure to maintain the requisite financial assurance for post-closure care for the fiscal year ending December 31, 2010.

PENALTY AMOUNT FOR COMPLAINT:

1. Gravity based penalty from matrix	\$37,500
(a) Potential for harm.	MAJOR
(b) Extent of Deviation.	MAJOR
2. Select an amount from the appropriate multi-day matrix cell.	N/A
3. Multiply line 2 by number of days of violation	N/A at this time
4. Add line 1 and line 3	\$37,500
5. Percent increase/decrease for good faith.	N/A
6. 10% Percent increase for willfulness/negligence.	10%
7. Percent increase for history of noncompliance.	N/A
8. Total lines 5 through 7.	10%
9. Multiply line 4 by line 8.	\$3,750
10. Calculate economic benefit.	\$17,349
11. Add lines 4, 9 and 10 for penalty amount inserted into the complaint.	<u>\$58,599</u>

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

Penalty Computation Worksheet

1. **Gravity Based Penalty:**

- a. Potential for Harm - The "Potential for Harm" is MAJOR. Financial responsibility requirements are important components of the RCRA program. Financial assurance for post-closure care ensures the existence of adequate funding to properly address regulated areas and helps protect human health and the environment. The failure by a company to meet the financial metrics of the corporate guarantee and financial test, or to submit an alternative financial assurance mechanism, means the financial resources needed to complete post-closure care requirements at hazardous waste management units could be deficient thereby substantially increasing the potential risk to human health and the environment. Failure to properly maintain financial assurance undermines and adversely impacts the purposes and procedures of the RCRA program.
- b. Extent of Deviation - The extent of deviation is MAJOR. The metrics of the corporate guarantee and financial test were not met.
- c. The applicable cell range is \$28,330 to \$37,500. Since the violation alleged in this Count occurred in 2010, EPA used the penalty matrix for violations which occurred after January 12, 2009. The high point of the range was selected because this is the third year the company is alleged to have violated this requirement.
- d. Multiple/Multi-day: EPA has not presently applied a multi day penalty to this violation.

2. **Adjustment Factors**

Good Faith: EPA at this time has made no adjustment for this factor in the penalty determination since EPA has no information concerning any mitigating factors; if EPA receives such information, it will then evaluate it and consider making an appropriate adjustment.

Willfulness/Negligence: This is the third year Respondent is alleged to have violated this requirement; thus a 10% adjustment is added.

History of Compliance: N/A

Ability to Pay: As this time, EPA has not made any adjustments based on ability to pay.

Other Unique Factors: N/A

3. **Economic Benefit**: The economic benefit for this amount is deemed significant and reflected in the penalty calculation. The economic benefit was calculated in the following manner: the cost of obtaining a Letter of Credit (LOC) equals 1.25% multiplied by \$1,269,000 (the estimated post-closure cost) which equals \$15,863 plus the calculated time value of the LOC's cost as per EPA's BEN Model for that year (or \$1,486) resulting in an economic benefit totaling \$17,349.

ATTACHMENT IV

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

Penalty Computation Worksheet (2011)

Respondent: The Black & Decker Corporation

Facility Address: 200 State St
 Brockport, New York 14218

Requirement Violated:

Count 4: 6 NYCRR § 373-2.8: Failure to maintain the requisite financial assurance for post-closure care for the fiscal year ending December 31, 2011.

PENALTY AMOUNT FOR COMPLAINT:

1. Gravity based penalty from matrix	\$37,500
(a) Potential for harm.	MAJOR
(b) Extent of Deviation.	MAJOR
2. Select an amount from the appropriate multi-day matrix cell.	N/A
3. Multiply line 2 by number of days of violation	N/A at this time
4. Add line 1 and line 3	\$37,500
5. Percent increase/decrease for good faith.	N/A
6. 20 Percent increase for willfulness/negligence.	20%
7. Percent increase for history of noncompliance.	N/A
8. Total lines 5 through 7.	20%
9. Multiply line 4 by line 8.	\$7,500
10. Calculate economic benefit.	\$8,995
11. Add lines 4, 9 and 10 for penalty amount inserted into the complaint.	<u>\$53,995</u>

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

Penalty Computation Worksheet

1. Gravity Based Penalty:

- a. Potential for Harm - The "Potential for Harm" is MAJOR. Financial responsibility requirements are important components of the RCRA program. Financial assurance for post-closure care ensures the existence of adequate funding to properly address regulated areas and helps protect human health and the environment. The failure by a company to have continuous compliance with corporate guarantee and financial test, or to submit an alternative financial assurance mechanism, means the financial resources needed to complete post-closure care requirements at hazardous waste management units could be deficient, thereby substantially increasing the potential risk to human health and the environment. Failure to properly maintain financial assurance undermines and adversely impacts the purposes and procedures of the RCRA program.
- b. Extent of Deviation - The extent of deviation is MAJOR. The metrics of the corporate guarantee and financial test were not met.
- c. The applicable cell range is \$28,330 to \$37,500. Since the violation alleged in this Count occurred in 2009, EPA used the matrix for violations which occurred after January 12, 2009. The high point of the range was selected because this is the fourth year the company is alleged to have violated this requirement.
- d. Multiple/Multi-day: EPA has not presently applied a multi day penalty to this violation.

2. Adjustment Factors

Good Faith: EPA at this time has made no adjustment for this factor in the penalty determination since EPA has no information concerning any mitigating factors; if EPA receives such information, it will then evaluate it and consider making an appropriate adjustment.

Willfulness/Negligence: This is the fourth year Respondent has violated the requirement; thus a 20% adjustment is added.

History of Compliance: N/A

Ability to Pay: As this time, EPA has not made any adjustments based on ability to pay.

Other Unique Factors: N/A

3. Economic Benefit: The economic benefit for this amount is deemed significant and reflected in the penalty calculation. The economic benefit was calculated in the

following manner: the cost of obtaining a Letter of Credit (LOC) equals 1.25% multiplied by \$1,128,000 (the estimated post-closure cost) which equals \$14,100 plus the calculated time value of LOC's cost as per EPA's BEN Model (or \$1,321) resulting in an economic benefit totaling \$15,421. Economic benefit is adjusted to reflect Respondent's non-compliance with financial assurance requirements through July (August 2011 it submitted its letter of credit to NYSDEC.) Therefore \$15,421 is divided by twelve months which equals \$1285 which is then multiplied by 7 months of noncompliance resulting in a total of \$8995.

ATTACHMENT V

GRAVITY BASED PENALTY MATRIX
For Violations Occurring from March 16, 2004 January 12, 2009

		EXTENT OF DEVIATION FROM REQUIREMENT		
P O T E N T I A L F O R H A R M		MAJOR	MODERATE	MINOR
	MAJOR	\$32,500 to 26,000	\$25,999 to 19,500	\$19,499 to 14,300
	MODERATE	\$14,299 to 10,400	\$10,399 to 6,500	\$6,499 to 3,900
	MINOR	\$3,899 to 1,950	\$1,949 TO 650	\$649 TO 130

ATTACHMENT V (cont.)

MULTI-DAY MATRIX

For Violations Occurring from March 16, 2004 through January 12, 2009

EXTENT OF DEVIATION FROM REQUIREMENT					
P O T E N T I A L F O R H A R M		MAJOR	MODERATE	MINOR	
	MAJOR		\$6,500 to \$1,300	\$6,499 to \$975	\$3,900 to \$715
	MODERATE		\$2,860 to \$520	\$2,080 to \$325	\$1,300 to \$195
	MINOR		\$780 to \$130	\$390 to \$130	\$130

ATTACHMENT VI

**GRAVITY BASED PENALTY MATRIX
For Violations Occurring after January 12, 2009**

		EXTENT OF DEVIATION FROM REQUIREMENT		
P O T E N T I A L F O R H A R M		MAJOR	MODERATE	MINOR
	MAJOR	\$37,500 To 28,330	\$28,330 to 21,250	\$21,250 to 15,580
	MODERATE	\$15,580 to 11,330	\$11,330 to 7,090	\$7,090 to 4,250
	MINOR	\$4,250 to 2,130	\$2,130 TO 710	\$710 TO 150

ATTACHMENT VI (cont.)

MULTI-DAY MATRIX
For Violations Occurring after January 12, 2009

		EXTENT OF DEVIATION FROM REQUIREMENT		
P O T E N T I A L F O R H A R M		MAJOR	MODERATE	MINOR
	MAJOR	\$7,090 to \$1,420	\$5,670 to \$1,070	\$4,250 to \$780
	MODERATE	\$3,120 to \$570	\$2,230 to \$360	\$1,420 to \$220
	MINOR	\$850 to \$150	\$430 to \$150	\$150