UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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IN THE MATTER OF	)	
	)	
BLACKINTON COMMON, LLC	)	**DOCKET NO. RCRA-01-2007-0164**
and CG2, INC.,	)	
	)	
RESPONDENTS	)	
	)	

DEFAULT ORDER AND INITIAL DECISION

Issued: April 23, 2009

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

For Complainant: David Peterson
Andrea Simpson
Amelia Katzen
U.S. EPA, Region 1
One Congress Street, Suite 1100
Boston, MA 02114

For Respondents:[1] Robert D. Cox, Jr., Esq.
Bowditch & Dewey, L.L.P.
P.O. Box 15156
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Worcester, MA 01615

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[1] Respondents and/or counsel did not appear at the scheduled hearing.

I. PROCEDURAL HISTORY

This civil administrative penalty proceeding arises under 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 ("Rules of Practice"), 40 C.F.R. part 22.

On September 28, 2007, Complainant United States Environmental Protection Agency ("the EPA"), Region I ("Complainant" or "the Region"), filed a two-count Complaint and Notice of Opportunity for Hearing ("Complaint") against Blackinton Common, LLC and CG2, Inc. ("Respondents") pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). The Complaint alleges that Respondents failed to adequately conduct hazardous waste determinations and comply with land disposal restriction requirements in violation of 40 C.F.R. § 268.7(a) (Count 1) and failed to send hazardous waste to a licensed facility in violation of Massachusetts Regulation 310 C.M.R. § 30.305 (Count 2). Complainant seeks the imposition of a civil administrative penalty in the amount of $227,500 against Respondents.

On October 29, 2007, Respondents filed their Answer to the Administrative Complaint and Request for a Hearing ("Answer").[2] In their Answer, Respondents denied that they violated RCRA in the manner alleged in the Complaint and requested an administrative hearing.

Pursuant to the undersigned's Prehearing Order, entered on March 17, 2008, Complainant submitted its Prehearing Exchange on May 2, 2008, Respondent submitted its Prehearing Exchange on June 2, 2008, and on June 16, 2008 Complainant submitted its Rebuttal Prehearing Exchange. On July 16, 2008, the undersigned scheduled the hearing for this matter to begin on August 25, 2008 and to continue through September 3, 2008 as necessary.

On July 21, 2008, the parties filed a Joint Motion to Extend Hearing Schedule, seeking a forty-five day extension of the hearing date due to witness scheduling problems. In order to facilitate scheduling between the undersigned and the parties, the parties filed a Joint Amended Motion to Extend Hearing Schedule on July 25, 2008. The parties were ordered to file a joint set of stipulated facts, exhibits, and testimony on or before November 3, 2008. For good cause shown, the hearing was postponed until November 17, 2008.

Both parties filed motions for leave to supplement their prehearing exchanges on October 31, 2008. These motions were granted in an order dated November 13, 2008. On November 3, 2008, the parties filed a set of Joint Stipulated Facts ("Joint Stipulations").

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[2] Respondents filed a joint Answer and prehearing exchange and are represented by the same counsel.

Complainant filed a Motion for Issuance of Subpoenas for Attendance of Witnesses on November 3, 2008, and another Motion for Issuance of a Subpoena for Attendance of a Witness ("Motions for Subpoenas") on November 5, 2008. Additionally, Complainant filed a Motion in *Limine* on November 3, 2008, requesting that Respondents be precluded from presenting any evidence at the hearing pertaining to financial inability to pay the proposed penalty. Complainant noted that Respondents, in their Answer and prehearing exchange, did not raise the issue of inability to pay. Respondents opposed Complainant's Motion for Subpoenas and Motion in *Limine* in a motion dated November 12, 2008. In their motion, Respondents argued that while they have not raised an inability to pay claim, the Motion in *Limine* was superfluous and contrary to the provisions of the Rules of Practice. In an Order dated November 13, 2008, this Tribunal denied Complainant's Motions for Subpoenas and granted Complainant's Motion in *Limine.* This Tribunal, however, noted in the Order that Respondents were not precluded from proffering evidence of inability to pay if they were to meet the requirements of Section 22.22(a)(1) of the Rules of Practice, 40 C.F.R. § 22.22(a)(1).

Respondent failed to appear at the scheduled hearing on November 17, 2008, in Boston, Massachusetts. At the hearing, Complainant moved for default as to liability. *See* Transcript ("Tran.") Vol. I pp. 19-21. No direct ruling was made on the Motion for Default at that time, and Complainant was offered the chance to proceed with the hearing as scheduled and present its case. Complainant chose to present witnesses and evidence related to Respondents' liability and the proposed penalty. Tran. Vol. I pp. 21-23.

Following the hearing, Complainant submitted a proposed Findings of Fact and Conclusions of Law, Proposed Order, and Post-Hearing Brief on March 16, 2009. Respondents did not submit a Post-Hearing Brief.

For the reasons discussed below, Complainant's motion for default is granted. Respondents are found to be in default pursuant to Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), and are assessed the proposed penalty of $227,500.

II. FINDINGS OF FACT

1. Respondent Blackinton is a Massachusetts Domestic Limited Liability Company registered with the Commonwealth of Massachusetts to do business at 637 Washington Street, Suite 200, Brookline, Massachusetts. Accordingly, Blackinton is a "person" as that term is defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

2. At all times relevant to the Complaint, Blackinton owned real estate located at 140 and 148 Commonwealth Avenue, North Attleboro, Massachusetts (the "Facility"), the former site of the V.H. Blackinton & Company, Inc., ("VHB") a jewelry manufacturing factory. Blackinton acquired the Facility on August 13, 2004, for the purpose of developing the site for residential use. Blackinton is, therefore, an "owner" and "operator" as those terms are defined at 40 C.F.R. § 260.10 and 310 C.M.R. § 30.010.

3. Respondent CG2 is a corporation organized under the laws of the Commonwealth of Massachusetts with its principal place of business located at 637 Washington Street, Suite 200, Brookline, Massachusetts. CG2 is, therefore, a "person" as that term is defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

4. CG2 is a management company which is registered with the Commonwealth of Massachusetts as a manager for Blackinton Commons, LLC. Gerald D. Cohen is listed with the Commonwealth as the President and Resident Agent for CG2, as well as the Resident Agent for Blackinton. At all times relevant to the Complaint, CG2 managed remediation and redevelopment activities at the Facility. CG2 is, therefore, an "operator" as that term is defined at 40 C.F.R. § 260.10 and 310 C.M.R. § 30.010.

5. From 1852 until January 1982, the Facility was used as a jewelry manufacturing establishment owned and operated by VHB. As documented in VHB's 1974 Clean Water Act Permit ("CWA Permit"), the Facility generated a waste stream that included electroplating solution, alkali baths, acid baths, boiler blowdown, and cooling water. The waste underwent segregation and collection, sedimentation, neutralization, and treatment, followed by a thickening operation employing wastewater treatment lagoons. The wastewater treatment sludge in the lagoons was disposed of on land and the treated wastewater, subject to the CWA Permit, discharged to a tributary of the Ten Mile River. The lagoon wastewater treatment sludge, which was generated from the electroplating operations at the Facility, meets the definition of a F006 listed hazardous waste under 40 C.F.R. § 261.3(a)(2)(ii), 40 C.F.R. § 261.31(a) and 310 C.M.R. § 30.131.

6. Waste from the wastewater treatment system contained contaminants, including arsenic, cadmium, chromium, lead, and silver, and other chemicals used in the electroplating process.

7. On December 2, 1984, VHB executed a *Notice Pursuant to G.L.c. 21C, § 7 and G.L.c. 111, § 150A* ("Registry Notice"), which was filed in the Land Registration Office, Bristol County North Registry District of the Land Court, stating that the Facility contained two closed surface impoundments (the wastewater treatment lagoons) "now or formerly containing treated and neutralized metal hydroxide sludge, which might have constituted hazardous waste as defined in G.L.c. 21C." A December 2001 Phase I site assessment conducted on the 148 Commonwealth Avenue parcel of the Facility by ENSTRAT Strategic Environmental Services documented that the lagoons did not receive any waste after November 18, 1980, and in May 1981, were covered with lime and gravel, graded over and seeded. Massachusetts Department of Environmental Protection ("Mass DEP") records document that the lagoons were covered with six inches of hydrated lime (520 bags), filled with 425 cubic yards of gravel, and the entire area was capped with 100 cubic yards of loam.

8. Prior to Respondents' commencing construction activities at the site in December 2004, several technical reports ("Consultants' Reports") documenting earlier investigations of soil and groundwater contamination at the site, including information about the history of manufacturing operations at the Facility and the operation and closure of the wastewater treatment lagoons were

available to Respondents. The Consultants' Reports were submitted to the Mass DEP as part of the Respondents' February 2005 Remedial Action Plan for the site.

9. Between October and November 2004, Respondents initiated remediation actions at the Facility as part of a redevelopment plan to convert the Facility to residential condominiums. Under Massachusetts General Laws Chapter 21E and regulations promulgated thereunder, Respondents were required to conduct an investigation of the site to determine the nature and extent of the contamination before remediating the property.

10. The first phase of site investigation includes an examination of state files and other historical sources to determine the prior use of the site and review permits, past enforcement actions, and reports of previous spills. State hazardous waste site files maintained by the Mass DEP were available to the public between 2003 and 2005 and document that the Facility was used for jewelry making and included electroplating operations. Respondents did not access the Mass DEP hazardous waste site files relating to the site at any time prior to 2006.

11. From 2003 to 2005, State water permit files maintained by the Mass DEP for VHB included the following documents:

a. Department of the Army, Corps of Engineers, VHB Application for Permit to Discharge or Work in Navigable Waters and Their Tributaries, dated August 25, 1971.
b. VHB "Part B" Supplemental Permit to Discharge Application Filing, dated October 29, 1971.
c. U.S. Army Corps of Engineers Public Notice of VHB Application for a permit for existing discharge to Ten Mile River, dated September 14, 1972.
d. Authorization to Discharge under the National Pollutant Discharge Elimination System issued to VHB (NPDES Permit No. MA0002054), dated November 5, 1974; and
e. Notional Pollutant Discharge Elimination System VHB Application for Permit to Discharge - Short Form C (NPDES Permit No. MA0002054), dated October 10, 1978.

12. The documents listed above indicate that operations at the Facility included electroplating processes, that electroplating was treated onsite in a waste water treatment system, and that sludge from the waste water treatment system were deposited in lagoons on the property.

13. At the time Respondents were developing the property, information about prior operations at the site was available from the original owner of the site, VHB, which currently conducts jewelry manufacturing operations near the original site. Although Respondents' representatives contacted VHB regarding the use of registered trademark "Blackinton" in their name for the residential development, Respondents never asked about electroplating or wastewater treatment operations at the site.

14. Under the Massachusetts program for the remediation of contaminated hazardous waste sites, the owner of a contaminated site is required to hire a Licensed Site Professional, who plans and conducts the investigation and remediation site. When investigating a potentially

contaminated site, the Licensed Site Professional is required to review historical records, including Mass DEP records, and typically talks to former property owners.

15. The remediation actions at the Facility included excavation of the site that contained the sludge lagoons formerly used by VHB to dispose of electroplating waste from the wastewater treatment system at the Facility.

16. In the course of remediating and redeveloping the Facility, the Respondents generated "waste" as defined in 40 C.F.R. § 260.10 and 310 C.M.R. § 30.010. Among the hazardous wastes that Respondents generated was wastewater treatment sludge (F006 listed hazardous waste) excavated from the former VHB wastewater treatment lagoon at the Facility, containing contaminants including arsenic, cadmium, chromium, lead, and silver.

17. At all times relevant to the Complaint, Respondents were "generators" of hazardous waste, as defined under 310 C.M.R. § 30.010.

18. Pursuant to 310 C.M.R. § 30.302(2) and (3), any person who generates a waste must determine if that waste is a listed or characteristic hazardous waste.

19. During July 2005, while conducting the remediation and redevelopment of the Facility, Respondents generated over 1,000 kilograms of hazardous waste per calendar month, qualifying Respondents as large quantity generators of hazardous waste. *See* 310 C.M.R. § 30.351(1)(a) and § 30.340(1).

20. As large quantity generators of hazardous waste, Respondents were subject to the federal and state standards applicable to large quantity generators found at 40 C.F.R. parts 262 and 268 and 310 C.M.R. §§ 30.300 *et seq.*

21. Limited sampling was relied upon by Respondents to determine whether waste at the Facility may have been characteristic hazardous waste. Characteristic hazardous waste is determined under standards identified in 310 C.M.R. §§ 30.120-125. In May 2004, FSL Associates, Inc. took two soil borings to characterize the lagoon contents. The Blackinton Information Request Response states that the "sludge cake layer was found at an average depth of four (4) feet below grade." The Release Abatement Measures ("RAM") Plan documents that on January 10, 2005, FSL collected two additional samples from the area of the former wastewater treatment lagoons. These samples were taken six inches below grade and were only analyzed for metals. Neither of these two samples was tested for cyanide, even though the lagoon was used to collect wastewater from historic electroplating operations in which cyanides were used. None of the six samples from the two sampling events used to characterize the waste for disposal purposes sampled the visible lawyer of sludge cake found four feet below the grade of the capped lagoons.

22. On February 23, 2005, the Mass DEP received the RAM Plan, outlining proposed remediation actions at the Facility. The RAM Plan served as the primary mechanism used by the

Respondents to obtain state regulatory approval for the ongoing remediation and redevelopment of the Facility.

23. On March 25, 2005, Mr. Jablonski of Mass DEP received a letter from Respondents stating that the excavated sludge would be disposed of as non-hazardous waste.

24. On April 8, 2005, Mr. Jablonski sent a reply memorandum to Respondents' Licensed Site Professional stating that his current understanding was that Responsents now planned to ship the metal-contaminated material from the sludge lagoons as hazardous waste.

25. On April 13, 2005, Respondents sent a plan modification to Mr. Jablonksi stating that the metal-contaminated sold and sludge from the former lagoons would be disposed of at a hazardous waste landfill in Model City, New York.

26. On April 13, 2006, following review of the submitted documents, Mass DEP issued a Notice of Noncompliance/Notice of Audit Findings ("NON/NOAF") and Notice Responsibility/Notice of Response Action ("NOR/NORA") to Blackinton. Mass DEP's NON/NOAF invalidated Blackinton's RAO submittal because it failed to meet the standard of care performance standards and other requirements of the Massachusetts Contingency Plan ("MCP"), 310 C.M.R. §§ 40.000 *et seq*.

27. On January 25, 2007, EPA sent an Information Request Letter ("EPA-IR") to Blackinton, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, and Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9604, in order to obtain additional information to evaluate the federal compliance status of the remediation of the Facility.

28. Blackinton's response to the EPA-IR ("Blackinton's IR Response"), dated February 28, 2007, included information which documented: (1) Respondents' knowledge of the past VHB electroplating operations at the Facility, including the Facility's CWA Permit discussed in Paragraph 5, above; (2) Respondents' knowledge of the location and capping of the Facility's former wastewater treatment lagoons by VHB; (3) Respondents' knowledge of previous investigations of soil and groundwater contamination at the Facility; and (4) Respondents' practice of waste characterization and disposal in remediating the Facility, including the capped wastewater treatment lagoons.

29. During the remediation of the Facility, Respondents generated at least 212 tons of waste, which included listed hazardous waste from the capped wastewater treatment lagoons. All of this waste therefore was listed hazardous waste pursuant to RCRA's Mixture Rule, 40 C.F.R. 261.3(a)(2)(iv).

30. Respondents shipped the waste from the sludge lagoons, in seven separate shipments, to the Waste Management Turnkey Landfill in Rochester, NH for disposal on July 6-7, 2005. The Waste Management Turnkey Landfill does not now and did not in July 2005 have interim status

or a valid license or permit to accept hazardous waste. Prior to accepting any waste at the Turnkey landfill, Waste Management employees conduct an assessment of the materials proposed for disposal to ensure that the materials are not hazardous.

31. On June 2, 2005, CG2 signed a Generator's Certification to Waste Management officials at the Turnkey Landfill, certifying that:

a. The waste represented by this waste profile sheet was not a "Hazardous Waste" as defined by US EPA, Canadian, Mexican, and/or state/province regulation, in the location where generated or otherwise managed;
b. The waste profile sheet and all attachments contain a true and accurate description of the waste materials;
c. All relevant information within the possession of the Respondents regarding known or suspected hazards pertaining to the waste was disclosed to Turnkey;
d. The analytical data attached to this certification derived from testing a representative sample in accordance with 40 C.F.R. § 261.20(c) or equivalent rules;
e. All changes that occur in the character of the waste would be identified by the Respondents and disclosed to Turnkey prior to providing the waste to Turnkey.

32. During the month of June 2005, Waste Management employees reviewed the submitted written material and then directly questioned Respondents' Licensed Site Professional about the waste. During the course of Wastes Management's assessment of Respondents' waste in June 2005, Respondents initially indicated to Waste Managment on the waste stream questionnaire that the material was a "listed" hazardous waste.

33. After Respondents were informed that listed hazardous waste could not be accepted at the Turnkey Landfill, Respondents' Licensed Site Professional withdrew the original waste stream questionnaire and submitted a new one, which stated that the material was not a listed waste.

34. Because of concerns regarding Respondents' Licensed Site Professional's responses during the pre-disposal assessment of the waste, Waste Management required Respondents to provide certification that the waste was not a listed hazardous waste. Respondents therefore submitted a letter signed by Robert Granger, Manager, Blackinton Commons LLC, to Waste Management on June 28, 2005, certifying that no information was available for the past processes that created the sludge cake residue from the former impoundment areas, and that, in his opinion, the materials were not listed wastes. Based on this certification, Waste Management accepted the waste for disposal at Turnkey Landfill.

35. Pursuant to 310 C.M.R. § 30.302 and 40 C.F.R. § 268.7(a), generators must adequately conduct hazardous waste determinations to properly characterize contaminated material as listed or characteristic hazardous waste or as non-hazardous waste, and determine whether the waste must be treated prior to being land disposed.

36. Respondents failed to adequately determine whether the Facility's former wastewater treatment lagoons, which Respondents excavated and disposed of as non-hazardous waste,

contained listed hazardous waste. The following information was available to Respondents to enable them to make a proper waste determination:

a. A review of historical records of VHB's operations, including a federal permit issued to VHB under the CWA, indicating that electroplating and other manufacturing waste was thickened and settled out in the wastewater treatment lagoons, prior to land disposal. This waste meets the definition of a F006 listed hazardous waste under 310 C.M.R. § 30.131;

b. Information obtained by EPA from Mass DEP files states that on June 10, 1970, Mass DEP conducted an inspection at VHB. An inspection memorandum, dated June 10, 1970, states the "the sludge and accompanying liquid from the treatment tanks are pumped to the sludge lagoons. All the tanks are dumped to the lagoons once every two months. The acid tanks and alkali floor spill collection tanks are also dumped, after neutralization to the subsurface lagoons;"

c. The December 2, 1984, VHB *Notice Pursuant to G.L.c. 21C, § 7 and G.L.c. 111, § 150A* provides regulatory notice that the Facility's former wastewater treatment lagoons "now or formerly contain[ed] treated and neutralized metal hydroxide sludge, which might have constituted hazardous waste as defined in G.L.c. 21C."

37. Respondents failed to adequately sample the visible layer of wastewater treatment sludge capped four feet below the surface to determine whether it exceeded characteristic hazardous waste standards under 310 C.M.R. §§ 30.120-125 prior to excavating and disposal.

38. VHB and Mass DEP's records indicate that wastes discharged into the lagoon met the current definition of F006 hazardous waste. Pursuant to 310 C.M.R. § 30.100, all wastes meeting the listing description are hazardous. Disposal prior to the enactment of RCRA does not affect the regulatory status of the waste.

39. Furthermore, because of the RCRA Mixture Rule, 40 C.F.R. 261.3(a)(2)(iv), the entirety of the approximately 212 tons of waste from the remediation of the Facility, which included intermixed F006 waste from the capped wastewater treatment lagoons, is subject to the Land Disposal Restriction ("LDR") treatment standards set forth under 40 C.F.R. § 268.40.

40. Because Respondents did not properly characterize the waste as hazardous, they did not determine whether the waste was required to be treated prior to being land disposed, as required under 40 C.F.R. § 268.7(a).

41. Accordingly, Respondents violated 310 C.M.R. § 30.302 and 40 C.F.R. § 268.7(a) by not identifying the wastewater treatment lagoon waste as F006 listed hazardous waste, by inadequately sampling the waste to determine whether it exceeded characteristic hazardous waste standards, and by failing to determine whether the hazardous waste was subject to LDR treatment standards prior to disposal.

42. Pursuant to 310 C.M.R. § 30.305, a generator sending hazardous waste off the site of generation shall send such waste only to a facility having a valid EPA Identification Number for

the treatment, storage or disposal of those wastes. If the facility is in a state other than Massachusetts, the facility shall have at that time: (1) interim status pursuant to 40 C.F.R. Part 270; or (2) a valid permit issued by EPA pursuant to 40 C.F.R. Part 270; or (3) a valid permit issued by a state authorized pursuant to 40 C.F.R. part 271.

43. Records submitted in the Blackinton IR Response indicate that approximately 212 tons of remediation waste was shipped off site by Respondents, in six separate shipments, as non-regulated contaminated soils to the Turnkey Landfill in New Hampshire. As discussed in Paragraph 25, above, the waste should have been managed and disposed of as F006 listed hazardous waste. The Turnkey Landfill does not have interim status or a valid license or permit to accept hazardous waste.

44. Accordingly, Respondents violated 310 C.M.R. § 30.305 by failing to send hazardous waste to a facility approved under the standards of 310 C.M.R. § 30.305 to accept hazardous waste.

45. Respondents failed to appear at the hearing scheduled to commence on November 17, 2008, in Boston, Massachusetts.

46. 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 2003 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.

47. Under the 2003 Civil Penalty Policy, Complainant determined that the gravity-based penalty for the two RCRA violations based on the seriousness of the violations as measured by the potential for human and environmental harm and harm to the regulatory program resulting from violations and the extent of deviation from the regulations was $32,500 for the first count and $195,000 for the second count, for a total of $227,500. No adjustments were made for the factors of good faith, willfulness or negligence, history of noncompliance, ability to pay, or other unique factors, and there was no additional assessment to account for the economic benefit to Respondents for their noncompliance.

III. CONCLUSIONS OF LAW

1. Respondents are in default for failing to appear at the scheduled hearing on November 17, 2008 in Boston, Massachusetts, and the record does not show good cause why a default order should not be issued.

2. The default of Respondents constitutes, for purposes of the above-cited matter only, an admission of all facts alleged in the Complaint and a waiver of their right to contest such factual allegations.

3. Respondents violated 310 C.M.R. § 30.302 and 40 C.F.R. § 268.7(a) by not identifying the excavated wastewater treatment lagoon waste as F006 listed hazardous waste, and by consequently failing to determine whether the hazardous waste was subject to LDR treatment standards prior to disposal.

4. Respondents violated 310 C.M.R. § 30.305 by failing to send hazardous waste to a facility approved under the standards of 310 C.M.R. § 30.305 to accept hazardous waste.

5. The proposed civil administrative penalty of $227,500 is appropriate. The proposed penalty is not clearly inconsistent with the record of proceeding or RCRA.

IV. 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 Commonwealth of Massachusetts received final authorization for its hazardous waste program effective February 7, 1985. *See* 50 Fed. Reg. 3344 (January 24, 1985). The regulations for Massachusetts' authorized hazardous waste program are codified at 310 C.M.R. §§ 30.000 *et seq.*

Section 3008 of RCRA authorizes the EPA to enforce the regulations of state hazardous waste programs authorized by Section 3006(b) of RCRA by issuing orders requiring compliance immediately or within a specified time for violations of any requirement of Subtitle C of RCRA, Sections 3001-3023 of RCRA, 42 U.S.C. §§ 6921-6939e. Section 3006 of RCRA, 42 U.S.C. § 6926, as amended, provides, *inter alia*, that authorized state hazardous waste programs are carried out under Subtitle C of RCRA. Accordingly, a violation of any requirement of law under an authorized state hazardous waste program is a violation of a requirement of Subtitle C of RCRA. Thus, in the matter at hand, the EPA brings this enforcement action against Respondents under the authority of Section 3008 of RCRA and the Massachusetts regulations concerning the handling and management of hazardous waste at 310 C.M.R. §§ 30.000 *et seq.*

Default at Hearing

The issues before me are whether a default order should be entered against Respondents and whether the proposed penalty of $227,500 should be assessed against Respondents. As previously discussed, this proceeding arises under the authority of Section 3008 of RCRA. Section 22.17(a) of the Rules of Practice governs when a party may be found to be in default. 40 C.F.R. § 22.17(a). The Rule provides that a default judgment may be entered against a party for

"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." *Id.* Furthermore, 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).

Upon a finding of default, "[t]he relief proposed in the complaint or 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).

Failure to Appear

On Friday, November 14, 2008, Respondents' counsel emailed[3] the parties and this Tribunal stating that the Respondents, "learned late yesterday that they no longer have a source of funding to defend this matter. Consequently, Respondents will not be able to go forward with the hearing scheduled for next week, and respectfully request a 60-day continuance in order to allow the Respondents to (1) seek a source for funding for their defense and/or (2) raise and present the defense of inability to pay."[4] Following receipt of the email, this Tribunal informed both parties during a telephone conference that Respondents' request for a continuance was denied and that the hearing would be convened as scheduled. Respondents stated that they would not appear at the hearing. Complainant stated that if Respondents failed to appear, Complainant would seek a default order.

On Sunday, November 16, 2008, I traveled from Washington, D.C. to Boston, Massachusetts for the hearing, which was scheduled to commence on Monday, November 17, 2008 at 9:30 am. Also on Sunday, Respondents' counsel emailed this Tribunal as well as Complainant and stated, "[b]ecause Respondents have no funds to defend this matter, they will not appear." As this second email was not sent until Sunday, I first saw the email after the hearing had commenced on Monday, November 17, 2008, when a copy was provided to me by the EPA.

The second email further explains that "[t]he costs of defense of the EPA's claims against the Respondents in this matter had, up until late Thursday, November 13, 2008, been paid by Respondents' insurance carrier. In advance of the hearing the Respondents sought assurances from their carrier that it would cover costs associated with the hearing itself." Respondents state

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[3] Both parties were warned in the March 17, 2008 Prehearing Order that email correspondence with the ALJ is not authorized. I reiterated this during the November 6, 2008 teleconference with both parties.

[4] It should be noted that under RCRA, the ability of the Respondent to pay a proposed penalty is not a factor that the EPA must consider in assessing a penalty. RCRA Section 3008(a)(3), 42 U.S.C. § 6928(a)(3). However, it is a mitigating factor set forth in the 2003 RCRA Civil Penalty Policy. Thus, the burden to demonstrate inability to pay rests with the Respondent.

that their insurance carrier did not notify them until late Thursday, November 13, 2008, and "confirmed in writing on November 14, 2008, that it would not pay costs for the hearing or any further costs or losses associated with EPA's claim." Respondents' counsel notes that this information:

> came as a surprise and disappointment to the Respondents; as noted previously, and shown by the Respondents' prehearing submissions, the Respondents were preparing to defend the EPA's liability claim up to the time of notice from their carrier, and through the hearing process the Respondents expected to demonstrate that EPA's liability claims are misplaced, but now have no source of funds to advance their meritorious defenses. The Respondents inability to pay obviously did not exi[s]t until November 13, 2008 when their carrier informed the Respondents that it would not pay, at which time the Respondents properly notified the EPA and ALJ of the same.

Respondents state that they "understand and expect the EPA will move for a default order in accordance with Rule 22.17." Respondents did not include any supporting documents with the email and did not file any additional motions.

At the hearing, Complainant made an oral motion for default, arguing that a continuance would be highly prejudicial to EPA's case. Complainant argued that it had spent significant resources in preparing for the hearing and arranging for witnesses. Complainant noted that several of its witnesses were not EPA employees and that it would have a difficult time rescheduling at least one its witnesses if the hearing were continued for 60 days. Complainant pointed out that all its witnesses were present and able to testify at the scheduled hearing. Tran. Vol. I, pp. 18-24. Complainant also submitted a written motion for default. Tran. Vol. I, pp. 23-24; C's Ex. 17.

I did not make a direct ruling on Complainant's Motion for Default at the hearing but held it in abeyance and allowed the Complainant to present its case in chief in the absence of Respondents. Now, I find that default has occurred because Respondents chose not to appear at the scheduled November 17, 2008 hearing and chose not to further defend themselves.

Good Cause

To negate a Default Order, Respondents must show good cause for not appearing at the scheduled November 17, 2008 hearing. 40 C.F.R. § 22.17(c). In the second email, Respondents asserted that they could not cover the costs associated with the hearing. I find that Respondents' claim does not constitute good cause as to preclude the entry of an Order for Default.

When default occurs, the Presiding Officer:

> 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.

40 C.F.R. § 22.17(c). The Presiding Officer's "good cause" determination, predicate to finding a party in default, takes the totality of the circumstances into consideration. *In re Pyramid Chemical Company*, 11 E.A.D. 657, 661 (EAB 2004); *see also In re Thermal Reduction Co.,* 4 E.A.D. 128, 131 (EAB 1992); *In re B & L Plating*, 11 E.A.D. 183, 191-192 (EAB 2003).

First, it should be noted that Respondents' request for a 60-day continuance was not the first request for an extension in this matter. Originally, this Tribunal scheduled the hearing for this matter to begin on August 25, 2008. However, On July 21, 2008, the parties filed a Joint Motion to Extend Hearing Schedule, seeking a forty-five day extension of the hearing date due to witness scheduling problems. The extension was granted and the hearing was rescheduled for November 17, 2008.

Here, Respondents' explanation for their failure to appear at the scheduled hearing is that their insurance carrier informed them that it would not pay the costs for the hearing or any further costs or losses associated with EPA's claim. Respondents did not file any documents in support of this claim. The availability of insurance to pay is not something that the EPA considers when evaluating an inability to pay claim. Instead, the EPA looks at all of Respondents' resources. Assuming that Respondents were truly unable to pay for legal services at the hearing, Respondents could appear *pro se* to present its defense to the allegations.[5] Respondents also failed to indicate if they anticipate future funding that would justify an extension of the hearing.
Regardless, a claim of inability to pay the proposed penalty or to pay for counsel does not constitute good cause for failure to appear at the scheduled hearing.

Furthermore, Respondents have not responded to Complainant's Motion for Default, submitted a Post-Hearing Brief, or otherwise presented argument to persuade me that good cause exists to negate a default order. Respondents have been found to be in default for failing to appear for the scheduled hearing and the record does not show good cause why a default order should not be issued.

Liability on Default

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). Thus, because Respondents have defaulted in the instant proceeding, the

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[5]Respondents were notified in the November 13, 2008 Order on Complainant's Motion in *Limine* that they were not precluded from proffering evidence of inability to pay if they were to meet the requirements of Section 22.22(a)(1) of the Rules of Practice, 40 C.F.R. § 22.22(a)(1).

factual allegations in the Complaint are accepted as true.

The facts alleged in the instant Complaint, deemed as admitted, establish, by a preponderance of the evidence, Respondents' liability for the seven cited violations of Sections 3002 and 3004 of RCRA, 42 U.S.C. of RCRA, 42 U.S.C. § 6922 and § 6924, the regulations promulgated thereunder at 40 C.F.R. § 268.7(a), and the Massachusetts hazardous waste management regulations codified at 310 C.M.R. § 30.302 and 310 C.M.R. § 30.305. Specifically, the alleged facts, deemed to be admitted, establish that Respondents failed to adequately conduct hazardous waste determinations and failed to comply with land disposal restriction requirements. In addition, Respondents failed to send hazardous waste to a licensed facility. Instead, Respondent shipped 212 tons of F006 listed hazardous waste in six shipments[6] to the Turnkey Landfill, a non-hazardous waste landfill. Each shipment was an independent act, and thus a separate violation of 310 C.M.R. § 30.305. Pursuant to Respondents' default, the facts alleged in the Complaint are deemed to be admitted and Respondents have waived the right to contest the factual allegations. 40 C.F.R. § 22.17(a).

Further, the evidence and testimony presented by the EPA at the hearing establishes by a preponderance of the evidence the liability of Respondents as charged in the Complaint.

Penalty on Default

The EPA proposes that Respondents be assessed a civil administrative penalty in the amount of $227,500 for its seven violations of RCRA and its implementing regulations, and Massachusetts 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). Furthermore, the ALJ shall not assess a penalty greater than that proposed by the EPA in the Complaint, the prehearing information exchange, or the motion for default, whichever is less. 40 C.F.R. § 22.7(b).

Accordingly, Complainant's burden of proof as to the proposed penalty is less demanding in a default case than in a contested case. *In the Matter of B&L Plating, Inc.,* CAA-5-2000-012, 2002 EPA ALJ LEXIS 22 (EPA ALJ April 5, 2002). Nevertheless, in a default case, Complainant is still required to make a *prime facie* case in regard to the appropriateness of the proposed penalty and to carry forth the burdens of presentation and persuasion.

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[6]Complainant eventually identified additional records and proffered evidence which reflected that Respondents sent a total of seven shipments and 243 tons of waste to Turnkey Landfill. However, I do not need to reach a decision on the alleged additional shipment, and this decision is limited to allegations raised in the Complaint.

The appropriateness of the proposed penalty in this proceeding brought under the authority of RCRA must be examined in light of the statutory penalty factors set forth at Section 3008(a)(3) of RCRA.[7] Section 3008(a)(3) of RCRA, in pertinent part, provides, "[i]n 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 contained in RCRA, the ALJ must also consider the guidance of any applicable EPA penalty policy when assessing a civil penalty. Section 22.27(b) of the rules of Practice provides, in pertinent part:

> If the Presiding Officer determines that a violation has occurred and the complainant 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. § 22.7(b).

In the instant matter, the proposed penalty was calculated on the basis of the guidelines set forth in the EPA's 2003 RCRA Civil Penalty Policy ("Penalty Policy"). The EPA submitted "Attachment 1" to the Complaint, which memorializes its analysis of the statutory penalty factors and its calculation of the penalty as prescribed by the Penalty Policy. At the hearing, Mr. Andrew Meyer provided detailed testimony regarding the calculation of the penalty in accordance with the statutory penalty factors and the governing Penalty Policy. Mr. Meyer conducted inspections of Respondents' Facility and calculated the proposed penalty. Tran. Vol. I, pp. 164-220.

For Count I, according to the Complainant's analysis supporting the proposed penalty and the testimony of Mr. Meyer, the EPA calculated a total gravity-based penalty of $32,500 for Respondent's violation of 310 C.M.R. § 30.302 and 40 C.F.R. § 268.7(a) by failing to adequately conduct hazardous waste determinations and comply with land disposal restriction requirements. The penalty calculation is based on the seriousness of the violations as measured by the potential for human and environmental harm resulting from the violation and the extent of deviation from the regulatory requirements. The factor of potential for harm includes both the risk of exposure of humans or the environment to hazardous waste and the adverse effect of noncompliance on

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[7] Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), as amended, provides for the assessment of a civil penalty not to exceed $25,000 per day of noncompliance for each violation of the requirements of Subtitle C of RCRA by issuing a civil penalty for any past or current violation of RCRA and requiring immediate compliance. In accordance with the Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69360 (Dec. 31, 1996), the maximum civil penalty for violations of Subtitle C of RCRA occurring after January 30, 1997 is $27,500. In accordance with the Civil Monetary Penalty Inflation Adjustment Rule, 69 Red. Reg. 7121 (Reb. 13, 2004), the maximum civil penalty for violations of Subtitle C of RCRA occurring after March 15, 2004, is $32,500 per day of each violation.

the RCRA program. Specifically, using the penalty matrix contained in the Penalty Policy, the EPA determined that for this violation the potential for harm and the extent of deviation from the regulatory requirements are both classified as major. Complaint, Attachment A, p. 2.; Tran. Vol. I, pp. 203-213.

Mr. Meyer also testified that he calculated the economic benefit that Respondents received for avoiding the cost of proper sampling and analysis of the sludge for hazardous waste characteristics to be $3,598. However, because the gravity-based component of the violation was already at the statutory maximum, no upward adjustment of the penalty was made for the economic benefit. Mr. Meyer also considered Respondents' good faith efforts to comply/lack of good faith, degree of wilfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors, as listed in the Penalty Policy but made no adjustments. Complaint, Attachment A, p. 3; Tran. Vol. I, p. 212.

For Count II, the EPA calculated a gravity-based penalty of $32,500 for each of Respondents' six separate shipments of hazardous waste from the site of generation to a waste management facility that was not licensed to accept hazardous waste. Each shipment was a separate violation of 310 C.M.R. § 30.305 with a total gravity-based penalty amount of $195,000. Complaint, Attachment 1, p. 4. Mr. Meyer testified that using the penalty matrix contained in the Penalty Policy, the EPA determined that for this violation the potential for harm and the extent of deviation from the regulatory requirements are both classified as major. Complaint, Attachment A, p. 3; Tran. Vol. I, pp. 214-220.

Furthermore, Mr. Meyer testified that the economic benefit of disposing of the waste at the Turnkey Landfill as opposed to the more expensive hazardous waste landfill in Model City was originally calculated to be $22,354, based on a difference of $110 per ton in shipping costs. Complaint, Attachment 1, p. 4. Complainant also introduced evidence through its Expert Witness Mary K. Medeiros that the economic benefit of Respondents' failure to send its hazardous waste to a licensed hazardous waste landfill is $23,877. Tran. Vol. II, pp. 62-63. Again, because the gravity-based component of the violation was already at the statutory maximum, no upward adjustment in the penalty was made for economic benefit. Complainant also considered the additional adjustment factors set forth in the Penalty Policy when calculating the penalty but made no adjustments. Tran. Vol. I, pp. 218-219.

For both counts, Mr. Meyer's testimony 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. Furthermore, the lack of downward adjustments to the gravity-based penalty is both reasonable and appropriate in this case. It should be noted that there is evidence in the record regarding Respondents' negligence or willfulness in both failing to make a proper hazardous waste determination and in specifically certifying the waste as non-hazardous and shipping it to the Turnkey Landfill. *See* Tran. Vol. I, pp. 212-213; Nov. 18 Tr. pp. 15-38. Mr. Meyer testified persuasively that Respondents had acted with enough wilfulness or negligence to justify a 25% upward adjustment. However, such an adjustment was not factored into the penalty because the gravity-

based component of the violation was already at the statutory maximum. Tran. Vol. I, pp. 212-213.

In conclusion, I find that the Complainant has met its burden of establishing its *prima facie* case as to the appropriateness of the proposed penalty. The EPA's penalty calculation narrative attached to the Complaint and the testimony of Mr. Meyer show that in assessing the penalty the EPA considered both penalty factors identified in Section 3008(a)(3) of RCRA and the additional adjustment factors set forth in the Penalty Policy. 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 $227,500 is assessed against Respondents.

ORDER

1. Respondents are found to be in default because they failed to appear at the scheduled hearing on November 17, 2008 in Boston, Massachusetts, and the record does not show good cause why a default order should not be issued. 40 C.F.R. § 22.17(a).

2. Respondents Blackinton Common and CG2, Inc., are assessed a civil administrative penalty in the amount of $227,500.

3. Payment of the full amount of this civil administrative penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below.[8] Payment shall be made by submitting a certified or cashier's check in the

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[8]Alternatively, Respondents may make payment of the penalty as follows:

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street

amount of $227,500, payable to “Treasurer, United States of America,” and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077

New York NY 10045
Field Tag 4200 of the Fedwire message should read “ D 68010727 Environmental Protection Agency ”

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact – Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ON LINE PAYMENT:

This payment option can be accessed from the information below:
WWW.PAY.GOV
Enter sfo 1.1 in the search field.
Open form and complete required fields.

St. Louis, MO 63197-9000

4. A transmittal letter identifying the subject case title and EPA docket number (RCRA-01-2007-0164), as well as Respondents' name and address, must accompany the check.

5. If Respondents fail to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. §§ 13.11, 901.9.

Appeal Rights

This 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 of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

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Barbara A. Gunning
Administrative Law Judge

Dated: April 23, 2009
Washington, D.C.