



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

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2008 JUN 10 AM 10:47  
REGIONAL HEARING  
CLERK

JUN 26 2008

**CERTIFIED MAIL- RETURN RECEIPT REQUESTED**

Mr. Robert Baker  
Chairman/CEO  
National Realty and Development Corp.(NRDC ) Equity Partners  
3 Manhattanville Road  
Purchase, NY 10577

Re: **In the Matter of National Realty and Development Corporation (NRDC)  
Equity Partners  
Docket Number RCRA-02-2008-7108**

Dear Mr. Baker:

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

You have the right to a formal hearing to contest any of the allegations in the Complaint 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.

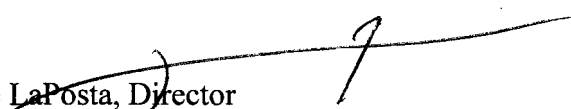
EPA encourages all parties against whom it files a Complaint to pursue the possibility of settlement and to have an informal conference with EPA. However, a request for an informal conference *does not* substitute for a written Answer, affect what you may choose to say in an Answer, or extend the thirty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

You will find enclosed a copy of the "Consolidated Rules of Practice," which govern this proceeding. (A brief discussion of some of these rules appears in the later part of the Complaint.) For your general information and use, I also enclose the "Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings" which may apply to you depending on the size of the proposed penalty and the nature of your company.

EPA encourages the use of Supplemental Environmental Projects, where appropriate, as part of any settlement. I am enclosing a brochure on EPA's Supplemental Environmental Projects Policy. Please note that these are only available as part of a negotiated settlement and are not available if this case has to be resolved by a formal adjudication. We look forward to negotiating a settlement of this matter and ensuring that NRDC owned and operated properties have returned to compliance in terms of RCRA and the Universal Waste Programs in a cooperative, expedited manner.

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

Sincerely,

  
Dore LaPosta, Director  
Division of Enforcement and Compliance Assistance

Enclosures

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

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**Region 2**

In The Matter of:

National Realty and Development Corp.  
(NRDC) Equity Partners,

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-02-2008-7108

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG II  
2008 JUL 10 AM 10:47  
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CLERK

**COMPLAINT**

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

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING (“Complaint”) serves notice of EPA’s preliminary determination that **National Realty and Development Corp. (NRDC) Equity Partners** (hereinafter “Respondent”) has violated certain requirements of the authorized New York State and New Jersey State hazardous waste programs.

Section 3006(b) of the Act, 42 U.S.C. § 6926(b), provides that EPA’s Administrator may, if certain criteria are met, authorize a state to operate a hazardous waste program (within the meaning of Section 3006 of the Act, 42 U.S.C. § 6926) in lieu of the regulations comprising the federal hazardous waste program (the Federal Program). The State of New York received final authorization to administer its base hazardous waste program on May 29, 1986. Since 1986, New York State has been authorized for many other hazardous waste requirements promulgated by EPA pursuant to RCRA. See 67 Fed. Reg. 49864 (August 1, 2002) and 70 Fed. Reg. 1825 (January 11, 2005). This includes most EPA regulations issued as of July 1, 1999.

Pursuant to Section 3006(b) of the Act, 42 U.S.C. § 6926(b), the State of New Jersey was authorized by EPA to conduct a hazardous waste program ( the “authorized State Program”). 64 Fed. Reg. 41823 (Aug. 2, 1999). There were changes in the scope of the authorized State Program as a result of EPA’s authorization of New Jersey’s regulations incorporating by reference changes to the federal program promulgated by EPA between July 2, 1993 and July 31, 1998. 67 Fed. Reg. 76995 (Dec. 16, 2002). These changes became effective February 14, 2003. Prior to February 14, 2003, the authorized State Program incorporated by reference, with some modifications, the regulations in the federal program at 40 Code of Federal Regulations (C.F.R.) Parts 124, 260-266, 268 and 270 as set forth in the 1993 edition. Since February 14, 2003, the

authorized State Program, with some modifications, essentially has incorporated by reference the regulations in the 1998 edition of the same Parts of Title 40 of the C.F.R. New Jersey's authorized regulations comprising the original State Program, authorized in 1999, can be found in the New Jersey Register. See 28 N.J.R. 4606 (Oct. 21, 1996). The New Jersey regulations authorized in 2002 can be found at 31 N.J.R. 166 (Jan. 19, 1999). New Jersey is not authorized for any regulations adopted by EPA after July 31, 1998. EPA has retained its authority to enforce the regulations comprising the authorized State Program. EPA retains primary responsibility for requirements promulgated pursuant to HSWA since July 31, 1998.

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

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

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

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

The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2, who has been duly delegated the authority to institute this action, hereby alleges:

### Background Allegations

1. Respondent is National Realty and Development Corp. (NRDC) Equity Partners (hereinafter "NRDC" and/or "Respondent"). Respondent is located at 3 Manhattanville Road, Purchase, NY 10577.
2. Respondent owns, operates or leases approximately twenty-three (23) Lord and Taylor stores in New York and New Jersey including stores at the Quaker Bridge Mall, located at Rt. 1 and Quaker Bridge Rd., Lawrenceville, NJ 08648 (hereinafter referred to as

Respondent's "Quaker Bridge Mall Store"), and at the Palisades Mall, located at 1000 Palisades Center, West Nyack, NY 10994 (hereinafter referred to as Respondent's "Palisades Mall Store").

3. In addition to the twenty-three Lord and Taylor stores, Respondent also owns, operates or leases approximately forty-five (45) commercial and/or retail facilities (hereinafter referred to as "45 Facilities") in New York and New Jersey, some of which Respondent has the sole or shared responsibility for maintenance.
4. Respondent is a "person," as defined at Section 1004(15) of the Act, 42 U.S.C. § 6903(15), and Title 6 of the New York Codes, Rules, and Regulations ("6 NYCRR") § 370.2(b) and 40 CFR 260.10 as incorporated by NJAC 7:26G-4.1.

#### Hazardous Waste Generation

5. In the course of normal operations, Respondent generated and continues to generate used or burnt-out light bulbs, also known as "spent lamps" at Respondent's Quaker Bridge Mall Store and at its Palisades Mall Store.
6. Spent lamps constitute a "solid waste," as that term is defined at 6 NYCRR § 371.1(c) and 40 CFR 261.2 as incorporated by NJAC 7:26G-5.1.
7. Spent lamps generated by Respondent's Quaker Bridge Mall Store and its Palisades Mall Store may exhibit the toxicity characteristic under the toxicity characteristic leaching procedure (TCLP) for metals, in particular mercury or lead.
8. At least some of the spent lamps would constitute a "hazardous waste" as that term is defined at 6 NYCRR § 371.1(d) and 40 CFR 261.3 as incorporated by NJAC 7:26G-5.1 under certain conditions.
9. Respondent's Quaker Bridge Mall Store and its Palisades Mall Store are each a conditionally exempt small quantity generator (CESQGs) of hazardous waste, provided each such store generates less than 100 kilograms ("kgs") of hazardous waste per month.
10. Spent lamps may be handled under the less stringent standards provided under the Universal Waste Rules, codified in federal regulations at 40 C.F.R. Part 273 and in New York State regulations at 6 NYCRR Part 374-3.
11. For purposes of this Complaint, where any of Respondent's stores handle and recycle the spent lamps they generate in accordance with the Universal Waste Rules and Regulations, such stores will be considered to have "a spent lamp program."

#### Hazardous Waste Notification

12. Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, all persons conducting activities that generate or otherwise cause hazardous waste to be handled in other ways are required to notify EPA of their hazardous waste activities.

13. Neither the Respondent's Quaker Bridge Mall Store nor its Palisades Mall Store have obtained an EPA Hazardous Waste Identification Number.

#### EPA Investigatory Activities

14. On or about March 9, 2007 and July 31, 2007, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, authorized representatives of EPA conducted inspections of Respondent's Quaker Bridge Mall Store and Palisades Mall Store.
15. At the time of the inspections, representatives of Respondent's Quaker Bridge Mall and Palisades Mall stores stated that there was no spent lamp program in place at the stores. In addition the representatives further stated that spent lamps generated at these stores were being disposed of with regular trash in the trash compactors.
16. Between the years 2004 and 2007, the types of lamps used at Respondent's Quaker Bridge Mall and Palisades Mall stores included (1) fluorescent, (2) incandescent, (3) mercury vapor, (4) metal halide, and (5) high pressure sodium vapor lamps.
17. Prior to, and at the time of, EPA's inspection of Respondent's Quaker Bridge Mall and Palisades Mall stores, the spent lamps generated were placed into trash compactors. Respondent was not managing its spent lamps in accordance with the Universal Waste requirements.
18. The trash compactors at Respondent's Quaker Bridge Mall and Palisades Mall stores are open containers into which Respondent's trash is placed and crushed to maximize space. The compactors, when turned on, crush the trash and would have broken the spent lamps, resulting in a release of mercury contained in the lamps.
19. Mercury is a "hazardous waste constituent" as that term is defined in 40 CFR § 260.10.

#### NOV and Information Request Letter (IRL)

20. On or about August 29, 2007, and September 12, 2007, EPA issued to Respondent a Notice of Violation (NOV) and RCRA Section 3007 Information Request Letter (IRL) and Supplemental Notice of Violation (NOV) and RCRA Section 3007 Information Request Letter (IRL).
21. The NOV's were based on observations made by EPA inspectors at Respondent's Quaker Bridge Mall and Palisades Mall stores. EPA determined that these two stores failed to make a hazardous waste determination for the spent lamps generated as required by 6 NYCRR § 372.2(a)(2). Respondent's Quaker Bridge Mall and Palisades Mall stores handled the spent lamps as regular trash and disposed of them in the trash compactors which would have caused releases of hazardous waste constituents, particularly mercury. The IRLs requested information on information on the types of lamps used by Respondent as well as information on spent lamps and disposal practices for all of Respondent's stores in New York and New Jersey as well as any stores Respondent leased or operated.

22. On December 4, 2007, December 7, 2007 and January 22, 2008, a representative for Respondent provided to EPA written responses to the NOV/IRLs.
23. According to the December 4, 2007 Response, between the Spring of 2004 and the Fall of 2007, all Lord and Taylor stores located in New York and New Jersey (including Respondent's Quaker Bridge Mall and Palisades Mall stores) purchased approximately 115,000 light bulbs of various types for the stores. Of the 115,000 bulbs, forty percent (40%) were fluorescent bulbs and sixty percent (60%) were incandescent bulbs (spots, floods, halogens, etc.)
24. According to the January 22, 2008 Response, the Material Safety Data Sheets ("MSDS") submitted to EPA as part of the Response on the light bulbs used by Respondent showed that most or all of the spent lamps generated by Respondent's New York and New Jersey Stores contained hazardous constituents including mercury and lead.
25. According to December 4, 2007 Response, Respondent retained a contractor "to set up a recycling program to correct each of the alleged violations and/or concerns noted in the NOV." As evidence of this claim, the Response also contained a letter from the contractor dated September 12, 2007 indicating it was "working to set up recycling and complete compliance to the ... Notice of Violation" and requested a 20 day extension.

#### **COUNT 1 - Failure to Make Hazardous Waste Determinations**

26. Complainant realleges each allegation contained above in paragraphs 1 through 25, with the same force and effect as if fully set forth below.
27. Pursuant to 40 CFR § 262.11, as incorporated by reference by NJAC 7:26G-6.1 and 6 NYCRR § 372.2(a)(2), a person who generates a solid waste must determine whether that solid waste is a hazardous waste, using the procedures specified in that provision (hereinafter a "hazardous waste determination").
28. In accordance with 6 NYCRR § 371.1(c) and 40 CFR 261.2 as incorporated by NJAC 7:26G-5.1, subject to certain inapplicable exclusions, a solid waste is defined as any discarded, abandoned, recycled, or inherently waste-like material. In accordance with the same provision, materials are solid wastes if they are abandoned by being disposed of, burned or incinerated.
29. Prior to, on the date of, and subsequent to EPA's inspections and the receipt of EPA's IRLs, Respondent used incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps to illuminate the interior and exterior of Respondent's Quaker Bridge Mall and Palisades Mall stores.
30. At various times prior to EPA's inspections and the receipt of EPA's IRLs, Respondent

had taken out of service and disposed of spent lamps as non-hazardous solid waste at Respondent's Quaker Bridge Mall and Palisades Mall stores.

31. Each of the spent lamps listed in paragraph 30 above is a "discarded material" and, as such, meets the definition of a "solid waste", as that term is defined at 6 NYCRR § 371.1(c) and 40 CFR 261.2 as incorporated by NJAC 7:26G-5.1.
32. In its IRL dated August 29, 2007, EPA asked Respondent "[i]f any sampling was conducted to determine whether the lamps were hazardous or non-hazardous wastes, please provide a copy of the analytical results. If generator knowledge was used, please provide documentation explaining the determination." EPA in its IRL requested that such information be provided for all of Respondent's Lord and Taylor stores as well as any other properties Respondent owned in New York and New Jersey.
33. In its December 4, 2007 Response to the IRL no documentation of sampling, analytical results or generator knowledge was provided by Respondent. Furthermore, in no subsequent Response was any such information provided.
34. Most or all of the MSDS submitted with Respondent's January 22, 2008 Response regarding the spent lamps generated by Respondent contained language which stated that (1) it is the responsibility of the generator to conduct TCLP tests to ensure proper classification and disposal of waste or (2) that such spent lamps would fail the TCLP tests and constitute hazardous waste.
35. Prior to EPA's inspections and receipt of EPA's IRL, Respondent had not determined, and did not have a third-party determine on its behalf, whether its spent lamps were hazardous wastes.
36. Respondent's failures to have made, or to have a third-party make on its behalf, a hazardous waste determination for its spent lamps as set forth in paragraphs "33" and "35" above constitute violations of 6 NYCRR § 372.2(a)(2) and 40 CFR § 262.11, as incorporated by reference by NJAC 7:26G-6.1.
37. 6 NYCRR 372.2(a)(2) and 40 CFR § 262.11, as incorporated by reference by NJAC 7:26G-6.1 constitute a requirement of Subtitle C of RCRA for purposes of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

### **PROPOSED CIVIL PENALTY**

The Complainant proposes, subject to the receipt and evaluation of further relevant information from Respondent, a civil penalty in the amount of **Thirty Two Thousand Five Hundred (\$32,500) Dollars** for the violation alleged herein.

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."



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 penalty amounts were amended for violations occurring on or after January 31, 1997. The maximum civil penalty under Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) is \$32,500 for any violation occurring after March 15, 2004. 40 C.F.R. Part 19.

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](http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf)." The penalty amounts in the 2003 RCRA Civil Penalty Policy were amended later to reflect inflation adjustments. These adjustments were made pursuant to a 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)" and a January 11, 2005 document entitled "Revised Penalty Matrices for the RCRA Civil Penalty Policy." This RCRA Penalty Policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors to particular cases.

A penalty calculation worksheet and narrative explanation to support the penalty figure for the RCRA violation cited in this Complaint is included in Attachment I, below. The matrix employed in the determination of the penalty is included as Attachment II, below. These Attachments are incorporated by reference herein.

### **COMPLIANCE ORDER**

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

- i. commencing on the effective date of this Compliance Order, determine whether, at its twenty-three (23) Lord and Taylor stores and forty-five (45) Facilities in New York and New Jersey, the spent light bulbs generated by Respondent are hazardous wastes and handle all spent lamps in accordance with all applicable federal and state regulatory requirements for the management of hazardous waste by generators and universal waste by handlers.
- ii. within thirty (30) calendar days of the effective date of this Compliance Order, submit to EPA written notice of its compliance (accompanied by a copy of all appropriate supporting documentation) or noncompliance for each of the requirements set forth herein at Respondent's twenty-three (23) Lord and Taylor stores and forty-five (45) Facilities in New York and New Jersey. If Respondent is in noncompliance with a particular requirement, the notice shall state the reasons for noncompliance and shall provide a schedule for achieving expeditious compliance with the requirement.
- iii. submit the above required information and notices to:

iii. submit the above required information and notices to:

Edward J. Guster III  
RCRA Compliance Branch  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 21<sup>st</sup> Floor  
New York, New York 10007-1866

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

Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise release Respondent from liability for any violations occurring or existing at its stores in New York, New Jersey, or elsewhere. Further, nothing herein waives, prejudices or otherwise affects the EPA's right (or the right of the United States on behalf of the EPA) to enforce any applicable provisions of law regarding Respondent.

#### **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 regarding hazardous waste violations is liable for a civil penalty of up to \$32,500 for each day of continued noncompliance. Such continued noncompliance may also result in suspension or revocation of any permits issued to the violator whether issued by the EPA, the State of New York or the State of New Jersey.

#### **V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION**

The rules of procedure governing this civil administrative litigation have been set forth in the "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS." These rules are codified at 40 C.F.R. Part 22. A copy of these rules accompanies this Complaint.

##### **A. Answering The Complaint**

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty and/or the Compliance Order is inappropriate or to contend that Respondent 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 30 days after service of the Complaint. 40

**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 the Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b).

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

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

**B. Opportunity To Request A Hearing**

If requested by Respondent, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondent requests 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 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 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(s) to the Complaint, any default order shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent(s) without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent 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 Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives the right to judicial review. 40 C.F.R. § 22.27(d).

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

#### **INFORMAL SETTLEMENT CONFERENCE**

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in the Complaint, and Respondent may also provide whatever additional information that they believe is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the financial or economic impact the proposed penalty would have on Respondent and/or (4) any other special facts or circumstances Respondent wishes to raise.

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

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

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

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

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

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

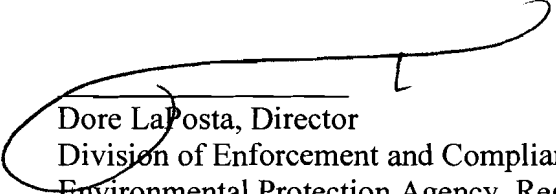
Respondent entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in the such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent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

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

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

**Dated:** JUNE 20, 2008

**COMPLAINANT:**

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

**To:** Mr. Richard Baker  
President/CEO  
National Realty and Development Corp. (NRDC) Equity Partners  
3 Manhattanville Road  
Purchase, NY 10577

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

Michael Hastry, Chief  
Bureau of Hazardous Waste Compliance and Enforcement  
Central Field Office, New Jersey Department of Environmental Protection  
300 Horizon Center- PO Box 407  
Trenton, NJ 08625-0407

***In re: NRDC***  
**Docket Number RCRA-02-2008-7108**

**CERTIFICATE OF SERVICE**

This is to certify that on JUL 10, 2008, 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-02-2008-7108 hereinafter referred to as the "Complaint"), together with Attachments I and II and with a copy of the "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS," 40 C.F.R. Part 22, to Mr. Richard Baker, President/CEO, National Realty and Development Corp. (NRDC) Equity Partners, 3 Manhattanville Road, Purchase, NY 10577, by certified mail, return receipt requested. On said day, I hand carried the original and a copy of the Complaint, with the accompanying attachments, to the Office of the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2, 290 Broadway, 16<sup>th</sup> floor, New York, New York 10007-1866.

Dated: JUL 10, 2008  
New York, New York

*Michael N. Baer*

**Attachment I - Penalty Calculation Worksheets**

**Penalty Calculation Worksheet - Count 1**

Requirement Violated:           Count 1: Failure to determine whether solid wastes (incandescent, fluorescent, mercury, high pressure sodium vapor, and metal halide lamps) are hazardous wastes.

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.	Not Applicable
3. Multiply line 2 by number of days of violation minus 1.	Not Applicable
4. Add line 1 and line 3	\$ 32,500
5. Percent increase/decrease for good faith.	Not Applicable
6. Percent increase for willfulness/negligence.	Not Applicable
7. Percent increase for history of noncompliance.	Not Applicable
8. Total lines 5 through 7.	Not Applicable
9. Multiply line 4 by line 8.	Not Applicable
10. Calculate economic benefit.	Not Applicable
11. Add lines 4, 9 and 10 for penalty amount to be inserted into the complaint.	\$ 32,500



## Narrative Explanation in Support of Penalty Figure - Count 1

### 1. Gravity Based Penalty

1. Potential for Harm – The potential for harm for a failure to conduct a hazardous waste determination is deemed to be Major. The RCRA Civil Penalty Policy provides that the potential for harm should be based on two factors: 1) the adverse impact of the noncompliance on the regulatory scheme; and 2) the risk of human or environmental exposure. The RCRA regulatory program is undermined when an owner/operator of a facility generating solid waste fails to determine whether each of the generated waste streams is hazardous. Failure to make hazardous waste determinations increases the likelihood that the hazardous waste is managed as non-hazardous waste, outside of the RCRA regulatory universe. This type of violation can result in multiple sequential violations involving each hazardous waste stream that is not identified. Further, failure to manage a hazardous waste pursuant to the RCRA regulatory scheme increases the risk of human and environmental exposure. In this particular case, Respondent had, in fact, mismanaged the disposal of the spent lamps as was observed or reported to EPA inspectors during the inspections. Respondent improperly disposed of the spent lamps that contained hazardous constituents such as mercury by first crushing the lamps which released the hazardous constituents before disposing of such wastes. Although requested by EPA to explain its disposal practices in the Information Request Letter sent by EPA to Respondent, Respondent did not produce any evidence that the spent bulbs were being handled any differently at the other 21 Lord and Taylor Stores or the forty five Facilities leased or operated by Respondent.
2. Extent of Deviation - The extent of deviation present in these violations was determined to be Major. Respondent failed to determine whether or not the spent lamps it generated were hazardous wastes. Respondent discarded thousands of lamps without making a hazardous waste determination. This amounts to a significant deviation from both the RCRA and Universal Waste programs.
3. The applicable cell ranges from \$ 26,000 to \$ 32,500. The high point of the cell matrix was selected because of the quantity of spent lamps for which Respondent did not make a hazardous waste determination.
4. Multiple/Multi-day - EPA is exercising its enforcement discretion in proposing a single penalty for the stores where EPA found violations.

### 2. Adjustment Factors

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

- 2. Willfulness/Negligence Not Applicable
- 3. History of Compliance Not Applicable
- 4. Ability to Pay Not Applicable
- 5. Environmental Project Not Applicable
- 6. Other Unique Factors Not Applicable

3. **Economic Benefit** - No penalty is being sought to recoup economic benefit since NRDC staff may have been able to make such determinations at no additional cost to Respondent beyond salaries already paid.

**Attachment II**

**Gravity-Based Penalty Matrix**

<b>EXTENT OF DEVIATION FROM REQUIREMENT</b>				
<b>P O T E N T I A L  F O R  H A R M</b>		<b>Major</b>	<b>Moderate</b>	<b>Minor</b>
	<b>Major</b>	<b>\$32,500 To 26,000</b>	<b>\$25,999 To 19,500</b>	<b>\$19,499 To 14,300</b>
	<b>Moderate</b>	<b>\$14,299 To 10,400</b>	<b>\$10,399 To 6,500</b>	<b>\$6,499 To 3,900</b>
	<b>Minor</b>	<b>\$3,899 To 1,950</b>	<b>\$1,949 To 650</b>	<b>\$649 To 130</b>