



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

SEP 30 2013

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

The Honorable Byron W. Brown
Mayor of Buffalo
201 City Hall
65 Niagara Square
Buffalo, NY 14202

Re: **In the Matter of the City of Buffalo**
Docket Number RCRA-02-2013-7108

Dear Mayor Brown:

Enclosed is the Complaint, Compliance Order and Opportunity for Hearing in the above-referenced proceeding. The Complaint alleges violations of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.*

You have the right to a formal hearing to contest any of the allegations in the Complaint and/or to contest the penalty proposed in the Complaint. If you wish to contest the allegations and/or the penalty proposed in the Complaint, you must file an Answer within **thirty (30)** days of your receipt of the enclosed Complaint with the Regional Hearing Clerk of the Environmental Protection Agency ("EPA"), Region 2, at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

If you do not file an Answer within thirty (30) days of receipt of this Complaint and have not obtained a formal extension for filing an Answer from the Regional Judicial Officer of Region 2, a default order may be entered against you and the entire proposed penalty may be assessed.

Whether or not you request a formal hearing, you may request an informal conference with EPA to discuss any issue relating to the alleged violations and the amount of the proposed penalty.

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2013 OCT 22 A 11: 25
REGIONAL HEARING
CLERK

EPA encourages all parties against whom it files a Complaint to pursue the possibility of settlement and to have an informal conference with EPA. However, a request for an informal conference **does not** substitute for a written Answer, affect what you may choose to say in an Answer, or extend the thirty (30) days by which you must file an Answer requesting a hearing.

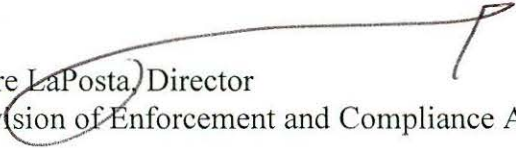
You will find enclosed a copy of the "Consolidated Rules of Practice," which govern this proceeding. (A brief discussion of some of these rules appears in the later part of the Complaint.)

For your general information and use, I also enclose both an "Information Sheet for U.S. EPA Small Business Resources" which may apply to you depending on the size of the proposed penalty and the nature of your company.

EPA encourages the use of Supplemental Environmental Projects, where appropriate, as part of any settlement. I am enclosing a brochure on "EPA's Supplemental Environmental Projects Policy." Please note that these are only available as part of a negotiated settlement and are not available if this case has to be resolved by a formal adjudication.

If you have any questions or wish to schedule an informal conference, please contact the attorney whose name is listed in the Complaint.

Sincerely,



Dore LaPosta, Director
Division of Enforcement and Compliance Assistance

Enclosures

cc: Karen Maples, Regional Hearing Clerk (without enclosures)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2013 OCT 22 A 11: 25
REGIONAL HEARING
CLERK

In The Matter of:

City of Buffalo

Respondent,

Proceeding Under Section 3008 of the
Solid Waste Disposal Act, as amended.

COMPLAINT, COMPLIANCE ORDER
AND NOTICE OF OPPORTUNITY
FOR HEARING

Docket No. RCRA-02-2013-7108

COMPLAINT

This is a civil administrative proceeding instituted pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984 (“HSWA”), 42 U.S.C. § 6901 *et seq.* (referred to collectively as the “Act” or “RCRA”).

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING (“Complaint”) serves notice of EPA’s preliminary determination that the **City of Buffalo**, has violated certain requirements of the authorized New York State hazardous waste program and the federal hazardous waste program.

Section 3006(b) of the Act, 42 U.S.C. § 6926(b), provides that EPA’s Administrator may, if certain criteria are met, authorize a state to operate a hazardous waste program (within the meaning of Section 3006 of the Act, 42 U.S.C. § 6926) in lieu of the regulations comprising the federal hazardous waste program (the Federal Program). The State of New York received final authorization to administer its base hazardous waste program on May 29, 1986. Since 1986, New York State has been authorized for many other hazardous waste requirements promulgated by EPA pursuant to RCRA, See 67 Fed. Reg. 49864 (August 1, 2002), 70 Fed. Reg. 1825 (January 11, 2005) and 74 Fed. Reg. 31380 (July 1, 2009) and 78 Fed. Reg. 15299 (March 11, 2013). New York is authorized for most hazardous waste regulations issued by EPA as of January 22, 2002 and the Uniform Hazardous Waste Manifest Amendments issued by EPA on March 4, 2005 and June 16, 2005.

Section 3008(a)(1) of RCRA, 42 U.S.C. §6928(a)(1), provides, in part, that “whenever on the basis of any information the Administrator [of EPA] determines that any person has violated or is

in violation of any requirement of this subchapter [Subtitle C of RCRA], the Administrator may issue an order assessing a civil penalty for any past or current violation.” Section 3008(a)(2) of RCRA, 42 U.S.C. 6928(a)(2) provides, in part, that “[i]n the case of a violation of any requirement of [Subtitle C of RCRA] where such violation occurs in a State which is authorized to carry out a hazardous waste program under [Section 3006 of RCRA, 42 U.S.C. 6926], the Administrator [of EPA] shall give notice to the State in which such violation has occurred prior to issuing an order.”

Section 3008(a) of the Act, 42 U.S.C. § 6928(a), authorizes EPA to enforce the regulations constituting the authorized State program and EPA retains primary responsibility for the enforcement of certain requirements promulgated pursuant to HSWA for which the State has not yet been authorized.

Section 3008(c) of the Act, 42 U.S.C. § 6928(c), authorizes EPA to seek a civil penalty for a violation of a schedule for corrective action in a compliance order.

The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2, who has been duly delegated the authority to institute this action, hereby alleges:

Jurisdiction

1. This Tribunal has jurisdiction over the subject matter of this action pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and 40 C.F.R. § 22.1(a)(4).
2. In accordance with Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), EPA has given the State of New York prior notice of this action.

Respondent's background

3. Respondent is the City of Buffalo (hereinafter “City of Buffalo”, “Buffalo” and/or “Respondent”). Buffalo’s main administrative offices are located at 65 Niagara Square (“City Hall”), Buffalo, New York 14202.
4. Respondent is a city that occupies about 52.5 square miles in Erie County in the State of New York.
5. Respondent owns and/or operates approximately 200 buildings (including, but not limited to, those utilized by General Services Buildings, Department of Public Works, Parks, and Streets, Buffalo Police Precincts and Fire Departments, public libraries, public parks, hockey area, skating rinks, community centers, museums, theaters, a zoo, and a marina) located at various sites throughout the City; these buildings do not include those operated and utilized by the Buffalo Board of Education.

6. Respondent is a “person” as defined at Section 1004(15) of the Act, 42 U.S.C. § 6903(15), and Title 6 of the New York Codes, Rules, and Regulations (“6 NYCRR”) § 370.2(b).

Hazardous Waste Generation

7. In the course of normal operations, the City of Buffalo generates “solid waste,” as that term is defined at 6 NYCRR § 371.1(c) through its various departmental entities.
8. In the course of normal operations, the City of Buffalo generates “hazardous waste,” as that term is defined at 6 NYCRR § 371.1(d) through its various departmental entities.
9. Solid and hazardous wastes generated by the City of Buffalo include, but are not limited to waste paints, spent solvents, corrosive liquids, used oil, used automotive fluids, and pharmaceutical wastes.
10. Some of the wastes described above exhibit the characteristic of ignitability.
11. The City of Buffalo generates significant amounts of spent lamps and Cathode Ray Tubes (CRTs), a solid and potentially hazardous waste stream, at all or most of its municipal buildings, and from street lighting.
12. Some of the spent lamps and CRTs generated at the approximately 200 buildings owned and/or operated by Buffalo and some of the spent lamps generated from street lighting, exhibit the characteristic of toxicity under the Toxic Characteristic Leaching Procedure (TCLP) for metals, in particular mercury.
13. Spent lamps may be handled under the less stringent standards provided under the Universal Waste Rules, codified in federal regulations at 40 C.F.R. Part 273 and in New York State regulations at 6 NYCRR Part 374-3.

Hazardous Waste Notification

14. Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, all persons conducting activities that generate hazardous waste are required to notify EPA of their hazardous waste activities.
15. At the present time, the City of Buffalo has notified EPA that it generates hazardous waste at approximately twenty- seven sites and Buffalo was assigned hazardous waste identification numbers for those sites.

Previous EPA Complaint and Consent Order

16. On June 30, 2010, the City of Buffalo was issued a “Complaint and Notice of Opportunity for Hearing” (“Complaint”) bearing docket number Docket No. RCRA-02-2010-7107. The

Complaint alleged violations of the requirements of RCRA and regulations concerning the management of hazardous waste.

17. The Complaint was issued in response to information obtained during an inspection and other investigatory activities at the offices of the City of Buffalo's Department of Public Works, Parks, and Streets ("DPW") and other offices at Buffalo's City Hall by a duly authorized representative of the EPA on September 24, 2009, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927.
18. The Complaint cited Respondent's failures to make, or to have a third-party make on its behalf, hazardous waste determinations for its spent fluorescent, high pressure sodium vapor, mercury vapor lamps, and metal halide lamps which failures constitute violations of 6 NYCRR § 372.2(a)(2).
19. The Complaint also cited the Respondent for not maintaining and operating its facilities in such a manner as to minimize the possibility of any unplanned sudden or non-sudden releases of hazardous waste or hazardous waste constituents to the air, soil, or surface water which could threaten human health or the environment in accordance with 6 NYCRR § 373-2.3(b) and/or 6 NYCRR § 373-3.3(b).
20. On April 11, 2011, pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, and 40 C.F.R. § 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, a Consent Agreement and Final Order ("Consent Order") was agreed to between the EPA and the City of Buffalo.
21. In the Consent Agreement, the City of Buffalo certified that it was in compliance with all of the terms of the Compliance Order that was issued to Respondent as part of the Complaint and agreed that it would hereinafter comply with all applicable federal and state regulatory requirements for the management of hazardous waste by generators and universal waste handlers at all of Buffalo's facilities.

EPA Investigatory Activities

22. On September 13 and September 14, 2011, a duly authorized representative of EPA conducted RCRA Compliance Evaluation Inspections ("Inspections") of six municipal sites owned and operated by the City of Buffalo pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927.
23. The Inspections were conducted to determine whether or not the City of Buffalo was complying with the Consent Order and with RCRA regulations at its multiple facilities.
24. At the time of the Inspections, several hundred containers, which contained waste paints, paint thinners, solvents, and related waste unidentifiable due to obliterated labels, were

observed in the former paint shop of the Mechanical Services building located at 1326 Seneca Street.

25. At the time of the Inspections, many of these containers referred to in paragraph 24, above, appeared to have been stored for extensive periods of time, had unreadable or no labels to identify their contents, were extremely corroded and some had already leaked their contents, and most appeared to have been stored in lieu of disposal.
26. At the time of the Inspections, all of the containers referred to in paragraph 24, above, were declared to be waste by the Mechanical Services department manager, Mr. Dennis Gesel, who stated that the painting operations room “is no longer used”.
27. At the time of the Inspections, several hundred spent fluorescent lamps were observed being stored in the basement of City Hall, in the Mechanical Services building, and at the Buffalo Museum of Science.
28. At the time of the Inspections, none of the several hundred spent fluorescent lamps referred to in paragraph 27, above, were labeled as hazardous or universal waste, and either were not being stored in containers or were being stored in open containers.
29. At the time of the Inspections, about 12 containers of spent lamps were piled in a haphazard manner in the Mechanical Services building.
30. At the time of the Inspections, other large spent mercury lamps, similar to those used to light stadiums and gymnasiums, were found randomly placed on the floor in hallways and other locations in the Mechanical Services building without being labeled or containerized or otherwise protected from breakage which would allow releases of mercury.
31. At the time of the Inspections, dozens of discarded CRTs were haphazardly stored in multiple locations owned by the City of Buffalo; CRTs can contain enough lead to require managing them as hazardous waste; however, none of the discarded CRTs observed during the inspections were labeled as hazardous or universal waste.

Information Request Letter (IRL), Notices of Violation, and Respondent’s Responses

32. On or about March 21, 2012, EPA issued to the City of Buffalo a Notice of Violation and RCRA Section 3007 Information Request Letter (“NOV-IRL”).
33. The NOV portion of the NOV-IRL, which was issued pursuant to Section 3008 of the Act, 42 U.S.C. § 6928, informed the Respondent that EPA had identified at least thirteen (13) RCRA violations at multiple sites and required Respondent to provide a description and documentation of the actions it had taken to correct the violations within thirty (30) calendar days from receipt of the NOV-IRL.

34. The IRL portion of the NOV-IRL was issued pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, and sought, in part, information and documentation relating to Respondent's management of the significant number of containers of waste and waste-like material being accumulated or stored, many of which had been observed to be corroded, leaking, or otherwise in poor condition, and many of which were unlabeled; this information was needed to assist EPA in fully evaluating Buffalo's compliance with RCRA regulations and with the Consent Order.
35. The IRL portion of the NOV-IRL also requested information concerning the City's management and disposal of discarded spent lamps and CRTs generated by its significant municipal administrative operations.
36. In a letter dated April 26, 2012, Respondent submitted its Response to the NOV-IRL (hereinafter "Response").

COUNT 1 – Failure to Make Timely Hazardous Waste Determinations

37. Complainant repeats and re-alleges each allegation contained in paragraphs "1" through "36", inclusive, with the same force and effect as if fully set forth herein.
38. Pursuant to 6 NYCRR § 372.2(a)(2), a person who generates a solid waste must determine, or have a third party determine, whether that solid waste is a hazardous waste, using the procedures specified in that provision.
39. In accordance with 6 NYCRR § 371.1(c), subject to certain inapplicable exclusions, a solid waste is defined as any discarded, abandoned, recycled, or inherently waste-like material. In accordance with the same provision, materials are solid wastes if they are abandoned by being disposed of, burned or incinerated.
40. Pursuant to 6 NYCRR § 371.1(c)(3) materials are solid wastes if they are abandoned by being:
 - a. disposed of;
 - b. burned or incinerated; or
 - c. accumulated, stored, or treated before or in lieu of being abandoned by being disposed of, burned or incinerated.
41. At the time of the Inspections, the City of Buffalo had generated waste at some of its approximately 200 buildings, including but not limited to waste paints and solvents which were "discarded material" and a "solid waste" as defined in 6 NYCRR § 371.1(c).
42. In its March 21, 2012 NOV-IRL, EPA cited the large number of containers of waste paints and solvents observed by the inspector at the time of the Inspections in the Mechanical Services Building as a violation of the requirement to make a hazardous waste determination.

43. In its Response dated April 26, 2012, to the March 21 NOV-IRL, with reference to the waste paints and solvents observed at the time of the Inspections in the Mechanical Services Building, the City of Buffalo stated that “[p]aint that was no longer usable, identified as waste paint, was transported for disposal” and that “[p]aint that was no longer usable was transported to the Cycle Chem, Inc., Lesisberry, PA facility on March 23, 2012, as evidenced on the hazardous waste manifest (Tracking 001055736 JJK).”
44. In its Response, Respondent provided a copy of hazardous waste manifest referred to in paragraph 43 above which showed that Respondent had generated 1,400 pounds of waste paint and that this waste paint was classified by Respondent as ignitable (D001) hazardous waste.
45. As of the date of the Inspections, Respondent had not itself determined, nor had a third-party determine, whether its wastes, including those noted in paragraphs “43” and “44”, above, constituted hazardous waste.
46. Respondent’s failures to timely have made, or have a third-party make on its behalf, hazardous waste determinations for the aforementioned wastes at its Mechanical Services Building, constitute multiple violations of 6 NYCRR § 372.2(a)(2).

COUNT 2 - Failure to Keep Containers in Good Condition and to Transfer Hazardous Waste

47. Complainant repeats and re-alleges each allegation contained in paragraphs “1” through “46”, inclusive, with the same force and effect as if fully set forth herein.
48. Pursuant to 6 NYCRR § 373-2.9(b) and 6 NYCRR § 373-3.9(b) generators are required to keep containers in good condition and to transfer hazardous waste from a leaking container to a container that is in good condition.
49. At the time of the Inspections, Respondent stored waste paints and waste solvents in containers that were corroded or had already breached and released their contents in the Mechanical Services building.
50. As set forth in paragraph 43 above, on a date more than six months after the Inspections, Respondent shipped these wastes off-site for disposal using a hazardous waste manifest that declared the wastes to be hazardous.
51. In its Response, the City of Buffalo, in reference to the waste paints and waste solvents observed in the Mechanical Services Building, stated “All reported or identified leaking containers have been removed or replaced immediately and contents transferred to a container in good condition, properly labeled and inventoried.”

52. Respondent's failures to keep containers of hazardous waste in good condition and to transfer hazardous waste from a leaking container to a container that was in good condition at its Facility, constitute multiple violations of 6 NYCRR § 373-2.9(b) or 6 NYCRR § 373-3.9(b).

COUNT 3 - Failure to Minimize Risks of Fire, Explosion and Releases

53. Complainant repeats and re-alleges each allegation contained in paragraphs "1" through "52", inclusive, with the same force and effect as if fully set forth herein.

54. Pursuant to 6 NYCRR § 373-2.3(b), and 6 NYCRR § 373-3.3(b), a facility must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment.

55. At the time of the Inspections, Respondent was storing hazardous wastes in several hundred containers, many of which had corroded and/or had leaked their contents in the Mechanical Services building. These materials were later shipped off-site and labeled as hazardous waste due to their ignitability.

56. At the time of the Inspections, Respondent was storing several hundred spent fluorescent lamps and CRTs in the basement of City Hall in a haphazard fashion without proper containment to prevent breakage and at least one lamp had broken and spilled its contents.

57. Fluorescent light bulbs often contain mercury which can be released to the surrounding air when bulbs break.

58. In its Response, the City of Buffalo stated "All violations with regard to the Universal Waste at the Mechanical Services building and in the basement of City Hall have been corrected."

59. Respondent's aforementioned failures to maintain and operate its Facilities to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents into the air, soil or surface water which could threaten human health or the environment, constitute multiple violations of 6 NYCRR § 373-2.3(b) or 6 NYCRR § 373-3.3(b).

COUNT 4 – Failure to Comply with an EPA Consent Order

60. Complainant repeats and re-alleges each allegation contained in paragraphs "1" through "58", inclusive, with the same force and effect as if fully set forth herein.

61. On April 11, 2011, pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, and 40 C.F.R. § 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, a Consent

Agreement was entered into between the EPA and the City of Buffalo and a Final Order incorporating the Consent Agreement was issued requiring compliance with its provisions.

62. The Consent Order required that, commencing on the effective date of the Order, the City of Buffalo would henceforth determine whether or not any and all solid wastes generated as part of its municipal activities are or are not hazardous waste.
63. As set forth in Count 1 above, at the time of the Inspections, the City of Buffalo had generated numerous wastes for which it had not timely made hazardous waste determinations.
64. The Consent Order required that, commencing on the effective of the Order, the City of Buffalo comply with all applicable federal and state regulatory requirements for the management of hazardous waste by generators and universal waste handlers.
65. As set forth in Counts 2 and 3 above, at the time of the Inspections, the City of Buffalo has failed to timely comply with important federal and state regulatory requirements for the management of hazardous waste by generators and universal waste handlers.
66. Respondent's failure to comply with the Consent Order constitutes a failure to take corrective action within the time specified in a compliance order issued under Section 3008 of RCRA.

II. PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Sections 3008(a)(3) and 3008(c) of the Act, 42 U.S.C. § 6928(a)(3) and § 6928(c). For purposes of determining the amount of any penalty assessed, Section 3008(a)(3) requires EPA to "take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." To develop the proposed penalty in this complaint, the Complainant has taken into account the particular facts and circumstances of this case and used EPA's 2003 RCRA Civil Penalty Policy, a copy of which is available upon request or can be found on the Internet at the following address: <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf>. This policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors to particular cases.

The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, required EPA to adjust its penalties for inflation on a periodic basis. Consistent with this, the penalty amounts in the 2003 RCRA Civil Penalty Policy have been amended to reflect inflation adjustments. These adjustments were made pursuant to the December 29, 2008 document entitled Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Penalty Monetary Penalty Inflation Adjustment Rule (effective January 12, 2009); and the November 16, 2009 document entitled Adjusted Penalty Policy Matrices based on the 2008 Civil Monetary Inflation Rule (with a further revision not relevant to this

action on April 6, 2010). The maximum civil penalty under Sections 3008(a)(3) and 3008(c) of RCRA, 42 U.S.C. § 6928(a)(3) and § 6928(c), for violations after January 12, 2009 is \$37,500 per day of violation. 40 C.F.R. Part 19.

The Complainant proposes, subject to receipt and evaluation of further relevant information from the Respondent, that the Respondent be assessed the following civil penalty for the violations alleged in this Complaint. A penalty calculation worksheet and narrative explanation to support the penalty figure for each violation cited in this Complaint are included in Attachment I, below. Matrices employed in the determination of the penalties are included as Attachment II.

In view of the above-cited violations, and pursuant to the authority of Sections 3008(a)(3) and 3008(c) of RCRA, 42 U.S.C. § 6928(a)(3) and § 6928(c), the Complainant herewith proposes the assessment of a civil penalty in the total amount of one hundred thirty one thousand, two hundred and fifty dollars (\$112,500) as follows:

Count 1:	\$ 37,500
Counts 2 and 3:	\$ 37,500
Count 4:	\$ 37,500

Total Proposed Penalty: \$ 112,500

III. COMPLIANCE ORDER

Based upon the foregoing, and pursuant to the authority of Section 3008 of the Act, Complainant issues Respondent the following Compliance Order. The City of Buffalo shall:

1. Commencing on the effective date of this Compliance Order, to the extent it has not done so, Respondent shall make the required determinations whether any and/or all of the solid wastes generated and stored at its Facilities are hazardous wastes.
2. Commencing on the effective date of this Compliance Order, Respondent shall maintain and operate its Facilities so as to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to the air, soil or surface water which could threaten human health or the environment.
3. Commencing on the effective date of this Compliance Order, Respondent shall, to the extent it has not done so, store hazardous waste only in containers that are in good condition.
4. Within thirty (30) calendar days of the effective date of this Compliance Order, Respondent shall comply with all other applicable federal and state regulatory requirements for hazardous waste generators, including those provisions for the on-site storage of hazardous waste

by the generator of such waste, at its Facilities and shall comply with universal waste rules applicable to the handling of its spent fluorescent bulbs.

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

Ronald Voelkel
Environmental Scientist
RCRA Compliance Branch
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency - Region 2
290 Broadway, 21st Floor
New York, New York 10007-1866

This Compliance Order shall take effect thirty (30) days after service of this Order, unless by that date Respondent has requested a hearing pursuant to 40 C.F.R. § 22.15. *See* 42 U.S.C. § 6928(b) and 40 C.F.R. §§ 22.37(b) and 22.7(c).

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 state) provisions, nor does such compliance release Respondent from liability for any violations at its Facilities. 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 its Facilities.

IV. NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

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 regarding hazardous waste violations is liable for a civil penalty of up to \$37,500 for each day of continued noncompliance (73 Fed. Reg. 75340, December 11, 2008).

V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 *Fed. Reg.* 40138 (July 23, 1999), entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS" and which are codified at 40 C.F.R. Part 22. A copy of these rules accompanies this "Complaint, Compliance Order and Notice of Opportunity for Hearing."

A. Answering The Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty and/or the Compliance Order 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, and such Answer must be filed within 30 days after service of the Complaint. 40 C.F.R. §§ 22.15(a) and 22.7(c). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866**

(NOTE: Any documents that are filed after the Answer has been filed should be filed as specified in “D” below.)

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 their 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, a hearing upon the issues raised by the Complaint and Answer may be held. 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. 40 C.F.R. § 22.15(c). With regard to the Compliance Order in the Complaint, unless Respondent requests a hearing pursuant to 40 C.F.R. § 22.15 within

thirty (30) days after the Compliance Order is served, the Compliance Order shall automatically become final. 40 C.F.R. § 22.37

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 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 [*i.e.* in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the 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 therefore 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. Any default order requiring compliance action shall be effective and enforceable against Respondent without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d).

D. Filing of Documents Filed After the Answer

Unless otherwise ordered by the Presiding Officer for this proceeding, all documents filed after Respondent has filed an Answer should be filed with the Headquarters Hearing Clerk acting on behalf of the Regional Hearing Clerk, addressed as follows:

If filing by the United States Postal Service:

Sybil Anderson
Headquarters Hearing Clerk
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900R
Washington, D.C. 20460

If filing by UPS, FedEx, DHL or other courier or personal delivery, address to:

Sybil Anderson
Headquarters Hearing Clerk
Office of the Administrative Law Judges
Ronald Reagan Building, Room M1200
U.S. Environmental Protection Agency
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

E. Exhaustion Of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Agency's Environmental Appeals Board ("EAB"; see 40 C.F.R. § 1.25(e)) 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).

To appeal an initial decision to the EAB, Respondent must do so "[w]ithin thirty (30) days after the initial decision is served." 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(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.

VI. 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 the 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:

Stuart Keith, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, Room 1623
New York, New York 10007-1866
212-637-3217

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.

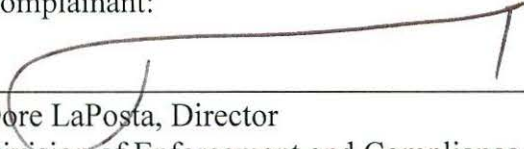
Any settlement that may be reached as a result of an informal settlement conference will be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). 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 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.

**VII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR
CONFERENCE**

If, instead of filing an Answer, Respondent wishes not to contest the Compliance Order in the Complaint and wants to pay the total amount of the proposed penalty within thirty (30) days after receipt of the Complaint, Respondent should promptly contact the Assistant Regional Counsel identified on the previous page.

Complainant:



Dore LaPosta, Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency, Region 2

Date SEPTEMBER 30 2013

To: The Honorable Byron W. Brown
Mayor of Buffalo
201 City Hall
65 Niagara Square
Buffalo, NY 14202

cc: Russ Brauksieck, Chief
Facility Compliance Section
Bureau of Technical Support
Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway, 11th Floor
Albany, NY 12233

In re: the City of Buffalo
Docket Number RCRA-02-2013-7108

CERTIFICATE OF SERVICE

This is to certify that on October 22, 2013, I served a true and correct copy of the foregoing "COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING," bearing Docket Number RCRA-02-2013-7108 hereinafter referred to as the "Complaint"), together with Attachments I and II and with a copy of the "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS," 40 C.F.R. Part 22, by certified mail, return receipt requested, to The Honorable Bryon W. Brown, Mayor of Buffalo, 201 City Hall, 65 Niagara Square, Buffalo, NY 14202. On said day, I hand carried the original and a copy of the Complaint, with the accompanying attachments, to the Office of the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2, 290 Broadway, 16th floor, New York, New York 10007-1866.

Mildred N. Bay

Dated: October 22, 2013
New York, New York

ATTACHMENT I

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

PENALTY COMPUTATION – COUNT 1

Respondent: City of Buffalo

Facility Address: 65 Niagara Square, Buffalo, NY

Requirement Violated:

6 NYCRR § 372.2(a)(2), a person who generates a solid waste must determine if that waste is a hazardous waste using the procedures specified in that provision.

PENALTY AMOUNT FOR COMPLAINT

1. Gravity based penalty from matrix	\$32,900
(a) Potential for harm.	MAJOR
(b) Extent of Deviation.	MAJOR
2. Select an amount from the appropriate multi-day matrix cell.	Not applicable
3. Multiply line 2 by number of days of violation minus 1.	Not applicable
4. Add line 1 and line 3	\$32,900
5. Percent increase/decrease for good faith.	Not applicable
6. Percent increase for willfulness/negligence.	Not applicable
7. Percent increase for history of noncompliance.	14%
8. Total lines 5 through 7	\$4,600
9. Calculate economic benefit.	Not applicable
10. Add lines 4, 8, and 9 for penalty amount to be inserted into the complaint.	\$37,500

NARRATIVE EXPLANATION IN SUPPORT OF PENALTY FIGURES – COUNT 1

1. Gravity Based Penalty

Potential for Harm - The RCRA Civil Penalty Policy provides that the potential for harm should be based on two factors: the risk of human or environmental exposure and the adverse impact of the noncompliance on the regulatory scheme. Where an owner/operator of a facility generating solid waste fails to perform the required hazardous waste determination, the adverse impact on the regulatory scheme is maximized. This follows because, if the owner/operator is unaware the facility is generating hazardous waste, or decides not to attempt to identify its solid wastes as hazardous waste and stores those wastes in lieu of disposal, there is a greater likelihood that the wastes will be handled and/or disposed of improperly and in a manner that presents a greater risk of environmental contamination.

Extent of Deviation - The extent of deviation present in this violation was determined to be MAJOR given the large number of containers that were not properly characterized and were being mismanaged.

The applicable cell ranges from \$28,330 to \$37,500. The mid-point for the cell matrix was selected consistent with the above.

Multiple/Multi-day – Despite the fact that that determinations were not made for multiple types of waste, multiple penalties are not being sought at this time.

2. Adjustment Factors

Good Faith - Based upon facility specific factors and available information that Respondent did not identify the violation and take corrective action prior to the EPA Inspections, no adjustment has been made at this time.

Willfulness/Negligence - Not applicable

History of Compliance – This violation was cited in a previous EPA Complaint.

Ability to Pay - Not applicable

Environmental Project - Not applicable

Other Unique Factors - Not applicable

3. Economic Benefit - At this time, EPA is not seeking to recover the economic benefit, because it is believed to be under the level considered to be insignificant under the 2003 RCRA Civil Penalty Policy. Although there is some economic benefit gained, the

Respondent ultimately incurred much of the expense associated with properly characterizing and managing its waste.

PENALTY COMPUTATION – COUNTS 2 and 3

Respondent: City of Buffalo

Facility Address: 65 Niagara Square, Buffalo, New York

Requirements Violated:

6 NYCRR § 373-2.9(b) and § 373-3.9(b). Respondent failed to keep containers in good condition and to transfer hazardous waste from leaking containers to containers that are in good condition.

6 NYCRR § 373-2.3(b) and § 373-.3(b). Respondent failed to maintain and operate the Facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment at its Facility.

1. Gravity based penalty from matrix	\$ 32,900
(a) Potential for Harm.	MAJOR
(b) Extent of Deviation.	MAJOR
2. Select an amount from the appropriate multi-day matrix cell.	Not applicable
3. Multiply line 2 by number of days of violation minus 1.	Not applicable
4. Add line 1 and line 3	\$32,900
5. Percent increase/decrease for good faith.	Not applicable
6. Percent increase for willfulness/negligence.	Not applicable
7. Percent increase for history of noncompliance.	14%
8. Total lines 5 through 7	\$4,600
9. Calculate economic benefit.	Not applicable
10. Add lines 4, 8, and 9 for penalty amount to be inserted into the complaint.	\$37,500

**NARRATIVE EXPLANATION IN SUPPORT OF PENALTY FIGURES – COUNTS 2
AND 3**

1. Gravity Based Penalty

- a. Potential for Harm - The potential for harm present in this violation was determined to be MAJOR. The Respondent at least two Facilities improperly stored containers of hazardous waste, many of which were corroded and/or had leaked. Since the waste exhibited the ignitability characteristic, this could have led to a fire or explosion. In addition, spent lamps containing mercury were stored in a haphazard fashion and without proper containment to prevent breakage, and at least one lamp was broken.
- b. Extent of Deviation - The extent of deviation present in this violation was determined to be MAJOR because of the large number of containers and spent lamps involved which amounted to several hundreds.
- c. The applicable cell ranges from \$ 28,339 to \$ 37,500. The mid-point of the cell range was selected.
- d. Multiple/Multi-day – The Agency, *at this time*, has used its enforcement discretion and has limited the penalty for the violations alleged in these counts to one day.

2. Adjustment Factors

Good Faith - Based upon Facility specific factors and available information that Respondent did not identify the violation and take corrective action prior to the EPA Inspections, no adjustment has been made at this time.

Willfulness/Negligence – Not applicable

History of Compliance – This violation was cited in a previous EPA Complaint and Respondent signed a CAFO stating that they would comply but failed to do so.

Ability to Pay - Not applicable

Environmental Project - Not applicable

Other Unique Factors - Not applicable

3. Economic Benefit - At this time, EPA is not seeking to recover the economic benefit, because it is believed to be under the level considered to be insignificant under the 2003 RCRA Civil Penalty Policy. Although there is some economic benefit gained, the

Respondent ultimately incurred much of the expense associated with properly managing its waste.

PENALTY COMPUTATION – COUNT 4

Respondent: City of Buffalo.

Facility Address: 65 Niagara Square, Buffalo, New York

Requirement Violated: Failure to comply with a Consent Agreement and Final Order

PENALTY AMOUNT FOR COMPLAINT

1. Gravity based penalty from matrix	\$37,500
(a) Potential for harm.	MAJOR
(b) Extent of Deviation.	MAJOR
2. Select an amount from the appropriate multi-day matrix cell.	Not applicable
3. Multiply line 2 by number of days of violation minus 1.	Not applicable
4. Add line 1 and line 3	\$37,500
5. Percent increase/decrease for good faith.	Not applicable
6. Percent increase for willfulness/negligence.	Not applicable
7. Percent increase for history of noncompliance.	Not applicable
8. Total lines 5 through 7	Not applicable
9. Calculate economic benefit.	Not applicable
10. Add lines 4, 8, and 9 for penalty amount to be inserted into the complaint.	\$37,500

NARRATIVE EXPLANATION IN SUPPORT OF PENALTY FIGURES – COUNT 4

1. Gravity Based Penalty

Potential for Harm – Because the wastes included paints, solvents and mercury containing spent lamps and the number of waste containers and spent lamps was high, the potential contamination from such wastes was serious. In addition, noncompliance with an EPA Order has an adverse effect on the implementation of the RCRA program. The potential for harm, therefore, was determined to be MAJOR.

Extent of Deviation - The extent of deviation present in this violation was determined to be MAJOR. Despite having been issued a formal enforcement action by the EPA for being out of compliance with hazardous waste regulations and having signed a Consent Agreement and being ordered to comply with the regulations, the City of Buffalo continued to violate in numerous instances the same regulations it had previously violated.

The applicable cell ranges from \$28,330 to \$37,500. The high-point for the cell matrix was selected consistent with the above.

Multiple/Multi-day – EPA is only seeking a penalty for one day at this time.

2. Adjustment Factors

Good Faith - Based upon facility specific factors and available information that Respondent did not identify the violation and take corrective action prior to the EPA Inspections, no adjustment has been made at this time.

Willfulness/Negligence – Not applicable

History of Compliance – Already accounted for

Ability to Pay - Not applicable

Environmental Project - Not applicable

Other Unique Factors - Not applicable

3. Economic Benefit - At this time, EPA is not seeking to recover the economic benefit, because it is believed to be under the level considered to be insignificant under the 2003 RCRA Civil Penalty Policy. Although there is some economic benefit gained, the Respondent ultimately incurred much of the expense associated with properly managing its waste.

ATTACHMENT II

Gravity-based penalty matrix
to supplement the RCRA Civil Penalty Policy
for violations that occur after January 12, 2009*

Extent of Deviation from Requirement

Potential for
Harm

	MAJOR	MODERATE	MINOR
MAJOR	\$37,500 to \$28,330	\$28,330 to \$21,250	\$21,250 to \$15,580
MODERATE	\$15,580 to \$11,330	\$11,330 to \$7,090	\$7,090 to \$4,250
MINOR	\$4,250 to \$2,130	\$2,130 to \$710	\$710 to \$150

* All penalties calculated in this action have been rounded to the nearest \$100.

Multi-Day Matrix of Minimum Daily Penalties
 To Supplement the RCRA Civil Penalty Policy
 For Violations That Occur After January 12, 2009*

Extent of Deviation from Requirement

Potential
for
Harm

	MAJOR	MODERATE	MINOR
MAJOR	\$7,090 to \$1,420	\$5,670 to \$1,070	\$4,250 to \$780
MODERATE	\$3,120 to \$570	\$2,230 to \$360	\$1,420 to \$220
MINOR	\$850 to \$150	\$430 to \$150	\$150

* All penalties calculated in this action have been rounded to the nearest \$100