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March 2, 2011

VIA FEDERAL EXPRESS

Ms. Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 2
290 Broadway, 16th Floor, Room 1631
New York, NY 10007-1866

RE: Aguakem Caribe, Inc.
Docket No. : RCRA-02-2009-7110

Dear Ms. Maples:

Please find enclosed Respondent's Post Trial Brief in the above-identified matter. An original and one copy is enclosed for your convenience.

Thank you for your courtesies.

Respectfully submitted,
FURGANG & ADWAR, L.L.P.

Sheryl Britney

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sb
Enclosure

cc: Ms. Mary Angeles (attn: Judge Barbara Gunning)
Lourdes del Carmen Rodriguez, Esq.

IN THE MATTER OF Aguakem Caribe, Inc. Respondent Proceeding under Section3008 of the Solid Waste Disposal Act, as amended, 42 USC § 6928	Docket No. RCRA-02-2009-7110

COMES NOW, Respondent Aguakem Caribe, Inc. ("Aguakem"), by its undersigned attorneys, and respectfully submits this Post-Hearing Submission, with proposed findings of material facts and law.

INTRODUCTION

From December 7-9, 2010, the Honorable Administrative Law Judge conducted a hearing in San Juan, Puerto Rico stemming from a September 25, 2009 Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint ") filed against Aguakem by the United States Environmental Protection Agency ("EPA.") In the Complaint,[i] EPA alleged that Aguakem, with regard to its former place of operations at Warehouse 6 in the Port of Ponce, Puerto Rico (the "former Facility"), (1) violated 40 C.F.R. § 262.11 by failing to determine whether "solid waste generated and abandoned at its [f]ormer [f]acility constitute[d] a hazardous waste, (2) violated 40 C.F.R. § 265.31 by failing to minimize the possibility of a fire, explosion, or an unexplained [. . .] release of hazardous waste; and (3) violated 40 C.F.R. §279.22(c) (1) for failing to properly label a container of unused oil. Complaint, Complaintant's Exhibit ("Exh") 1. For the reasons set forth below, the EPA's claims should be dismissed with prejudice.

The EPA failed to establish that Aguakem violated RCRA. As shown below, the EPA did not establish that Aguakem failed to make a hazardous waste determination. Critically, the record demonstrates that not only did the EPA fail to meet its burden of persuasion that Aguakem failed to make a hazardous waste determination and failed to minimize risk of fire, explosion or release, the record undisputedly establishes that Aguakem was never a generator of hazardous waste.

From its initial inspection through to the evidentiary hearing in this matter, the EPA has known and never disputed that Aguakem did not abandon any materials at the former Facility. The EPA's initial inspection report stated that "[Aguakem] was not going to finalize the [move from the Facility] until a lead abatement was performed." Complainant's Exh. 3, p. 4. All evidence and testimony in their record is consistent with this statement. Hence, the record is undisputed that Aguakem did not abandon any materials at the Facility.

From this critical finding, the EPA's claims must fail. Counts 1 and 2, where the EPA alleges that Aguakem failed to make a hazardous waste determination and failed to minimize the risk, are entirely contingent upon the assertions that Aguakem is a generator of "solid waste." The undisputed record establishes that in fact, Aguakem was not a generator of "solid waste" at the Facility, as Aguakem neither abandoned nor discarded any material at the Facility. Since Aguakem did not generate any solid waste, it had no obligation to (1) make a hazardous waste determination or (2) minimize risks of fire, explosion or release regarding hazardous wastes.

In addition, Aguakem met its burden of proving that it is unable to pay the fine proposed by the EPA. The undisputed testimony of Aguakem's independent auditor established that given Aguakem's financial condition rendered it unable to pay the fine [proposed by the EPA.

Finally, the EPA failed to meet its burden of persuasion that its proposed penalty is appropriate. Specifically, the EPA did not abide by the guidelines in establishing the period of the alleged violations, the economic benefit derived from the alleged violations, or that Aguakem's alleged violations were "willful" or "negligent." The heart of EPA's failure is its decision to ignore the undisputed fact that the former Facility was contaminated with lead and Aguakem's actions seeking abatement of this problem. Aguakem was required to relinquish possession of the former Facility under a court order of eviction. The Municipio of Ponce was solely in control of the former Facility by law. EPA's calculation of a penalty simply chose to ignore these realities. This is not in conformance with

Accordingly, the Honorable Administrative Law Judge should enter an order dismissing this action with prejudice.

PROPOSED FINDINGS OF MATERIAL FACTS

Respondent Aguakem submits the following as proposed findings of material and undisputed facts:

a. Respondent Aguakem Caribe, Inc. is a corporation organized and authorized to do business under the laws of the Commonwealth of Puerto Rico. (Complaint and Answer.)

b. Mr. Jorge J. Unanue is the President of Aguakem Caribe, Inc. (Id.)

c. Respondent has been in the water treatment chemical (iron and aluminum salts) manufacturing industry since 1995. (Id.)

d. Respondent manufactures a variety of water treatment chemical products and

blends that are used in private and public owned potable and wastewater treatment plants. (See generally, December 9, 2010 Transcript, p. 56.et seq., testimony of Jorge J. Unanue.)

e. Respondent's former facility, located in a portion of a warehouse identified as an area in Building 6 on the Puerto de Ponce, a property owned by the Port of Ponce Authority ("PPA") (which is owned by the Municipio of Ponce), is located in PR-12, Santiago de los Caballeros Ave., Ponce, Puerto Rico (hereinafter the "Facility"). Id. at pp. 59-60..

f. Respondent had a lease agreement for the former Facility with PPA, since approximately June 28, 1995 to approximately May 23, 2005, thereafter the lease agreement continued on a month to month basis until September 2006, at which time the Municipio of Ponce sought and received a judicial order of eviction. The parties negotiated an extension of time for Aguakem to remain in the Facility through December 2006. In December 2006, the Municipio of Ponce sought to forcibly remove Respondent from the Facility, including the sending of marshals to effectuate the removal of Respondent `from the Facility. The Municipio of Ponce and the Respondent then reached agreement to permit Respondent to remove its equipment and products from the Facility by December 31, 2006. For the removal process, the Municipio of Ponce contracted with Demaco to oversee the removal process. See Complainant's Exh. 3, Compliance Evaluation Inspection Report, pp. 2-4. See also December 9, 2010 Transcript, pp. 59-71, testimony of Jorge J. Unanue.)

g.

h. The Facility consisted of the following areas: Office; Laboratory; Tank farm; containment systems; Process Area; Storage Area and Unloading/loading dock. (Id.)

i. Respondent operated its business at the Facility from at least June 28, 1995 to December 28, 2006. See December 9, 2010 Transcript, p. 56-71, testimony of Jorge J. Unanue.)

j. In December 2006, Respondent became concerned regarding the activities of certain contractors for the Municipio of Ponce and the PPA as it appeared to Respondent that these activities were releasing harmful substances into Warehouse and the Facility. See Complainant's Exh. 3, Compliance Evaluation Inspection Report, pp. 2-4. See also December 9, 2010 Transcript, pp. 84-99, testimony of Jorge J. Unanue.)

k. As a result, in December 2006, Respondent ordered testing for lead and asbestos in the Facility and in the other parts of Warehouse 6. This testing was performed by Envirorecycling, Inc. The analysis of the test results was performed by a laboratory certified company, EM&L Analytical of Westmont, New Jersey. The test showed illegal levels of lead in the Facility and in Warehouse 6. Respondent received these results on December 28, 2006. In addition, testing demonstrated lead contamination was found in the employees of the Respondent. (Id.)

l. On December 28, 2006, the same day Respondent received the lead contamination results; Respondent immediately communicated them to the Municipio of Ponce and the PPA and informed them that immediate action was necessary. In addition, Respondent delivered copies of the test results to Jorge

Hernandez, the Executive Director of the PPA. See Complainant's Exh. 3, Compliance Evaluation Inspection Report, pp. 2-4. See also December 9, 2010 Transcript, pp. 99-102, testimony of Jorge J. Unanue.)

m. Respondent informed the Municipio of Ponce and the PPA that the process of removal of Respondent's equipment and products would have to be immediately suspended until such time as the lead contamination issue was resolved. Nonetheless, Respondent assured the Municipio of Ponce and the PPA that Respondent was not abandoning its property, equipment or products, as it intended to complete the removal process as soon as the lead contamination issue was resolved. (Id.)

n. The Municipio of Ponce and the PPA never responded to Respondent's communications. See December 9, 2010 Transcript, pp. 101-2, testimony of Jorge J. Unanue.)

o. On January 29, 2007, the Municipio of Ponce contacted the EPA regarding the Facility. See Complainant's Exh. 3, Compliance Evaluation Inspection Report, pp. 2-4.)

p. On or about February 2, 2007, EPA representatives conducted a compliance evaluation inspection (CEI) under 3007 of RCRA, 42 U.S.C. § 6927 (the "Inspection") at the former Facility. See Complainant's Exh. 3, Compliance Evaluation Inspection Report. See also December 7-8 Transcript, testimony of Eduardo Rodriguez and Jesse Aviles.)

q. Zolymar Luna, Eduardo Gonzalez and Jesse Aviles, EPA representatives,

conducted the February 2, 2007 CEI at Respondent's former Facility. (Id.)

r. In the opening meeting of the inspection, the EPA met with Quinones of the Municipio of Ponce. In addition, the EPA representatives spoke by telephone with Hernandez of the Municipio. See Complainant's Exh. 3, Compliance Evaluation Inspection Report, pp. 2-4. See also December 7-8, 2010 Transcript, testimony of Eduardo Gonzales and Jesse Aviles.)

s. The Municiipio representatives stated to the EPA that Aguakem had complained of lead contamination at the Facility and that Aguakem had suspended the removal process of the materials located at the Facility until such time as the lead contamination was abated. The Municipio representative also stated to EPA that Aguakem had been legally evicted from the former Facility and had no legal right to enter or control the former Facility. See Complainant's Exh. 3, Compliance Evaluation Inspection Report, pp. 2-4. See also December 7-8, 2010 Transcript, testimony of Eduardo Gonzales and Jesse Aviles.)

t. Previously, Respondent Aguakem removed equipment and materials from the former Facility to its current facility prior to December 28, when it was informed that the former Facility had suffered lead contamination. See Complainant's Exh. 3, Compliance Evaluation Inspection Report, pp. 2-4. See also December 9, 2010 Transcript, pp. 88-102, testimony of Jorge J. Unanue.)

u. The Muncipio confirmed to the EPA that the former Facility was contaminated with lead. See Complainant's Exh. 3, Compliance Evaluation Inspection Report, pp. 2-4. See also December 7-8 Transcripts, testimony of Jesse Aviles, pp. .)

v. On February 7, 2007, Respondent Aguakem communicated with the EPA and expressed its desire to completely cooperate with the EPA. See December 9 Transcript, testimony of Jorge Unanue, pp. 120-125.

w. On February 7, 2007 an inspection and assessment of the former Facility was conducted by the EPA CERCLA Emergency Response Team at Respondent's Facility. Complaint.

x. In March 2007, Respondent communicated with the EPA regarding the situation at the former Facility and fully informed them of what had transpired regarding the removal process, the lead contamination and Respondents' desire to complete the removal process, its communications with the Municipio of Ponce and the PPA. See December 9 Transcript, testimony of Jorge Unanue, pp. 125-129.

y. The EPA has never responded to these communications. The EPA has never acknowledged nor permitted the Respondent to complete the removal process, despite Respondent's express statement that it was ready, willing and able to do so once the lead contamination issue had been resolved. Id.

z. From February 7, 2007, the Facility was under the supervision of the EPA. Complainant's Exh. 1, Complaint. Complainant's Exh. 3, Compliance Evaluation Inspection Report.

aa. On June 27, 2007, EPA entered into an Administrative Order on Consent (AOC) with Municipio of Ponce and Aguakem. Complainant's Exh. 13, Administrative Order on Consent.

bb. Mr. Angel Rodriguez, EPA's On-Scene-Coordinator, was responsible for the

oversight of the removal activities at Respondent's Facility. Id.

cc. From approximately February 14, 2007 to approximately August 29, 2008, removal actions at Building 6 were conducted under EPA's oversight. December 8, 2010 Transcript, Testimony of Angel Rodriguez.

dd. Respondent approved and signed the CERCLA AOC for removal activities at the former Facility. Complainant's Exh. 13, Administrative Order on Consent.

ee. Respondent fully complied with the AOC. December 9, 2010 Transcript, p. 205, testimony of Jorge J. Unanue.

ff. Respondent was never afforded the opportunity to retrieve materials from the former Facility.December 9, 2010 Transcript, p. 129, testimony of Jorge Unanue..

gg. Respondent was never informed that the lead contamination at the former Facility was abated.Id.

hh. Respondent consistently informed EPA and the Municipio of its willingness and desire to retrieve its materials from the former Facility. December 9, 2010 Transcript, pp. 129-30. Testimony of Jorge Unanue.

ii. The value of the materials at the former Facility to Aguakem was upwards of $75,000. *Id.*

Proposed Conclusions of Contended Law and Facts

A. Aguakem Did Not Produce Hazardous Waste

The EPA alleges that Aguakem produced hazardous waste at its former Facility. But the evidence and testimony presented at the evidentiary hearing establishes without dispute that

Aguakem never abandoned the materials at its former Facility. Rather, Aguakem suspended its relocation activities due to its well founded, good faith belief that the former Facility was contaminated with lead. In addition, Aguakem was legally precluded from reentering the former Facility as it was under a legal order of eviction.

The basis of this belief was test results provided to Aguakem by Envirorecycling, Inc., an independent environmental consulting firm on December 28, 2006. Aguakem received these test results while in the process of relocating its equipment and materials from the former Facility to its new facilities. The test results showed illegal levels of lead in the Facility and in Warehouse 6.

Enivrorecycling, Inc. recommended that Aguakem immediately suspend operations, including relocation operations, at the former Facility and seek to have steps taken to ameliorate the contamination.

Aguakem immediately informed the owner of the former Facility, the Municipio of Ponce, about this development. In addition, Respondent delivered copies of the test results to Jorge Hernandez, the Executive Director of the Municipio's Port Authority. Respondent informed the Municipio of Ponce that the process of removal of Respondent's equipment and products would have to be immediately suspended until such time as the lead contamination issue was resolved. Nonetheless, Aguakem assured the Municipio of Ponce that Respondent was not abandoning its property, equipment or products, as it intended to complete the removal process as soon as the lead contamination issue was resolved and the Municipio permitted Aguakem to reenter the former Facility.

(i) The RCRA Provisions EPA Seeks To Apply To Aguakem Require A Finding Of Generation Of Solid Waste

In the Complaint, EPA acknowledges that the RCRA regulations it is seeking to apply to Aguakem require that Aguakem generated "solid waste," as that term is defined by 40 C.F.R. § 261.2. EPA further acknowledges that 40 C.F.R. § 261.2(b) defines solid waste as "discarded material." As demonstrated below, the evidentiary record and the applicable case law establish that since Aguakem never intended to "discard" or "abandon" the material, then it did not generate "solid waste" (and as a necessary result, Aguakem did not generate hazardous waste.)

(ii) Aguakem Did Not Abandon Or Discard Materials From the Former Facility

As the EPA acknowledged in the Complaint and at the Hearing, the RCRA requirements at issue in Counts 1 and 2 are only applicable if Aguakem generated "solid waste" by discarding or abandoning the materials at the former Facility. Since Aguakem neither abandoned nor discarded any materials at the former Facility, it never generated "solid waste."

In *American Mining Congress v. EPA,* 824 F.2d 1177 (D.C.Cir.1987), the District of Columbia circuit held that the term "discarded" conforms to its plain meaning. *Id.* at 1193. Thus, items that are "disposed of, abandoned or thrown away" are discarded. *Id.* Legal abandonment of property is premised on determining the intent to abandon, which requires an inquiry into facts and circumstances. *American Petroleum Institute v. EPA*, 216 F.3d 50, 55, (D.C. Cir. 2000). *See also Baglin v. Cusenier Co.,* 221 U.S. 580, 597-98, 31 S.Ct. 669, 55 L.Ed. 863 (1911); *International Finance Corp. v. Jawish,* 71 F.2d 985, 986 (D.C.Cir.1934); *see also Katsaris v. United States,* 684 F.2d 758, 761-62 (11th Cir.1982) .

An inquiry into the facts and circumstances of the instant matter demonstrate conclusively that Aguakem never intended to discard or abandon the materials at the former Facility. As has been acknowledged by all the parties from the first day of EPA's involvement at

the former Facility, there has never been a contention that Aguakem intended to abandon materials at the former Facility. A review of the EPA's Compliance Evaluation Inspection makes this abundantly clear:

> As part of the [Compliance Evaluation Inspection], an opening meeting was held between the Port Authority Director of Operations, Mr. Quinones, and EPA representatives. At the meeting, Mr. Quinones explained to EPA's representatives about the previous and current legal situation among Aguskem's President, Jorge Unanue, and the Port Administration. During the meeting Mr. Quinones stated that such company was leasing a section of a facility, identified as Building # 6, for the manufacturing of water purificati on chemicals. In addition, he explained that as part of the Port of Americas development project, the Port of Ponce had to vacate some of the leased areas for its eventual demolition. Consequently, in September 2005, the Port requested to the Building #6 tenant (Aguakem) to vacate the property as per property lease expiration and other demolition issues (e.g. asbestos and lead exposure levels). According to Mr. Quinones, Aguakem did not move out from the facility at the stipulated time, and as a result an Eviction Order ("The Court Order") was issued against Aguakem. The objective of the order was to expedite the evacuation process of the building area for its eventual demolition as part of the Port of Americas project[. . .] As part of the opening meeting of the inspection, Mr. Quinones contacted Mr. Hernandez via conference call in order to clarify the specific aspects regarding Aguakem's relocation and other property agreements between Mr. Hernandez and Mr. Unanue. [. . .] Mr. Hernandez [stated that] Mr. Unanue [stated] that prior and during relocation activities he requested to conduct an asbestos and lead survey, since he was concerned with the safety and health of his employees due to nearby uncontrolled demolition operations. **As a result the survey indicated that the property contained harmful levels of lead, and therefore he was not going to finalize the mobilization until a lead abatement was performed on Building #6.** The survey results confirmed Aguakem's allegation, demonstrating that in fact the facility contained lead based paint and ACM's in a friable form, but did not pose an actual harmful working environment since it was not yet disturbed by the demolition operations.

(Emphasis supplied.) Complainants Exhibit 3, RCRA Compliance Evaluation Report. As this narrative makes crystal clear, Aguakem's intent to reenter the former Facility to remove the materials once it was certified that there was no lead contamination was always understood by all the parties, specifically the Municipio and EPA. There simply is no basis to conclude that Aguakem intended to discard or abandon the materials in the former Facility. See also testimony of Jorge Unanue, December 9, 2010 Transcript, pp. 129-30.

A review of *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir 2000) I is instructive, In *ABC*, the District of Columbia Circuit court ruled that the EPA improperly defined "solid waste." The court ruled that:

> [I]n American Mining Congress v. EPA, 824 F.2d 1177 (D.C.Cir.1987) ("AMC I"). The court began by referring to the "ordinary, plain-English meaning" of "discarded"-"'disposed of,' 'thrown away,' or 'abandoned.' " Id. at 1184. [. . .] After examining the structure and history of RCRA, see id. At 1184-92, the AMC I court concluded: "Congress clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." Id. at 1190. The court therefore set aside an EPA rule regulating secondary "materials reused within an ongoing in-doctrinal process," id. At 1182, because the materials were "neither disposed of nor abandoned," id. at 1193. [. . .]The holding in AMC I thus appears to answer the question we have before us.

The ABC court further quoted *AMC I*:

> Relying on AMC, the EPA nevertheless insists that RCRA may be applied to materials that are not disposed of, abandoned, or thrown away, but are destined for reuse in an ongoing industrial process. [. . .] Here, Congress defined "solid waste" as "discarded material." The ordinary, plain-English meaning of the word "discarded" is "disposed of," "thrown away" or "abandoned." Encompassing materials retained for immediate reuse within the scope of "discarded" strains, to say the least, the everyday usage of that term. * * *The question we face, then, is whether ... Congress was using the term "discarded" in its ordinary sense-"disposed of" or "abandoned"-or whether Congress was using it in a much more open-ended way, so as to encompass materials no longer useful in their original capacity though destined for immediate reuse in another phase of the industry's ongoing production process. 824 F.2d at 1183-84, 1185. EPA reads, or rather misreads, these passages to mean that it may treat secondary materials as "discarded" whenever they leave the production process and are stored for any length of time.

Rejecting EPA's attempt to parse the *AMC I* holding, the *ABC* court stated:

> EPA supplies the definition: immediate reuse is "continuous recirculation of secondary materials back into recovery processes without prior storage" unless the storage for later recycling complies with the conditions EPA sets forth in the new § 261.4(a) (17) of its regulations. 63 Fed.Reg. at 28,580-83. Of course, this thoroughly ignores the AMC I court's holding that, under RCRA, material must be thrown away or abandoned before EPA may consider it to be "waste." As we have said, material stored for recycling is plainly not in that category.

The instant controversy does not even begin to approach the level of complexity seen in *AMC I* and *ABC*. Here there is no dispute that Aguakem never abandoned or discarded the materials at the former Facility. Aguakem always intended to retrieve the materials and was only prevented from doing so because it was never informed by the Municipio or EPA that the lead contamination had been resolved and that Aguakem could retrieve its materials. Since the materials at the former Facility were not discarded or abandoned, then Aguakem did not generate "solid waste" and necessarily, "hazardous waste." Accordingly, the RCRA regulations regarding determination and storage of "hazardous waste" EPA alleges Aguakem violated are not applicable. Counts 1 and 2 thus necessarily fail.

B. Aguakem Made A Determination Of Hazardous Waste

Even if, as a legal matter, it is determined that in fact Aguakem generated "solid waste" at its former Facility, Aguakem made a determination of "hazardous waste." The determination Aguakem made was that it in fact did not generate "solid waste" as it did not believe it had "discarded" or "abandoned" materials at the former Facility.

In the normal course, the question of whether a determination of hazardous waste has been done is reserved for issues where there is no question regarding the generation of waste. Here, it is beyond cavil that Aguakem had a good faith basis for believing that it had not generated hazardous waste as it never believed that it had discarded.

C. EPA Did Not Provide Evidence That Materials At The Former Facility Were "Hazardous"

EPA presented no evidence that the materials at the former Facility were hazardous. None of EPA's witnesses testified to any testing, other than the most cursory at the February 7, 2007 CERCLA inspection, was done of the materials at the former Facility. No EPA witness could

testify as to what the materials were. The entirety of EPA's evidence regarding the hazardous nature of the materials found at the former Facility was the labels attached to the containers in which the materials were kept. EPA performed no independent evidence of what the materials were. The burden of proof for the assertion that the materials were hazardous belonged to the EPA They failed to meet their burden.

D. The Evidence Demonstrates That Any Danger Related To The Materials At The Former Facility Resulted From Actions Unrelated To Aguakem

EPA asserts that when the inspected the former Facility on February 2, 2007, the conditions of the former Facility led them to conclude that there was a significant risk to human health and the environment. The condition of the former Facility on that date (and all dates after December 28, 2006) was entirely the responsibility of the Municipio of Ponce, the owner and operator of the former Facility in that period.

The Municipio was at fault for four reasons: (1) it caused the lead contamination that required the suspension of Aguakem relocation process on December 28, 2006; (2) it failed to either abate the lead contamination or notify Aguakem that the issue had been resolved in order to permit Aguakem to reenter and remove the materials from the former Facility; (3) it failed to allow Aguakem to reenter the former Facility to remove the materials and (4) the Municipio failed to secure the former Facility, leaving it open to entry.

EPA is attempting to hold Aguakem responsible for the action of the Municipio. This constitutes an abuse of discretion on the part of EPA.

E. Aguakem Established That It Is Unable To Pay The Fine Proposed By The EPA

The defense of "inability to pay" is either a defense against a claim of violation of EPA or a circumstance for mitigating a penalty. (See, e.g., *In re Dearborn Refining Company*, RCRA (3008) Appeal No. 03-04). In any event, the uncontroverted evidence presented in the hearing

demonstrates that a penalty that even approaches the amounts sought by EPA is impossible for Aguakem to pay. The testimony of Aguakem's independent auditor, Eduardo Guzman was unequivocal and uncontroverted – Aguakem has a negative balance in its cash accounts. (See December 8, 2010 Transcript, pp. 1-16, Testimony of Eduardo Guzman.) Aguakem exists hand to mouth. Aguakem would be put out of business were the penalty sought by EPA imposed. This point requires no true elaboration. The financial statements of Aguakem speak for themselves. Aguakem does not have the wherewithal to pay even a fraction of what EPA seeks. To pay the amount EPA seeks from Aguakem would be a fantasy. It simply cannot do it. EPA presented no evidence or testimony (indeed it could not) to counter this obvious fact.

F. The Penalty EPA Seeks Is Inappropriate And Not In Conformance With EPA Policy

(i) EPA Guidelines

The EPA has published a RCRA Civil Penalty Policy.[1] The document summarizes the policy as follows:

> The penalty calculation system established through U.S. Environmental Protection Agency's RCRA Civil Penalty Policy ("Penalty Policy" or "Policy") is based upon Section 3008 of RCRA, 42 U.S.C. § 6928. Under this section, the seriousness of the violation and any good faith efforts to comply with applicable requirements are to be considered in assessing a penalty. Consistent with this statutory direction, this Penalty Policy consists of: (1) determining a gravity-based penalty for a particular violation, from a penalty assessment matrix, (2) adding a "multi-day" component, as appropriate, to account for a violation's duration, (3) adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and (4) adding to this amount the appropriate economic benefit gained through non-compliance. More specifically, the revised RCRA Civil Penalty Policy establishes the following penalty calculation methodology:
>
> Penalty Amount = gravity-based + multi-day +/- adjustments + economic benefit component

RCRA Civil Penalty Policy, p. 8. The purpose of the policy is described as:

[1] EPA testified that it adhered to the Policy in this action. December 7, 2010 Transcript, p. 95, Testimony of Eduardo Gonzalez.

> The purposes of the Policy are to ensure that RCRA civil penalties are assessed in a manner consistent with Section 3008; that penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained

RCRA Policy, p. 12. EPA proposed penalty fails to forward the purposes of the policy and does not comply with the Policy.

From the standpoint of the purposes of the Policy, EPA proposed penalty in fact thwarts EPA policy by discouraging a party, such as Aguakem, from attempting to ensure that it is maintaining a lead and asbestos free work environment. It is important to understand the genesis of this situation – it arose because Aguakem discovered that the former Facility was contaminated with lead (a fact confirmed by EPA in its CEI Report) and took the prudent step of stopping operations until the situation was resolved. Aguakem's reward for its vigilance on the issue of lead contamination, an action against it by the EPA, is a classic case of no good deed going unpunished.

In every aspect of its calculation, EPA has simply ignored the circumstances surrounding this matter. Surely such an approach violates the spirit and the letter of EPA policy.

(ii) EPA's Misapplication of The Gravity-Based Component of The RCRA Penalty Policy

Two factors are considered in determining the gravity-based penalty component: (1) potential for harm; and (2) extent of deviation from a statutory or regulatory requirement.

In applying these criteria in this matter, EPA did not make a rational analysis. First with regard to "potential for harm," EPA did not make a rational basis for determining that there was a major risk of harm. The location of the materials at the former Facility, located in area not open to the public and under the control and supervision of the Municipio of Ponce, should not have

posed a serious risk. No persons should have been able to access the former Facility without the authorization of the Municipio. If in fact access to the former Facility was permitted, this was due to the actions of the owner of the former Facility, the Municipio of Ponce, not the actions of Aguakem, who was legally prohibited from entering the former Facility without the permission of the Municipio of Ponce.

In explaining its application of the policy criteria, Eduardo Rodriguez of the EPA stated that "the seriousness of the violation is when we found a facility that it doesn't really comply with any requirements of the statute." *Id.*, p. 104. EPA refused to consider the context of this situation. This is not a case of an entity that generates solid waste or hazardous waste in the ordinary course of its operations. The entire premise of EPA's case here is that Aguakem abandoned the materials at the former Facility (as demonstrated above, this premise is simply wrong.) In the normal course, Aguakem has no need for a policy for the disposal of solid waste and hazardous waste as it does not produce either. It is the height of unfairness and capriciousness for EPA to simply ignore this and treat Aguakem as deliberating flouting the applicable statutes. This simply did not happen.

Moreover, EPA simply chose to ignore that the former Facility was under the complete control of the Municipio of Ponce from December 28, 2006 to the date of the inspection. Whatever the conditions of the former Facility were on February 2, 2007 was entirely under the control of the Municipio of Ponce. To take just one example, one of the factors that EPA stated created substantial risk was the fact that the former Facility was open, but this was entirely out of Aguakem's control The former Facility was under the control of the Municipio de Ponce and Aguakem was impeded by court order from reentering the former Facility. The conditions of the former Facility from December 28, 2006 on was not within Aguakem's control.

Similarly, EPA ignored the circumstances surrounding this situation when assessing the seriousness of the violation described in Count 2 of the Complaint. Indeed, this flaw is even more pointed here as the ability to minimize risks at the former Facility was completely beyond the control of Aguakem after December 28, 2006 as it was legal impeded from entering the former Facility by court order. The responsibility was entirely that of the Municipio of Ponce. In its calculation, EPA simply ignored this salient fact.

EPA's rote formulation that Aguakem's violations were serious simply ignored completely the actual situation at hand. It was arbitrary, capricious, irrational and unsupported by evidence. It was a blatant violation of the RCRA Civil Penalty Guidelines. The Guidelines provide in pertinent part:

> Just as important as the violation involved are the case specific factors surrounding the violation. Enforcement personnel should avoid automatic classification of particular violations.

Guidelines, p. 15. It is patent that in fact EPA engaged in automatic classification in this case, without regard to the "case specific factors" surrounding this matter. There is no explanation at all as to why the violation was major as opposed to moderate or minor. There was no consideration of the fact that Aguakem no longer had a legal right to enter the former Facility. There was no discussion of the lead contamination issues which led Aguakem to suspend its relocation efforts. In short, there was no rational consideration of the matter at all. EPA's efforts on calculating an appropriate penalty were in fact a complete abrogation of the policies enunciated in the Guidelines.

With regard to the "deviation from requirements" factor, the circumstances of this matter are simply not comparable to the standard matter. Again, the issue of the alleged abandonment of the materials at the former Facility overhangs this as practically all aspects of this matter.

Aguakem, in good faith, believe that it did not generate solid waste or hazardous waste, because it did not abandon the materials. Even if Aguakem was mistaken on this point, its mistake simply does not undermine any EPA policy or regulation.

These grievous departures from EPA guidelines lie at the heart of the unreasonableness of EPA's penalty calculations. If EPA had truly applied the letter and spirit of the guidelines, the violations would have been deemed inadvertent and minor and the lowest level of penalty would have been assessed, even if, as a strictly legal matter, Aguakem was deemed to have abandoned the materials at the former Facility.

(iii) EPA's Misapplication Of The Multiday Violation Guideline

With regard to Count 2 of the Complaint, failure to minimize risk, EPA chose to apply a multiday calculation, calculating from December 28, 2006 to February 7, 2007. This application is a gross violation of the RCRA Civil Penalty Guidelines. The Guidelines state:

> In most instances, the Agency should only seek to obtain multi-day penalties, if a multi-day penalty is appropriate, for the number of days it can document that the violation in question persisted.

Guidelines, p. 23. EPA provided, and could not provide, any documentation of the period for which the alleged violations described in Count 2 occurred. Indeed, yet again EPA ignored the facts surrounding this matter – specifically that Aguakem was legally impeded from reentering the former Facility after December 28, 2006. The former Facility was under the control of the Municipio of Ponce throughout that period. Indeed, the testimony of Eduardo Gonzales of the EPA illustrates the absurdity of EPA's calculation of a multi-day violation:

> The warehouse was open, was not under the control of any employee from [. . .] Aguakem [. . .]

December 7, 2010 Transcript, p. 111. this is actually a point Aguakem has repeatedly made – the former Facility, by court order, was no longer accessible to Aguakem, The decisions to keep the

former Facility "open" was entirely under the control of the Municipio of Ponce after December 28, 2006.

Another failing by the EPA on this point is that it never documents precisely when, under its theory, Aguakem abandoned or discarded the materials at the former Facility.

(iv) EPA's Failure To Properly Apply Mitigating Factors

In calculating the proposed penalty in this matter, EPA failed to properly apply mitigating factors. First, EPA applied a negligence upward adjustment. Second, EPA improperly failed to consider Aguakem's ability to pay. Third, EPA miscalculated the economic benefit Aguakem derived from the violation. Fourth, EPA did not consider the specific factors involving this matter in deterring the penalty.

a. EPA's Improper Application Of An Upward Negligence Adjustment

In one of the remarkable parts of EPA's calculations, it chose to apply an upward negligence adjustment on Counts 1 and 2 based on this statement: "EPA informed Respondent of the risks associated to the abandonment of a large quantity of chemical materials, but Respondent failed to act upon." Complainant's Exh. 3, Narrative Explanation to Support Complaint Amount. When precisely did EPA "inform Respondent?" The EPA does not say. Surely it did not happen prior to the late afternoon of February 2, 2007as this was the first time EPA had ever spoken to Aguakem. However, nothing in the record indicates that in fact EPA ever gave such warning to Aguakem. See, e.g. December 7, 2010 Transcript, pp. 120 -130, Cross Examination of Eduardo Rodriguez. In fact, what is clear from the record is that the EPA never stated to Aguakem that it could, much less, should retrieve its materials. The EPA never stated this despite being made dully aware that Aguakem wanted the materials and was only impeded by the fact that it believed there was lead contamination in the former Facility and because it was legally impeded, by

Court Order, from reentering the former Facility without the authorization of the Municipio of Ponce. EPA's application of a negligence factor here is nothing short of ironic and ludicrous.

b. EPA's Improper Failure To Consider Aguakem's Inability To Pay the Proposed Fine

EPA failed to consider Aguakem's ability to pay the proposed fine. See Complainant's Exh. 3, Narrative Explanation to Support Complaint Amount. EPA stated that "Respondent has not provided information to demonstrate its inability to pay." Of course, EPA never requested such information; Indeed, Aguakem had no idea that it was the subject of an action until it was served with the Complaint. In any event, as detailed above, Aguakem does not have the ability to pay and EPA must consider it in determining the penalty here. It has not done so.

c. EPA Failed To Consider The Economic Value of The Materials To Aguakem

In the continuing pattern of simply ignoring the essential facts of this matter, EPA calculated that Aguakem received an economic benefit from losing valuable materials necessary to its operation. EPA calculated that Aguakem drew a $19,266.00 benefit from losing its material. This bizarre conclusion is belied by the facts. In fact, the value of the lost material to Aguakem was upwards of $75,000.00. December 9, 2010 Transcript, pp. 129-30. Testimony of Jorge Unanue.

The EPA never considered this when calculating the "economic benefit" Aguakem gained from losing its materials in the former Facility. Thus, EPA's revising the penalty upward on this basis is without merit.

d. The EPA Never Considered The Unique Factors Specific To This Action

EPA acknowledges that it considered that there were no unique factors it considered regarding this matter. Complt's Exh 3. Narrative Explanation To Support Complaint Amount. As detailed at the hearing and in this submission, this matter is practically sui generis. It is unlike almost any other case of this type, EPA admits that in fact it did not take into account the specific

and unique factors that permeate this case. This lack of consideration is obvious, given the outrageous and unsubstantiated penalty EPA is seeking to impose. This violates the RCRC Penalty Guidelines.

CONCLUSION

For all the reasons set forth herein, the Honorable Administrative Law Judge should dismiss the Complaint or, in the alternative, deny the penalties sought by EPA, and grant such other and further relief as the Administrative Law Judge deems just and proper.

Respectfully submitted, in New York, New York this 2nd day of March, 2011.

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CERTIFICATE OF SERVICE

I certify that on this date a copy of this Preliminary Exchange was served upon:

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[i] The record for consideration by the Administrative Law Judge is limited to the evidence presented during the December 2010 hearing.