



generator of solid waste and hazardous waste as those terms are defined in COMAR 26.13.01.03.B (29), (73) and (31) and: 1) subsequently treated, stored and/or disposed of solid wastes without performing a hazardous waste determination on such solid wastes in accordance with COMAR 26.13.03.02A; 2) failed to respond to an Information Request Letter (“IRL”) from EPA, pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 6927(a), regarding the management of hazardous waste at the Facility.

The Complaint was served upon the Respondent on March 25, 2011, by UPS, next day delivery. UPS is “a reliable commercial delivery service that provides written verification of delivery,” within the meaning of 40 C.F.R. § 22.5(b)(1). A true and correct copy of the Complaint is attached *Exhibit 1* to Complainant's accompanying Memorandum of Law. Respondent received copies of the Complaint on March 25, 2011, as evidenced by the UPS Delivery Notification, *Exhibit 2* to Complainant's accompanying Memorandum of Law.

In the Complaint, Complainant proposed the assessment per day of non-compliance for each violation, pursuant to Section 3008(a)(3) and (g) of RCRA, 42 U.S.C. § 6928(a)(3) and (g). Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant did not originally propose a specific penalty, but stated that it would do so after an exchange of information had occurred. For the purposes of this Default Motion, Complainant has calculated and now proposes the assessment of a specific penalty in the amount of \$64,000. The proposed penalty is based upon consideration of the statutory penalty factors set forth in Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), which include the seriousness of the violation and any good faith efforts to comply with the applicable requirements. These factors were applied to the particular facts and circumstances of this case with specific reference to EPA's October 1990 RCRA Civil Penalty Policy, as revised in June, 2003 (“RCRA Civil Penalty Policy”) which reflects the statutory penalty criteria and

factors set forth at Section 3008(a)(3) and (g) of RCRA, 42 U.S.C. §§ 6928(a)(3) and (g), the appropriate *Adjustment of Civil Monetary Penalties for Inflation*, 40 C.F.R. Part 19. See *Declaration of Kenneth J. Cox, Exhibit 5* to Complainant's accompanying Memorandum of Law; see also, *Summary of Violations and Penalty Computation Worksheets, Exhibits 7(a) and 7(b)* to Complainant's accompanying Memorandum of Law. Pursuant to 40 C.F.R. Part 19, penalties for RCRA violations occurring after January 12, 2009 have been increased to a per violation statutory maximum penalty of up to \$37,500. See *RCRA Civil Penalty Policy, Exhibit 3* to Complainant's accompanying Memorandum of Law; 40 C.F.R. Part 19, *Exhibit 4* to Complainant's accompanying Memorandum of Law.

Under the *RCRA Civil Penalty Policy*, a company's inability to pay usually will be considered only if the issue is raised by the respondent, and the burden of raising and presenting evidence regarding any inability to pay a particular penalty rests with the respondent. *RCRA Civil Penalty Policy*, at 39. Respondent did not raise a claim of inability to pay so Complainant made no adjustment to the proposed penalty based upon inability to pay and no such adjustment is appropriate on the record of this proceeding.

In the Complaint, Complainant ordered Respondent to perform certain "*compliance tasks*." Because Respondent did not file an answer to the Complaint, or otherwise request a hearing, this Compliance Order automatically became a final order 30 days after it was served. 40 C.F.R. § 22.37(b). Therefore, it is not necessary for the Regional Judicial Officer to take any further action with regard to the Compliance Order.

Pursuant to 40 C.F.R. § 22.15(a), the deadline for Respondent to file an Answer to the Complaint was thirty days after service of the Complaint, or April 24, 2011. Respondent has not filed an Answer to the Complaint as of the date of filing of this Motion. In accordance with 40

C.F.R. § 22.15(d), “[f]ailure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.” 40 C.F.R. § 22.17(a) provides, in relevant part, that “[a] party may be found to be in default, after motion, upon failure to file a timely answer to the complaint . . . .” 40 C.F.R. § 22.17(b) further provides, in relevant part, that

[w]hen the Presiding Officer finds that a default has occurred, [s/]he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. . . . The relief proposed in the . . . motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

Pursuant to 40 C.F.R. § 22.17(a), Respondent's failure to file an Answer within thirty days of service of the Complaint “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.” In light of Respondent's admission of all material factual allegations in the Complaint and on the basis of the law, the facts, the supporting evidence and the rationale in support of Complainant's requested relief, as fully set forth in the accompanying Memorandum of Law and the attachments thereto, the Complainant respectfully moves:

- (a) for the entry of a Default Order against the Respondent, pursuant to 40 C.F.R. § 22.17(b) of the *Consolidated Rules*; and
- (b) for the full assessment of the \$64,000 civil penalty proposed above, and such other relief as the Regional Judicial Officer determines to be fair and equitable, against Respondent and in the form of the proposed Order that is attached hereto for your consideration.

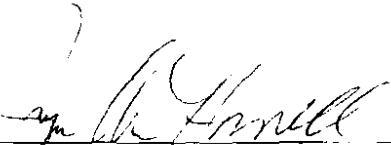
Such requested relief is clearly consistent with the record in this proceeding and with RCRA.

WHEREFORE, Complainant requests that the Regional Judicial Officer issue a Default Order against the Respondent and therein assess the full amount of the proposed \$64,000 civil penalty and impose any such further relief to which the Regional Judicial Officer determines that Complainant is entitled, via execution of the proposed Order that is annexed hereto.

Respectfully submitted,

Dated:

Jun 22, 2011



Joyce Howell  
Senior Assistant Regional Counsel (3RC30)  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

In the Matter of:

Hagerstown Aircraft Services, Inc.

RESPONDENT

Hagerstown Aircraft Services, Inc.  
14235 Oak Springs Road  
Hagerstown, MD 21742

FACILITY

Docket No. RCRA-03-2011-0112

Proceeding under Section 3008(a)  
and (g), 42 U.S.C. § 6928(a) of the  
Resource Conservation and Recovery Act

**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT'S  
MOTION FOR A DEFAULT ORDER**

The United States Environmental Protection Agency, Region III ("Complainant"), respectfully submits this Memorandum of Law in support of its Motion for the issuance of a Default Order against Respondent, Hagerstown Aircraft Services, Inc., for its failure to file a timely Answer in accordance with 40 C.F.R. § 22.15(a) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules")*, 40 C.F.R. Part 22.

**I. STATEMENT OF FACTS**

This action was commenced with an Administrative Complaint, Compliance Order and Right to Request a Hearing ("Complaint") which was filed with the Regional Hearing Clerk on March 24, 2011, pursuant to the Resource Conservation and Recovery Act ("RCRA"), Section 3008(a) and (g), 42 U.S.C. §§ 6928(a) and (g). In the two-count Complaint, Complainant alleged that the Respondent violated RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e and the authorized Maryland Hazardous Waste Management Regulations ("MdHWMR"), Code of Maryland Regulations ("COMAR"), Title 26, Subtitle 13 *et seq.*

Specifically, the Complaint alleged that Respondent generated, and subsequently treated, stored and/or disposed of, a solid waste, without performing a hazardous waste determination on such solid waste, and failed to respond to an Information Request Letter regarding the management of hazardous waste at the Facility.

A true and correct copy of the Complaint is attached hereto as *Exhibit 1*. A copy of the signed original Complaint, and of the *Consolidated Rules*, was served upon the Respondent on

March 25, 2011, by UPS, next day delivery. UPS is “a reliable commercial delivery service that provides written verification of delivery.” within the meaning of 40 C.F.R. § 22.5(b)(1). The Respondent received a copy of the Complaint and of the *Consolidated Rules* on March 25, 2011, as evidenced by the copies of the UPS Delivery Notification attached as *Exhibit 2*.

In order to effectuate proper service of process of the Complaint, Complainant mailed via UPS, overnight delivery a copy of the signed original Complaint, and of the *Consolidated Rules*, to Tracey Potter, President, Hagerstown Aircraft Services, Inc., at the Respondent’s corporate business address, 14235 Oak Springs Road, Hagerstown, MD, 21742. This The associated UPS Delivery Notification confirms UPS’ delivery of this mailing to the Respondent’s corporate business address and its acceptance by Hagerstown employee T. Slyconish by listing “SLYCONISH” as the person to whom UPS made the delivery. *Exhibit 2*.

Complainant’s service of the Complaint and of the *Consolidated Rules* upon T. Slyconish constitutes sufficient service pursuant to 40 C.F.R. § 22.5(b)(1), which provides that:

(i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent’s behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

(ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

Applicable case law clarifies what constitutes sufficient service of a complaint on a respondent or representative. In *Katzon Brothers, Inc. v. United States Environmental Protection Agency*, 839 F.2d 1396 (10th Cir. 1988), the United States Court of Appeals for the Tenth Circuit determined that when service is to be made on a corporation, the *Consolidated Rules* merely require that the letter sending the complaint be properly addressed, rather than actually delivered, to an officer, partner, agent, or other authorized representative. *Id.* at 1399.

We believe the relevant sections of EPA’s Consolidated Rules do not require direct personal service. . . . Service to a “representative” encompasses a personal secretary . . . who regularly receives and signs for certified mail. If “representative” was intended to be narrowly read to include only officers, partners, and agents, it would have been further qualified to incorporate the specific classes of persons mentioned in the second section.

*Id.*

The *Katzon* court further found that “. . . when service is effectuated by certified mail, the letter need only be addressed, rather than actually delivered, to an officer, partner, agent, or other authorized individual.” The court held that Section 22.5(b)(1)(i)-(ii)(A) of the *Consolidated Rules* “. . . ensures that the representative who actually receives the mail will know to whom it should be delivered. Any other interpretation would severely hinder service of process on corporations by certified mail, since the postal service employee would have to wait on the corporation's premises until the officer, partner, or agent could sign the return receipt.” *Id.* In addition, “a person who signs a certified mail receipt green card and picks up mail at a respondent's business post office box is authorized to receive service of process under the Rules of Practice.” See *In the Matter of Herman Roberts*, Docket No. OPA 99-512, 2000 EPA RJO LEXIS 211 (RJO, “Order,” April 14, 2000). Although the delivery method in the instant case was an overnight commercial delivery service and not certified mail by the U. S. Postal Service, the analysis above as to proper service should not differ.

Complainant originally proposed the assessment a civil penalty against Respondent per day of non-compliance for each violation. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant did not originally propose a specific penalty, but stated that it would do so after an exchange of information had occurred. Since that time, a proposed penalty in the amount of \$64,000 has been calculated by the Complainant and it is a penalty in this amount which is now being sought. The proposed penalty is based upon information available to EPA at this time, the statutory penalty factors<sup>1</sup> set forth in Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), the guidelines in EPA's October, 1990 RCRA Civil Penalty Policy, as revised in June, 2003 (“*RCRA Civil Penalty Policy*”), attached hereto as *Exhibit 3*, and the appropriate *Adjustment of Civil Monetary Penalties for Inflation*, 40 C.F.R. Part 19, attached as *Exhibit 4*. See also *Declaration of Kenneth J. Cox in Support of the United States Environmental Protection Agency's Proposed Penalty in the Matter of Hagerstown Aircraft Services, Inc., EPA Docket No. RCRA-03-2011-0112* (hereinafter, *Declaration of Kenneth Cox*), attached hereto as *Exhibit 5*.

## II. ARGUMENT

### A. **The Respondent is in Default under 40 C.F.R. § 22.17(a)**

Section 22.17(a) of the *Consolidated Rules* states that:

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing.

40 C.F.R. § 22.17(a) (*emphasis added*).

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<sup>1</sup> The statutory penalty factors include the seriousness of the violation and any good faith efforts by Respondent to comply with the applicable requirements. RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3).



Moreover, “[w]hen the Presiding Officer finds that default has occurred, [s]he shall issue a default order against the defaulting party as to any or all parts of the proceeding *unless the record shows good cause why a default order should not be issued.*” 40 C.F.R. § 22.17(c) (*emphasis added*). EPA administrative law judges have recognized that a default order generally should be issued when there has been a failure to comply with an order without “good cause.” *In the Matter of Tanana Corp. and Tri-Angle Corp.*, EPA Docket No. RCRA-03-2003-0263 (J. Gunning, Jul. 29, 2004, at 3, *In the Matter of Jack Golden*, EPA Docket No. CWA-10-99-0188 (J. Gunning, Oct. 6, 2000), at fn. 6.

To date, Respondent has failed to file an Answer, as required by 40 C.F.R. § 22.15(a), which provides, in pertinent part, that a written answer to a complaint must be filed with the Regional Hearing Clerk within thirty days after service of the complaint. Respondent’s failure to answer the complaint constitutes a clear default under the Consolidated Rules. 40 C.F.R. § 22.17(a). Accordingly, the Regional Judicial Officer should enter a Default Order against the Respondent.

**B. A Default by the Respondent Constitutes an Admission of All Facts Alleged in the Complaint and a Waiver of Respondent’s Right to Contest Such Allegations**

Section 22.17(a) of the *Consolidated Rules* provides, in relevant part, that:

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). The mandatory language of 40 C.F.R. § 22.17(a) requires the Presiding Officer to accept as true all of the facts alleged in the Complaint. *In the Matter of Tanana Corp. and Tri-Angle Corp.*, EPA Docket No. RCRA-03-2003-0263 (J. Gunning, Jul. 29, 2004, at 3). Therefore, upon determination by the Regional Judicial Officer that the Respondent is in default, the Respondent will be deemed to have admitted all of the facts alleged in the Complaint and will have waived the right to contest such allegations.

The Complaint alleges facts in support of each element of each claim arising from each violation in Counts I and II in the Complaint, a copy of which is attached as *Exhibit I*. The facts alleged in the Complaint – and deemed admitted – are sufficient to establish Respondent’s liability for each of such violations of COMAR 26.13.03.02A and Section 3007(a) of RCRA, 42 U.S.C. § 6927(a), by a preponderance of the evidence. Accordingly, the Regional Judicial Officer should enter a Default Order finding that Respondent violated COMAR 26.13.03.02A and Section 3007(a) of RCRA, 42 U.S.C. § 6927(a) as set forth in Counts I and II of the Complaint.

### C. The Proposed Penalty is Consistent with the Record Evidence and the Law

The Respondent's failure to comply with each of the regulations alleged to have been violated in Counts I and II of the Complaint subjects the Respondent to liability for civil penalties. Section 3008(g) of RCRA, 42 U.S.C. § 6928(g), provides in relevant part that any person who violates any requirement of RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e, or provisions of an authorized state program, shall be liable for a civil penalty not to exceed \$25,000 for each day of violation. The Debt Collection Improvement Act of 1996 ("DCA") and the subsequent The Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, increased the maximum amount of civil penalties which can be assessed by EPA for each day of a violation of RCRA Subtitle C occurring on or after January 30, 1997 from \$25,000 to \$27,000 after March 15, 2004 but before January 12, 2009 to \$32,500, and after January 12, 2009 to \$37,500.

For purposes of determining the amount of any penalty to be assessed, Section 3008(a)(3), 42 U.S.C. § 6928(a)(3), requires EPA to take into account the seriousness of the violation and any good faith efforts by Respondent to comply with the applicable requirements. RCRA does not include ability to pay as one of the factors that EPA must consider in assessing a penalty, and therefore, Respondent's ability to pay the proposed amount is not an element of Complainant's proof. *In the Matter of Bil-Dry Corp.*, EPA Docket No. RCRA-III-264 (J. McGuire, Oct. 8, 1998), at 19, citing *In the Matter of Central Paint and Body Shop, Inc.*, RCRA Appeal No. 86-3, 2 E.A.D. 309, 313-314, 1987 EPA App. LEXIS 8 (Final Decision, Jan. 7, 1987).

In developing the proposed penalty, Complainant was guided by the *RCRA Civil Penalty Policy*. See *Exhibit 3*. This policy provides a rational, consistent and equitable methodology for applying the statutory penalty factors enumerated above to the specific facts and circumstances of this case. Under RCRA, the ability of a violator to pay a proposed penalty is not a factor that the Agency must consider in assessing a penalty. "The burden of raising and presenting evidence regarding any inability to pay a particular penalty rests with the respondent . . . . Thus, a company's inability to pay usually will be considered only if the issue is raised by the respondent." *RCRA Civil Penalty Policy*, at 39.

Pursuant to the *RCRA Civil Penalty Policy*, an initial gravity-based penalty was calculated for each violation based on two components: the potential for harm of the violation and the extent of deviation from the applicable requirement. The results of that analysis were used to select corresponding penalty values for single day and multi-day violations from the penalty matrices published in the *RCRA Civil Penalty Policy*. The initial penalty for each violation was adjusted in accordance with the *RCRA Civil Penalty Policy* to account for other factors including any good faith efforts to comply with the applicable requirements, and any willfulness or negligence. In addition to the gravity-based penalty, the *RCRA Civil Penalty Policy* recommends that penalty assessments capture any significant economic benefit that Respondent realized as a result of noncompliance.

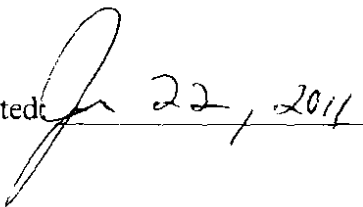
The Complainant proposes the assessment of a total civil penalty of \$64,000. The EPA Region III employee who calculated the proposed penalty, Mr. Kenneth Cox, considered the statutory penalty factors identified at Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), the *RCRA Civil Penalty Policy*, and the appropriate inflation adjustment pursuant to 40 C.F.R. Part 19. See *Declaration of Kenneth Cox*, attached as *Exhibit 5*. A summary of each violation alleged in the Complaint and the proposed penalty rationale for each alleged violation is fully discussed in the *Declaration of Kenneth Cox (Exhibit 5)* and in the associated Penalty Computation Worksheets, attached as *Exhibit 7*. Each rationale is based upon facts which were alleged in the Complaint and which, upon a finding of default, are deemed admitted.

EPA Region III respectfully submits that the proposed penalty of \$64,000 for the Respondent's RCRA violations is not "clearly inconsistent with the record" in this case or with RCRA, and that, in accordance with 40 C.F.R. § 22.17(c), the payment of the proposed penalty should be ordered.

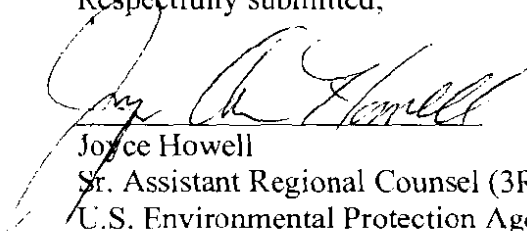
### III. CONCLUSION

For all of the foregoing reasons, Complainant requests that the Court enter a Default Order assessing the proposed penalty of \$64,000 against the Respondent in the form of the proposed Order for Default that is attached hereto.

Dated

 22, 2011

Respectfully submitted,



Joyce Howell  
Sr. Assistant Regional Counsel (3RC30)  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

## EXHIBITS

- Exhibit 1 - Administrative Complaint and Notice of Opportunity for Hearing (Docket No. RCRA-03-2011-0112)*
- Exhibit 2 - UPS Delivery Notification*
- Exhibit 3 - RCRA Civil Penalty Policy*
- Exhibit 4 - Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Part 19, the Memorandum: Amendments to EPA's Civil Penalty Policy to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (December 29, 2008); Memorandum: Revision to Adjusted Penalty Policy Matrices Package. (April 6, 2010).*
- Exhibit 5 - Declaration of Mr. Kenneth J. Cox in Support of the United States Environmental Protection Agency's Proposed Penalty in the Matter of Hagerstown Aircraft Services, Inc., EPA Docket No. RCRA-03-2011-0112*
- Exhibit 6 - Summary of Violations*
- Exhibit 7 - Penalty Computation Worksheets*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

In the Matter of: :  
: :  
Hagerstown Aircraft Services, Inc. :  
: :  
RESPONDENT : Docket No. RCRA-03-2011-0112  
: :  
: : Proceeding under Section 3008(a)  
Hagerstown Aircraft Services, Inc. : and (g), 42 U.S.C. § 6928(a) of the  
14235 Oak Springs Road : Resource Conservation and Recovery Act  
Hagerstown, MD 21742 :  
: :  
FACILITY :

**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below, I caused to be hand-delivered to Ms. Lydia Guy, Regional Hearing Clerk (3RC00), U.S. EPA Region III, 1650 Arch Street, 5<sup>th</sup> Floor, Philadelphia, PA 19103-2029, the original and one copy of the foregoing Motion for a Default Order, supporting Memorandum of Law and Exhibits, and a proposed form of an Order for Default, in the above-captioned matter. I further certify that on the date set forth below, I caused true and correct copies of the same to be served upon each of the following persons at the following addresses and in the manner identified below:

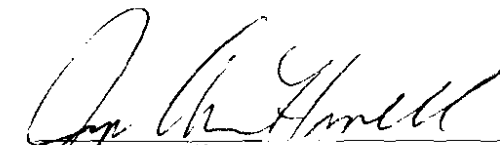
Via Hand Delivery to:

Ms. Lydia Guy  
Regional Hearing Clerk (3RC00)  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2019.

Via UPS Next Day Delivery, signature requested, to:

Tracey Potter, President  
Hagerstown Aircraft Services, Inc.  
14235 Oak Springs Road  
Hagerstown, MD 21742

Date: Jun 23, 2011

  
\_\_\_\_\_  
Joyce Howell  
Sr. Assistant Regional Counsel (3RC30)  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029