

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

In the Matter of  
Aguakem Caribe, Inc.  
**Respondent**

**Prehearing Exchange**

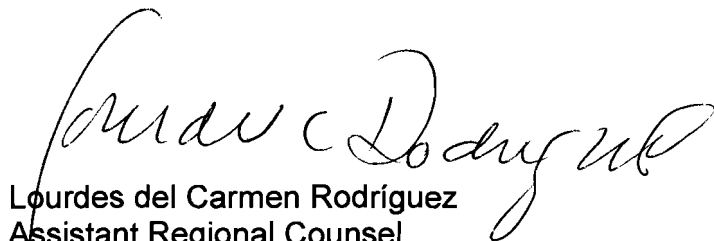
Docket No. RCRA-02-2009-7110

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REGION 2  
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REGIONAL HEARING  
CLERK

**COMPLAINANT'S INITIAL PREHEARING EXCHANGE**

Pursuant to the request made by Hon. William B. Moran, Administrative Law Judge, on the Prehearing Order dated November 25, 2009, the Complainant in the above captioned matter hereby files its Initial Prehearing Exchange for the above captioned matter.

Respectfully submitted, in San Juan, Puerto Rico this day of January 20, 2010.



Lourdes del Carmen Rodríguez  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
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1. **Each Party shall submit a list of all expert and other witnesses it intends to call with a brief narrative summary of their expected testimony; and copies of all documents and exhibits it intends to introduce into evidence. The exhibits should include a resume for each proposed expert witness.**

Complainant expects to call the following persons as witnesses at the hearing:

- A. **Eduardo R. González, PE**  
RCRA Program  
Response and Remediation Branch  
Caribbean Environmental Protection Division  
U.S. Environmental Protection Agency, Region 2

Mr. González will testify about the factual and legal aspects of the case, among others, he will testify about the RCRA regulations and how they apply to Respondent's facility. He will testify as to his experience in conducting RCRA compliance inspections, and his knowledge in the safe handling, transportation, disposal and treatment of hazardous substances and solid wastes. He will testify as to the Inspections he conducted at Respondent's facility and the findings that led to the issuance of the penalty complaint. He will also testify with regard to his knowledge and experience in calculating civil penalties for violations of the RCRA program and about the specific facts and circumstances in this case and how they were considered in supporting the calculation of the penalty assessed in the complaint (the reasoning behind the calculation of said assessed penalty and the appropriateness of the penalty according to the RCRA statutory factors and applicable penalty policy). In his testimony, Mr. González is expected to discuss and explain the significance of various exhibits Complainant intends to offer into evidence, among them the RCRA Compliance Evaluation Inspection Reports, the Request for Information letters sent to Respondent and to the Port of Ponce Authority and the responses received by EPA. Mr. González will also testify as to the rest of the other exhibits and how they were used in the calculation of the proposed penalty.

**B. Zolymar Luna**  
RCRA Program  
Response and Remediation Branch  
Caribbean Environmental Protection Division  
U.S. Environmental Protection Agency, Region 2

Ms. Luna will testify about the factual and legal aspects of the case, among others, she will testify about the RCRA regulations and how they apply to Respondent's facility. She will testify as to her experience in conducting RCRA compliance inspections, and her knowledge in the safe handling, transportation, disposal and treatment of hazardous substances and solid wastes. She will testify as to the Inspections she conducted at Respondent's facility and the findings that led to the issuance of the penalty complaint. She will also testify with regard to her knowledge and experience in calculating civil penalties for violations of the RCRA program and about the specific facts and circumstances in this case and how they were considered in supporting the calculation of the penalty assessed in the complaint (the reasoning behind the calculation of said assessed penalty and the appropriateness of the penalty according to the RCRA statutory factors and applicable penalty policy). In her testimony, Ms. Luna is expected to discuss and explain the significance of various exhibits Complainant intends to offer into evidence, among them the RCRA Compliance Evaluation Inspection Report, the Administrative Complaint with the attachments describing the penalty and other documents mentioned below that she reviewed as part of calculating the proposed penalty in the complaint.

**C. Jesse Avilés**  
RCRA Program  
Response and Remediation Branch  
Caribbean Environmental Protection Division  
U.S. Environmental Protection Agency, Region 2

Mr. Avilés will testify about the factual and legal aspects of the case, among others, he will testify about the RCRA regulations and how they apply to Respondent's facility. He will testify as to his participation in the Inspections conducted at Respondent's facility and the findings that led to the issuance of the penalty complaint. In his testimony, Mr. Avilés is expected to discuss and explain the significance of various exhibits Complainant intends to offer into evidence.

**D. Angel C. Rodríguez**  
Superfund Program  
Response and Remediation Branch  
Caribbean Environmental Protection Division  
U.S. Environmental Protection Agency, Region 2

Mr. Rodríguez is expected to testify about his participation in the removal activities conducted at Respondent's facility, including the findings of fact that led to the Administrative Order on Consent (AOC) entered between EPA, Respondent and the Port of Ponce Authority (PPA) under Section 104 of CERCLA and Respondent's participation under the AOC. Mr. Rodríguez will also testify as to how EPA responded to the emergency at the facility; EPA's removal procedures and the protocol and results of the sampling taken at Respondent's former facility, mentioned in the Complaint. In his testimony, Mr. Rodríguez will discuss and explain the significance of various exhibits Complainant intends to offer into evidence.

Complainant reserves the right, and nothing herein is intended or is to be construed to prejudice or waive any such right, to call or not to call any of the aforementioned potential witnesses, and to expand or otherwise modify the scope, extent and/or areas of the testimony of any of the above-named potential witnesses, where appropriate. In addition, Complainant reserves the right to list and to call additional potential hearing witnesses, including expert witnesses, to answer and/or rebut evidence (testimonial or documentary) listed by Respondent in its prehearing exchange or on matters arising as a consequence of such evidence.

Complainant expects to introduce into evidence the following exhibits or documents:

- i. ***Complainant's Exhibit 1 - Administrative Complaint***, Docket No. RCRA-02-2009-7110, dated September 25, 2009, with letter addressed to Mr. Jorge Unanue, with attachments.
- ii. ***Complainant's Exhibit 2 - Respondent's Answer to the Complaint, Request for Hearing***, dated October 23, 2009.
- iii. ***Complainant's Exhibit 3 - RCRA Compliance Evaluation Inspection Report, of Port of Ponce-"Puerto de Ponce" by Eduardo R. González and Zolyamar Luna, dated September 30, 2008 with attachments. Inspection conducted on February 2, 2007.***

- iv. **Complainant's Exhibit 4** - RCRA Compliance Evaluation Inspection Report, Aguakem, signed by Eduardo R. González and Jesse Avilés, dated May 1, 2008 with attachments. Inspection conducted on February 2, 2007.
- v. **Complainant's Exhibit 5** – RCRA Section 3007 Request for Information, addressed to Mr. Jose Manuel Unanue, dated May 12, 2008, ref. No. CEPD-RCRA-08-3007-0000-002, with attachments.
- vi. **Complainant's Exhibit 6** - Notice of Violation(NOV)/RCRA § 3007 Request for Information, addressed to Jose A. Hernandez, Port of Ponce Authority's (PPA) Executive Director, dated September 30, 2008.
- vii. **Complainant's Exhibit 7** – PPA's response to EPA's NOV and Request for Information dated December 12, 2008 and signed by Jorge A. Hernandez, with partial attachments (contracts from 1995-2005 between PPA and Aguakem). Note: the contracts are in Spanish, translations will be provided of the contracts prior to hearing)
- viii. **Complainant's Exhibit 8** – Second RCRA Section 3007 Request for Information, addressed to Mr. Jose Manuel Unanue, dated May 6, 2009, Ref. No. CEPD-RCRA-09-3007-0000-01.
- ix. **Complainant's Exhibit 9** – Respondent's response letter to EPA's Second Request for Information, dated June 30, 2009, and signed by Mr. Jorge Unanue (without attachments).
- x. **Complainant's Exhibit 10** – EPA's Emergency Response Team Pollution Report, Aguakem Abandoned Waste, dated February 12, 2007 from OSC Angel Rodriguez.
- xi. **Complainant's Exhibit 11** – EPA's Emergency Response Team Pollution Report, Aguakem Abandoned Waste, dated April 2, 2008, from OSC Angel Rodriguez.
- xii. **Complainant's Exhibit 12** – PPA Notification of Regulated Waste Activity, electronic version of EPA Form 8700-12.
- xiii. **Complainant's Exhibit 13** – Administrative Agreement and Order on Consent for a Removal Action, In the matter of the Aguakem Chemical Site, Municipality of Ponce and Aguakem Caribe, Inc. Index Nurnber CERCLA-02-2007-2017.
- ivx. **Complainant's Exhibit 14** – Monthly Progress Report (October 10, 2008), from Caribe Environmental Services, dated October 10, 2008 and addressed to Angel C. Rodriguez, with attachments.

Complainant is not including as part of the exhibits EPA's 2003 RCRA Civil Penalty Policy. This document is legal material readily available to the Administrative Law Judge as well as Respondent's Counsel electronically in EPA's web-site:

<http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf>

However, we will provide copy of the policy if deemed necessary by the Administrative Law Judge.

- 2. The Complainant shall submit a statement explaining in detail how the proposed penalty amount was determined, including a description of how the specific provisions of any penalty or enforcement policies or guidelines were applied in calculating the penalty.**

The proposed civil penalty has been determined in accordance with Section 3008(a)(3) of the Resource Conservation and Recovery 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, the Complainant has taken into account the particular facts and circumstances of this case and used EPA's 2003 RCRA Civil Penalty Policy. The policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors to particular cases.

The penalty amount and the rationale Complainant used to support the penalty was based on the evidence known to EPA, as a result of the information gathered during the information requests, both to Respondent and to Port of Ponce Authority, the findings made during EPA's RCRA inspections and the information gathered as a result of EPA's CERCLA action.

A penalty calculation worksheet and narrative explanation to support the penalty figure for each violation cited in this Complaint was included with the Complaint (Complainant's Exhibit 1, Attachment I). Matrices employed in the determination of individual and multi-day penalties are included as Attachments II, and III of the Complaint. Respondent showed no good effort to comply, as the evidence will demonstrate, (he abandoned the waste when he moved out of the facility and failed to comply with the CERCLA Administrative Order on Consent to conduct the removal of the substances left behind by Respondent), EPA did not make any adjustment to the penalty for good faith for two counts of the Complaint. However, Complainant did make a penalty adjustment and increased the penalty amount by 10% for willfulness/negligence, for the same two counts. Respondent had knowledge of EPA's inspections and did not correct the situation at the facility nor showed any intention to comply with the applicable RCRA regulations.

The above mentioned attachments describe how Complainant calculated the penalty amounts for each of the Counts. Complainant's witnesses, Mr. Gonzalez and Ms. Luna will discuss the penalty calculation. To avoid being repetitive, we incorporate the narratives included in the Attachments as part of this pre-hearing request.

- 4. The Complainant shall submit a statement on the applicability of the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. §3501 et seq., to this proceeding, including whether there is a current Office of Management and Budget Control number involved and whether the provisions of Section 3512 of the PRA may apply to this case.**

Pursuant to the PRA, federal agencies such as EPA may only collect penalties regarding the "collection of information"<sup>1</sup> if the Agency first receives and properly notices approval for the collection of that information from the Office of Management and Budget ("OMB"). *Id.* This requirement protects the public from *paperwork* regulations; it does not apply to statutory or substantive requirements. See generally Dole v. United Steelworkers of America, 494 U.S. 26 (1990); Gossner Foods v. Environmental Protection Agency, 918 F. Supp. 359, 362 (D. Utah 1996). Counts 1 and 2 are all substantive requirements.<sup>2</sup> The PRA only applies to paperwork violations and does not therefore apply to these counts. See 44 U.S.C. § 3512.

Count 3 alleges that Respondent violated 40 C.F.R. § 279.22 by failing to properly label containers of used oil. The remediation of oil spills is a substantive requirement not subject to the PRA. Labeling requirements may be subject to the PRA unless the federal agency prescribes exact language.<sup>3</sup> Accordingly, because 40 C.F.R. § 279.22 mandates that the phrase "used oil" be placed on containers, it is not subject to the PRA.

- 5. Each party shall submit its views on the place for the hearing pursuant to §§ 22.21(d) and 22.19(d) of the Rules. Each party should also indicate when they would be available for the hearing, and give an estimate of the time needed to present its direct case.**

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<sup>1</sup> The "collection of information" is defined in the PRA to include the "obtaining . . . , soliciting, or requiring the disclosure..." of information."

<sup>2</sup> Count 1 is the failure to make a hazardous waste determination and Count 2 is the failure to minimize releases of hazardous waste and waste constituents.

<sup>3</sup> 5 C.F.R. § 1320.3(c)(2) excludes "information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public" from the definition of the "collection of information" and thus PRA requirements.

Pursuant to 40 CFR §§ 22.21(d) and 22.19(d), the hearing should be held in the county where the Respondent conducts business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional office is located, or in Washington, D.C. Complainant requests that the hearing be held in San Juan, where the relevant Environmental Protection Agency Regional Division office is located. This location is convenient for both parties and witnesses. In the alternative, it could be held in Ponce, Puerto Rico, where the facility was located and the place of business of Respondent. There is no need to hold the hearing in New York, since the Complainant, the Director of the Caribbean Environmental Protection Division, of EPA, Region 2, is located in San Juan, Puerto Rico. The Complainant can assist by providing the Regional Hearing Clerk with information on facilities which may be available for purposes of holding the hearing. Complainant has available the month of April, except April 2, 6 and 30. Complainant estimates it will need one day and a half (1 ½) to present its direct case.

In San Juan, Puerto Rico, January 20, 2010

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION II

In the Matter of

In the Matter of Aguakem Caribe, Inc.

Respondent

Complainant's Prehearing Exchange

CWA-02-2009-7110

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Complainant's Prehearing Exchange**, dated January 20, 2010, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy, **Federal Express** to:

Karen Maples  
Regional Hearing Clerk  
Region 2  
U.S. Environmental Protection Agency  
290 Broadway, 17<sup>th</sup> Floor  
New York, NY 10007-1866.

Copy by **Federal Express** to:

Attorney for Respondent:  
Armando Llorens, Esq.  
FURGANG & ADWAR  
1325 Avenue of the Americas, 28<sup>th</sup> Floor  
New York, New York 10019  
[Phone: (212) 725-1818

Copy by **Federal Express** to:

Administrative Law Judge:  
The Honorable William B. Moran  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Franklin Court Building  
1099 14<sup>th</sup> Street, N.W., Suite 350  
Washington, D.C. 20005  
[Phone: (202) 564-6255 Att: Knolyn R. Jones, Legal Staff Assistant]

1/20/2010  
Date

