



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

BY HAND

August 15, 2013

Hon. Renée Sarajian
Presiding Officer
USEPA Region III
1650 Arch Street
Philadelphia, PA 19102

Re: Hagerstown Aircraft Services, Inc.
EPA Docket No. RCRA-03-2011-0112

Dear Judge Sarajian:

Enclosed please find a copy of Complainant's Reply to Respondent's Motion to Set Aside Default Order and for a Stay of Proceedings. Under cover of this letter I am filing the original and one copy with the Regional Hearing Clerk and serving a copy on counsel for Respondent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joyce A. Howell".

Joyce A. Howell
Senior Assistant Regional Counsel
USEPA Region III
1650 Arch Street
Philadelphia, PA 19103
P: 215.814.2644
F: 215.814.2603
Howell.joyce@epa.gov

cc: Lydia Guy, regional Hearing Clerk (by hand)
M. Trent Zivkovich, Esq. (by overnight carrier)
Kenneth Cox (3LC70) (by hand)



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3. Respondent failed to file an Answer or otherwise respond to the Complaint, and accordingly, Complainant filed a Motion for Default Order on June 23, 2011. (Exhibit A). Respondent received the Motion for Default Order on June 24, 2011. (Exhibit A, Tab 2).
4. On June 27, 2013, the Regional Judicial Officer issued an Initial Decision and Default Order. (“Default Order”) (Exhibit B). The Order for Default requires Respondent to immediately comply with the Compliance Tasks contained in paragraphs 29 through 35 of the Complaint.
5. The Default Order further requires Respondent to pay a penalty in the amount of \$64,000 30 days after the Default Order becomes final. (Exhibit C, p. 20).
6. Respondent subsequently filed a Motion to Set Aside the Default Order and to Temporarily Stay the Proceedings.

Argument

There is nothing in Respondent’s Motion which justifies setting aside the Default Order. Respondent does not deny the facts alleged in the Complaint and Respondent does not proffer new evidence which would ameliorate or nullify Complainant’s allegations, nor does Respondent allege a defect in service. Respondent’s primary argument is that Respondent’s current management was unaware of EPA’s Complaint and the subsequent Motion for a Default Order. This claim is insufficient to set aside the Default Order. The standard for setting aside a default order, known as the “totality of the circumstances” test, was summarized in IMO Barry, CWA-05-2010-008, 2011 EPA ALJ Lexis 25, (December 21, 200):

Setting aside an entry of default "is essentially a form of equitable relief," and the undersigned must consider the "totality of the circumstances" when determining if there is good cause to do so. *Rybond, Inc.*, 6 E.A.D. 614, 624 (EAB 1996) (quoting *Midwest Bank & Trust Co., Inc.*, 3 E.A.D. 696, 699 (CJO 1991)) (quotation marks omitted); see *JHNY, Inc.*, 12 E.A.D. at 384. Factors traditionally considered under the "totality of the circumstances" include whether a procedural requirement was violated, whether the "violation is proper grounds for a default order, and whether there is a valid excuse or justification for not complying with the procedural requirement." *JHNY, Inc.*, 12 E.A.D. at 384. The undersigned may also consider "whether the defaulting party would likely succeed on the substantive merits if a hearing were held." *JHNY, Inc.*, 12 E.A.D. at 384. The burden is on the defaulting party "to demonstrate that there is more than the mere possibility of a defense, but rather a 'strong probability' that litigating the defense will produce a favorable outcome." *Pyramid Chem. Co.*, 11 E.A.D. 657, 662 (EAB 2004). This inquiry includes an examination of "whether the penalty assessed in the default order is a reasonable one." *JHNY, Inc.*, 12 E.A.D. at 384.

Id. For the reasons set forth below, the totality of the circumstances in this matter demonstrate that the Default Order was properly issued and that the Motion to Set Aside the Default Order and Temporarily Stay Proceedings should be denied.

1. There is no valid excuse for Respondent's failure to Answer the Complaint.

The Complaint in this matter was served on Respondent on March 11, 2011 (Exhibit A, Tab1) after the completion of an EPA investigation of Hagerstown Aircraft Services, Inc. ("Hagerstown Aircraft") for violations of RCRA. (Exhibit A, Tab 1). EPA's investigation included a Compliance Evaluation Inspection of the Hagerstown Aircraft facility on April 28, 2010. (Exhibit A, Tab 1, p. 2).¹ The CEI was conducted by a representative from EPA and the Maryland Department of the Environment ("MDE"). Complainant obtained proof of service of the Complaint on Respondent. (Exhibit A, Tab 2). Mr. Tracy Potter, now deceased, managed Hagerstown Aircraft at the time the Complaint was served on the company. An Answer to the Complaint was due thirty days after service of the Complaint, on April 24, 2011. 40 C.F.R.

¹ Respondent's moving papers also acknowledge the April 2010 EPA Compliance Evaluation Inspection. Respondent's Motion at 2.

§ 22.15(a). No Answer to the Complaint or other responsive pleading was ever filed by Hagerstown Aircraft.

Respondent's moving papers do not claim a "valid excuse or justification for not complying with the procedural requirement" existed two years ago when the Complaint was filed, only that the person who could possibly know of any such defect did not keep any records and is recently deceased, and thus unavailable to provide evidence. Respondent's failure to identify any reason for its failure to timely file an Answer or responsive pleading does not suffice as basis for setting aside the Default Order.

2. Failure to file an Answer is proper grounds for Default

The Consolidated Rules are clear that failure to file an Answer will place a party in jeopardy of Default. 40 C.F.R. § 22.17(a). Likewise, the Consolidated Rules provide that failure to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of such allegations. 40 C.F.R. § 22.15(d). Two years elapsed without Respondent's engagement in the administrative process. As noted by this Court in IMO Turner, 2 E.A.D. 96 (EAB 1985)

My interest in the just determination of cases before the U.S. Environmental Protection Agency requires the fair and expeditious application of the Consolidated Rules of Practice. The Rules provide for the entry of a default order to avoid indefinitely prolonged litigation and a consequent subversion of the orderly process of this administrative system.

Id. In the absence of any engagement by Respondent over the two year period during the pendency of Complainant's Motion for Default, it is respectfully submitted that the Presiding Officer had no other option but to enter a Default Order.

3. Respondent is not likely to prevail on the merits

Respondent has admitted in its moving papers that it was out of compliance with RCRA. Respondent's Motion p. 2. Moreover, as recited in Exhibit A to Respondent's Motion, many of the violations observed by a representative of MDE on May 3, 2013 were the same violations observed by EPA and MDE three years earlier. (Respondent's Motion, Exhibit A, p. 4). Given the evidence supplied by Respondent, it appears there is no dispute as to Respondent's liability for the allegations contained in Count I of the Complaint.

Likewise, Respondent does not claim it did not receive the EPA Information Request Letter ("IRL"), only that the person who could possibly know of any such defect did not keep any records and is recently deceased, and thus unavailable to provide evidence. In support of Complainant's Motion for Default Order, Mr. Kenneth Cox, an EPA employee, submitted his sworn statement that an IRL had been sent to Hagerstown Aircraft. A Proof of Delivery supplied by UPS is attached hereto as Exhibit C. It is uncontroverted that Hagerstown Aircraft Services did not respond to the IRL. In the absence of any contrary evidence, there are no material facts in controversy regarding Count II of the Complaint.

4. The penalty assessed is reasonable.

The Declaration of Mr. Kenneth Cox (Exhibit A, Tab 5) submitted in support of Complainant's Motion for Default sets forth the basis and rationale for Complainant's proposed penalty that was subsequently assessed by the Presiding Officer in the Initial Decision and Default Order. (Exhibit B). It is respectfully submitted that the detailed penalty rationale set forth by Mr. Cox supports a finding that the penalty assessed is reasonable.²

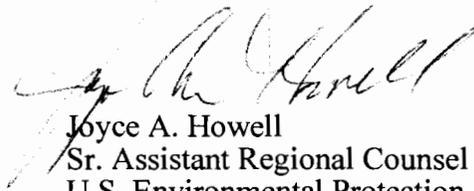
5. Hagerstown Aircraft is in Default

Hagerstown Aircraft is in Default of the Complaint, not Mrs. Kimberly Potter.

Unquestionably the recent events endured by Mrs. Potter are tragic. Nonetheless, it is often the case that environmental violations occur because an individual in an organization was absent, or failed to do what was necessary to comply with the law, albeit for lack of training, experience, or simply by neglect. While the circumstances here are sympathetic, it is the organization which has been found in default. Although Mrs. Potter was unaware of the EPA enforcement action against Respondent and was not involved in the management and operation of the company, Respondent Hagerstown Aircraft remains liable for the RCRA violations alleged in the Complaint. See In re: Rybond, Inc., 6 E.A.D. 614 (1996) (Property owner liable as "owner" under RCRA even if owner has no knowledge of tenant's storage of hazardous waste on property).

Therefore, for the reasons set forth above, it is respectfully requested that Respondent's Motion to Set Aside Default Order and to Temporarily Stay Proceedings be denied.

Respectfully submitted,



Joyce A. Howell
Sr. Assistant Regional Counsel (3RC30)
U.S. Environmental Protection Agency
Region III
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Philadelphia, PA 19103-2029
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howell.joyce@epa.gov

Dated Aug 15, 2012

EXHIBITS

1. Complainant's Motion for Default dated June 23, 2011, with attachments.
2. Initial Decision and Default Order dated June 27, 2013.
3. UPS Proof of Delivery for Show Cause letter dated June 9, 2010.

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

REGIONAL HEARING CLERK
EPA REGION III, PHILA. PA

2013 AUG 15 PM 4:10

RECEIVED

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, 5th Floor, Philadelphia, PA 19103-2029, the original and one copy of the foregoing Complainant's Reply to Respondent's Motion to Set Aside Default Order and Temporarily Stay Proceedings. 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:

By Hand:

Hon. Renée Sarajian
Regional Judicial Officer
USEPA Region III
1650 Arch Street
Philadelphia, PA 19103

Via UPS Next Day Delivery, signature requested, to:

M. Trent Zivkovich, Esq.
Whiteford, Taylor & Preston, L.L.P.
Seven St. Paul Street
Baltimore, MD 21202-1636

Date: Aug 15, 2013



Joyce A. Howell
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EXHIBIT A

TO

**COMPLAINANT'S RESONSE TO RESPONENT'S MOTION TO
SET ASIDE DEFAULT ORDER AND TEMPORARILY STAY PROCEEDINGS**

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

5 NEXT DAY DELIVERY

June 23, 2011

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

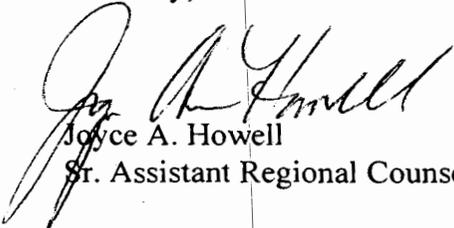
Re: Resource Conservation and Recovery Act
Administrative Complaint, Compliance Order
and Notice of Opportunity for Hearing
IMO Hagerstown Air Services
EPA Docket No. RCRA-03-2011-0112

Dear Mr. Potter:

Enclosed is a Motion for Default Order filed pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and Revocation /Termination or Suspension of Permits ("Consolidated Rules of Practice") set forth at 40 C.F.R. Part 22.

A response to this Motion within fifteen (15) days of its receipt. Failure to respond may result in the filing of a Default Order imposing a civil penalty without further proceedings.

Sincerely,


Joyce A. Howell
Sr. Assistant Regional Counsel

Enclosures
cc: Ken Cox (3LC70)

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

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

2011 JUN 23 11:55
REGIONAL HEARING CLERK
PHILADELPHIA, PA

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 factors¹ 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*).

¹ 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.

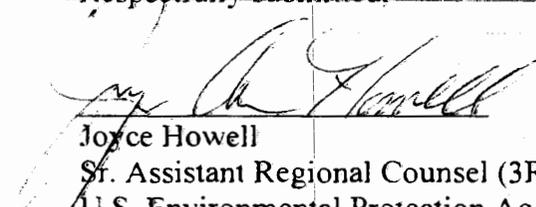
EPA Region III respectfully submits that the proposed penalty of \$64,000 for the Respondent's RCRA violations is not "clearly inconsistent with the record" in this case or with RCRA, and that, in accordance with 40 C.F.R. § 22.17(c), the payment of the proposed penalty should be ordered.

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.

Respectfully submitted,

Dated: Jan 22, 2011


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

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

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, 5th 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:

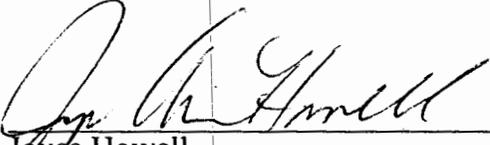
Ms. Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2019.

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

2011 JUN 23 10:00 AM
U.S. EPA
REGION III