UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	Docket No.: RCRA-04-2002-4006
Aero Design, Inc.	)	
	)	
Respondent.	)	
	)	

INITIAL DECISION AND DEFAULT ORDER

This is a proceeding under Section 3008(8) of RCRA, 42 U.S.C. § 6928(a). The proceeding is governed by the United States Environmental Protection Agency's ("EPA") Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules of Practice"). Complainant, Chief, RCRA Enforcement and Compliance Branch, Waste Management Division of the Environmental Protection Agency (EPA) Region 4, has filed a Motion for Default ("Motion") pursuant to 40 C.F.R. § 22.17, seeking an order assessing a civil penalty in the amount of $128,300 against Respondent, Aero Design, Inc.("ADI"). Pursuant to the Consolidated Rules of Practice and the record in this matter and the following Findings of Fact, Conclusions of Law and Determination of Remedy, Complainant's Motion for Default is hereby GRANTED.

BACKGROUND

Complainant filed a Complaint and Compliance Order (Complaint) on September 23, 2002 and served it upon Respondent on September 25, 2002. Section XIV of the Complaint, entitled, "Opportunity to Request a Hearing", provides information concerning Respondent's obligations with

respect to responding to the complaint. Paragraph 79, specifically states, in bold type, that "if a written Answer to this Order is not filed with the Regional Hearing Clerk within thirty (30) days after Respondent's receipt of this Order, Respondent may be found in default pursuant to 40 C.F.R. § 22.17." Section XIV also provided that "Failure of Respondent to admit, deny, or explain any material factual allegation in the Complaint constitutes an admission of the allegations." To date, Respondent has neither filed an answer to the Complaint nor any other document in response thereto.

FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record, I make the following findings of fact:

1. Section 3002 of RCRA, 42 U.S.C. § 6922, requires the Administrator of EPA to promulgate regulations establishing standards applicable to generators of hazardous waste. Pursuant to that provision, EPA promulgated 40 C.F.R. Part 262 - Standards Applicable to Generators of Hazardous Waste. The regulations became effective on November 19, 1980.

2. Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), sets forth the requirements for facilities that treat, store or dispose of hazardous waste, and prohibits the treatment, storage, or disposal of hazardous waste without interim status or a permit issued pursuant to RCRA. The implementing regulations for this requirement are found in 40 C.F.R. Parts 124, 264, 265 and 270. The regulations became effective on November 19, 1980, and became enforceable by EPA on February 12, 1985, when the State of Florida received final authorization for 40 C.F.R. Parts 124, 264, 265 and 270.

3. Section 3008(c) of RCRA, 42 U.S.C. § 6928(c) authorizes the Administrator to assess a civil penalty of up to $27,500 for each day of continued noncompliance with a previously issued Compliance Order.

4. 40 C.F.R. § 262.34 and F.A.C. Ann. R.62-730.160, provides hazardous waste generators a conditional exemption from the permitting requirements of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) if they meet the requirements described therein. Facilities that operate under the conditional exemption regulations, but fail to comply with the regulatory requirements of 40 C.F.R. § 262.34 and F.A.C. Ann. R.62-730.160, act as treatment, storage and disposal facilities (TSDFs), and thereby become subject to Section 3005(a) of RCRA, 42 U.S.C.
§ 6925(a).

5. Pursuant to 40 C.F.R. § 261.2 and F.A.C. Ann. R.62-730.030, a solid waste is any discarded material that is not otherwise excluded by the regulations.

6. Pursuant to 40 C.F.R. § 262.11 and F.A.C. Ann. R.62-730.160, any person who generates a solid waste must determine if the waste is a hazardous waste.

7. Pursuant to 40 C.F.R. § 261.31 and F.A.C. Ann R.62-730.030, a solid waste that consists of spent solvent MEK and waste stripper is a listed hazardous waste and has the EPA Hazardous Waste Numbers F003 and F005.

8. Pursuant to 40 C.F.R. § 261.21 and F.A.C. Ann R.62-730.030, a solid waste that consists of spent solvent MEK and waste paint stripper may be a characteristic hazardous waste and may have the EPA Hazardous Waste Number D001.

9. Pursuant to 40 C.F.R. § 261.24 and F.A.C. Ann R.62-730.030, a solid waste that consists of MEK and waste paint stripper may be a toxic hazardous waste and may have the EPA Hazardous Waste Number D035.

10. Pursuant to 40 C.F.R. § 265.31 and F.A.C. Ann. R.62-730.180, a facility must maintain and operate the facility in a manner which minimizes the possibility of a release of hazardous waste or hazardous waste constituents.

11. Respondent is the "operator" of a "facility" located at 5601 NW 15th Avenue, Fort Lauderdale, Florida, which is located within the Fort Lauderdale Executive Airport, as those terms are defined in 40 C.F.R. § 260.10 and F.A.C. Ann. R.62-730.020.

12. Respondent strips and repaints the exteriors of private aircrafts at the facility.

13. On September 1, 1997, the Respondent notified the Florida Department of Environmental Protection (FDEP) as a small quanitity generator of hazardous waste, and was assigned the site specific EPA ID number FLD 085 029 213.

14. Respondent generates solid waste (MEK and waste paint stripper) from the stipping and painting processes at the facility.

15. Respondent disposes of its waste MEK generated from the stripping and painting processes as hazardous waste D001, D035, F003, and F005.

16. On March 15, 1999, FDEP conducted a RCRA Compliance Evaulation Inspection (CEI) of ADI which revealed numerous violations of RCRA.

17. On April 26, 2000, EPA and FDEP conducted a RCRA CEI of ADI, pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) for violations discovered during the March 1999 and April 2000 RCRA CEIs.

19. On December 7, 2002, EPA and ADI entered into a Consent Agreement and Final Order (CAFO), Docket No. RCRA-04-2001-04, which resolved the March 28, 2001, EPA Complaint.

20. In accordance with Paragraph 18 of the CAFO, Respondent agreed to pay a penalty of $5,000 in twelve (12) equal monthly installments of $441.67. The first payment was due on January 6, 2002 and the reamining eleven payments were due on the 28th of each subsequent month.

21. The only payments made by Respondent were $441.67 on June 10, 2002, and August 24, 2002, and $883.34, on October 4, 2002, and December 6, 2002.

22. Respondent has therefore been in violaiton of Paragraph 18 of its CAFO, Docket Number RCRA-04-2001-04, since January 7, 2002.

23. In accordance with Paragraph 22 of the CAFO, Respondenbt agreed to maintain compliance with all applicable provisions of RCRA and the implementing regulations including but not limited to the following:

a. By February 28, 2002, Respondent was required to certify to EPA and FDEP that it has made a hazardous waste determination as required by 40 C.F.R. § 262.11 on the waste paint filters, and effluent discharged to the floor drains from the paint stripping operation, and indicate the results of the hazardous waste determination.

b. Respondent certified in the CAFO that it is a conditionally exempt small quantity generator within the meaning of 40 C.F.R. § 261.5(a). The CAFO noted that should

Respondent become either a small quantity generator or large quantity generator, Respondent is required to compy with all RCRA regulations applicable to such generators.

c. Respondent agreed to comply with the applicable container management requirements of RCRA. Specifically, Respondent agreed to keep all containers of hazardous waste closed during storage, except when it is necessary to add or remove waste. Respondent agreed that it will ensure that each container of hazardous waste is labeled or marked clearly with the words "Hazardous Waste" while being accumulated on-site.

24. On May 16, 2002, FDEP conducted a RCRA CEI of ADI. The CEI revealed numerous violations of RCRA, including, as set out below, that ADI had not complied with any provisions of the CAFO.

25, Respondent's waste manifests dated February 8, 2002, May 23, 2002, and July 18, 2002, demonstrate that Respondent is at least a small quantity generator if not a large quantity generator of hazardous waste. In the December 7, 2001, CAFO, Respondent certified that it s a conditionally exempt small quantity generator within the meaning of 40 C.F.R. § 261.5(a).

26. Respondent has been in violation of Paragraph 22 of its CAFO, Docket Number RCRA-04-2001-04, since March 1, 2002.

27. Pursuant to Section 3008(c) of RCRA, 42 U.S.C. § 6928(c), if a violator fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than $27,500 for each day of continued noncompliance with the order and the

Administrator may suspend or revoke any permit issued to the violator (whether issued by the Administrator or the State).

28. Therefore, Respondent is in violation of a Compliance Order entered into purusant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and is liable for penalties of up to $27,500 for each day of noncompliance pursuant to Section 3008(c) and (g) of RCRA, 42 U.S.C. § 6928(c) and (g).

29. During the May 16, 2002, CEI, the hazardous waste storage area contained approximately thirty 55-gallons drums. Inpspectors observed that some drums were empty, some drums contents were unknown, and several drums contained hazardous waste (three drums of MEK, three drums of waste paint stripper, and one drum of used oil).

30. During the May 16, 2002, CEI, inspectors observed in the hazardous waste storage area that two 55-gallon waste MEK drums were not marked with the words "Hazardous Waste," and had no accumulation start date. One 55-gallon waste MEK drum had an accumulation start date but was not marked with the words "Hazardous Waste." Three 55-gallon waste paint stripper drums were not marked with the words "Hazardous Waste," and had no accumulation start date. One of the paint stripper drums was open during the inpspection. The 55-gallon used oil drum was not marked with the words "Used Oil."

31. Conditions for exemption from Section 3005 of RCRA set out in 40 C.F.R. § 262.34(d)(2) and F.A.C. Ann. R.62-730.160, which reference 40 C.F.R. § 265.173 and F.A.C. Ann. R.62-730.180, provide, in part, that a generator may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status provided that each container holding hazardous waste is always closed during storage, except when it is necessary to add or remove waste.

32. Conditions for exemption from Section 3005 of RCRA set out in 40 C.F.R. § 262.34(d)(4) and F.A.C. Ann. R.62-730.160, which reference 40 C.F.R. § 262.34(a)(2) and (3) and F.A.C. Ann. R.62-730.160, provide, in part, that a generator may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status provided that the date upon which each period of accumulaiton begins is clearly marked and visible for inspection on each container and that each container is marked clearly with the words "Hazardous Waste" while being accumulated on-site.

33. Respondent is a generator of used oil pursuant to 40 C.F.R. § 279.1 and F.A.C. Ann. R.62-710.210.

34. Pursuant to 40 C.F.R. § 279.22(c)(1) and F.A.C. Ann. R.62-710.210, containers used to store used oil at a generator facility must be labeled or marked clearly with the words "Used Oil."

35. Respondent violated Section 3005(a) of RCRA by not meeting the conditions for storing a hazardous waste without a permit or interim status that are found in 40 C.F.R. § 262.34(d)(2) and (d)(4) and F.A.C. Ann.R. 62-730.160(1), which reference 40 C.F.R. § 262.349a)(2) and (a)(3) and F.A.C. Ann. R.62-730.160 and 40 C.F.R. § 265.173 and F.A.C. Ann. R.62-730.180. In addition, Respondent also violated 40 C.F.R. § 279.22(c)(1) and F.A.C. Ann. R.62-710.210. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. 6928(a), Respondent is therefore liable for penalties of up to $27,500 for each day of continued noncompliance.

36. During the May 16, 2002, inspection of the hazardous waste storage area, one 55-gallon waste MEK drum was leaking.

37. Conditions for exemption from Section 3005 of RCRA set out in 40 C.F.R. § 262.34(d)(4) and F.A.C. Ann. R.62-730.060(1), which reference 40 C.F.R. § 265.31 and F.A.C. Ann. R.62-730.180(2), provide, in part, that a generator may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status provided that the facility is maintained, and operated to minimize the possibility of a fire, explosion, or an unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.

38. Respondent violated Section 3005(a) of RCRA by not meeting the conditions for storing a hazardous waste without a permit or interim status that are found in 40 C.F.R. § 262.34(d)(4) and F.A.C. Ann.R. 62-730.160 which reference 40 C.F.R. § 265.31 and F.A.C. Ann. R.62-730.180(2), for failing to maintain and operate its facility in a manner which minimizes the possibility of a release of hazardous waste or hazardous waste constituents. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Respondent is therefore liable for penalties of up to $27,500 for each day of continued noncompliance.

39. During the May 16, 2002, CEI, inspectors were informed by Respondent's representative that no waste determination had been performed on its paint filters from the paint booth and the effluent discharged to the floor drain from the paint stripping operations.

40. The waste paint filters from the paint booth are solid wastes as defined by 40 C.F.R. § 261.2.

41. The effluent discharged to the floor drain from the paint stripping operation is a solid waste as defined by 40 C.F.R. § 261.2.

42. Respondent violated 40 C.F.R. § 262.11 and F.A.C. Ann. R.62-730.160 for failing to conduct a hazardous waste determination on its paint filters and effluent discharged to the floor drains from the paint stripping operation. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Respondent is therefore liable for penalties of up to $27,500 for each day of continued noncompliance.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. §22.17(c) and 22.27(a), and based on the entire record, I reach the following conclusions of law:

1. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

2. Respondent was required to file an answer to the Complaint within thirty (30) days of service of the Complaint. 40 C.F.R. § 22.15(a).

3. Respondent's failure to file an answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

4. Complainant's Motion for Default Order was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).

5. Respondent was required to file any response to the motion within 15 days of service. 40 C.F.R. § 22.16(b).

6. Respondent's failure to respond to the motion is deemed to be a waiver of any objection to the granting of the motion. 40 C.F.R. § 22.16(b).

7. Respondent is in violation of a Compliance Order entered into pursuant to Section3008(a) of RCRA, 42 U.S.C. § 6928(a), and is liable for penalties of up to $27,500 for each day of noncompliance pursuant to Section 3008(c) and (g) of RCRA, 42 U.S.C. § 6928(c) and (g).

8. Respondent violated 40 C.F.R. § 262.11 and F.A.C. Ann. R.62-730.160 for failing to conduct a hazardous waste determination on its paint filters and effluent discharged to the floor drains from the paint stripping operation. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Respondent is therefore liable for penalties of up to $27,500 for each day of continued noncompliance.

9. Respondent violated Section 3005(a) of RCRA by not meeting the conditions for storing a hazardous waste without a permit or interim status that are found in 40 C.F.R. § 262.34(d)(4) and F.A.C. Ann. R.62-730.160 which reference 40 C.F.R. § 265.31 and F.A.C. Ann. R.62-730.180(2), for failing to maintain and operate its facility in a manner which minimizes the possibility of a release of hazardous waste or hazardous waste constituents. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Respondent is therefore liable for penalties of up to $27,500 for each day of continued noncompliance.

10. Respondent violated Section 3005(a) of RCRA by not meeting the conditions for storing a hazardous waste without a permit or interim status that are found in 40 C.F.R. § 262.34(d)(2) and (d)(4) and F.A.C. Ann. R.62-730.160(1), which reference 40 C.F.R. § 262.34(a)(2) and (a)(3) and F.A.C. Ann. R.62-730.160 and 40 C.F.R.§ 265.173 and F.A.C. Ann. R.62-730.180. In addition, Respondent also violated 40 C.F.R. § 279.22(c)(1) and F.A.C.

Ann. R.62-710.210. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. 6928(a), Respondent is therefore liable for penalties of up to $27,500 for each day of continued noncompliance.

DETERMINATION OF REMEDY

According to 40 C.F.R. §22.17(c), "[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) also states, "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." In this case, the relief proposed in the Complaint and requested in this Motion is assessment of a penalty of $128,300 and the performance of the injunctive relief as follows:

To come into compliance with the requirements of Subtitle C of RCRA, 42 U.S.C. §6921, et seq., and 40 C.F.R. Parts 260 through 270; to make all required submittals and certifications to Complainant; and to undertake the following acts within the times specified below pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a):

a. Within thrirty (3) calendar days of the effective date of this Default Order, Respondent shall comply with the CAFO, Docket Number RCRA-04-2001-04, dated December 7, 2001.

b. Within thirty (30) calendar days of the effective date of this Default Order, Respondent must make a hazardous waste determination as required by 40 C.F.R. § 262.11 and F.A.C. Ann. R.62-730.160 on all solid wastes generated on-site.

c. Within sixty (60) calendar days of the effective date of this Default Oder, Respondent shall submit a letter, describing how hazardous waste is currently managed at the facility, how Respondent has come into compliance for each violation cited in the Complaint, and develop and submit a plan which indicates how Respondent will maintain compiance with the RCRA regulations.

With respect to penalty, the Consolidated Rules of Practice, 40 C.F.R. § 22.27(b) provides that the Presiding Officer shall determine the amount of the civil penalty

> "...based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detain in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act...If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing exchange, or the motion for default, whichever is less."

Complainant had not originally demanded a specific penalty in the Complaint. See 40 C.F.R.§ 22.14(a)(4)(ii). However, in its Motion, Complainant proposes the Respondent be assessed a civil penalty of $128,300 for the violations alleged in the Complaint. Complainant based its proposed penalty upon facts alleged above, upon those factors which EPA must consider pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), and the "October 1990 RCRA Civil Penalty Policy (RCPP)," including (1) the seriousness of the violations; (2) any good faith efforts by the Respondent to comply with applicable requirements; (3) the potential for harm to human health or the environment; (4) the extent to which the conduct of Respondent has deviated from the regulatory requirements; (5) the presense of multiple violations; (6) the number of days over which the violations occurred; and (7) the economic benefit accruing to the Respondent, as well as such other matters as justice may require.

Complainant based its proposed penalty on calculations it performed under the Penalty Policy and attached a penalty calculation worksheet and narrative summary explaining the reasoning behind the penalty proposed for the violations alleged in the Complaint. See Exhibit E attached to Motion. Based on my review of the record, I have determined that the penalty sought by Complainant is appropriate for the reasons discussed below.

Count 1, Violation of Compliance Order - 3008(c): Complainant looked at the factors for determining Gravity, and appropriately determined that the potential of harm was moderate, and the extent of deviation from applicable requirements to be major. According to the RCPP this carries a penalty range of $8,000 to $10,999. Complainant found the failure to comply with the provisions of the CAFO to this extent to be a very serious violation, and a reflection of the fact that Respondent had not been deterred from violating RCRA through an enforcement action. Complainant also argued that there is a continued risk to human health and the environment due to Respondent's continuing violation of RCRA. Therefore Complainant selected a penalty on the high end of the range of $10,999. Assessment of multi-day penalties for Count I is in order. Although Respondent's violations of the CAFO have continued for 395 days, Complainant proposed limiting the multi-day penalty to the presumed 2-180 days for all violations with a gravity component of moderate potential for harm/major extent of deviation. This assessment provides sufficient deterrent to Respondent against future violations. Applying the lowest end of the penalty range of $400, as sufficient deterrent, for 179 days the total multi-day penalty is $71,600. Considering the various factors under the RCPP to determine whether adjustments should be made, Complainant made no adjustments for good faith efforts, history of noncompliance, or other unique factors. Since the economic benefit for this violation fell below

$2500, there was no calculation for economic benefit. Determining that Respondent's failure to comply with the CAFO was wilful, EPA sought an assessment upward 5% for Respondent's willfulness. In accordance with 61 Fed. Reg. 69360, Complainant then applied a 10%increase to the gravity based penalty to account for inflation. The total penalty sought for Count 1 is $95,302.

Count 2, Hazardous Waste Determination, 40 C.F.R. § 262.11: Complainant looked at the factors for determining Gravity , and appropriately determined that the potential of harm was moderate, even though it found risk of harm to the regulatory program to be major. The extent of deviation from applicable requirements was determined to be moderate. Although Respondent's deviation was significant, Complainant took into consideration that Respondent did make some hazardous waste determinations of other waste streams onsite. According to the RCPP a gravity determination of moderate potential for harm / moderate extent of deviation has a potential penalty range of $5000 to $7000. Due to the fact that Respondent failed to conduct a hazardous waste determination on two of the three waste streams generated at the facility on at least three different occasions, and finding the harm to the regulatory program was major, a penalty at the high range, $7,999 was selected. EPA does not seek any multi-day penalties for this Count, nor for adjustment factors of good faith efforts, or other factors. Finding total economic benefit to be relatively insignificant, $2500, Complainant does not seek recovery for economic benefit for this count. However, EPA seeks an upward adjustment of 25% for Respondent's history of noncompliance. This is based upon the State's inspection report of March 15, 1999, CEI and accompanying warning letter ordering Respondent to perform a hazardous waste determination. Furthermore, Respondent failed to perform a hazardous waste determination

required by the CAFO. In accordance with 61 Fed. Reg. 69360, Complainant then correctly applied a 10% increase to the gravity based penalty. The total penalty sought for Count II is $10,999.

Count 3: Storage Without a Permit and Failure to Operate the Facility to Mimimize the Possibility of any Sudden or Non-Sudden Release to the Environment:

Complainant looked at the factors for determining Gravity, and determined that the potential for harm was moderate, and the extent of deviation from the applicable requirements was also moderate. According to the RCPP this carries a penalty within the range of $5,000 to $7,999. A penalty at the high end of the range $7,999 was selected, because Respondent failed to clean-up spilled methyl ethyl ketone in the storage area. EPA does not seek any multi-day penalties for this Count, nor for adjustment factors of good faith efforts, or other factors. Finding total economic benefit to be relatively insignificant, $2500, Complainant does not seek recovery for economic benefit for this count. However, EPA seeks an upward adjustment of 25% for Respondent's history of noncompliance citing non-compliance with hazardous waste management requirements found on March 15, 1999, April 26, 2000 and failure to clean up the leaking MEK drum discovered on the April visit. In accordance with 61 Fed. Reg. 69360, Complainant then applied the10% increase to the gravity based penalty. The total penalty sought for Count 3 is $10,999.

Count 4: Storage Without a Permit - Used Oil Requirements and Container Management, 40 C.F.R. §262.34(d)(40) / 262.34(a)(2) & (3) and § 262.34(d)(2) / 265.173(a): Using its enforcement discretion, EPA chose to combine the used oil and the hazardous waste container management violations because the violations are similar in nature (drum labeling violations), and the penalty calculated is of sufficient magnitude to deter future viiolations. Complainant looked at the factors for

determining Gravity, and determined that the potential for harm was moderate because the probability of risk of exposure is moderate and the harm to the RCRA regulatory program is moderate as well. The extent of deviaiton from applicable requirements was major, because most of the requirement were not met. According to the RCPP a gravity determination of moderate potential for harm/ major extent of deviation has a potential range of $8,000 to $10,999. A penalty at the low end of the range, $8,000, was selected as providing a sufficient deterrent impact. EPA does not seek any multi-day penalties for this Count, nor adjustment factors for good faith efforts, or other factors. Finding total economic beneift to be relatively insignificant, $2500, Complainant does not seek recovery for economic benefit for this count. However, EPA seeks an upward adjustment of 25% for Respndent's history of noncompliance. This is based upon Respondent having violated many of, if not all, the exact same container management requirements in March 1999, April 2000 and May 2002. Furthermore, Respondent failed to address violations cited in the CAFO. In accordance with 61 Fed. Reg. 69369, Complainant then applied the10% increase to the gravity based penalty. The total penalty sought for Count II is $11,999.

The total penalty sought for Counts 1 through 4 is $128,300.

According to 40 C.F.R. § 22.17(c), "[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) also states, "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the rquested relief is clearly inconsistent with the record of the proceeding or the Act." In this case, the relief proposed in the Complaint and requested in this Motion is assessment of a penalty of

$128,300 and the performance of the injunctive relief specified in paragraph 43 above. This relief is consistent with the record of this proceeding and the underlying Act.

Based on my consideration of the relevant statutory factors in light of the record in this proceeding, I have determined that the injunctive relief is warranted and that the proposed penalty of $128,300 should be assessed.

DEFAULT ORDER

Respondent is hereby ORDERED as follows:

A. Respondent is asessed a civil penalty in the amount of **$128,300**.

B. Respondent shall, come into compliance with the requirements of Subtitle C of RCRA, 42 U.S.C. § 6921, et seq., and 40 C.F.R. Parts 260 through 270; to make all required submittals and certifications to Complainant; to undertake the following acts within the times specified below pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a):

a. Within thirty (30) calendar days of the effective date of this Default Order, Respondent shall comply with the CAFO, Docket Number RCRA-04-2001-04, dated December 7, 2001.

b. Within thirty (30) calendar days of the effective date of this Default Order, Respondent must make a hazardous waste determination as required by 40 C.F.R. § 262.11 and F.A.C. Ann. R.62-730.160 on all solid wastes generated on-site.

c. Within sixty (60) calendar days of the effective date of this Default Order, Respondent shall submit a letter, describing how hazardous waste is currently managed at the facility, how Respondent has come into compliance for each violation cited in the

Complaint, and develop and submit a plan which indicates how Respondent will maintain compliance with the RCRA regulations.

The injunctive relief is effective and enforceable on the date this Default Order is issued.

Respondent shall pay the penalty in the following manner:

1. Within thirty (30) days after this Default Order is issued, payment shall be made by cashier's or certified check payable to "Treasurer, United States of America," and mailed to:

Regional Hearing Clerk
U.S.Environmental Protection Agency
Post Office Box 100142
Atlanta, Georgia 30384

The check shall reference "Docket NO RCRA-04-2002-4006."

2. At the time the check is sent, Respondent shall mail a copy of it to:

Regional Hearing Clerk
U.S. EPA, Region 4
61 Forsyth St.
Atlanta, Georgia 30303

and to:

Jeffrey T. Pallas, Chief
South Enforcement and Compliance Section
RCRA Enforcement and Compliance Branch
Waste Management Division
U.S. EPA, Region 4
61 Forsyth St.
Atlanta, Georgia 30303

C. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a final order unless: (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceeding within thirty (30) days

from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order; or (3) the Envionmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Dated: April 1, 2003

/S/
SUSAN B. SCHUB
Regional Judicial Officer