UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	)	
	)	
SPLENDID ENTERPRISES LIMITED	)	**DOCKET NO. RCRA-02-2001-7101**[1/]
d/b/a SPLENDID CLEANERS a/k/a	)	
SPLENDID CLOTHING CARE CENTER,	)	
	)	
RESPONDENT	)	

DEFAULT ORDER AND INITIAL DECISION

Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§6901 et seq.("RCRA"): Pursuant to Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a), Respondent, Splendid Enterprises Limited, is found to be in default because of its failure to appear at hearing, and such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. Respondent violated Section 3005 of RCRA, as amended, 42 U.S.C. § 6925, and the New York hazardous waste management regulations. The $34,250 civil administrative penalty proposed in the Complaint is assessed against Respondent.

Issued: September 20, 2002

Barbara A. Gunning
Administrative Law Judge

Appearances[2/]:

[1/] The hearing transcript incorrectly lists the Docket Number for this case as RCRA 220-01-7101. The correct Docket Number is RCRA-02-2001-7101.

[2/] Respondent did not appear at the scheduled hearing. In Orders entered by the undersigned on April 23, 2002 and May 2, 2002, Respondent's counsels' Motions to Withdraw Representation were granted, respectively.

For Complainant: Beverly Kolenberg, Esquire
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INTRODUCTION

This civil administrative penalty proceeding arises under the authority of Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901 et seq. (collectively referred to as "RCRA"). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32 (2000).

The United States Environmental Protection Agency ("Complainant" or the "EPA") initiated this proceeding by filing a Complaint against Splendid Enterprises Limited doing business as Splendid Cleaners and also known as Splendid Clothing Care Center, Respondent ("Respondent"). The Complaint charges Respondent with violating Section 3005 of the RCRA, as amended, 42 U.S.C. §§ 6925, and the New York State regulations concerning the management of hazardous waste.[3/] Complainant seeks the imposition of a civil administrative penalty in the amount of $34,250 against Respondent.

Respondent failed to appear at the scheduled hearing on May 6, 2002, in New York, New York. At the hearing, Complainant moved for

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[3/] The EPA's regulations governing the handling and management of hazardous waste are found at 40 C.F.R. Parts 260-272. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Administrator of the EPA may authorize a state to operate a hazardous waste program in lieu of the federal hazardous waste program. The State of New York has received final authorization to administer most of its hazardous waste program, but the EPA retains authority to enforce the regulations comprising the authorized State program under Section 3008 of RCRA, 42 U.S.C. § 6928. *See infra* p. 10-11 for more detailed discussion.

default as to liability.[4/] *See* Transcript ("Tr.") at 6. For the reasons discussed below, Complainant's motion for default will be granted. Respondent is found to be in default pursuant to Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), and is assessed the proposed penalty of $34,250.

FINDINGS OF FACT

1. Respondent is Splendid Enterprises Limited, doing business as Splendid Cleaners, and also known as Splendid Clothing Care Center ("Respondent").

2. Respondent is a domestic corporation, incorporated in the State of New York.

3. Respondent conducts solvent-based fabric cleaning ("dry cleaning"), laundering, and related activities in a facility located at 636 11th Avenue at 46th Street, New York, New York 10036 ("Facility").

4. Respondent is an "owner" and "operator" of the Facility as those terms are defined in 6 NYCRR § 370.2(b).

5. Respondent is a "person" as that term is defined in 42 U.S.C. § 6903(15) and 6 NYCRR § 370.2(b).

6. Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, the EPA was informed by notification under the name Merit Cleaners, dated September 19, 1995 ("Notification"), that activities involving hazardous waste, specifically the generation of hazardous waste, were conducted at the Facility.

7. In response to the Notification, the EPA provided the Facility with EPA Identification Number NYR000014902.

8. Pursuant to Section 3010 of RCRA, Respondent informed the EPA, by Notification dated August 23, 1999 ("2nd Notification"), of a name change and ownership change to Splendid Enterprises Limited as of August 5, 1999.

[4/] Complainant's Motion for Accelerated Decision on Liability was pending at the time of hearing.

9. Mr. Joon Jeong was employed as the Plant Manager by Merit Cleaners prior to August 5, 1999, and he continued to work as the Plant Manager for Respondent until in or about the Spring of 2000.

10. Respondent has been and continues to be a “generator” of “hazardous waste” as those terms are defined in 6 NYCRR §§ 370.2(b) and 371.1(d).

11. On or about August 8, 2000, duly designated representatives of the EPA (“Inspectors”) conducted a Compliance Evaluation Inspection of the Facility (“Inspection”).

12. At the time of the Inspection, the Inspectors were accompanied by the following representatives of Respondent: Mr. Willie Jones, Facility Office Manager; and Mr. Kenneth W. Huang, Owner, President, and Facility Manager.

13. At the time of the Inspection, the Inspectors found several waste streams at the Facility, including, but not limited to: tetrachloroethylene contaminated waste distillation residues (“Perc sludge”); spent tetrachloroethylene contaminated lint, button trap and spin disk filter wastes (“Perc Lint Waste”); and spent tetrachloroethylene contaminated separator wastewater (“Perc Wastewater”).

14. Tetrachloroethylene is also known as “perchloroethylene” and is commonly referred to as “perc.”

15. The three waste streams identified in ¶13 above are generated in part from a process in which Respondent reclaims spent tetrachloroethylene for reuse in the Facility’s dry cleaning operations.

16. The Perc Sludge and the Perc Lint Waste are listed hazardous wastes, each with EPA Hazardous Waste Code F002 (Spent Halogenated Solvent) as defined in 6 NYCRR § 371.4(b)(1).

17. The Perc Wastewater is both a listed hazardous waste, with EPA Hazardous Waste Code F002 (Spent Halogenated Solvents and Still Bottoms), and a toxic characteristic hazardous waste, with EPA Hazardous Waste Code D039 (Tetrachloroethylene), as defined in 6 NYCRR § 371.3(e)(1).

18. At the time of the Inspection, Respondent was storing Perc Sludge in four, 15-gallon (gal.) capacity drums. A full 15-gal. capacity drum of Perc Sludge contains approximately 195 pounds (lbs.) of Perc Sludge. At the time of the Inspection, two full drums weighed 195 lbs. each (“Drum 1" and “Drum 2"), one 4/5 full drum contained 150 lbs. of Perc Sludge (“Drum 3"), and one 3/4 full drum contained 140 lbs. of Perc Sludge (“Drum 4”).

19. At the time of the Inspection, Respondent was accumulating Perc Lint Waste in a 1/3-full, 15-gal. capacity drum weighing at least 10 lbs. (“Drum 5").

20. At the time of the Inspection, Respondent was storing Perc Wastewater in a full, 40-gal. capacity container weighing at least 330 lbs. (“Container 1").

21. At the time of the Inspection, Respondent was accumulating Perc Wastewater in three, 5-gal. capacity plastic containers for a total of at least 63 lbs. (“Container 2,” “Container 3,” and “Container 4").

22. At the time of the Inspection, Respondent was storing and/or accumulating at least 1,073 lbs. of F002 hazardous waste.

23. At the time of the Inspection, Respondent did not have a RCRA hazardous waste storage permit and had not qualified for interim status.

24. At the time of the Inspection, Drum 1 was labeled with the accumulation start date of July 12, 2000, indicating that the accumulation of hazardous waste in the drum had started on July 12, 2000.

25. At the time of the Inspection, Drum 2, Drum 3, Drum 4, Drum 5, Container 1, and Container 2 were not labeled as hazardous waste, with other words that identified their contents, or with the accumulation start dates.

26. At the time of the Inspection, Drum 3, Drum 5, Container 1, Container 2, Container 3, and Container 4 were not closed and hazardous waste was not being added or removed.

27. At the time of the Inspection, the Facility’s operating record indicated that weekly container inspections had

not taken place since July 17, 2000, or six weeks earlier.

28. At the time of the Inspection, Container 1 was stored next to the Facility's boiler, adjacent to two open, functioning floor drains.

29. At the time of the Inspection, Container 1 had been topped off and liquid had spilled and pooled around the base of the container and had flowed to the adjacent floor drain.

30. At the time of the Inspection, Respondent produced Safety-Kleen hazardous waste disposal invoices covering the period from August 16, 1999 until July 13, 2000. Respondent had sent off-site at least 8 shipments of hazardous waste in this time period.

31. According to records at the facility, Respondent did not prepare manifests for hazardous waste transported from the Facility. The last date of a manifest for hazardous waste from the Facility was on or about November 3, 1998.

32. At the time of the Inspection, Respondent could not document that it had made any attempt to make arrangements or agreements to familiarize local hospitals with the properties of hazardous waste handled at the Facility and the types of injuries or illnesses which could result from fires, explosions, or releases to the Facility.

33. At the time of the Inspection, Respondent could not document that it had made any attempt to make arrangements or agreements to familiarize police, fire departments, emergency response teams with the layout of the Facility, properties of hazardous waste handled at the Facility and associated hazards, places where Facility personnel would normally be working, entrances to the Facility, and possible evacuation routes. Respondent could not document attempts to make agreements with State emergency response teams, emergency response contractors, and equipment suppliers

34. At the time of the Inspection, Respondent did not have a completed copy of its New York City Department of Environmental Protection ("NYCDEP") Facility Inventory Form.

35. The NYCDEP, along with the fire department, serves New York City as hazardous material emergency responders. The “Right-To-Know” form for New York City facilities addresses arrangements with emergency response teams, agreements designating the primary emergency authority, and agreements with State emergency response teams.

36. On or about August 31, 2000, the EPA issued to Respondent a Notice of Violation (“NOV”), the second for the Facility in a two-year period, and a Request for Information pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927. The NOV alleged that Respondent had failed to comply with provisions of 6 NYCRR §§ 372 and 373 and with Section 3005 of RCRA.

37. On or about October 17, 2000, Respondent submitted its response to the EPA’s NOV and Request for Information (“Response”). In the Response, Respondent stated that over the past year, the Facility generated 20 gals./month of Perc Lint Waste, 30 gals./month of Perc Sludge, and 60 gals./month of Perc Wastewater.

38. Respondent’s Response indicated an average hazardous waste generation rate of 390 lbs./month of Perc Sludge, 500 lbs./month of Perc Wastewater, and an unknown rate of Perc Lint Waste, for a total of more than 890 lbs./month of F002 hazardous waste.

39. Prior to, and at the time of the Inspection, Respondent was a small quantity generator of hazardous waste within the meaning of 6 NYCRR §§ 370.2(b) and 372.2(a)(8)(iii).

40. On or about June 19, 1998, EPA issued a Notice of Violation to Merit Cleaners, which had been operating the Facility, alleging the following violations:

    a. Failure to post the names and telephone numbers of the emergency coordinators next to the telephone.
    b. Failure to post the location of fire extinguishers and spill control material and, if present, fire alarm, next to the telephone.
    c. Failure to post the telephone number of the fire department next to the telephone.
    d. Failure to ensure that all employees were thoroughly familiar with proper waste handling and emergency procedures.
    e. Failure to mark clearly each container in accumulation areas with the words “Hazardous Waste”

and with other words that identify the contents of the containers.

f. Failure to record clearly on each storage container the date upon which each period of accumulation began.

g. Failure to mark clearly each container placed in storage areas with the words “Hazardous Waste” and with other words that identify the contents of the containers.

h. Failure to inspect, at least weekly, areas where containers are stored.

i. Failure to prepare hazardous waste manifests properly.

j. Failure to retain at the Facility a copy of each hazardous waste manifest for at least three years.

k. Failure to furnish, upon request, signed treatment, storage, and disposal facility manifest copies for all of 1996.

l. Failure to attempt to make arrangements to familiarize police, fire departments, and emergency response teams with the layout of the Facility, properties of hazardous waste handled at the Facility and associated hazards, the locations where Facility personnel would normally be working, entrances to and roads inside the Facility, and possible evacuation routes.

m. Failure to make agreements with State emergency response teams, emergency response contractors, and equipment suppliers.

n. Failure to attempt to make arrangements to familiarize local hospitals with the properties of hazardous wastes handled at the Facility and the types of injuries or illnesses which could result from fires, explosions, or releases at the Facility.

o. Failure to retain at the Facility a copy of all land disposal restriction documentation for at least five years.

41. Respondent uses fluorescent light bulbs for lighting purposes at the Facility.

42. At the time of and prior to the Inspection, Respondent managed spent fluorescent light bulbs by placing them in the dumpster at the Facility for disposal by a solid waste carting company.

43. Fluorescent bulbs, when taken out of service for disposal, constitute a "solid waste" as defined in 6 NYCRR § 371.1(c).

44. Most current and past manufactured fluorescent bulbs, when taken out of service for disposal, are "toxicity characteristic hazardous wastes" as defined in 6 NYCRR § 371.3(e)(1) due to mercury content (EPA Hazardous Waste Code D009).

45. At the time of the Inspection, Respondent had not determined if its waste fluorescent bulbs were a hazardous waste.

46. Respondent failed to appear at the hearing scheduled to commence on May 6, 2002 in New York, New York.

47. Complainant's proposed civil administrative penalty was determined in accordance with the penalty factors listed in Section 3008(a)(3) of RCRA and upon consideration of the EPA's 1990 RCRA Civil Penalty Policy. Complainant considered both statutory penalty factors identified in Section 3008(a)(3), and its proposed penalty is supported by its analysis of those factors.

48. Under the 1990 RCRA Civil Penalty Policy, Complainant determined that the gravity-based penalty for the seven RCRA violations based on the seriousness of the violations as measured by the potential for human and environmental harm resulting from the violations and the extent of deviation from the regulations was $32,500 with $1,750 added to reflect the multi-day component of the penalty for Count 5. No adjustments were made for the factors of good faith, willfulness or negligence, history of noncompliance, ability to pay, environmental projects, or other unique factors, and there was no additional assessment to account for the economic benefit to Respondent from its noncompliance.

DISCUSSION

Applicable Law

Pursuant to Section 3006(b) of RCRA, the Administrator of the EPA may authorize a state to operate a hazardous waste program in lieu of the federal hazardous waste program. The regulations

promulgated by the state hazardous waste program must be equivalent to, consistent with, and no less stringent than the regulations promulgated by the federal hazardous waste program. *See* 42 U.S.C. § 6926.

The State of New York received initial authorization for its hazardous waste program effective May 29, 1986. *See* 51 Fed. Reg. 17737 (May 15, 1986). The EPA granted authorization for changes to the State of New York's hazardous waste program on August 12, 1997 effective October 14, 1997.[5/] *See* 62 Fed. Reg. 43111 (Aug. 12, 1997). The regulations for the State of New York's authorized hazardous waste program in effect from 1998 through 2000 are found in the Official Compilation of Codes, Rules, & Regulations of the State of New York ("NYCRR"), Title 6, Sections 360-76 (6 NYCRR §§ 360-76 (2000)).

Section 3008 of RCRA authorizes the EPA to enforce the regulations of state hazardous waste programs authorized by Section 3006(b) of RCRA. *See also* 40 C.F.R. § 271.3(b)(2). Thus, in the instant matter the EPA brings this enforcement action against Respondent under the authority of Section 3008 of RCRA and the New York State regulations concerning the handling and management of hazardous waste at 6 NYCRR §§ 360-76.

Default at Hearing

In Respondent's Answer and Amended Answer, Respondent contested its liability but did not request a hearing upon the issues raised in the Complaint. Under the Rules of Practice governing this proceeding, "[i]f the respondent does not request a hearing, the Presiding Officer[6/] may hold a hearing if issues appropriate for adjudication are raised in the answer." 40 C.F.R. § 22.15(c). As such, to clarify Respondent's intentions, the Prehearing Order issued by the undersigned on May 21, 2001 stated:

5/ The EPA also granted authorization to the State of New York for changes to its hazardous waste program on November 16, 2001. *See* 66 Fed. Reg. 57679 (Nov. 16, 2001). Because the alleged violations occurred in 2000, the authorized hazardous waste program in effect at the time of the violations was the program authorized effective October 14, 1997.

6/ The term "Presiding Officer" refers to the ALJ designated by the Chief ALJ to serve as the Presiding Officer. 40 C.F.R. § 22.3(a).

> Accordingly, Respondent is hereby directed to clarify its position as to whether a hearing before an Administrative Law Judge is requested. Such clarification statement by Respondent shall be filed on or before **August 2, 2001**. (emphasis in original).

In response, on July 19, 2001 Respondent requested a formal hearing on the issues of this case.[7/]

In the Order Scheduling Hearing dated February 4, 2002, the date for the hearing was set for May 6, 2002 in New York, New York. The Order Scheduling Hearing contained the following advisement:

> IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.(emphasis in original).

A copy of the Order Scheduling Hearing was served on Respondent's counsel on February 4, 2002.

Additionally, the file reflects that Respondent's counsel sent a copy of the Order Scheduling Hearing to Respondent via facsimile on April 8, 2002 and by mail on April 10, 2002. *See* Letter from Attorney John V. Soderberg to Kenneth Huang, April 10, 2002. Complainant also sent a copy of this Order to Respondent via facsimile and Federal Express. *See* Letter from Beverly Kolenberg, EPA, to Hon. Barbara A. Gunning, April 11, 2002 and Letter from Beverly Kolenberg to Kenneth W. Huang, April 10, 2002.

I note the abovementioned communications only to underscore that both Complainant and this Court have gone to great lengths to clarify Respondent's intention to request a hearing and to ensure that Respondent received adequate notice of the hearing date and location. Notwithstanding the multiple notices sent to Respondent concerning the hearing, Respondent failed to appear for the scheduled hearing and failed to notify the undersigned of its non-appearance. Thus, Respondent is found to be in default. If Respondent had timely notified this Court of its intention not to appear at hearing, this Court may have saved government resources (such as the cost of travel to the hearing, court reporter and

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[7/] *See* Letter to the undersigned dated July 19, 2001 from John V. Soderberg, counsel for Respondent then of record. In an Order entered by the undersigned on April 23, 2002, Respondent's counsel's Motion to Withdraw as counsel of record was granted.

transcript fees, travel time, as well as resources expended by Complainant).

Liability on Default

The issues before me are whether a default order should be entered against Respondent and whether the proposed penalty of $34,250 should be assessed against Respondent. As previously discussed, this proceeding arises under the authority of Section 3008 of RCRA. The procedural regulations governing such proceedings are found at the Rules of Practice, 40 C.F.R. Part 22. Section 22.17(a) of the Rules of Practice concerning default states, in pertinent part:

> 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*. 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) (emphasis added).

Section 22.17(c) of the Rules of Practice concerning default orders states, in pertinent part:

> When the Presiding Officer finds that default has occurred, 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. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.17(c).

A party's failure to appear at hearing subjects the defaulting party to a default order under Section 22.17(a) of the Rules of Practice. Although the ALJ is accorded some discretion in making the default determination under Section 22.17 of the Rules of

Practice, such discretion is usually reserved for minor violative conduct or when the record shows "good cause" why a default order should not be issued.[8/]

Here, Respondent has been found to be in default for failing to appear for the scheduled hearing. Respondent has proffered no explanation for its failure to appear at the scheduled hearing. As such, the record does not show good cause why a default order should not be issued.

As cited above, Section 22.17(a) of the Rules of Practice provides that "[d]efault 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). This regulatory provision, couched in mandatory language, requires, upon Respondent's default, that I accept as true all facts alleged in the Complaint. Thus, in the instant proceeding, I must accept as true all facts alleged in the instant Complaint. *Id*.

The facts alleged in the instant Complaint establish, by a preponderance of the evidence, Respondent's seven violations of Section 3005 of RCRA and the New York hazardous waste management regulations codified at 6 NYCRR §§ 372.2(a)(2), 372.2(b)(1), 373-1.2, -2.3(g)(1), -2.9(d)(1)-(2), -2.9(e), as charged in the Complaint. Specifically, the alleged facts, deemed to be admitted, establish that Respondent stored hazardous waste at the Facility without having obtained a RCRA permit or qualifying for interim status; failed to keep hazardous waste drums and containers closed during storage; failed to conduct weekly inspections of hazardous waste storage containers and storage areas at the Facility from on or about July 17, 2000 to on or about August 31, 2000; failed to properly handle and store hazardous waste storage containers; failed to ship hazardous waste off-site with an accompanying

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[8/] The language of Section 22.17(a) of the Rules of Practice concerning the entry of a default order is discretionary in nature, providing that "a party may be found in default . . . upon failure to appear at a conference or hearing." The application of the regulation should be made as a general rule in order to effectuate its intent. Thus, when the facts support a finding that there has been a failure to appear at a hearing without good cause, a default order generally should follow. Discretion may be exercised in instances of minor nonperformance, and lesser sanctions as appropriate, are available to the ALJ for violative conduct that does not reach the level of default.

manifest; failed to make appropriate arrangements with emergency response teams and to familiarize local hospitals; and failed to make a hazardous waste determination as to waste fluorescent bulbs. 42 U.S.C. § 6925; 6 NYCRR §§ 372.2(a)(2), 372.2(b)(1), 373-1.2, -2.3(g)(1), -2.9(d)(1)-(2), -2.9(e).

Penalty on Default

The EPA proposes that Respondent be assessed a civil administrative penalty in the amount of $34,250 for its seven violations of RCRA and the State regulations. Section 22.24(a) of the Rules of Practice places the burdens of presentation and persuasion on Complainant to prove that "the relief sought is appropriate." 40 C.F.R. § 22.24(a). Each matter of controversy is adjudicated under the preponderance of the evidence standard. 40 C.F.R. § 22.24(b). The Rules of Practice also direct that where a party is found liable in default, as is the case here, "[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." 40 C.F.R. § 22.17(c).

As such, Complainant's burden of proof as to the requested relief is less demanding in a default case than in a contested case. *See* 63 Fed. Reg. 9464, 9470 (Feb. 25, 1998)(Proposed Rule). This does not mean, however, that Complainant is released from the requirement to make a *prima facie* case in regard to the appropriateness of the proposed penalty. *See id*. at 9470. In other words, a finding of default as to liability may reduce what the EPA needs to show to support the proposed penalty but such finding does not disturb the EPA's underlying burdens of presentation and persuasion to establish that the relief sought is appropriate.

The appropriateness of the recommended penalty in this proceeding brought under RCRA must be examined in light of the

statutory penalty factors set forth at Section 3008(a)(3) of RCRA.[9/] Section 3008(a)(3) of RCRA, in pertinent part, provides:

> In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

42 U.S.C. § 6928(a)(3).

In addition to consideration of the statutory penalty criteria, the ALJ must also consider any applicable EPA penalty policy. Section 22.27(b) of the Rules of Practice, concerning the ALJ's initial decision provides, in pertinent part:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended 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.

40 C.F.R. 22.27(b).

However, as shown by the Environmental Appeals Board's ("EAB") case *In re Employer's Insurance of Wausau and Group Eight Technology, Inc. ("Wausau")*, TSCA Appeal No. 95-6,6 E.A.D. 735, 761 (EAB, Feb. 11,1997), one cannot apply the penalty policy unquestionably as if the policy were a rule with binding effect, because such policy has not been issued in accordance with the Administrative Procedure Act ("APA") procedures for rulemaking. Furthermore, the EAB has held that the ALJ has "the discretion

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[9/] Section 3008(g) of RCRA authorizes the imposition of a civil penalty in an amount not to exceed $25,000 per day for each violation. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires the EPA to periodically adjust penalties to account for inflation. The EPA has issued a Civil Monetary Penalty Inflation Adjustment Rule which declares that the maximum civil penalty for violations of RCRA that occurred after January 30, 1997, and assessed under Section 3008, is $27,500 per day of noncompliance. *See* 40 C.F.R. Part 19; 61 Fed. Reg. 69360, 69362 (Dec. 31, 1996).

either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB, Sep. 27, 1995). Although the EAB in *Wausau*, *supra*, ultimately upheld the use of the PCB Penalty Policy in assessing a civil administrative penalty in that case, the EAB readily recognized the limitations of the role and application of the various EPA Penalty Policies. In discussing these limitations, the EAB noted that the relevant penalty policy must not be treated as a rule and that in any case where the basic propositions on which a policy is based are genuinely placed at issue, adjudicative officers "must be prepared 'to re-examine [those] basic propositions.'" *Wausau*, *supra*, at 761, *quoting, McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988).

In the instant matter, the proposed penalty was calculated on the basis of the guidelines set forth in the EPA's 1990 RCRA Civil Penalty Policy ("Penalty Policy"). The EPA submitted a "Narrative Explanation to Support Complaint Amount" as Attachment I of its Complaint, which memorializes its analysis of the statutory penalty factors and its calculation of the penalty as prescribed by the Penalty Policy. *See* "Complaint, Compliance Order, and Notice of Opportunity for Hearing." Complainant's Exhibit ("Ex.") 8. At the hearing, Carl F. Plossl provided detailed testimony concerning the calculation of the penalty in accordance with the statutory penalty factors and the governing Penalty Policy. Mr. Plossl was the EPA's lead inspector who inspected Respondent's Facility on August 8, 2002 to determine Respondent's compliance with hazardous waste requirements.

According to the EPA's analysis supporting the proposed penalty and the testimony of Mr. Plossl, the EPA calculated a total gravity-based penalty of $32,500 for the seven RCRA violations based on the seriousness of the violations as measured by the potential for human and environmental harm resulting from the violations and the extent of deviation from the regulatory requirements. *See* Penalty Policy at 12. The factor of potential for harm encompasses the risk of exposure of humans or the environment to hazardous waste and the adverse effect of noncompliance on the RCRA program. *See id*. at 13. An amount of $1,750 was added to the gravity-based penalty to reflect the multi-day component of the penalty for Count 5.

Specifically, using the penalty matrix contained in the Penalty Policy, the EPA determined the amounts of the gravity-based penalties as follows: Count 1, moderate potential for harm and extent of deviation, $5,500; Counts 2 and 4 combined, moderate potential for harm and major extent of deviation, $10,500; Count 3,

moderate potential for harm and extent of deviation, $7,150; and Count 5, moderate potential for harm and extent of deviation, $7,150 with a "multi-day" component of $250 per day for seven days duration ($1,750) for a total of $8,900; Count 6, minor potential for harm and moderate extent of deviation, $1,100; Count 7, minor potential for harm and moderate extent of deviation, $1,100. No adjustments were made for the factors of good faith, willfulness or negligence, history of noncompliance, ability to pay, environmental projects, or other unique factors. The EPA made no additional assessment to account for the economic benefit to Respondent from its noncompliance.

The testimony of Mr. Plossl amply supports the EPA's characterizations of the seriousness of the violations as measured by the potential for human and environmental harm resulting from the violations and the extent of deviation from the regulations. Further, the absence of downward adjustments to the gravity-based penalty is both reasonable and appropriate.[10/] In this regard, I note that evidence of record keeping irregularities presented by Complainant at hearing suggests that Respondent not only did not make a good faith effort to comply with the hazardous waste requirements, but that it possibly in bad faith falsified inspection records. *See* Tr. at 113-17; Complainant's Ex. 7. I note also that there was evidence showing that Respondent repeatedly misrepresented its generator status under 6 NYCRR § 371.1(f)(1) to its waste handler and had prior RCRA violations. *See* Tr. at 39-45, 51-2, 104-110; Complainant's Exs. 6,15. I further note that apparently Respondent was deliberately attempting to evaporate tetrachloroethylene from one of its waste streams, which not only violates hazardous waste container management standards, but also potentially exposes workers and others to a harmful chemical.[11/] *See* Tr. at 91-92. Given the seriousness of

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[10/] Respondent has not raised the issue of inability to pay the proposed penalty. Such issue, to be considered in this proceeding under Section 3008 of RCRA, must be raised and proven as an affirmative defense by Respondent. *See In re Carroll Oil Company*, RCRA Appeal No. 01-02, 2002 EPA App. LEXIS 14 (EAB, July 31, 2002).

[11/] Evidence showing that Respondent kept the doors of the dry cleaning machines' vapor barrier room propped open, allowing perchloroethylene to escape, was also presented at hearing. *See* Tr. at 74, 78-81; Complainant's Exs. 12A, 12B, 13A. Perchloroethylene is a known toxic chemical that can cause severe damage to the liver and kidneys. *See Occupational Health Guideline*

(continued...)

Respondent's violations and the apparent lack of good faith effort to comply with the applicable requirements, I observe that Complainant sought a relatively modest penalty in this enforcement action.[12/]

In conclusion, I find that the EPA has met its burden of establishing its *prima facie* case as to the appropriateness of the recommended penalty. The EPA's penalty calculation narrative attached to the Complaint and the testimony of Mr. Plossl show that in assessing the penalty the EPA considered both penalty factors identified in Section 3008(a)(3) of RCRA; that is, the "seriousness of the violation" and "any good faith efforts to comply with applicable requirements." Further, the proposed penalty is not clearly inconsistent with the record of the proceeding or RCRA. *See* 42 U.S.C. § 3008; 40 C.F.R. §§ 22.17(c), 22.24(a). Accordingly, the proposed civil administrative penalty of $34,250 is assessed against Respondent.

CONCLUSIONS OF LAW

1. Respondent is found to be in default because it failed to appear at the scheduled hearing on May 6, 2002 in New York, New York, and the record does not show good cause why a default order should not be issued. 40 C.F.R. § 22.17(a).

2. The default by Respondent constitutes, for purposes of the above-cited matter only, an admission of all facts alleged in the Complaint and a waiver of its right to contest such factual allegations. 40 C.F.R. § 22.17(a).

[11/] (...continued)
for Tetrachloroethylene, Dept. Health and Human Serv. (NIOSH), Pub. No. 81-123 (1976). I recognize that enforcement of worker safety and air quality standards is beyond the scope of this proceeding. However, such evidence indicates that Respondent was not making a good faith effort to comply with the regulatory requirements for hazardous waste. Furthermore, potential exposure to workers resulting from the violations in this proceeding is germane to the seriousness of the violation, a statutory penalty factor.

[12/] The EPA exercised its discretion in proposing a lower penalty. For example, the EPA waived the multi-day penalty component for Counts 1 and 2. *See* Tr. at 130, 136-37.

3. Respondent violated Section 3005 of RCRA and 6 NYCRR § 373-1.2 for storing hazardous waste without a permit and without having qualified for interim status or having met the handling requirements for exemption from permitting requirements.

4. Respondent violated 6 NYCRR § 373-2.9(d)(1) for failing to keep hazardous waste containers closed during storage.

5. Respondent violated 6 NYCRR § 373-2.9(e) for failing to inspect at least weekly areas where hazardous waste containers are stored.

6. Respondent violated 6 NYCRR § 373-2.9(d)(2) for handling or storing a hazardous waste container in a manner which may rupture the container or cause it to leak.

7. Respondent violated 6 NYCRR § 372.2(b)(1) for failing to ship hazardous waste off-site with an accompanying manifest.

8. Respondent violated 6 NYCRR § 373-2.3(g)(1) for failing to attempt to make arrangements with emergency response teams and local hospitals.

9. Respondent violated 6 NYCRR § 372.2(a)(2) for failing to make a determination as to whether disposed fluorescent bulbs constituted hazardous waste.

10. The proposed civil administrative penalty of $34,250 is appropriate. The proposed penalty is not clearly inconsistent with the record of proceeding or RCRA. 42 U.S.C. § 3008; 40 C.F.R. §§ 22.17(c), 22.24(a).

ORDER

1. Respondent is found to be in default and, accordingly, is found to have violated Section 3005 of RCRA and the New York State hazardous waste management regulations as charged in the Complaint.

2. Respondent, Splendid Enterprises Limited d/b/a Splendid Cleaners a/k/a Splendid Clothing Care Center, is assessed a civil administrative penalty of $34,250.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the service date of the final order by submitting a cashier’s check or certified check in the amount of

$34, 250, payable to the "Treasurer, United States of America," and mailed to:

EPA Region 2
(Regional Hearing Clerk)
P.O. Box 360188M
Pittsburgh, PA 15251

4. A transmittal letter identifying the subject case and EPA docket number (RCRA-02-2001-7101), as well as Respondent's name and address, must accompany the check.

5. If Respondent fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

This Default Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within thirty (30) days after the service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this Decision.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: September 20, 2002
Washington, DC