

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL PROTECTION AGENCY
2011 SEP 22 A 11:10
RECEIVED
REGIONAL OFFICE
EPCRA

IN THE MATTER OF:

The Battery Recycling Company, Inc.

RESPONDENT

DOCKET NUMBER EPCRA-02-2011-4301

MOTION FOR CONTINUANCE AND TO AMEND COMPLAINT

TO THE REGIONAL JUDICIAL OFFICER:

COMES NOW Complainant, the United States Environmental Protection Agency (EPA), by and through the undersigned attorney and very respectfully avers and prays as follows:

1. That the Complaint in the above-captioned matter was issued on March 1, 2011, and received by Respondent on March 28, 2011.
2. That by its terms and conditions, the Complaint administratively extended, by ninety (90) days, until Monday, June 27, 2011, the time to Answer the Complaint.
3. That the Parties continue to make progress in their effort to reach an agreement in furtherance of settlement of the matter at hand.
4. That settlement of the matter at hand would promote procedural economy, avoiding the delays and costs resulting from an administrative hearing, and is in the interest of both Parties.
5. That on or about June 21, 2011, EPA sent Respondent a Request for Information as a follow up to the October 28, 2008, Inspection.

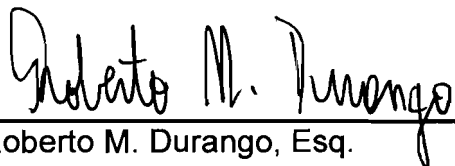
6. That on or about July 14, 2011, EPA received a response to the Request for Information, which revealed additional violations.
7. That Rule 22.14 (c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Rules of Practice), 40 C.F.R. § 22.14 (c), provides that: “[t]he complainant may amend the complaint once as a matter of right at any time before the answer is filed.”
8. That Complainant hereby invokes the right to amend the Complaint to include the additional violations and submits, as an attachment to this Motion, the Amended Complaint, in order to resolve all matters averred against Respondent in one proceeding, to promote judicial economy.
9. That the Parties desire to continue in good faith to negotiate a settlement of this matter in an attempt to reach an amicable resolution of the issues raised.
10. That the Amended Complaint administratively extends Respondent’s time to file a timely Answer to the Complaint to ninety (90) days.
11. That on June 22, 2011, this Court issued an Order Granting an Extension of Time to File an Answer to the Complaint until September 26, 2011.
12. That in order to avoid confusion, Complainant respectfully requests that the ninety (90) days be computed from September 26, 2011, granting Respondent an extension to file a timely Answer the Complaint until Monday, December 26, 2011.

WHEREFORE, Complainant amends the Complaint as a matter of right, pursuant to Rule 22.14(c) of the Rules of Practice, and respectfully requests granting Respondent an extension to file a timely Answer the Complaint until Monday, December 26, 2011.

RESPECTFULLY SUBMITTED in San Juan, Puerto Rico, this 21st day of September, 2011.

ATTORNEY FOR COMPLAINANT

Roberto M. Durango, Esq.
Assistant Regional Counsel
U. S. EPA, Region 2
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1492 Ponce de León Ave.
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Roberto M. Durango

Roberto M. Durango, Esq.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

IN THE MATTER OF:

The Battery Recycling Company, Inc.

RESPONDENT

DOCKET NUMBER EPCRA-02-2011-4301

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Motion for Continuance and to Amend Complaint**, dated September 21, 2011, was sent in the following manner to the addresses listed below:

Original and Copy by **Overnight**:

Karen Maples
Regional Hearing Clerk
U.S. EPA, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

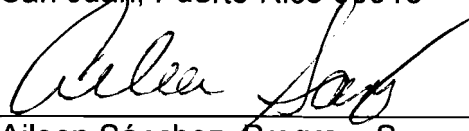
Copy by **Overnight**:

Helen S. Ferrara
Regional Judicial Officer
U.S. EPA, Region 2
290 Broadway - Room 1626
New York, NY 10007-1866

Copy by **Certified Mail**:

Carlos Colón-Franceschi, Esq.
Toro, Colón, Mullet, Rivera & Sifre, P.S.C.
Attorneys for Respondent,
The Battery Recycling Company, Inc.
416 Ponce de León Avenue
Union Plaza Suite 311
San Juan, Puerto Rico 00918

Dated: 9/21/2011


Aileen Sánchez, Program Support Assistant
EPA, Region 2, Office of Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:

The Battery Recycling Company, Inc.
Bo. Cambalache, Rd. #2, Km. 72.2
Arecibo, PR 00613-1016

RESPONDENT

EPCRA-02-2011-4301

PROCEEDING PURSUANT TO SECTION
325(c) OF TITLE III OF THE SUPERFUND
AMENDMENTS AND REAUTHORIZATION
ACT

U.S. ENVIRONMENTAL
PROTECTION AGENCY
2011 SEP 22 A 11:15
REGIONAL HEARING
CLERK

**AMENDED COMPLAINT, FINDINGS OF VIOLATION, NOTICE OF PROPOSED
ASSESSMENT OF A CIVIL PENALTY, AND NOTICE OF
OPPORTUNITY TO REQUEST A HEARING**

Amended Complainant, as and for her Complaint against Respondent, hereby alleges:

1. This civil administrative action is instituted pursuant to Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act (42 U.S.C. § 11001 et seq.) which is also known as the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA).

2. The Complainant, Dore LaPosta, Director, Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency (EPA), Region 2, has been duly delegated the authority to institute this action.

3. Respondent is The Battery Recycling Company, Inc. (BRC).

4. Respondent maintains a facility that is the subject of this Complaint at Bo. Cambalache, Rd. #2, Km. 72.2, Arecibo, PR 00613-1016 (Respondent's Facility).

5. Pursuant to Sections 313 and 328 of EPCRA, 42 U.S.C. §§ 11023 and 11048, EPA promulgated the Toxic Chemical Release Reporting: Community Right-to-Know Rule (40 C.F.R. Part 372).

6. Under Section 313 of EPCRA and 40 C.F.R. § 372.22, owners or operators of a facility subject to the requirements of Section 313(b) are required to submit, annually, no later than July 1 of each year, a Toxic Chemical Release Inventory Reporting Form R, EPA Form 9350-1 (Form R), for each toxic chemical listed under 40 C.F.R. § 372.65 and/or 40 C.F.R. § 372.28 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding the established toxic chemical thresholds. The completed and accurate Form R is required to be submitted to the Regional Administrator of the EPA and to the State in which the subject facility is located.

7. As an alternative to the requirements set forth above, pursuant to Section 313(f)(2) of EPCRA (42 U.S.C. § 11023(f)(2)), and 40 C.F.R. § 372.27, owners or operators of a facility subject to the requirements of Section 313(b), with respect to the manufacture, process or otherwise use of a toxic chemical, may apply an alternate threshold of one million (1,000,000) pounds per year to that chemical if the conditions set forth in 40 C.F.R. § 372.27(a) are met. If the aforementioned alternate threshold for a specific toxic chemical is applicable, such owners or operators, in lieu of filing a Form R therefore, may submit an "Alternate Threshold Certification Statement" (Form A) (see 71 Fed. Reg. 76,944, Dec. 22, 2006) pursuant to 40 C.F.R. § 372.27(b). Pursuant to 40 C.F.R. § 372.27(e)(3), EPA has excluded Persistent Bioaccumulative Toxic Chemical (PBT) dioxin and dioxin-like compounds from eligibility for the Alternate Thresholds described in 40 C.F.R. § 372.27(a).

8. Under Section 313 of EPCRA and 40 C.F.R. § 372.85, owners or operators of a facility subject to the requirements of Section 313(b) are required to submit an estimate of the amount of the chemical transferred in pounds during the preceding calendar year, no later than July 1 of each year, on a Toxic Chemical Release Inventory Reporting Form R, EPA Form 9350-1 (Form R), for each toxic chemical listed under 40 C.F.R. § 372.65 and/or 40 C.F.R. § 372.28 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding the established toxic chemical thresholds. The completed and accurate Form R is required to be submitted to the Regional Administrator of the EPA and to the State in which the subject facility is located.

9. This Complaint serves notice that Complainant has reason to believe that Respondent failed to submit timely, complete and accurate Toxic Chemical Release Inventory Reporting Form R reports as required by Section 313 of EPCRA (42 U.S.C. § 11023), and the Federal regulations that set out in greater detail in the Section 313 reporting requirements, codified at 40 C.F.R. Part 372.

10. Respondent is a corporation organized pursuant to the laws of the Commonwealth of Puerto Rico.
11. Respondent is a "person" within the meaning of Section 329(7) of EPCRA (42 U.S.C. § 11049(7)).
12. Respondent is an owner of a "facility" as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), and by 40 C.F.R. § 372.3.
13. Respondent is an operator of a "facility" as that term is defined in Section 329(4) of EPCRA (42 U.S.C. § 11049(4)), and in 40 C.F.R. § 372.3.
14. Respondent's facility has 10 or more "full time employees" as the term is defined by 40 C.F.R. § 372.3.
15. Respondent's Facility is in the Standard Industrial Classification (SIC) Code 3692.
16. Respondent's Facility is in the North American Industry Classification System (NAICS) Code 423610.
17. Respondent's Facility is subject to the requirements of EPCRA, Section 313(b), 42 U.S.C. § 11023(b), and 40 C.F.R. § 372.22.
18. On or about October 28, 2008, authorized representatives of EPA conducted an inspection of Respondent's Facility to determine Respondent's compliance with the Toxic Chemical Release Reporting requirements (the Inspection).
19. On or about June 21, 2011 a request for additional information as a follow up to the October 28, 2008 inspection was issued by EPA. Respondent provided additional information requested on July 14, 2011.

COUNT 1

20. Complainant realleges each allegation contained in Paragraphs "1" through "19" with the same force and effect as if fully set forth herein.
21. Pursuant to the Inspection, EPA representatives determined that during the 2005 calendar year, Respondent processed (as defined in 40 C.F.R. § 372.3) over 13,000,000 pounds of lead, Chemical Abstracts Service (CAS) Registry Number 7439-92-1.
22. Lead is listed under 40 C.F.R. § 372.65 and 40 C.F.R. § 372.28.
23. The established threshold amount for reporting the lead for the 2005 calendar year was 100 pounds. [40 C.F.R. § 372.28].

24. Respondent “processed” lead in quantities exceeding the established threshold for reporting during the 2005 calendar year. [40 C.F.R. § 372.28].

25. Respondent was required to submit by July 1, 2006 a complete and accurate Form R for lead for the 2005 calendar year to the Administrator of EPA and to the Commonwealth of Puerto Rico.

26. Respondent failed to submit to the Administrator and to the Commonwealth of Puerto Rico, in a timely manner, a complete and accurate Form R for lead for the 2005 calendar year by July 1, 2006.

27. Respondent's failure to submit in a timely manner a complete and accurate Form R or for lead constitutes a failure or refusal to comply with Section 313 of EPCRA (42 U.S.C. § 11023), and with 40 C.F.R. § 372.30.

COUNT 2

28. Complainant realleges each allegation contained in Paragraphs "1" through "27" with the same force and effect as if fully set forth herein.

29. Pursuant to the Inspection, EPA representatives determined that during the 2006 calendar year, Respondent processed (as defined in 40 C.F.R. § 372.3) over 15,000,000 pounds of lead, Chemical Abstracts Service (CAS) Registry Number 7439-92-1.

30. Lead is listed under 40 C.F.R. § 372.65 and 40 C.F.R. § 372.28.

31. The established threshold amount for reporting lead or lead compounds for the 2006 calendar year was 100 pounds. [40 C.F.R. § 372.28].

32. Respondent “processed” lead or lead compounds in quantities exceeding the established threshold for reporting during the 2006 calendar year. [40 C.F.R. § 372.28].

33. Respondent was required to submit by July 1, 2007 a complete and accurate Form R for lead for the 2006 calendar year to the Administrator of EPA and to the Commonwealth of Puerto Rico.

34. Respondent failed to submit to the Administrator and to the Commonwealth of Puerto Rico, in a timely manner, a complete and accurate Form R for for lead for the 2006 calendar year by July 1, 2007.

35. Respondent's failure to submit in a timely manner a complete and accurate Form R for lead constitutes a failure or refusal to comply with Section 313 of EPCRA (42 U.S.C. § 11023), and with 40 C.F.R. § 372.30.

COUNT 3

36. Complainant realleges each allegation contained in Paragraphs "1" through "35" with the same force and effect as if fully set forth herein.

37. Pursuant to the Inspection, EPA representatives determined that during the 2007 calendar year, Respondent processed (as defined in 40 C.F.R. § 372.3) over 19,000,000 pounds of lead, Chemical Abstracts Service (CAS) Registry Number 7439-92-1.

38. Lead is listed under 40 C.F.R. § 372.65 and 40 C.F.R. § 372.28.

39. The established threshold amount for reporting lead or lead compounds for the 2007 calendar year was 100 pounds. [40 C.F.R. § 372.28].

40. Respondent "processed" lead or lead compounds in quantities exceeding the established threshold for reporting during the 2007 calendar year. [40 C.F.R. § 372.28].

41. Respondent was required to submit by July 1, 2008 a complete and accurate Form R for lead for the 2007 calendar year to the Administrator of EPA and to the Commonwealth of Puerto Rico.

42. Respondent failed to submit to the Administrator and to the Commonwealth of Puerto Rico, in a timely manner, a complete and accurate Form R for for lead for the 2007 calendar year by July 1, 2008.

43. Respondent's failure to submit in a timely manner a complete and accurate Form R for lead constitutes a failure or refusal to comply with Section 313 of EPCRA (42 U.S.C. § 11023), and with 40 C.F.R. § 372.30.

COUNT 4

44. Complainant realleges each allegation contained in Paragraphs "1" through "43" with the same force and effect as if fully set forth herein.

45. Pursuant to the Inspection, EPA representatives determined that during the 2006 calendar year, Respondent processed (as defined in 40 C.F.R. § 372.3) over 229,000 pounds of antimony, Chemical Abstracts Service (CAS) Registry Number 7440-36-0.

46. Antimony is listed under 40 C.F.R. § 372.65 and 40 C.F.R. § 372.28.

47. The established threshold amount for reporting antimony or antimony compounds for the 2006 calendar year was 25,000 pounds. [40 C.F.R. § 372.28].

48. Respondent "processed" antimony or antimony compounds in quantities

exceeding the established threshold for reporting during the 2006 calendar year.

[40 C.F.R. § 372.28].

49. Respondent was required to submit by July 1, 2007 a complete and accurate Form R for antimony for the 2006 calendar year to the Administrator of EPA and to the Commonwealth of Puerto Rico.

50. Respondent failed to submit to the Administrator and to the Commonwealth of Puerto Rico, in a timely manner, a complete and accurate Form R for for antimony the 2006 calendar year by July 1, 2007.

51. Respondent's failure to submit in a timely manner a complete and accurate Form R for lead constitutes a failure or refusal to comply with Section 313 of EPCRA (42 U.S.C. § 11023), and with 40 C.F.R. § 372.30.

COUNT 5

52. Complainant realleges each allegation contained in Paragraphs "1" through "51" with the same force and effect as if fully set forth herein.

53. Pursuant to the Inspection, EPA representatives determined that during the 2007 calendar year, Respondent processed (as defined in 40 C.F.R. § 372.3) over 376,000 pounds of antimony, Chemical Abstracts Service (CAS) Registry Number 7440-36-0.

54. Antimony is listed under 40 C.F.R. § 372.65 and 40 C.F.R. § 372.28.

55. The established threshold amount for reporting antimony or antimony compounds for the 2006 calendar year was 25,000 pounds. [40 C.F.R. § 372.28].

56. Respondent "processed" antimony or antimony compounds in quantities exceeding the established threshold for reporting during the 2007 calendar year. [40 C.F.R. § 372.28].

57. Respondent was required to submit by July 1, 2008 a complete and accurate Form R for antimony for the 2007 calendar year to the Administrator of EPA and to the Commonwealth of Puerto Rico.

58. Respondent failed to submit to the Administrator and to the Commonwealth of Puerto Rico, in a timely manner, a complete and accurate Form R for antimony for the 2007 calendar year by July 1, 2008.

59. Respondent's failure to submit in a timely manner a complete and accurate Form R for lead constitutes a failure or refusal to comply with Section 313 of EPCRA (42 U.S.C. § 11023), and with 40 C.F.R. § 372.30.

COUNT 6

60. Complainant realleges each allegation contained in Paragraphs "1" through "59" with the same force and effect as if fully set forth herein.

61. Respondent submitted a 2008 Form R for lead before the July 1, 2010 deadline in a timely fashion.

62. Respondent did not report an estimate of the amount transferred in pounds in their 2008 Form R lead submission.

63. Pursuant to the EPA additional information requested on June 21, 2011 and a timely lead Form R submission for calendar year 2010, EPA determined that during the 2008 calendar year Respondent had transfers of lead to an offsite location (Allied Waste of Ponce, Inc. located at the 500 Municipal Rd, La Cotorra, Ponce, Puerto Rico).

64. An estimate of the amount of the chemical transferred in pounds is a reporting requirement under §372.85(b) (15).

65. Respondent was required to report a complete and accurate Form R for lead for the 2008 calendar year to the Administrator of EPA and to the Commonwealth of Puerto Rico.

66. Respondent failed to submit to the Administrator and to the Commonwealth of Puerto Rico, a complete and accurate Form R for lead for the 2008 calendar year by July 1, 2009 that included an estimate of the amount of chemical transferred in pounds per year.

67. Respondent's failure to submit a complete and accurate Form R for lead constitutes a failure or refusal to comply with Section 313 of EPCRA (42 U.S.C. § 11023), and with 40 C.F.R. § 372.85.

COUNT 7

68. Complainant realleges each allegation contained in Paragraphs "1" through "67" with the same force and effect as if fully set forth herein.

69. Respondent submitted a 2009 Form R for lead before the July 1, 2010 deadline in a timely fashion.

70. Respondent did not report an estimate of the amount transferred in pounds in their 2009 Form R lead submission.

71. Pursuant to the EPA additional information requested on June 21, 2011 and a timely lead Form R submission for calendar year 2010, EPA determined that during the 2009

calendar year Respondent had transfers of lead to an offsite location (Allied Waste of Ponce, Inc. located at the 500 Municipal Rd, La Cotorra, Ponce, Puerto Rico).

72. An estimate of the amount of the chemical transferred in pounds is a reporting requirement under §372.85(b)(15).

73. Respondent was required to report a complete and accurate Form R for lead for the 2009 calendar year to the Administrator of EPA and to the Commonwealth of Puerto Rico.

74. Respondent failed to submit to the Administrator and to the Commonwealth of Puerto Rico, a complete and accurate Form R for lead for the 2009 calendar year by July 1, 2010 that included an estimate of the amount of chemical transferred in pounds per year.

75. Respondent's failure to submit a complete and accurate Form R for lead constitutes a failure or refusal to comply with Section 313 of EPCRA (42 U.S.C. § 11023), and with 40 C.F.R. § 372.85.

PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 325(c) of EPCRA (42 U.S.C. § 11045(c)), which authorizes the assessment of a civil penalty of up to \$25,000 per day for each violation of Section 313 of EPCRA 42 U.S.C. §11023. Pursuant to the Debt Collection and Improvement Act, Violations occurring after March 15, 2004, are subject to penalties of up to \$32,500 per day per violation. Violations occurring after January 12, 2009, are subject to penalties of up to \$37,500 per day per violation, 31 U.S.C. § 3701 *et seq.* (DCIA), and 40 C.F.R. Part 19, promulgated pursuant to DCIA.

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case, to the extent known at the time, with specific reference to EPA's "Enforcement Response Policy for Section 313 of EPCRA" dated April 12, 2001, a copy of which is available upon request. This policy provides a rational, consistent and equitable calculation methodology for penalties in particular cases. In calculating a proposed penalty pursuant to this policy, EPA takes into account the gravity of the violations, as well as certain factors such as a violator's history of prior such violations and its ability to pay.

The Complainant proposes, subject to receipt and evaluation of further relevant information that Respondent be assessed the following civil penalties for the violations alleged in the Complaint:

<u>COUNT 1</u> – Failure to submit a Toxic Chemical Release Inventory Reporting Form R for lead for the 2005 Calendar Year	\$32,500
<u>COUNT 2</u> – Failure to submit a Toxic Chemical Release Inventory Reporting Form R for lead for the 2006 Calendar Year	\$32,500
<u>COUNT 3</u> – Failure to submit a Toxic Chemical Release Inventory Reporting Form R for lead for the 2007 Calendar Year	\$32,500
<u>COUNT 4</u> – Failure to submit a Toxic Chemical Release Inventory Reporting Form R for antimony for the 2006 Calendar Year	\$32,500
<u>COUNT 5</u> – Failure to submit a Toxic Chemical Release Inventory Reporting Form R for antimony for the 2007 Calendar Year	\$32,500
<u>COUNT 6</u> – Failure to submit a complete an accurate Toxic Chemical Release Inventory Reporting Form R for lead for the 2007 Calendar Year	\$21,250
<u>COUNT 7</u> – Failure to submit a complete an accurate Toxic Chemical Release Inventory Reporting Form R for lead for the 2007 Calendar Year	\$21,250
*TOTAL PROPOSED PENALTY:	<u>\$205,000</u>

*In accordance with Agency policies regarding modifications to the relevant penalty policies, the total gravity-based penalty amount is rounded to the nearest unit of 100 dollars.

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits” (CROP), which have been codified at 40 C.F.R. Part 22. A copy of such rules accompanies this Complaint.

A. Answering the Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written Answer to the Complaint. 40 C.F.R. § 22.15(a). The address of the Regional Hearing Clerk of EPA, Region 2, is:

Ms. Karen Maples, Regional Hearing Clerk
Office of the Regional Hearing Clerk
U.S. EPA, Region 2
290 Broadway, 16th Floor (1631)
New York, New York 10007-1866

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. [40 C.F.R. § 22.15(a)]

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. [40 C.F.R. § 22.15(b)] The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing. [40 C.F.R. § 22.15(b)]

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity to Request a Hearing

If requested by Respondent in its answer, a hearing upon the issues raised by the Complaint and Answer may be held. See, 40 C.F.R. § 22.15(c). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. See, 40 C.F.R. § 22.15(c).

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act (5 U.S.C. §§ 551–59), and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

C. Failure to Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation.

[40 C.F.R. § 22.15(d)] If Respondent fails to file a timely Answer to the Complaint [i.e., in accordance with the period set forth in 40 C.F.R. § 22.15(a); extended to 90 days for this Complaint], Respondent may be found in default upon motion. [40 C.F.R. § 22.17(a)]. Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. [40 C.F.R. § 22.17(a)] Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued thereof shall be issued pursuant to 40 C.F.R. § 22.17(c).

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 pursuant to 40 C.F.R. § 22.27(c). [40 C.F.R. § 22.17(d)] If necessary, EPA may then seek to enforce such Final Order of default against Respondent, and to collect the assessed penalty amount, in federal court.

D. Exhaustion of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a Final Order

pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. [40 C.F.R. § 22.27(d)]

In order to appeal an initial decision to the Agency's Environmental Appeals Board (EAB), 40 C.F.R. § 1.25(e), Respondent must do so "within thirty (30) days after the initial decision is served." Pursuant to 40 C.F.R. § 22.07(c), where service is effected by mail, "five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document". Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a Final Order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. [40 C.F.R. § 22.18(b)] At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to:

Roberto M. Durango, Esq.
Assistant Regional Counsel
U.S. EPA, ORC, Region 2
1429 Ponce De Leon Avenue
Santurce, PR 00907-4127
Phone: (787) 977-5822

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. [40 C.F.R. § 22.18(b)(1)] Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written Consent Agreement. [40 C.F.R. § 22.18(b)(2)] In accepting the Consent Agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the Final Order that is to accompany the Consent Agreement. [40 C.F.R. § 22.18(b)(2)] In order to conclude the proceeding, a Final Order ratifying the Parties' agreement to settle will be executed. [40 C.F.R. § 22.18(b)(3)].

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in the such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may resolve this proceeding by paying the specific penalty proposed in the Complaint and filing a copy of the check or other instrument of payment with the Regional Hearing Clerk, Region 2 (at the New York address noted above) 40 C.F.R. § 22.18(a). A copy of the check or other instrument of payment should also be provided to the

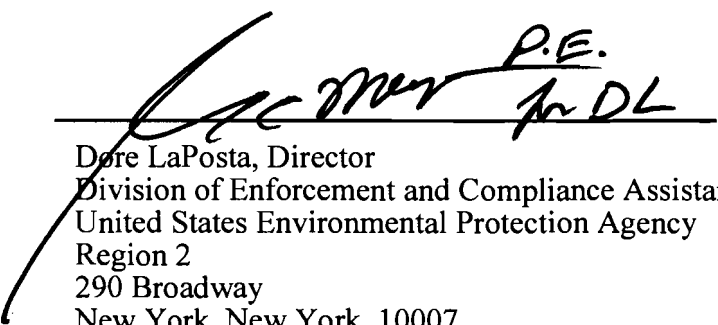
EPA contact identified on the previous page. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America", in the full amount of the penalty assessed in this Complaint to the following addressee:

Regional Hearing Clerk
United States Environmental Protection Agency - Region 2
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251

Pursuant to 40 C.F.R. § 22.18(a)(3), upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a Final Order. Issuance of this Final Order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Further, pursuant to 40 C.F.R. § 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said Final Order to federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable regulations and requirements, and to maintain such compliance.

Dated: _____

8/26/11



Dore LaPosta, Director
Division of Enforcement and Compliance Assistance
United States Environmental Protection Agency
Region 2
290 Broadway
New York, New York 10007