UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**
	)
MUNICIPALITY OF CATAÑO	**) Dkt. No. RCRA-02-2006-7116**
Department of Transportation	**)**
and Public Works,	**)**
	)
Respondent.	**)**

DEFAULT ORDER AND INITIAL DECISION

Background

This proceeding was commenced on September 28, 2006 with the filing of an Administrative Complaint by the Complainant, the United States Environmental Protection Agency, Region 2 ("EPA"), against Respondent, Municipality of Cataño. The Complaint charges the Respondent in three counts with violations of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*. ("RCRA"), by failing to respond to an EPA Information Request Letter issued pursuant to Section 3007(a) of RCRA (42 U.S.C. § 6927) (Count 1); failing to label containers with the words "Used Oil," as required by RCRA implementing regulation 40 C.F.R. § 279.22(c)(1) (Count 2); and failing to stop, contain, clean up and manage properly used oil releases as required by RCRA implementing regulation 40 C.F.R. § 279.22(d). The Complaint proposes a total penalty of $39,462 and requests a Compliance Order.

On or about October 30, 2007, Respondent filed an Answer to the Complaint and a separate Motion Requesting Hearing.[1] In its Answer, Respondent admitted the truth of essentially all of the factual allegations made in the Complaint, including that it was a "person" as defined by RCRA Section 1004(15) (42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10; that it was the "owner and/or operator" of a "facility," specifically its Municipality's Department of Transportation and Public Works ("Facility"), as those terms are defined by 40 C.F.R. § 260.10; that it is a "used oil generator" as defined by 40 C.F.R. § 279.20(a); that EPA conducted a RCRA compliance inspection of the Facility on December 7, 2005 and found 25 improperly labeled used oil containers and/or tanks; that on or about February 14, 2006, pursuant to RCRA Sections 3007 and 3008 (42 U.S.C. §§ 6927 and 6828), EPA issued to it a Notice of Violation

[1] The Answer to the Complaint and Motion Requesting Hearing filed on Respondent's behalf were prepared and signed by Hernan G. Chico Fuertes, Office of Legal Service for the Municipality of Cataño.

("NOV") and Information Request Letter ("IRL"); and that it failed to timely and fully respond to the NOV/IRL.[2] *See*, Answer ¶¶ 1-19. Respondent further admitted in essence the violations alleged in Counts 1 through 3. In response to Count 1 Respondent noted that it was in the process of preparing its final response to the IRL but due to "technicalities" it took more time to prepare, and that it completed its Final Report on October 11, 2006. In response to Count 2 Respondent asserted that it took "affirmative action" and properly corrected the violations by February 2006. In response to Count 3 Respondent asserted that it was in the process of taking steps to correct the violations, in that on December 2, 2005, just days prior to the EPA inspection at issue in the Complaint, it entered into a contract with a third party in that regard. Answer ¶¶ 20-33. Respondent's Answer further alleged that "as of today the Municipality is in full compliance," and that the proposed penalty "has not taken into consideration all the steps and corrective actions taken whereby by February 2006 all the alleged violation [sic] or most of them has [sic] been corrected." Answer ¶ 33 and p. 3.

Respondent attached to its Answer a number of documents, the majority of which are written in Spanish, including what appears to be correspondence from Respondent to EPA dated April 11, 2006, April 24, 2006, and October 11, 2006; facsimile cover sheets dated April 11, 2006, April 27, 2006, and May 2, 2006; a contract between Respondent and a third party for disposition of gasoline with sludge dated December 2, 2005, with proof of insurance and corporate status attached; receipts for goods received by a recycling plant on December 13, 2005 and January 2006, transportation manifests, and laboratory chain of custody records for used oil and mineral oil dated December 21, 2005 and January 12, 2006; disposal restriction notification form for hazardous waste dated December 13, 2005; uniform hazardous waste manifests for gasoline and sludge dated December 13, 2005; and a laboratory report on a used oil sample dated January 12, 2006. *See*, documents attached to Answer.

Thereafter, the parties were offered, and accepted, an opportunity to participate in this Tribunal's Alternative Dispute Resolution (ADR) process. The parties participated in ADR from November 9, 2006 until January 11, 2007, when the Neutral Judge Carl C. Charneski reported that "[t]here has not been enough progress made in this case toward settlement that [sic] would warrant an extension of the ADR process." Thereafter, the undersigned was designated to preside over this matter.

On January 16, 2007, a Prehearing Order was issued requiring the Complainant to file its Initial Prehearing Exchange in this matter on or before February 16, 2007; Respondent to file its Initial Prehearing Exchange on or before March 2, 2007; and permitting Complainant to file a rebuttal prehearing exchange on or before March 16, 2007. The Prehearing Order further stated:

Each party is hereby reminded that failure to comply with the prehearing

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[2] The only factual allegation Respondent did not admit in its Answer was that on "April 27, 2006" it submitted a partial response to the NOV, alleging instead it submitted such response on "April *11*, 2006." Compl. ¶18; Ans.¶ 18 .

> exchange requirements set forth herein, including Respondent's statement of election only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party. See Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17.

In accordance with the Prehearing Order, on February 13, 2007, Complainant filed its Initial Prehearing Exchange (PHE), identifying three witnesses and four exhibits as well as providing other information responsive to the Prehearing Order.[3]

On March 15, 2007, Complainant filed a Motion for Entry of Default, seeking imposition of the full proposed penalty and compliance order, citing as a factual basis therefor that Respondent had not responded in any way to this Tribunal's Prehearing Order.

To date, Respondent has not filed any response to the Prehearing Order or the Motion for Default.[4]

Discussion

As noted in Complainant's Motion, Section 22.17 of the Consolidated Rules of Practice ("Rules") provides that:

> (a) Default. A party may be found to be in default: . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer . . . . 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. . . .

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[3] Complainant actually attached to its Prehearing Exchange the four exhibits listed therein as those it intended to introduce into evidence at hearing (nos. 1 through 4), but attached thereto three additional exhibits (nos. 5 through 7) in response to inquiries made by this Tribunal in the Prehearing Order. Exhibit 5 appears to be a facsimile cover sheet sent by Respondent to EPA on April 27, 2006 with an accompanying letter dated April 24, 2006 and attachments thereto. This exhibit is written primarily in Spanish and is unaccompanied by an English translation. Complainant's Exhibits 6 and 6(a) are copies of the Civil Monetary Penalty Inflation Rule, published respectively at 69 Fed. Reg. 7121 (Feb. 13, 2004) (Ex. 6) and 61 Fed. Reg 69364 (Dec. 31, 1996) (Ex. 6(a)), which are in English.

[4] Complainant alleges in its Default Motion that it contacted Respondent's counsel to inform him of the filing of the Motion and that said counsel advised Complainant that he would be filing Respondent's Prehearing Exchange "today," presumably meaning March 15, 2007, the date the Motion was filed. *See,* Motion for Default, ¶ 31. However, the Regional Hearing Clerk advised this Tribunal that as of April 16, 2007, Respondent had not filed a Prehearing Exchange nor a response to the Motion for Default.

> (b) Motion for default. A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.
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> (c) Default order. 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 the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. . . .
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> (d) Payment of penalty; effective date of compliance or corrective action orders . . . . Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). . . .

40 C.F.R. § 22.17.

Further, Section 22.16(b) of the Rules provides in pertinent part that:

> A party's response to any written motion must be filed within 15 days after service of such motion. . . . Any party who fails to respond within the designated period waives any objection to the granting of the motion.

40 C.F.R. § 22.16(b). Section 22.7(c) of the Rules extends by five days the time allowed by the Rules for filing of a response to a document served by first class mail or commercial delivery service. 40 C.F.R. § 22.7(c).[5]

This Tribunal's Prehearing Order issued on January 16, 2007 required Respondent to respond to it on or before March 2, 2007 or suffer default. Rules 22.16(b) and 22.7(c), required Respondent to respond to the Motion for Default filed on March 15, 2007, on or before April 4, 2007 or be considered to have waived any objection to the granting of the Motion. To date, Respondent has not responded to either the Prehearing Order or the Motion for Default. Thus,

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[5] The additional five days provided by 40 C.F.R. § 22.7(c) applies to response times set forth in the Rules ("the time allowed by these Consolidated Rules of Practice"), not to due dates set by the Presiding Officer.

the Respondent is hereby found to have waived any objection to the granting of the Motion and to be in default for failing to respond to this Tribunal's Prehearing Order of January 16, 2007. In accordance with Rule 22.17(a), such default constitutes grounds for assessment of the monetary penalty and compliance order proposed in the Complaint unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

The following Findings of Fact and Conclusions of Law are based upon the Complaint, Respondent's Answer thereto, Complainant's Prehearing Exchange, and other documents of record in the case.[6]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Complainant is the United States Environmental Protection Agency (EPA), Region 2, specifically the Director of the Carribean Environmental Protection Division, who has been duly delegated the authority to institute the action. Comp, p. 2; Ans. § 1.

2. The Respondent is the Municipality of Cataño, a municipal governmental authority founded in 1927 and located in Puerto Rico, governed under the "Ley de Municipios Autónomos," Public Law No. 81, August 30, 1991, as amended. Comp. ¶ 1; Ans. ¶ 1.

3. At all times relevant hereto, Respondent was a "person" as defined by RCRA Section 1004(15) (42 U.S.C. § 6903(15)) and 40 C.F.R. § 260.10. Comp. ¶ 2; Ans. ¶ 2.

4. At all times relevant hereto, Respondent was the "owner and/or operator" of a "facility," specifically its Department of Transportation and Public Works located at Road #869, Industrial Park at Las Palmas Ward in Cataño, Puerto Rico ("the Facility"), as those terms are defined by 40 C.F.R. § 260.10. Comp. ¶ 3; Ans. ¶ 3.

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[6] In light of the fact that Respondent submitted various documents written in Spanish in connection with its Answer, the Prehearing Order stated that "the parties are hereby advised that in order for this Tribunal to assure that a complete and proper evidentiary record is created in this case for the purposes of decision and appeal, it is necessary that, to the fullest extent possible, all Spanish language material accepted into evidence be accompanied by a written English translation by a government certified Spanish-English language translator." *See,* Prehearing Order, §1(C). Complainant submitted with its Prehearing Exchange (PHE) a complete copy of the Respondent's Answer to the Complaint with exhibits in Spanish attached (C's PHE Ex. 2) for the sake of completion, noting it intended to only rely upon the Answer itself which was written in English. Complainant also attached to its Prehearing Exchange another document written primarily in Spanish identified as Ex. 5, but not listed as a document it intended to introduce at hearing. Complainant suggested in its Prehearing Exchange that the party which generated the document be responsible for translating it. In reaching the decision herein, only documents written in English were considered and relied upon .

5. At all times relevant hereto, by reasons of its activities at the Facility, Respondent was a "used oil generator," as defined under 40 C.F.R. § 279.20(a), and such "used oil" generated and stored at the Facility was subject to the requirements of RCRA and 40 C.F.R. Part 279, Subpart C. Comp. ¶¶ 8, 9; Ans. ¶¶ 8, 9.

6. On or about December 7, 2005, EPA conducted a RCRA Compliance Evaluation Inspection of the Facility and advised Respondent that it found 25 containers and/or tanks holding used oil which were not labeled with the words "used oil," including a 1,000-gallon above-ground used oil storage tank located next to the Mechanic shop, a half-full, 55-gallon steel container of used oil/water placed on the concrete floor next to the Carpentry Warehouse, thirteen (13) 55-gallon steel containers filled with transformer oil situated at the Former Used Oil/Filler Change Area, an open 5-gallon plastic container filled with used oil and water located at the Employee's Parking Lot, and nine (9) 55-gallon steel containers filled with used oil placed in a secondary containment-like structure at the Employee's Parking Lot. Comp. ¶¶ 10-12; Ans. ¶¶ 10-12; C's PHE Ex. 3, p. 7.

7. During the inspection, stains were observed both on the concrete floor next to the open 5-gallon plastic container filled with a mixture of used oil and water located in the Employee's Parking Lot, and the nine (9) 55-gallon steel containers filled with used oil in the Employee's Parking Lot which the inspector concluded were "probably from releases" from the containers. Comp. ¶ 29; Ans. ¶ 29; C's PHE Ex. 3, pp. 5, 7.

8. On or about February 14, 2006, pursuant to RCRA Sections 3007 and 3008 (42 U.S.C. §§ 6927 and 6828), EPA issued to Respondent a Notice of Violation (NOV) and Information Request Letter (IRL) identifying the violations found during the inspection and requesting that Respondent provide certain information in regard to its hazardous waste generation activities "no later than thirty (30) calendar days from receipt." Comp. ¶ 13; Ans. ¶ 13; C's PHE Ex. 4.

9. Respondent received by certified mail the NOV/IRL on or about February 21, 2006, making the deadline for responding thereto on or about March 23, 2006. Comp. ¶ 14; Ans. ¶ 14.

10. Respondent did not submit to Complainant a response to the NOV/IRL by March 23, 2006. Comp. ¶ 14; Ans. ¶ 14.

11. On or about April 6, 2006, EPA unsuccessfully attempted to contact Respondent's Facility Director by telephone regarding its lack of response to the NOV/IRC, and left a message in regard thereto. Comp. ¶ 15; Ans. ¶ 15.

12. On April 10 and 11, 2006, Respondent contacted Complainant by telephone, advised it that the NOV/IRL had been misplaced and that an informal response would be submitted

on April 10, and requested an additional 10 days to formally respond to the NOV/IRL. EPA granted Respondent the requested extension. Comp. ¶¶ 16, 17; Ans. ¶¶ 16, 17.

13. Respondent thereafter submitted a *partial* response to the NOV/IRL including therewith a copy of a contract it had entered into to correct, clean and dispose of the unlabelled used oil containers identified by EPA during its inspection. Comp. ¶ 18; Ans. ¶ 18.

14. As of the filing of the Complaint on September 29, 2006, Respondent still had not fully responded to the NOV/IRL. Comp. ¶ 19; Ans. ¶ 19.

COUNT 1

15. Section 3007(a) of RCRA (42 U.S.C. § 6927) provides in pertinent part that:

> For purposes of . . . enforcing the provisions of this title, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request . . . of the Environmental Protection Agency . . . furnish information relating to such wastes . . ..

16. On or about February 21, 2006, Respondent received from EPA an Notice of Violation and Information Request Letter (NOV/IRL) issued pursuant to RCRA Section 3007 (42 U.S.C. § 6927) requesting Respondent furnish to EPA information explicitly relating to the "hazardous wastes" (as defined in 40 C.F.R. Part 261) generated and stored at the Facility. *See*, C's PHE Ex. 4.

17. The IRL required Respondent to furnish the information requested therein to EPA within 30 days of receipt unless otherwise extended by the Agency (as occurred in this case) allowing Respondent until April 21, 2006 to respond. *See*, C's PHE Ex. 4.

18. Respondent failed to fully respond to the IRL within the time allotted. Comp. ¶ 14; Ans. ¶ 14.

19. Respondent's failure to fully and timely respond to EPA's IRL issued on February 14, 2006 constitutes a violation of RCRA Section 3007(a) (42 U.S.C. § 6927). *See e.g., United States v. Charles George Trucking Co.*, 642 F. Supp. 329, 333 (D. Mass. 1986)(defendants' failure to respond to information request under RCRA Section 3007(a) within 30 days subjects them to summary finding of liability and imposition of a civil penalty); *United States v. Liviola*, 605 F. Supp. 96, 99 (D. Ohio 1985)(EPA was entitled to request information from the defendants under RCRA § 3007(a) and its reasonable request was flaunted, subjecting Respondent to injunctive relief and penalties under RCRA 6928 even if violation was not willful and no compliance order issued).

COUNT 2

20. Section 279.22(c)(1), 40 C.F.R., provides in pertinent part that: "Containers and aboveground tanks used to store used oil at generator facilities must be labeled or marked clearly with the words "Used Oil."

21. At the time EPA inspected Respondent's facility on December 7, 2005, Respondent had 25 containers and/or aboveground tanks which were used to store used oil at the Facility which were not clearly labeled or marked with the words "Used Oil." Comp. ¶¶ 10-12; Ans. ¶¶ 10-12; C's PHE Ex. 3, p. 7.

22. Respondent's failure to have such containers and/or above ground tanks labeled or marked clearly with the words "Used Oil"constitutes a violation of 40 C.F.R. § 279.22(c)(1). *See e.g., Dearborn Refining Co.*, EPA Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 64 (ALJ, Aug. 15, 2003) *aff'd* RCRA (3008) Appeal No. 03-04, 2004 EPA App. LEXIS 33 (EAB, Sept. 10, 2004)(respondent liable for penalty for failure to label aboveground tanks and containers used to store or process used oil with the words "Used Oil."); *James Bond*, EPA Docket Nos. CWA-08-2004-0047 & RCRA-08-2004-0019, 2005 EPA ALJ LEXIS 1 (ALJ, Jan. 11, 2005)(entry of default order and imposition of penalty for, *inter alia*, failure to properly label used oil tanks).

COUNT 3

23. Section 279.22(d), 40 C.F.R. provides in pertinent part that:

> Upon detection of a release of used oil to the environment . . . a generator must perform the following cleanup steps:
> (1) Stop the release;
> (2) Contain the released used oil;
> (3) Clean up and manage properly the released used oil and other materials; and
> (4) If necessary, repair or replace any leaking used oil storage containers or tanks prior to returning them to service.

24. Prior to EPA's inspection on December 7, 2005, Respondent had detected releases of used oil to the environment, specifically to the concrete floor next to the plastic and steel containers of hazardous waste located in its Employee's Parking Lot, but had failed to stop, contain, clean up and manage the release. *See*, Ans. ¶ 29 (representing Respondent had entered into a contract "to correct the situation" of the releases on December 2, 2005).

25. Respondent's failure to stop, contain, clean up and manage said releases constitutes a violation of 40 C.F.R. § 279.22(d). *See e.g.*, *James Bond*, *supra* (entry of default order and imposition of penalty for, *inter alia*, failure to properly perform requisite clean up of used oil releases).

FINDINGS OF FACT AS TO PENALTY
AND DETERMINATION OF CIVIL PENALTY AMOUNT

26. Section 22.17(c) of the Consolidated Rules of Practice provides in pertinent part that upon issuing a default "[t]he relief proposed in the complaint . . . 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). Section 22.28(b) of the Rules further provides that in determining the penalty the "Presiding Officer shall consider any civil penalty guidelines issued under the Act." 40 C.F.R.§ 22.28(b).

27. Section 3008(a)(3) of RCRA (42 U.S.C. 6928(a)(3)) provides in pertinent part that:

> Any penalty assessed [by the Administrator] . . . shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subtitle.[7] 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.

28. In June 2003, EPA issued a Civil Penalty Policy for RCRA violations. *See*, http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf.

29. I have determined that $39,462, the aggregate penalty proposed in the Complaint for the three counts of violation, is not the appropriate civil penalty to be assessed against Respondent for these violations. The documents submitted into the record show that Respondent made good faith efforts to comply with applicable requirements. The proposed penalty provides absolutely no downward adjustment for good faith, one of the two statutory factors for penalty assessment. Therefore the proposed penalty is clearly inconsistent with the record of the proceeding and clearly inconsistent with the Act. I believe a maximum five percent (5%) downward adjustment for good faith is warranted on the basis of Respondent's attempt to come into timely compliance with the violations prior to the EPA inspection and its purported full compliance within two months after the EPA inspection. In addition, it is noted that Respondent honestly acknowledged in its Answer the factual allegations underlying the violations and liability for the violations themselves.

30. Considering Respondent's good faith efforts to comply with applicable requirements, the penalty assessed is $37,488. In reaching this conclusion, I have taken into account the

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[7] This maximum penalty amount has been twice adjusted upward pursuant to the Civil Monetary Penalty Inflation Adjustment Rule and is now set at $32,500 per day for violations occurring on or after March 15, 2004. *See*, 69 Fed. Reg. 7121 (Feb. 13, 2004).

penalty criteria under the Act, the record, and the above referenced Penalty Policy.[8]

31. In assessing this penalty, with the exception of the lack of any downward adjustment for good faith, I find persuasive the rationale for the calculation of the proposed penalty set forth in the Complaint, referenced in Complainant's Initial Prehearing Exchange filed in this proceeding, and incorporate such rationale by reference into this Order.

32. In reaching the appropriate penalty amount I have also taken into account the following facts of record among many others:

a. Respondent is a Municipality which has been in operation over 30 years and has 175 employees. C's PHE Ex. 3.

b. At the Facility, Respondent generates solid and hazardous waste as well as used oil. The used oil generated is stored primarily in 55-gallon containers which are eventually sent for recycling. C's PHE Ex. 3.

c. In 1980, Congress found and declared that "used oil constitutes a threat to public health and the environment when reused or disposed of improperly." 42 U.S.C. § 6901a.

d. Photographs taken during the EPA inspection appear to show unmarked used oil containers and tanks in poorly maintained condition and the inspector found the Facility "under poor housekeeping conditions" "which may result in a potential threat to the environment." C's PHE Ex. 3, p. 6 and attachments thereto.

e. The General Supervisor of the Facility advised the inspector that the nine (9) 55-gallon containers with used oil "appeared like a miracle at the employee's parking lot" "approximately three (3) months ago," and he did not "know the origin of such used oil containers." C's PHE Ex. 3, p. 5.

f. Respondent offers no explanation or excuse for its failure to properly label and/or mark its containers and tanks with used oil or clean up used oil releases on its concrete floor in the Employee Parking area, an area likely accessible to many.

g. The Inspection Report indicates that on November 8, 2005, almost exactly a month before the EPA inspection at issue in the case, Respondent had a "Compliance Assistance Visit" from the Puerto Rico Environmental Quality Board, Land Pollution Control Program during which it was advised of the need

[8]The Prehearing Order issued in this case gave Respondent the opportunity to submit a detailed statement explaining why the proposed penalty should be reduced or eliminated, and particularly to submit any documentation which would evidence inability to pay the proposed penalty. *See*, Prehearing Order dated January 16, 2007. As indicated above, to date Respondent has chosen not to respond to that Order.

to comply with the Federal Hazardous Waste requirements applicable to generators of used oil.

h. Respondent responded to the issues raised by such visit with the apparent intention of remedying them by entering into a contract with Corredores y Contractistas Corp., an "environmental firm," specializing in "such matters," on December 2, 2005, within a month after the Compliance Assistance Visit. Ans. ¶ 29 and p. 3; C's PHE p. 6; C's PHE Ex. 3, p. 1.

i. At the time of EPA's inspection, on December 7, 2005, a month after the Compliance Assistance Visit, but just two days after the contract was concluded, the Facility still had 25 improperly labeled or marked used oil containers/above ground tanks and had yet to clean up the releases of the used oil which the EPA inspector suggested came from leaking used oil containers. C's Ex. 3, p. 7.

j. However, by February 2006, two months after EPA's inspection, Respondent had allegedly arranged for the removal of the used oil containers, leaving on site only the 1000 gallon tank, and represented that it would properly label and mark this tank with the words "used oil."[9] C's PHE p. 6.

k. Respondent claims it came into full compliance and corrected all of the noted violations or "most of them" by February 2006 and "as of today [October 24, 2006] is in full compliance. Ans. ¶ 26 , 33 and p. 3.

l. Respondent fails to provide a detailed and persuasive excuse for its failure to fully and timely respond to EPA's IRL which it received on February 21, 2006, other than to say that because of some unspecified "technicalities" it took "more time" than it presumably anticipated to prepare the response and that on "October 11, 2006 the final report was completed." Ans. ¶¶ 22. Further, the Complaint alleges and Respondent admits that it was EPA who initiated first contact with Respondent regarding its overdue response to the IRL and it was only after EPA initiated such contact that Respondent requested an extension of time until April 21, 2006. Comp. ¶¶ 15-17; Ans. ¶¶ 15-17. In addition, the record indicates that Respondent did not even reply to EPA's NOV/IRL within the extended time courteously given it, but responded sometime shortly thereafter in part and allegedly six months later in full.

m. Respondent was forthright in admitting the accuracy of the factual allegations and violations set forth in the Complaint.

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[9] Complainant asserts in its Prehearing Exchange that there has been no follow-up inspection so it cannot confirm with certainty the accuracy of Respondent's allegations in this regard, but acknowledges receiving, albeit poor quality, copies of manifests indicative of Respondent's disposal of the 24 containers of used oil and photographs purportedly showing the properly labeled 1000-gallon storage tank, *in Spanish*, which by itself probably would not meet the regulatory requirement. C's PHE pp. 5-6.

n. Respondent did not file any response to the Prehearing Order issued by this Tribunal.

COMPLIANCE ORDER

The EAB has observed that "[RCRA] confers *broad discretion* on the Administrator (and derivatively to his delegatees) to fashion appropriate compliance orders for RCRA violations." *Pyramid Chemical Company*, 11 E.A.D. 657, 686, n.40 (EAB 2004) (emphasis in original), *quoting A.Y. McDonald Indus.*, 2 E.A.D. 402, 428 (CJO 1987) (emphasis added), and *citing Arrcom, Inc.*, 2 E.A.D. 203, 210-14 (CJO 1986). This authority flows from RCRA § 3008(a), 42 U.S.C. § 6928(a), and 40 C.F.R. § 22.37(b).

The Complaint seeks a "Compliance Order" and in regard thereto proposes the following language:

1. Respondent shall, within thirty (30) calendar days of the effective date of this Compliance Order, comply with a full and accurate response to the Information Request.

2. Within ten (10) calendar days of the effective date of this Compliance Order, Respondent shall:

    a. store used oil only in tanks and/or containers that are clearly labeled or marked with the words "Used Oil," in compliance with 40 C.F.R. § 279.22(c)(1).

    b. Clean up and manage properly all used oil releases at the Facility in compliance with 40 C.F.R. § 279.22; and

    c. comply with the applicable regulations and standards governing the handling and management of used oil as set forth in 40 C.F.R. § 279.

3. All responses, documentation, and evidence submitted in response to this Compliance Order should be sent to:

Miguel A. Batista
Response & Remediation Branch
Carribean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2
Centro Europa Building, Suite 417
1492 Ponce de Leon Avenue
San Juan, Puerto Rico 00907

> Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all other applicable RCRA statutory or regulatory (federal and/or Commonwealth) provisions, nor does such compliance release Respondent from liability for any violations at the Facility. In addition, nothing herein waives, prejudices or otherwise affects EPA's right to enforce any applicable provision of law, and to seek and obtain any appropriate penalty or remedy under any such law, regarding Respondent's generation, handling and/or management of hazardous waste at the Facility.
>
> Pursuant to the terms of Section 3008(c) of RCRA and the Debt Collection Improvement Act of 1996, a violator failing to take corrective action within the time specified in a compliance order is liable for a civil penalty of up to $32,500 for each day of continued noncompliance. Such continued noncompliance may also result in suspension or revocation of any permits issued to the violator whether issued by EPA [sic].

See, Complaint, pp. 8-9.

In its Motion for Default, Complainant implies that there is some uncertainty as to whether injunctive relief in the form of a compliance order may be issued upon default and cites *Central Bus Co., Inc., et al*, EPA Docket No. RCRA-02-2003-7501, 2004 EPA ALJ LEXIS 110, 3-4 (ALJ, May 24, 2004) for the proposition that such relief may be granted. That opinion, in turn, cited in support of its holding in favor of granting such relief the decision of the Environmental Appeals Board in *Rybond, Inc.*, 6 E.A.D. 614, 642 n. 38 (EAB 1996), upholding the compliance order portion of a default order under Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), as well as several other decisions including *George Atkinson*, EPA Docket No. RCRA-9006-VIII-97-02, 1998 EPA ALJ LEXIS 122 (ALJ, Oct. 26, 1998); *Joe Mortiboy*, EPA Docket No. RCRA-UST-1092-12-01-9006, 1995 EPA ALJ LEXIS 1 (ALJ, April 27, 1995); *G.S. Service Corp.*, EPA Docket No. V-W-90-R-07, 1993 EPA ALJ LEXIS 287 (ALJ, Dec 30, 1993); and *Cirtek Maryland, Inc.*, EPA Docket No. RCRA-III-177, 1992 EPA ALJ LEXIS 308 (ALJ, March 30, 1992).

It is noted that Rule 22.17(c) and (d) specifically provide in pertinent part:

> ***The 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. . . .
>
> Payment of penalty; effective date of compliance or corrective action orders . . . . Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). ***Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c)***. . . .

40 C.F.R. § 22.17 (emphasis added).

Based upon these authorities, I find that injunctive relief in the form of a compliance order may be granted upon default where appropriate.

In this case, the Respondent represents in its unsworn Answer that "as of today the Municipality is in full compliance." Ans. ¶ 33. For its part, Complainant's Prehearing Exchange suggests that Respondent has proffered to it documentation suggesting that it remedied the violations, but notes that the photographs Respondent submitted in this regard were of "poor quality," that it has not performed an additional follow-up inspection which would independently confirm the accuracy of Respondent's claims, and that it anticipated that it would be in a "better position" to assess such claims once it received Respondent's Prehearing Exchange. However, as noted above, Respondent did not submit a Prehearing Exchange providing clear and certain evidence in support of its representations as to compliance nor has it responded to the request for injunctive relief in the default order. The supporting documents Respondent did submit with its Answer are primarily in Spanish without an English translation and as a result cannot confirm to this Tribunal's satisfaction Respondent's current state of compliance. Therefore, I find it appropriate on the record upon default to issue the injunctive relief in the form of a Compliance Order as proposed in the Complaint as such relief is not inconsistent with the record in this proceeding and RCRA. 40 C.F.R.§ 22.17(c).

ORDER

1. For failing to comply with the Prehearing Order of the Presiding Officer as enumerated above, Respondent Municipality of Cataño is hereby found in **DEFAULT.**

2. Respondent is hereby found liable on the three counts of violation alleged in the Complaint and is assessed an aggregate civil administrative penalty in the amount of $37,488.

3. Payment of the full amount of this civil 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. Payment shall be made by submitting a certified or cashier's check in the amount of $37,488, payable to "Treasurer, United States of America," and mailed to:

   Regional Hearing Clerk
   U.S. Environmental Protection Agency, Region 2
   Mellon Bank
   P.O. Box 360188 M
   Pittsburgh, PA 15251

4. A transmittal letter identifying the subject case and EPA docket number 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 entry of

this Order, interest on the penalty may be assessed. *See*, 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

6. **Pursuant to 40 C.F.R. § 22.17(c), Respondent may file a Motion to set aside the default order for good cause. This Order on Default constitutes an initial decision, and an initial decision becomes a final order forty-five (45) days after its service upon the parties unless it is appealed to or reviewed sua sponte by the EAB, or a party moves to set aside the Default Order. 40 C.F.R. §§ 22.17(c) and 22.27(c). An appeal of an initial decision must be filed within thirty (30) days of service of the initial decision, as provided in 40 C.F.R. § 22.30.**

7. Respondent Municipality of Cataño is hereby further **ORDERED** to comply with the following Compliance Order pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a):

COMPLIANCE ORDER

8. Respondent shall, within thirty (30) calendar days of the effective date of this Compliance Order, comply with a full and accurate response to the Information Request to the extent it has not previously done so.

9. Within ten (10) calendar days of the effective date of this Compliance Order, Respondent shall:

   a. store used oil only in tanks and/or containers that are clearly labeled or marked with the words "Used Oil," in compliance with 40 C.F.R. § 279.22(c)(1).

   b. Clean up and manage properly all used oil releases at the Facility in compliance with 40 C.F.R. § 279.22; and

   c. comply with the applicable regulations and standards governing the handling and management of used oil as set forth in 40 C.F.R. § 279.

10. All responses, documentation, and evidence submitted in response to this Compliance Order should be sent to:

Miguel A. Batista
Response & Remediation Branch
Carribean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2
Centro Europa Building, Suite 417
1492 Ponce de Leon Avenue
San Juan, Puerto Rico 00907

11. Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all other applicable RCRA statutory or regulatory (federal and/or Commonwealth) provisions, nor does such compliance release Respondent from liability for any violations at the Facility. In addition, nothing herein waives, prejudices or otherwise affects EPA's right to enforce any applicable provision of law, and to seek and obtain any appropriate penalty or remedy under any such law, regarding Respondent's generation, handling and/or management of hazardous waste at the Facility.

12. Pursuant to the terms of Section 3008(c) of RCRA and the Debt Collection Improvement Act of 1996, a violator failing to take corrective action within the time specified in a compliance order is liable for a civil penalty of up to $32,500 for each day of continued noncompliance. Such continued noncompliance may also result in suspension or revocation of any permits issued to the violator issued by EPA.

_____

Susan L. Biro
Chief Administrative Law Judge

Dated: April 17, 2007
Washington, D.C.