UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
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AGUAKEM CARIBE, INC.,	)	**DOCKET NO. RCRA-02-2009-7110**
	)	
	)	
	)	
RESPONDENT	)	

INITIAL DECISION

Issued: December 22, 2011

Before: Barbara A. Gunning
Administrative Law Judge
U.S. Environmental Protection Agency

Appearances:

For Complainant:

Lourdes del Carmen Rodriguez, Esquire
Roberto Mateo Durango, Esquire
U.S. Environmental Protection Agency, Region 2
Caribbean Environmental Protection Division
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For Respondent:

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I. PROCEDURAL HISTORY

On September 29, 2009, the United States Environmental Protection Agency ("EPA" or "Agency"), Region 2, Caribbean Environmental Protection Division ("Complainant"), initiated this proceeding by filing a Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") pursuant to Section 3008 of the Solid Waste Disposal Act, as amended, commonly referred to as

the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928. The Complaint alleges in three counts that Aguakem Caribe, Inc. ("Respondent" or "Aguakem"), violated regulations governing the management of hazardous waste and used oil, promulgated by EPA at 40 C.F.R. parts 260 through 279, as a result of its chemical manufacturing operations at a facility owned by the Port of Ponce Authority in Ponce, Puerto Rico.

Specifically, the Complaint alleges that Respondent became a generator of "solid waste," as that term is defined by 40 C.F.R. § 261.2, by vacating the facility in Ponce, Puerto Rico, on or about December 28, 2006, and failing to remove certain materials from the facility, thereby abandoning the materials. Based upon these allegations, Count 1 of the Complaint charges Respondent with failing to determine whether each solid waste generated at the facility constituted a "hazardous waste," in violation of 40 C.F.R. § 262.11. Count 2 charges Respondent with failing to maintain and operate the facility in a manner that minimized the possibility of a fire, explosion, or any unplanned release of the materials - which, the Complaint alleges, constituted hazardous waste - in violation of 40 C.F.R. § 265.31. Finally, Count 3 charges Respondent with failing to clearly label a container storing used oil with the words "USED OIL," in violation of 40 C.F.R. § 279.22(c)(1). For these alleged violations, the Complaint seeks a Compliance Order and a civil administrative penalty in the aggregate amount of $332,963.

On October 26, 2009, Respondent filed an Answer to Complaint and Request for Hearing ("Answer"), in which Respondent denies the allegations and raises a number of affirmative defenses to liability. As grounds for these defenses, Respondent asserts in its Answer that it was forced to leave the Ponce facility due to high levels of lead and asbestos caused by the PPA's activities on the surrounding property and that it intended to remove the materials remaining at the facility once the lead and asbestos contamination had been remediated. Accordingly, Respondent argues, it never abandoned the facility or the materials therein.

By Order dated November 16, 2009, the Honorable William B. Moran, an Administrative Law Judge in EPA's Office of Administrative Law Judges, was designated to preside in this case. Pursuant to the Prehearing Order issued by Judge Moran on November 25, 2009, the parties filed initial prehearing exchanges. Thereafter, Complainant filed a Reply to Respondent's Prehearing Exchange and, in a single document, a Motion in Limine and Motion to Strike ("Complainant's Motions"). Respondent, in turn, filed a supplement to its initial prehearing exchange and, in a single document, an Opposition to EPA's Motion in Limine and

Motion to Strike, and Request for Discovery and Rescheduling of Hearing ("Respondent's Request for Discovery").[1/]

On April 22, 2010, this matter was reassigned to the undersigned due to Judge Moran's departure from EPA's Office of Administrative Law Judges. By Orders dated May 14, 2010, and June 2, 2010, the undersigned accepted the supplement to Respondent's initial prehearing exchange, denied Complainant's Motions, and denied Respondent's Request for Discovery.

On November 1, 2010, Respondent submitted an Additional Supplement to its Initial Prehearing Exchange. Complainant subsequently filed an Objection to Respondent's Additional Supplemental to its Initial Prehearing Exchange ("Complainant's Objection") and its own Supplemental Prehearing Exchange. The undersigned denied Complainant's Objection by Order dated November 15, 2010.

On November 16, 2010, the parties submitted a Joint Set of Stipulated Facts, Exhibits and Testimony ("Joint Stipulations" or "Jt. Stips.").

The evidentiary hearing in this matter commenced in San Juan, Puerto Rico, on December 7, 2010, and concluded on December 9, 2010. Complainant presented the testimony of three witnesses at the hearing: Mr. Eduardo González, Mr. Jesse Avilés, and Mr. Ángel C. Rodríguez. Complainant also proffered 11 documents that were received into evidence. These documents were marked as Complainant's Exhibits ("CEX") 1, 3, 5-11, and 13-14.[2/] Respondent presented the testimony of two witnesses at the hearing, Mr. Edgardo Guzman and Mr. Jorge J. Unanue. Respondent

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[1/] On February 17, 2010, Judge Moran issued a Notice of Hearing notifying the parties that a hearing in this case would commence on May 4, 2010. In its Request for Discovery, Respondent requested that the hearing be rescheduled in order to afford Respondent the opportunity to obtain certain information identified therein. This request became moot, however, by the Notice of Hearing Postponement issued by Judge Moran on March 29, 2010, in which Judge Moran postponed the hearing pending rulings on Complainant's Motions and Respondent's Request for Discovery.

[2/] Complainant's Exhibit 7 consists of a letter written in English and addressed to Mr. González from Jorge A. Hernández Lázaro, the Director Ejectivo of the Port of Ponce Authority, and a number of other documents written only in Spanish. Complainant's Exhibit 7 was admitted for the limited purpose of demonstrating that Mr. González received the letter and documents. Day One Tr. at 64-49.

also proffered four documents that were received into evidence and marked as Respondent's Exhibits ("REX") 2A, 2B, 3, and 5.[3/]

Pursuant to the Order Setting Briefing Schedule issued by the undersigned on January 19, 2011, Complainant submitted a Post Hearing Brief ("Complainant's Brief" or "C's Brief") and Respondent submitted a Post Trial Brief ("Respondent's Brief" or "R's Brief") on March 2, 2011. Complainant subsequently submitted a Post Hearing Reply ("Complainant's Reply" or "C's Reply") on March 16, 2011.

II. STATUTORY AND REGULATORY BACKGROUND

A. REGULATION OF HAZARDOUS WASTE

Congress enacted RCRA in 1976 as an amendment to the existing Solid Waste Disposal Act of 1965 in response to findings that increased industrial, commercial, and agricultural operations in this country had generated "a rising tide of scrap, discarded, and waste materials," which presented communities with "serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes" that were of national scope and concern. 42 U.S.C. § 6901(a). Congress was further motivated by findings that "disposal of solid waste and hazardous waste . . . without careful planning and management can present a danger to human health and the environment"; that "alternatives to existing methods of land disposal must be developed" due to a shortage of suitable disposal sites; and that methods to extract usable materials and energy from solid waste were available. 42 U.S.C. § 6901(b)-(d).

In view of these findings, Congress designed RCRA to include two foundational programs: one governing "solid waste," the framework for which is set forth in Subtitle D of the statute, and one governing "hazardous waste," the framework for which is set forth in Subtitle C. Codified at 42 U.S.C. §§ 6921-6939f, Subtitle C was crafted "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)). To achieve this goal, RCRA "empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management

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[3/] The hearing transcripts are not clear as to whether Respondent's Exhibit 3 was formally received into evidence. I ruled at the hearing, however, that it was admissible. Day Three Tr. at 92-94. Accordingly, in the event that it was not received into evidence at that time, Respondent's Exhibit 3 is deemed received into evidence by this Initial Decision.

procedures of Subtitle C . . . ." *City of Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 331 (1994) ("*City of Chicago*").[4]

1. Definition of "Hazardous Waste"

While Subtitle C of RCRA directs EPA to "promulgate regulations establishing a comprehensive management system . . .[,] EPA's authority . . . extends only to the regulation of 'hazardous waste.'" *American Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) ("*AMC I*"). Section 1004(5) of RCRA defines the term "hazardous waste" in the following manner:

> The term 'hazardous waste' means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may - (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazardous to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).

This definition clearly indicates that, in order for a material to constitute a "hazardous waste," it must first qualify as a "solid waste" under the statute. *See AMC I*, 824 F.2d at 1179 ("Because 'hazardous waste' is defined as a subset of 'solid waste,' . . . the scope of EPA's jurisdiction is limited to those materials that constitute 'solid waste.'"). RCRA defines the term "solid waste," in pertinent part, as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility *and other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . ." 42 U.S.C. § 6903(27) (emphasis added).

Consistent with the statute, the regulations promulgated by EPA to implement Subtitle C, found at 40 C.F.R. parts 260 through 279,[5] also define "hazardous waste" as a subset of "solid waste"

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[4] In contrast, non-hazardous solid wastes "are regulated much more loosely under Subtitle D [which is codified at] 42 U.S.C. §§ 6941-6949." *City of Chicago*, 511 U.S. at 331.

[5] Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, EPA may authorize qualified states to administer and enforce their own hazardous waste regulations in lieu of the federal regulations (continued...)

and "solid waste" as "any discarded material." *See* 40 C.F.R. §§ 261.3, 261.2(a)(1). While not defined by statute, the term "discarded material" is defined by the regulations, in relevant part, as including materials that are "abandoned."[6] 40 C.F.R. § 261.2(a)(2)(i). The regulations further prescribe that "[m]aterials are solid waste if they are abandoned by being: (1) [d]isposed of; or (2) [b]urned or incinerated; or (3) [a]ccumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated." 40 C.F.R. § 261.2(b).

Once a material qualifies as a "solid waste" under the regulations, it must then qualify as a "hazardous waste" in order to be subject to regulation under Subtitle C. Set forth above, the statutory definition of the term "hazardous waste" is broad, with Congress "delegating to EPA the task of promulgating regulations identifying the characteristics of hazardous waste and listing specific wastes as hazardous." *Natural Res. Def. Council v. EPA*, 25 F.3d 1063, 1065 (D.C. Cir. 1994) (citing 42 U.S.C. § 6921). The regulations enacted by EPA pursuant to this authority provide that a solid waste constitutes a "hazardous waste" when, subject to certain exceptions, it satisfies one of two conditions: (1) the waste material exhibits the hazardous characteristics of ignitability, corrosivity, reactivity, or toxicity as defined by 40 C.F.R. §§ 261.21-.24; or (2) the waste material is specifically listed as a hazardous waste at 40 C.F.R. §§ 261.31-.33 following a rulemaking proceeding. 40 C.F.R. §§ 261.3, 261.20(a), 261.30(a). The regulations assign to each characteristic of hazardous waste and specifically listed hazardous waste a unique hazardous waste number. For example, "[a] solid waste that exhibits the characteristic of corrosivity has the EPA Hazardous Waste Number of D002." 40 C.F.R. § 261.22(b).

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[5] (...continued)
promulgated by EPA. The Commonwealth of Puerto Rico is not so authorized. *See* 40 C.F.R. part 272. Accordingly, the operative regulations in the Commonwealth of Puerto Rico and for purposes of this proceeding are those promulgated by EPA.

[6] The regulatory definition of "discarded material" also includes materials that are "recycled," "considered inherently waste-like," and "a military munition identified as a solid waste in [40 C.F.R.] § 266.202." 40 C.F.R. § 261.2(a)(1)(2)(i). Complainant has not alleged that the materials at issue in this proceeding fall within any of these categories of "discarded material."

2. Generators of Hazardous Waste

Once a material qualifies as a "hazardous waste," it is subject to all of the applicable requirements imposed by Subtitle C and the implementing regulations. These requirements include standards governing generators of hazardous waste, developed by EPA pursuant to Section 3002(a) of RCRA, 42 U.S.C. § 6922(a), and codified at 40 C.F.R. part 262. Counts 1 and 2 of the Complaint charge Respondent with violations of these standards.

Specifically, Count 1 alleges that Respondent violated 40 C.F.R. § 262.11, which requires "[a] person who generates a solid waste, as defined in 40 C.F.R. § 261.2, [to] determine if that waste is a hazardous waste" using the procedure described in the regulation. Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and the regulations at 40 C.F.R. § 260.10, define the term "person" as, among other entities, a corporation.

The regulations at 40 C.F.R. § 262.34(a)(4) authorize "a generator [to] accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status" as long as the generator complies with the requirements governing owners or operators set forth in subparts C and D of 40 C.F.R. part 265. Count 2 of the Complaint alleges that Respondent violated one such requirement, found at 40 C.F.R. § 265.31, which instructs that "[f]acilities 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."

While Section 1004(6) of RCRA defines the phrase "hazardous waste generation" as "the act or process of producing hazardous waste," the statute does not specifically define the term "generator." 42 U.S.C. § 6903(6). The regulations found at 40 C.F.R. § 260.10 define the term, however, as "any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation." The regulations also define the term "facility," in pertinent part, as "[a]ll contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste, or for managing hazardous secondary materials prior to reclamation." 40 C.F.R. § 260.10.

B. REGULATION OF USED OIL

Through passage of the Used Oil Recycling Act of 1980 ("UORA"), Congress supplemented the basic requirements for the regulation of hazardous waste set forth in Subtitle C of RCRA with special provisions for used oil. *See* Used Oil Recycling Act of 1980, Pub. L. No. 96-463, 94 Stat. 2055-59 (1980) (codified as

amended in scattered sections of 42 U.S.C. §§ 6901-6992k). Added to the statute by the UORA and later amended by the Hazardous and Solid Waste Amendments of 1984, Section 3014(a) of RCRA directs EPA to develop "such performance standards and other requirements as may be necessary to protect the public health and the environment from hazards associated with recycled oil" and, to the extent possible within that context, refrain from discouraging used oil recycling. 42 U.S.C. 6935(a). Section 3014(b) further directs EPA to determine whether used oil should be listed as a hazardous waste under Section 3001 of RCRA, 42 U.S.C. § 6921.

Pursuant to these mandates, EPA subsequently promulgated regulations governing the management of used oil and, based upon its determination that used oil handled in compliance with these regulations would not pose serious adverse risks to human health and the environment, decided not to list used oil as a hazardous waste. Recycled Used Oil Management Standards, 57 Fed. Reg. 41,566, 41,566-67, 41,575 (Sept. 10, 1992). Codified at 40 C.F.R. part 279, the regulations developed by EPA for used oil establish requirements applicable to, among other entities, used oil generators.

Of particular relevance here, the regulations codified at 40 C.F.R. § 279.22 establish controls on the storage of used oil by used oil generators, providing, in pertinent part, that "[c]ontainers and aboveground tanks used to store used oil at generator facilities must be labeled or marked clearly with the words 'Used Oil.'" 40 C.F.R. § 279.22(c)(1). Count 3 of the Complaint charges Respondent with a violation of this provision. The term "used oil generator" is defined as "any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation." 40 C.F.R. § 279.1. The term "used oil" is defined broadly by the regulations as "any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities." 40 C.F.R. § 279.1; *see also* 42 U.S.C. § 6903(36) ("The term 'used oil' means any oil which has been-(A) refined from crude oil, (B) used, and (C) as a result of such use, contaminated by physical or chemical impurities."). Finally, the term "container" is defined by the regulations as "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled." 40 C.F.R. § 279.1.

III. FACTUAL BACKGROUND

A. RESPONDENT'S LEASE OF, AND RELOCATION FROM, THE FORMER FACILITY

Respondent, Aguakem Caribe, Inc., is a corporation organized and authorized to do business under the laws of the Commonwealth of Puerto Rico. Compl. ¶ 2; Answer ¶ 2; Jt. Stips. ¶ I(a). In

operation since at least 1995, Respondent manufactures a variety of chemical products used by potable and wastewater treatment plants. Compl. ¶¶ 4, 5; Answer ¶¶ 4, 5; Jt. Stips. ¶¶ I(d) and I(e); Day Three Transcript ("Day Three Tr.") at 60.

Respondent presently conducts its chemical manufacturing operations at a facility located at PR-132, Villa Final Street, Canas Ward, Ponce, Puerto Rico ("Canas Facility"), which is owned by La Huella Taina, Inc. ("Huella Taina"). Compl. ¶ 6; Answer ¶ 6. Respondent previously conducted its chemical manufacturing operations at a warehouse known as Building 6 located within the Puerto de Ponce at PR-12, Santiago de los Caballeros Avenue, Ponce, Puerto Rico. Compl. ¶ 8; Answer ¶ 8; Jt. Stips. ¶ I(f). The Puerto de Ponce is owned by the Port of Ponce Authority ("PPA"), which is, in turn, owned by the Municipio of Ponce. Compl. ¶ 8; Answer ¶ 8; Jt. Stips. ¶ I(f); R's Brief at 4; CEX 3, RCRA Compliance Evaluation Inspection Report ("CEI Report") at 2.

Beginning approximately June 28, 1995, Respondent leased an area of 23,806 square feet within Building 6 ("Former Facility") from the PPA for its chemical manufacturing operations. Compl. ¶ 9; Answer ¶ 9; Jt. Stips. ¶ I(h). After the initial five-year lease term ended in 2000, the PPA notified Respondent of plans to develop the Port of the Americas megaport at the Puerto de Ponce, which would require Respondent to vacate the Former Facility. Day Three Tr. at 61-62. In the meantime, however, Respondent and the PPA renewed the lease for the Former Facility on a year-to-year basis until approximately May 23, 2005. Day Three Tr. at 62-63; Jt. Stips. ¶ I(h). Thereafter, Respondent and the PPA renewed the lease on a month-to-month basis. Day Three Tr. at 63; Jt. Stips. ¶ I(h).

In September of 2006, the Municipio of Ponce sought and received a judicial order of eviction against Respondent. Jt. Stips. ¶ I(h). Respondent and the Municipio of Ponce subsequently negotiated an extension of time for Respondent to remain at the Former Facility through December of 2006. *Id.* According to Mr. Jorge J. Unanue, Respondent's President and Chief Executive Officer, Compl. ¶ 3; Answer ¶ 3; Jt. Stips. ¶ I(c); Day Three Tr. at 56, Respondent began relocating its operations from the Former Facility to the Canas Facility on or about December 16, 2006, Day Three Tr. at 80-81, 141. At the hearing held in this matter, Mr. Unanue testified that, to facilitate the removal of Respondent's materials from the Former Facility, its contractor demolished the dikes existing in the northern and southern portions of Building 6 and, with the permission of the PPA, certain walls within Building 6. Day Three Tr. at 154-55, 157, 160.

Mr. Unanue further testified that, around the time of Respondent's relocation, the PPA had removed the doors from Building 6's eastern entrance and that a contractor employed by

the PPA was using the eastern portion of Building 6, which was not covered by Respondent's lease, to store lumber. Day Three Tr. at 72-73, 76-77, 205; *see also* CEX 9, Respondent's response to EPA's Second RCRA § 3007 Information Request ("Second Response") at 6. Mr. Unanue alleged that the contractor was also performing demolition and construction activities in the vicinity of Building 6 in November and December of 2006. Day Three Tr. at 72, 84. Claiming that these activities generated large quantities of dust, Mr. Unanue testified that this dust entered Building 6, resulting in complaints from Respondent's employees. Day Three Tr. at 72, 84-85, 171, 173-74; *see also* CEX 9, Second Response at 3. According to Mr. Unanue, a communication from the PPA's contractor also alerted him in late fall of 2006 to the presence of asbestos in the buildings being demolished at the Puerto de Ponce, Day Three Tr. at 150-51, and a consultant hired by Mr. Unanue subsequently advised him that Building 6 also likely contained lead, *id.* at 84-85.

Consequently, Mr. Unanue testified, he hired Envirorecycling, Inc. ("Envirorecycling"), to conduct sampling of the dust within Building 6 in December of 2006. Day Three Tr. at 85-86, 88-89; REX 3, Environmental Sampling for Contamination in Dust for Asbestos and Lead at Aguakem in Ponce, Puerto Rico ("Sampling Report"). Mr. Unanue received the Sampling Report prepared by Envirorecycling on December 28, 2006. Day Three Tr. at 100-01; CEX 9, Second Response at 4. He testified that, upon his review of the Sampling Report and its recommendations, he directed Respondent's employees on December 28, 2006, to suspend all relocation activities at the Former Facility. Day Three Tr. at 98-100; *see also* CEX 9, Second Response at 3-4, 9. Mr. Unanue acknowledged that, at the time Respondent suspended its relocation activities, it had not yet removed certain equipment and materials, including iron salts, aluminum salts, hydrochloric acid, and polymers, from the Former Facility. Day Three Tr. at 128-29, 163-64, 184-85; *see also* CEX 9, Second Response at 4. Mr. Unanue also conceded that, while he closed the doors at the northern and western entrances of Building 6 upon Respondent's departure, the eastern entrance lacked a door and he did not post warning signs, as recommended by the Sampling Report. Day Three Tr. at 180-81, 204-05.

According to Mr. Unanue, he immediately notified Mr. Jorge A. Hernández, Executive Director of the PPA, that the Sampling Report indicated that Building 6 was contaminated with lead and he provided Mr. Hernández with a copy of the Report at Mr. Hernández's request. Day Three Tr. at 99-100, 180; *see also* CEX 9, Second Response at 4, 9. Mr. Unanue further claimed that he instructed his attorney to inform counsel for the PPA of the Sampling Report's findings. Day Three Tr. at 100-01; *see also* CEX 9, Second Response at 9-10.

In late January of 2007, Mr. Hernández contacted Mr. Unanue and inquired as to whether Respondent intended to retrieve its materials from the Former Facility. Day Three Tr. at 102; CEX 3, CEI Report at 4. Mr. Unanue informed Mr. Hernández that Respondent would not remove the materials until the PPA performed a lead abatement at Building 6 and certified that the lead contamination had been remediated. Day Three Tr. at 102-03; CEX 3, CEI Report at 4; CEX 9, Second Response at 4.

B. FEBRUARY 2, 2007 INSPECTION

On January 29, 2007, Mr. Hernández contacted representatives of EPA and alleged that Respondent had abandoned numerous chemicals at the Former Facility after vacating the property. CEX 3, CEI Report at 2, 4. As a result, representatives from the RCRA Response and Remediation Branch of EPA's Caribbean Environmental Protection Division - Mr. Eduardo R. González, a Senior Environmental Engineer; Mr. Jesse Avilés, an Environmental Scientist; and Ms. Zolymar Luna, an Environmental Engineer ("EPA inspectors") - conducted a Compliance Evaluation Inspection ("CEI" or "inspection") at the Former Facility on February 2, 2007, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927. CEX 3, CEI Report at 1-2; Jt. Stips. ¶ III.

As part of the CEI, the EPA inspectors first held an opening meeting with Mr. José A. Quiñones, the Port Authority Auxiliary Director of Operations, and Mr. Hernández, who participated by telephone. CEX 3, CEI Report at 2-3; Day Two Transcript ("Day Two Tr.") at 92. During this meeting, Mr. Quiñones informed the EPA inspectors that, in September of 2005, the PPA had requested that Respondent vacate the Former Facility due to the impending demolition of Building 6 as part of the construction of the Port of the Americas megaport, the expiration of Respondent's lease, and "demolition issues," such as asbestos and lead exposure levels. CEX 3, CEI Report at 3. According to Mr. Quiñones, the Municipio of Ponce obtained the judicial order of eviction against Respondent after Respondent failed to vacate the Former Facility by the date agreed upon by Respondent and the PPA. *Id.*

Mr. Hernández, in turn, informed the EPA inspectors that, after he observed numerous drums and containers, or approximately 20 percent of Respondent's inventory, at Building 6 following Respondent's departure, he contacted Mr. Unanue to notify him of these remaining materials. CEX 3, CEI Report at 4. Mr. Hernández further informed the EPA inspectors that Mr. Unanue claimed that he had been concerned prior to and during Respondent's relocation from the Former Facility about the safety and health of Respondent's employees due to nearby uncontrolled demolition operations; that he consequently sought sampling of asbestos and lead levels at Building 6; that the sampling indicated that the property contained harmful levels of lead; and that Respondent would resume its relocation activities once a

lead abatement was performed at Building 6. *Id.* Mr. Hernández asserted that, in response to Mr. Unanue's claims, the PPA conducted its own sampling at Building 6. *Id.* According to Mr. Hernández, this sampling confirmed Mr. Unanue's allegations that the property contained lead-based paint and friable asbestos-containing materials but found that these materials did not pose "an actual harmful working environment" because they had not yet been disturbed by demolition activities. *Id.*

Following the opening meeting, the EPA inspectors toured Building 6, accompanied by Mr. Quiñones, to evaluate the conditions of the Former Facility. CEX 3, CEI Report at 1, 4; Day One Transcript ("Day One Tr.") at 25, 300; Day Two Tr. at 9. Mr. Avilés took photographs during the tour. Day One Tr. at 32, 301. The EPA inspectors subsequently prepared a written account of the CEI and included several of these photographs. CEX 3, CEI Report at Appendix III; Day One Tr. at 280.

During the tour, the EPA inspectors observed that entry to Building 6 was restricted by yellow caution tape at the northern and western entrances but that the entrance doors were either open or damaged. CEX 3, CEI Report at 5; Day One Tr. at 238; Day Two Tr. at 93-94. The EPA inspectors further observed numerous labeled and unlabeled containers, drums, and tanks of varying volumes in and around Building 6. CEX 3, CEI Report at 2. They noted that some of these receptacles were open and appeared to be in deteriorated condition. *Id.* at 3, 5-8. They also detected spilled and leaking materials throughout Building 6. *Id.* at 4, 6-8.

In particular, the EPA inspectors counted approximately 100 square, plastic and metal-framed containers with a volume of one cubic yard, otherwise known as "totes," in and around Building 6. CEX 3, CEI Report at 5-7; Day One Tr. at 37. While touring the exterior of Building 6, the EPA inspectors observed one such tote containing a liquid and labeled with the words "FERROUS CHLORIDE" located on top of a stormwater catch basin in Building 6's parking lot. CEX 3, CEI Report at 5, Appendix III (Photograph 3); Day One Tr. at 37; Day Two Tr. at 17. Mr. Avilés testified that the EPA inspectors assumed that the stormwater catch basin discharged to the Caribbean Sea. Day Two Tr. at 18. Mr. González testified that the tote was open, rusted, deteriorated, and labeled as corrosive. Day One Tr. at 37.

The EPA inspectors discovered additional totes inside Building 6, CEX 3, CEI Report at 6-7, including one unlabeled tote that Mr. Avilés described at the hearing as open, rusted, and covered with powder, Day Two Tr. at 13; *see also* CEX 3, CEI Report at 6, Appendix III (Photograph 9), and another unlabeled tote that Mr. Avilés described as open, rusted, and nearly full of liquid, Day Two Tr. at 14-15; *see also* CEX 3, CEI Report at 6,

Appendix III (Photograph 10).[7] The EPA inspectors also observed approximately 26 totes stacked against the northern wall of Building 6, some of which were labeled as "SUMP WATER LOW pH." CEX 3, CEI Report at 6, Appendix III (Photograph 6). Mr. González testified that these totes were labeled as corrosive substances and that many were "open," "rusted," "bent," and "leak[ing]." Day One Tr. at 39, 43.

The EPA inspectors observed numerous 55-gallon drums and 5-gallon containers located in and around Building 6 as well, CEX 3, CEI Report at 5-7, including an unlabeled 5-gallon container storing an "oily waste" inside Building 6 near the northern entrance, CEX 3, CEI Report at 6; Day Two Tr. at 30. They also observed approximately fourteen 55-gallon plastic drums labeled as "Sodium Aluminate" located on wooden pallets in the southeastern section of Building 6's interior. CEX 3, CEI Report at 6, Appendix III (Photograph 8). The EPA inspectors noted that one of the drums was open and two were leaking. CEX 3, CEI Report at 6.

In addition, while touring the southwestern section of Building 6's interior, the EPA inspectors discovered a "tank farm" consisting of five 2,600-gallon storage tanks and their respective secondary containment systems. CEX 3, CEI Report at 7, Appendix III (Photograph 13). The EPA inspectors noted that three of the tanks were labeled as "Corrosive Liquid," one was labeled as "Ferric Sulfate," and the final tank was labeled as "Ferrous Chloride." CEX 3, CEI Report at 7. The EPA inspectors observed a 30-gallon container and 5-gallon container, one labeled as "Sodium Benzoate" and the other unlabeled, also within the tank farm. *Id.* Mr. González and Mr. Avilés testified that the secondary containment systems, or dikes, within the tank farm were partially demolished and that an unknown powder, yellow and brown in color, was spread on the floor. Day One Tr. at 50; Day Two Tr. at 16-17; *see also* CEX 3, CEI Report at Appendix III (Photograph 13). Mr. González speculated at the hearing that the material on the floor of the tank farm had leaked from the tanks. Day One Tr. at 258-59. The EPA inspectors observed an additional dike adjacent to the tank farm that was also partially demolished and another unknown powder, this time white in color, spread on the floor. CEX 3, CEI Report at 7, Appendix III (Photograph 12); Day One Tr. at 49, 203; Day Two Tr. at 19-20.

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[7] The exact location of these totes is not clear from the record. *See* Day Two Tr. at 14 (explaining that the tote depicted in Photograph 9 is located on the north side of Building 6 "towards . . . the southern portion of the building"), 15 (explaining that the tote depicted in Photograph 10 is also located by "the northern wall towards the southern part of the building"); CEX 3, CEI Report at 6 (describing the totes depicted in Photographs 9 and 10 in the "Southeast" section of the CEI Report).

Finally, the EPA inspectors observed two partially demolished wooden structures within Building 6. CEX 3, CEI Report at 6-7. Mr. González and Mr. Avilés testified at the hearing that an unknown white powder was spread on the floor inside one of these structures, a partially demolished wooden shed located in the southeastern section of Building 6's interior. Day One Tr. at 47-48; 207-08; Day Two Tr. at 18-19; *see also* CEX 3, CEI Report at 6, Appendix III (Photograph 11). They also noted that the shed's secondary containment system, yellow in color, had been broken. Day One Tr. at 48; Day Two Tr. at 19; *see also* CEX 3, CEI Report at Appendix III (Photograph 11). The EPA inspectors observed that the second partially demolished structure contained a laboratory in which numerous opened and unopened chemical reagents were stored. CEX 3, CEI Report at 7.

During the course of their tour, the EPA inspectors did not perform any sampling of the materials found at Building 6. Rather, Mr. González testified, they relied upon any labels or other information affixed to the containers, drums, and tanks to identify their contents, many of which appeared to be corrosive chemicals or oxidizers. Day One Tr. at 51, 53, 195, 231.

Upon completion of their tour of Building 6, the EPA inspectors next conducted an inspection of Respondent's Canas Facility. Day Two Tr. at 9. Prior to and following their tour of the Canas Facility, they met with Mr. Jose Manuel Unanue, who identified himself as Respondent's business manager.[8/] *Id.* at 9, 98, 100. Mr. Avilés testified that, when questioned about the Former Facility during the final meeting, Mr. Jose Unanue informed the EPA inspectors that Respondent left the Former Facility on December 28, 2006, and was not returning to it. *Id.* at 102-03. Mr. Jose Unanue claimed, however, that Respondent's move to the Canas Facility had been performed by another employee and that he was uncertain as to "what happened there because he was on vacation" during the relocation process. *Id.* at 10, 103.

Mr. González testified that the EPA inspectors notified Mr. Jose Unanue that a quantity of Respondent's materials remained at the Former Facility and inquired as to what actions Respondent intended to take regarding these materials. Day One Tr. at 121-22. According to Mr. González, Mr. Jose Unanue did not inform the EPA inspectors that Respondent intended to take any action, *id.* at 120, 279, or otherwise "say much about the subject" of the remaining materials, *id.* at 278. Rather, Mr. González testified, Mr. Jose Unanue gave only "short answers" to the EPA inspectors' questions, responded that "he need[ed] to find out about the situation," or failed to "clearly respond." *Id.* at 122.

[8/] At the hearing, Mr. Jorge Unanue also identified Mr. Jose Unanue as his nephew. Day Three Tr. at 111, 121.

Based upon the conditions they observed at the Former Facility and their subsequent meeting with Mr. Jose Unanue at Respondent's Canas Facility, the EPA inspectors concluded that the materials remaining at the Former Facility had been abandoned by Respondent and that they, therefore, constituted solid waste. Day One Tr. at 82, 134, 138-39, 162; Day Two Tr. at 41-42.

C. FEBRUARY 7, 2007 REMOVAL ASSESSMENT

Immediately following their final meeting with Mr. Jose Unanue on February 2, 2007, the EPA inspectors referred the Former Facility to EPA's Superfund Removal Program. Day One Tr. at 134; CEX 3, CEI Report at 4. On February 7, 2007, a contractor known as the Removal Support Team 2 ("RST2 contractor") performed a removal assessment at the Former Facility pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") on behalf of EPA's Emergency Response Program. Day Two Tr. at 147, 184-85; CEX 11, Pollution Report dated February 7, 2007 ("2007 Pollution Report") at 1; CEX 3, CEI Report at 7. The purpose of the removal assessment was to determine whether the Former Facility qualified for a removal action. Day Two Tr. at 185. Ángel C. Rodríguez, an Environmental Engineer and On-Scene Coordinator from the Response and Remediation Branch of EPA's Caribbean Environmental Protection Division, *id.* at 145, supervised the performance of the removal assessment, *id.* at 147. Mr. Rodríguez subsequently prepared a report of the removal assessment, dated February 12, 2007. CEX 11, 2007 Pollution Report.

During the removal assessment, Mr. Rodríguez and the RST2 contractor observed numerous containers, drums, and tanks at Building 6, many of which appeared to be in deteriorated condition and surrounded by spilled materials. CEX 11, 2007 Pollution Report at 1-2. In particular, they observed in the laboratory area of the Former Facility a number of containers storing acids, bases, and buffers that were "broken, spilled or in deteriorated condition." *Id.* at 2. They also observed spills of "hydrochloric acid, low pH (pH less than 1) liquids from sumps, ferrous chloride, ferric sulfate, [and] sodium aluminate, and spills of unknown solid chemicals, corrosive materials" throughout Building 6. *Id.* at 1-2. Mr. Rodríguez testified that, based upon his professional experience and his observation of opened bags of sodium hydroxide, he believed that Respondent had spread sodium hydroxide on the floor of Building 6 in an attempt to neutralize materials leaking from nearby tanks. Day Two Tr. at 157-58. He also testified that, when questioned about Respondent's whereabouts during the removal assessment, Mr. Hernández of the PPA informed him that Respondent had claimed that asbestos and lead levels at Building 6 prevented it from recovering the materials remaining there. *Id.* at 194-95.

As part of the removal assessment, Mr. Rodríguez and the RST2 contractor compiled an inventory of the materials located in and around Building 6. CEX 11, 2007 Pollution Report at 2; CEX 3, CEI Report at 7. According to Mr. Rodríguez, he and the RST2 contractor relied upon labels affixed to the various containers, drums, and tanks to prepare the inventory. Day Two Tr. at 152. Mr. Rodríguez testified that, while he and the RST2 contractor performed "field sampling" of the liquid materials at Building 6 utilizing pH testing strips, they did not perform any comprehensive sampling of the materials during the removal assessment. *Id.* at 213. The RST2 contractor also performed air monitoring at Building 6 and determined that all initial readings were below background levels. Day Two Tr. at 152, 213; CEX 11, 2007 Pollution Report at 2; CEX 3, CEI Report at 7.

D. RESPONDENT'S FEBRUARY 7, 2007 COMMUNICATION WITH EPA

At Mr. Jorge Unanue's request, counsel for Respondent contacted Mr. González of EPA by email on February 7, 2007. Day Three Tr. at 121, 124-125; REX 5, February 7, 2007 email. In this communication, Respondent's counsel first acknowledged that the EPA inspectors had sought information related to the Former Facility from Mr. Jose Unanue during the final meeting at Respondent's Canas Facility on February 2, 2007. REX 5, February 7, 2007 email. Respondent's counsel then informed Mr. González that "it would be helpful" to Respondent if EPA submitted such a request in writing and that, upon receipt of the written request, Respondent would work "expeditiously" to comply. *Id.* After reiterating Respondent's commitment to cooperating with EPA, counsel for Respondent stated that Respondent was "hopeful that the EPA [could] provide . . . guidance with regard to lead contamination, as Aguakem employees [had] been exposed to illegal lead levels" at the Former Facility. *Id.*

E. FEDERAL NOTICE OF FEDERAL INTEREST

Following the February 7, 2007 removal assessment, Mr. Rodríguez prepared documents that he identified as Field Notices of Federal Interest ("FNFIs").[9] Day Two Tr. at 152. EPA issued

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[9] Mr. González, on the other hand, described these documents as "*Federal* Notices of Federal Interest." Day One Tr. at 128 (emphasis added). Neither party introduced copies of the FNFIs into evidence at the hearing. Thus, the precise title of these documents is unclear from the record.

However, Mr. Rodríguez explained the mechanics of a FNFI during his testimony. As he described, FNFIs direct potentially responsible parties to perform certain actions within a specified period of time. Day Two Tr. at 153-54. When multiple parties are

(continued...)

the FNFIs to Respondent and the PPA under CERCLA on February 9, 2007. CEX 3, CEI Report at 8; Day One Tr. at 125; Day Two Tr. at 152-53. Mr. Rodríguez testified that, although potentially responsible parties are typically notified verbally of a FNFI prior to issuance of the document, he was unable to reach Mr. Unanue when he attempted to contact him. Day Two Tr. at 153, 191-92. Mr. Rodríguez testified that he subsequently submitted the FNFI to Mr. Unanue by facsimile. *Id.* at 153.

Mr. Rodríguez further testified that, because of the severity of the conditions observed by representatives of EPA at Building 6, the FNFIs required Respondent and the PPA to notify him "immediately" in writing as to their intended actions at the property. Day Two Tr. at 154-55, 188. According to Mr. Rodríguez, the PPA verbally notified him, both on and before February 9, 2007, of its intention to perform the necessary actions at Building 6. *Id.* at 155-56, 162, 188-89, 192. He testified that Respondent, on the other hand, failed to respond to the FNFI. *Id.* at 155, 201.

Under the supervision of EPA's Emergency Response Program, representatives of the PPA subsequently performed removal activities at Building 6 pursuant to the FNFI between February of 2007 and March of 2008. Day Two Tr. at 156-57, 162-63, 165; CEX 10, Pollution Report date April 2, 2008 ("2008 Pollution Report") at 1-2. Specifically intended to stabilize those materials that were leaking or otherwise stored haphazardly at the Former Facility, these activities included securing the materials in appropriate containers and moving the materials to another location within the Puerto de Ponce. CEX 10, 2008 Pollution Report at 2; Day Two Tr. at 166, 206-07. Respondent did not participate in the performance of any of the removal activities. Day Two Tr. at 166. Mr. Rodríguez admitted, however, to speaking with Mr. Unanue about the activities at an unspecified time. Day Two Tr. at 201-03; Day Three Tr. at 214-15.

E. ADMINISTRATIVE ORDER ON CONSENT

While supervising the removal activities performed under the FNFI, EPA's Emergency Response Program discovered that the representatives of the PPA were "neutralizing" materials at Building 6 without EPA's authorization and had attempted unsuccessfully to dispose of those materials at a landfill. Day Two Tr. at 163-64; CEX 11, 2008 Pollution Report at 2. Consequently, EPA invited Respondent and the PPA to enter into an

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[9] (...continued)
involved, the first party to respond to a FNFI becomes responsible for performing the necessary actions at the site. *Id.* at 155, 189-90. In the absence of a response, EPA performs the actions itself and later seeks reimbursement from the parties. *Id.* at 155.

administrative order on consent to ensure the proper disposal of the materials. Day Two Tr. at 164; CEX 11, 2008 Pollution Report at 2. EPA, Respondent, and the PPA entered into the Administrative Agreement and Order on Consent for a Removal Action ("AOC") pursuant to Sections 104(a), 106, 107, and 122 of CERCLA, 42 U.S.C. §§ 9604(a), 9606, 9607, and 9622, on July 27, 2007. CEX 13, AOC.

Mr. Rodríguez, among others, supervised the implementation of the AOC. Day Two Tr. at 170, 172-73. According to Mr. Rodríguez, the AOC required the PPA and Respondent to dispose of the materials that had been previously stabilized by the PPA's representatives pursuant to the FNFI. *Id.* at 167. He testified that, while Respondent participated in the document's generation, Respondent did not perform any removal activities under the AOC, incur any expenses related to the performance of those activities, or contact EPA in order to participate in the performance of the activities, despite repeated invitations from EPA. *Id.* at 170-72; *see also* Day One Tr. at 244, 268-69.

As part of the removal activities performed under the AOC, the PPA's representatives prepared and submitted monthly reports to EPA, which included seven shipping manifests for materials removed from Building 6 and certificates of disposal certifying that the materials were properly disposed following shipment to the United States. Day Two Tr. at 174-76, 178; CEX 14, Monthly Progress Report (October 10, 2008) ("Monthly Progress Report"). These manifests identified the shipped materials as hazardous wastes and listed their appropriate EPA hazardous waste numbers. CEX 14, Monthly Progress Report at Appendix 1.

F. REQUESTS FOR INFORMATION

By letter dated May 12, 2008, EPA requested information from Respondent regarding its operations at the Former Facility and Canas Facility pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927. Compl. ¶ 32; Answer ¶ 32; CEX 5, RCRA § 3007 Information Request ("First Request"). Respondent submitted a written response to Complainant's First Request on or about November 6, 2008. Compl. ¶ 33; Answer ¶ 33.

EPA subsequently notified Respondent by letter dated May 6, 2009, that it had failed to provide all of the information requested in the First Request and directed Respondent to submit a complete response to each question set forth therein. Compl. ¶ 34; Answer ¶ 34; CEX 8, Second RCRA § 3007 Information Request ("Second Request"). Respondent submitted a written response to EPA's Second Request ("Second Response") on or about June 30, 2009. Compl. ¶ 36; Answer ¶ 36; CEX 9, Second Response. Although the Second Response's table of contents indicates that Respondent attached a number of documents to the Second Response, including documents identified as "Lead Contamination -

Laboratory Reports" and "Product Formulations," CEX 9, Second Response at 1, none of these documents were introduced by the parties at the hearing.

In the Second Response, Respondent provided, among other information, a list of its inventory as of December 31, 2006, which it prepared based upon available records. CEX 9, Second Response at 10-11. Both Mr. González and Mr. Avilés confirmed at the hearing that the materials identified in the Second Response corresponded to materials observed by EPA inspectors at the Former Facility. Day One Tr. at 83-84; Day Two Tr. at 36, 39-40.

Shortly thereafter, on September 29, 2009, Complainant filed the Complaint to initiate this proceeding.

IV. BURDEN OF PROOF

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. Pursuant to Section 22.24(a) of the Rules of Practice:

> The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

40 C.F.R. § 22.24(a).

Of particular relevance to the present proceeding, the regulations developed to implement Subtitle C of RCRA provide that, once the complainant satisfies its initial burden of demonstrating that a particular material constitutes "solid waste" for regulatory purposes, the respondent bears the burden of presenting evidence that the material is exempt or excluded from regulation:

> Respondents in actions to enforce regulations implementing [S]ubtitle C of RCRA who raise a claim that a certain material is not solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production

> process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so.

40 C.F.R. § 262.2(f).

In carrying their respective burdens of proof, the parties are subject to a preponderance of the evidence standard. 40 C.F.R. § 22.24(b). To prevail under this standard, a party must demonstrate that the facts the party seeks to establish are more likely than not to be true. *See, e.g.*, *Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02, 2011 EPA App. LEXIS 10, *14 (EAB, Mar. 16, 2011) ("A factual determination meets the preponderance of the evidence standard if the fact finder concludes that it is more likely true than not.") (citing *Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 n.20 (EAB 2004); *Lyon County Landfill*, 10 E.A.D. 416, 427 n.10 (EAB 2002), *aff'd*, No. Civ-02-907, 2004 WL 1278523 (D. Minn. June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005); and *Bullen Cos., Inc.*, 9 E.A.D. 620, 632 (EAB 2001)).

V. LIABILITY

A. COUNTS 1 AND 2

Counts 1 and 2 of the Complaint charge Respondent with violations of regulations governing generators of hazardous waste set forth at 40 C.F.R. part 262. As a preliminary matter, I note that the Complaint alleges that Respondent became a generator of hazardous waste on or about December 28, 2006, and that Respondent had violated the regulations at issue in Counts 1 and 2 as of at least February 2, 2007, the date of the CEI at the Former Facility. Additionally, the proposed penalty narrative attached to the Complaint alleges a period of violation for Count 2 beginning on December 28, 2006, and ending on February 9, 2007, the date on which EPA stabilized the conditions at Building 6, according to Complainant. Therefore, the relevant time period to consider in adjudicating Respondent's liability for the violations alleged in Counts 1 and 2 is December 28, 2006, through February 9, 2007.

1. Do the Materials at the Former Facility Constitute "Solid Waste"?

As discussed above, EPA's authority to regulate "hazardous waste" under Subtitle C of RCRA extends only to those materials that first qualify as "solid waste." Thus, the threshold question in adjudicating Respondent's liability for the violations alleged in Counts 1 and 2 is whether the materials remaining at the Former Facility constitute "solid waste," as

that term is defined by RCRA and the implementing regulations. As discussed above, Complainant bears the initial burden of production and ultimate burden of persuasion of this issue. The parties largely focused on it at the hearing and in their Briefs. Their arguments are summarized below.

a. Arguments of the Parties

(i) Complainant's arguments

As presented in its Brief, Complainant's position in this proceeding is that Respondent generated "solid waste" on or about December 28, 2006, at the time Respondent "abandoned" the Former Facility and any materials remaining therein. *See* C's Brief at 10. To support its contention that Respondent "abandoned" the materials, Complainant relies upon testimony from Mr. Eduardo González and Mr. Jesse Avilés concerning the conditions they observed at the Former Facility during the CEI on February 2, 2007, and their understanding of the term "abandoned" for purposes of determining whether violations of RCRA and the implementing regulations have occurred. C's Brief at 8-10.

As previously recounted, Mr. González conducted the CEI at the Former Facility on February 2, 2007, accompanied by Mr. Avilés and Ms. Zolymar Luna. CEX 3, CEI Report at 1. As Complainant notes, Mr. González testified that photographs taken during the CEI show containers of materials in various states of deterioration, including containers that were rusted, broken, open, and leaking. C's Brief at 8 (citing Day One Tr. at 50-51). Mr. Gonzalez further testified that the materials may be characterized as "abandoned" because, in the context of Subtitle C of RCRA, a material is "abandoned" when it is not under the control or supervision of the owner or operator of the facility. C's Brief at 8 (citing Day One Tr. at 51).

Turning to the testimony of Mr. Avilés, Complainant notes that, based upon his observations of the materials at the Former Facility during the CEI, Mr. Avilés concluded that the materials had not been properly maintained and, therefore, were not in any condition to be used by Respondent. C's Brief at 10 (citing Day Two Tr. at 41). Mr. Avilés then testified that the conditions at the Former Facility, in part, led to the determination that the materials had been "abandoned" and, thus, constituted "solid waste." C's Brief at 10 (citing Day Two Tr. at 41-43).

(ii) Respondent's arguments

Respondent denies in its Brief that it "abandoned" materials or generated "solid waste" at the Former Facility. R's Brief at 2, 9-14. Respondent cites several legal authorities to support its position. R's Brief at 11, 13-14. In particular, Respondent cites *American Petroleum Institute v. EPA*, 216 F.3d 50 (D.C. Cir.

2000) ("*API*"), for the proposition that "[l]egal abandonment of property is premised on determining the intent to abandon, which requires an inquiry into facts and circumstances." *Id.* at 11. Respondent argues that such an inquiry in the present proceeding "demonstrate[s] conclusively that Aguakem never intended to discard or abandon the materials at the [F]ormer Facility." *Id.* Rather, Respondent contends, it merely suspended its relocation activities based upon its "well founded, good faith belief" that the Former Facility was contaminated with lead. *Id.* at 10. Respondent claims that it intended to remove the materials as soon as it was notified that the lead contamination had been remediated. *Id.* at 12.

Respondent further claims that it promptly notified representatives of the PPA and Municipio of Ponce that "the process of removal of Respondent's equipment and products would have to be immediately suspended until such time as the lead contamination issue was resolved." R's Brief at 10. According to Respondent, however, it also "assured the Municipio of Ponce that Respondent was not abandoning its property . . . as it intended to complete the removal process as soon as the lead contamination issue was resolved and the Municipio permitted Aguakem to reenter the [F]ormer Facility."[10/] *Id.* Respondent contends that the written account of the CEI performed on February 2, 2007, clearly demonstrates that both the PPA and EPA understood its intention to retrieve the materials once it received notice that the lead contamination had been remediated. *Id.* at 12 (citing CEX 3, CEI Report at 3-4). Respondent claims that it never received such notice, however, from either the PPA or EPA. *Id.* at 14.

(iii) Complainant's arguments in reply

Complainant maintains in its Reply that Respondent "abandoned" the materials at the Former Facility, and thereby generated "solid waste," on or about December 28, 2006. *See* C's Reply at 6. Complainant argues that, contrary to Respondent's claims, Respondent lacked any intention of resuming its relocation activities at the Former Facility. C's Reply at 4. Rather, Complainant contends, Respondent left deteriorated containers and spilled materials at the Former Facility as a "cost saving measure" because it would otherwise have been required to address their disposal. *Id.* at 6.

Above all, Complainant disputes Respondent's allegation that demolition and construction activities conducted at the Puerto de Ponce caused harmful levels of lead to enter Building 6, as found

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[10/] Respondent claims that it "was legally precluded from reentering the [F]ormer Facility as it was under a legal order of eviction." R's Brief at 10.

by Envirorecycling, arguing that this claim is unsupported by the record. C's Reply at 3-4, 6. Complainant notes that the Sampling Report generated by Envirorecycling and relied upon by Respondent expressly states that the sampling results "do not meet EPA standards for sample matrix and are not recognized under the NLLAP accreditation program." *Id.* at 3 (quoting REX 3, Sampling Report at 4). Complainant also points out that Mr. Hernández of the PPA represented to the EPA inspectors during the February 2, 2007 inspection that sampling conducted by the PPA demonstrated that the asbestos and lead levels at Building 6 posed no harm. C's Reply at 4 (citing CEX 3, CEI Report at 4). Finally, Complainant questions Mr. Unanue's purported concern for Respondent's employees, arguing that he failed to take any steps to protect the employees prior to his receipt of the Sampling Report, despite his prior knowledge of the dust entering Building 6 and the asbestos levels at the Puerto de Ponce. *Id.* at 3, 6.

b. Discussion

As noted above, RCRA and the regulations implementing Subtitle C define the term "solid waste" as "discarded material." 42 U.S.C. § 6903(27); 40 C.F.R. § 261.2(a)(1). In turn, the term "discarded material" is defined by the regulations as including materials that are "abandoned." 40 C.F.R. § 261.2(a)(2)(i). A material is "abandoned" for regulatory purposes if it is "(1) [d]isposed of; or (2) [b]urned or incinerated; or (3) [a]ccumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated." 40 C.F.R. § 261.2(b).

Here, Complainant claims that, on or about December 28, 2006, the materials remaining at the Former Facility qualified as "solid waste" by virtue of being "abandoned" by Respondent. Complainant fails to cite any legal authority to support its position. Rather, Complainant relies solely upon its witnesses' testimony as to their understanding of the term and their determination that Respondent "abandoned" the materials within the regulatory definition by failing to maintain control over the materials or manage the materials in a manner such that they could be reused, as evidenced by the conditions observed at the Former Facility by the EPA inspectors during the February 2, 2007 inspection.[11/] Respondent, on the other hand, relies upon the

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[11/] Arguably, some of the EPA inspectors' observations, such as their discovery of rusted containers and drums in and around Building 6, suggest that the conditions there were long-standing. Nevertheless, Complainant does not allege that the materials in question qualified as "solid waste" prior to Respondent's departure from the Former Facility on December 28, 2006, or that Respondent was otherwise generating "solid waste" at the Former Facility (continued...)

decision of the U.S. District of Columbia Circuit Court of Appeals ("D.C. Circuit") in *API* for the proposition that the legal abandonment of property requires an intent to abandon. Respondent claims that it never intended to abandon the materials remaining at the Former Facility after it suspended its relocation activities and that both the PPA and EPA were aware that Respondent lacked any such intent, as demonstrated by the record in this proceeding.

In considering the scope of the regulatory definition of the term "abandoned" and whether the evidence in the record supports a finding that the materials remaining at the Former Facility were indeed "abandoned" during the relevant time period and thereby constituted "solid waste," I note that Complainant alleges, in effect, that two distinct types of materials were present at the Former Facility as of the February 2, 2007 inspection: (1) materials that were stored in containers at the Former Facility and (2) materials that had spilled or were leaking from containers at the Former Facility. I will address each of these categories of materials in turn.

(i) Stored materials

As summarized above, Complainant argues that evidence of the conditions at the Former Facility, as first observed by representatives of EPA during the February 2, 2007 inspection, demonstrates that the materials remaining there were "abandoned" and constituted "solid waste" for regulatory purposes beginning on or about December 28, 2006. Respondent counters that legal abandonment of property requires an intent to abandon and that the record in this matter clearly establishes that Respondent lacked any such intent with respect to the materials remaining at the Former Facility after it suspended its relocation activities.

First, I find that the record contains ample evidence that a number of the containers and drums present at the Former Facility as of the February 2, 2007 inspection and February 7, 2007 removal assessment were in various states of deterioration, as claimed by Complainant. Several photographs taken by Mr. Avilés during the inspection depict open and rusted containers. CEX 3, CEI Report at Appendix III (Photographs 3, 9, 10). Mr. González testified that the totes stacked against the northern wall of Building 6 were open, rusted, bent, and leaking. Day One Tr. at 43. Additionally, the EPA inspectors documented the presence of other open and leaking containers and drums, some of which were

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[11/] (...continued)
during its operations. Rather, as previously discussed, Complainant claims only that the materials in question first qualified as "solid waste" on or about December 28, 2006, at the time Respondent "abandoned" the Former Facility.

unlabeled, in their written account of the inspection. CEX 3, CEI Report at 6. Similarly, Mr. Rodríguez documented in his account of the February 7, 2007 removal assessment that he and the RST2 contractor observed in the laboratory area of the Former Facility a number of containers that were "broken, leaking, or in deteriorated condition." CEX 11, 2007 Pollution Report at 2. He also recorded that many of the totes were observed in deteriorated condition. *Id.* at 1. While Respondent denied the allegations in the Complaint related to the condition of containers found at the Former Facility as of the February 2, 2007 inspection, it failed to offer any evidence in rebuttal at the hearing. Thus, the preponderance of the evidence establishes that a number of the containers and drums observed at the Former Facility on February 2 and 7, 2007, were in deteriorated condition.

Complainant claims, in essence, that these conditions demonstrate that Respondent failed to maintain control of the materials or manage the materials in a manner such that they could be reused, which, in turn, establishes that the materials were "abandoned" for regulatory purposes. Complainant fails to cite any legal authority to support its interpretation of the term "abandoned." Although Complainant frames its arguments largely in reference to this regulatory term, I note that the Agency has provided guidance as to relevant factors bearing on whether a particular material constitutes a "solid waste" by virtue of being "recycled,"[12/] which is helpful in considering the merits of Complainant's position.

In particular, the Agency identified a number of situations in the preamble to a final rule amending the then-existing definition of "solid waste" that the Agency considered evidence of "sham" recycling. Definition of Solid Waste, 50 Fed. Reg. 614, 638 (Jan. 4, 1985). The Agency advised, in pertinent part:

> Records ordinarily are kept documenting use of raw materials and products. Records likewise are usually

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[12/] The regulations at 40 C.F.R. § 261.1(7) provide that "[a] material is 'recycled' if it is used, reused, or reclaimed." Materials qualify as "solid wastes" within the meaning of 40 C.F.R. § 261.2 if the materials are recycled, or accumulated, stored, or treated prior to recycling, by being used in a manner constituting disposal; burned for energy recovery; reclaimed; or accumulated speculatively. 40 C.F.R. § 261.2(c). In contrast, materials do not constitute "solid wastes" within the meaning of 40 C.F.R. § 261.2 if the materials are recycled by being used or reused as ingredients in an industrial process to manufacture a product; used or reused as effective substitutes for commercial products; or returned to the original process from which they are generated as a substitute for feedstock materials. 40 C.F.R. § 261.2(e).

> retained to document secondary material use and reuse. The Agency consequently views with skepticism situations where secondary materials are ostensibly used and reused but the generator or recycler is unable to document how, where, and in what volumes the materials are being used and reused. The absence of such records in these situations consequently is evidence of sham recycling.
>
> [Another] indication of sham use is if the secondary materials are not handled in a manner consistent with their use as raw materials or commercial product substitutes. Thus, if secondary materials are stored or handled in a manner that does not guard against significant loss (*i.e.*, the secondary materials are stored in leaking surface impoundments, or are lost through fires or explosions), there is a strong suggestion that the activity is not legitimate recycling.

50 Fed. Reg. at 638. Thus, the Agency explicitly instructs that an entity's failure to keep records of its materials or handle its materials in a manner designed to safeguard their value is compelling evidence that the entity is not legitimately using or reusing those materials. *See Bil-Dry Corp.*, EPA Docket No. RCRA-III-264, 1998 EPA ALJ LEXIS 114, at *42-43 (ALJ, Oct. 8, 1998).

Consistent with this guidance, the Environmental Appeals Board ("EAB" or "Board") held in *Bil-Dry Corporation*, 9 E.A.D. 575 (EAB 2001) ("*Bil-Dry*"), that a facility's management practices are relevant as to whether a particular material qualifies as a "solid waste." *Bil-Dry*, 9 E.A.D. at 599-605. The respondent in *Bil-Dry* claimed that the contents of three drums located at its facility were not solid wastes, as argued by the complainant, but raw materials used in its production processes at the facility. *Id.* at 599. Finding that the drums at issue were in good condition, the Board was nevertheless persuaded that the respondent treated the contents of the drums as solid waste, in part because the evidence in the record established that they were not properly labeled. *Id.* at 602-03. The Board also found that the respondent failed to produce credible evidence that it kept records documenting the existence or use of the drums and their contents. *Id.* at 603-04. Accordingly, the Board affirmed the conclusion of the Administrative Law Judge in the underlying proceeding, holding that, "based in part on the storage and condition of [the drums], it was reasonable to conclude that the contents of the drums was [*sic*] waste materials." *Id.* at 604.

The Board did not rely solely on "the storage and condition" of the drums, however, to reach this decision.[13/] The Board also

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[13/] The Board's reliance on multiple factors suggests that (continued...)

considered the respondent's inability to identify the contents of the drums as relevant, finding the respondent's claim that it "occasionally" utilized those materials to be implausible when the evidence demonstrated that the respondent did not know what the drums contained and the respondent produced no reliable evidence in rebuttal. *Bil-Dry*, 9 E.A.D. at 599-600. While the respondent offered the testimony of its president, who stated that he personally used materials from the drums, to support its claim, the Board was not persuaded by this evidence, holding that a mere declaration is insufficient to demonstrate that a particular material is useful raw material. *Id.* at 600. Taking note of the Agency's guidance that "records ordinarily are kept documenting use of raw materials and products," the Board found the record in *Bil-Dry* to be devoid of such evidence. *Id.* at 601 (quoting 50 Fed. Reg. at 638). The EAB concluded, "Based on [the respondent's] management and handling of the drums . . . and its inability to identify their contents, the [Administrative Law Judge] correctly held that the [complainant] had met its burden of proving that the drums at issue contained solid waste." *Id.* at 600.

Applying the Board's reasoning to the instant proceeding, I find that this case is distinguishable from *Bil-Dry*. While the record here contains ample evidence that a number of the containers and drums present at the Former Facility as of the February 2, 2007 inspection and February 7, 2007 removal assessment were in deteriorated condition, it also demonstrates that the majority of the containers, drums, and tanks were labeled, unlike the drums at issue in *Bil-Dry*. CEX 3, CEI Report at 5-7, Appendix III. Some evidence exists that Respondent also kept records of the materials used and manufactured at the Former Facility. As part of the Second Response that it submitted to EPA, Respondent provided a list of its total inventory as of December 31, 2006, which it prepared using "inventory records on hand as of [that date]." CEX 9, Second Response at 10-11. Mr. González and Mr. Avilés confirmed the accuracy of this list at the hearing, testifying that the materials listed in the Second Response corresponded to the materials identified by EPA inspectors at the Former Facility. Day One Tr. at 83-84; Day Two Tr. at 36, 39-40.

The labeling of the containers, drums, and tanks, and the information provided by Respondent in its Second Response, are compelling evidence of Respondent's ability to identify the contents of those receptacles, in further contrast with *Bil-Dry*. This conclusion is supported by the EPA representatives' own

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[13/] (...continued)
"the storage and condition" of containers, standing alone, is not dispositive of whether the contents of the containers qualify as "solid waste."

identification of the materials. As Mr. González and Mr. Rodríguez testified, they relied upon the labels and other information provided on the containers, drums, and tanks to identify the materials found at the Former Facility during the February 2, 2007 inspection and February 7, 2007 removal assessment.[14/] Day One Tr. at 51, 53, 195, 231; Day Two Tr. at 152. Additionally, although Respondent represented in its Second Response that the "[c]hemicals left at Building 6 were not reconciled due to the hazardous conditions from the lead contamination," CEX 9, Second Response at 10, Mr. Unanue testified that the materials remaining at the Former Facility after Respondent suspended its relocation activities included iron salts, aluminum salts, and hydrochloric acid,[15/] Day Three Tr. at 163-64. These materials are consistent with those identified by the EPA representatives during the inspection and removal assessment. *See* CEX 3, CEI Report at 5-7, 9; CEX 11, 2007 Pollution Report at 1-2.

In view of these considerations, I find that the deteriorated condition of some of the containers and drums remaining at the Former Facility after December 28, 2006, does not, by itself, adequately demonstrate that Respondent effectively "abandoned" the stored materials, as argued by Complainant, at least as of that date. While Complainant did not draw attention to it in its Brief, Complainant's witnesses identified additional grounds for their determination that the materials had been "abandoned" by Respondent. In particular, Mr. González noted that Respondent failed to inform EPA that materials remained at the Former Facility after it ceased its relocation activities, unlike the PPA, which contacted EPA in late January of 2007 upon its discovery of the materials. Day One Tr. at 157. Mr. González and Mr. Avilés each testified that their meeting with Mr. Jose Unanue at the close of their inspection of Respondent's Canas Facility on February 2, 2007, also served as a basis for their conclusion that the materials remaining at the Former Facility had been "abandoned." Day One Tr. at 134, 138-39, 162; Day Two Tr. at 41-42. Finally, Mr. González testified that their determination was further supported

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[14/] As discussed in greater detail later in this Initial Decision, representatives of EPA relied upon labeling to determine not only the chemical identity of materials at the Former Facility but also their hazardous nature.

[15/] According to Respondent's Second Response, Respondent prepared the following iron salts at the Former Facility: ferric sulfate, ferrous sulfate, ferrous chloride, and ferric chloride. CEX 9, Second Response at 3, 5. Respondent also prepared the following aluminum salts at the Former Facility: aluminum chlorohydrate, poly-aluminum chloride, aluminum chloride, and aluminum sulfate. CEX 9, Second Response at 3, 5.

by Respondent's failure to respond to the FNFI issued on February 9, 2007. Day One Tr. at 141.

The record contains unrefuted evidence, however, that Respondent did, in fact, communicate with EPA regarding the Former Facility during the relevant time period. Mr. Unanue testified that he instructed his attorney to contact Mr. González after Mr. Jose Unanue notified him of the meeting he had with the EPA inspectors at Respondent's Canas Facility on February 2, 2007. Day Three Tr. at 121. Respondent produced a copy of the email sent by counsel for Respondent to Mr. González on February 7, 2007, pursuant to Mr. Unanue's instructions. REX 5, February 7, 2007 email. In this communication, Respondent's counsel first acknowledged that the EPA inspectors had sought information related to the Former Facility from Mr. Jose Unanue on February 2, 2007. REX 5, February 7, 2007 email. Respondent's counsel then informed Mr. González that "it would be helpful" to Respondent if EPA submitted such a request in writing and that, upon receipt of the written request, Respondent would work "expeditiously" to comply. *Id.* After reiterating Respondent's commitment to cooperating with EPA, counsel for Respondent stated that Respondent was "hopeful that the EPA [could] provide . . . guidance with regard to lead contamination, as Aguakem employees [had] been exposed to illegal lead levels" at the Former Facility. *Id.* Although he denied any recollection of the date on which he received it, Mr. González admitted at the hearing that he received an electronic communication from Respondent. Day One Tr. at 140.

Further, while Mr. González cites Respondent's failure to respond to the FNFI as a basis for the determination that the materials remaining at the Former Facility were "abandoned," Day One Tr. at 141, the record is not clear as to the precise deadline for Respondent's response to the FNFI. As previously discussed, neither party produced a copy of the FNFI issued to Respondent at the hearing. Mr. Rodríguez testified that he issued the FNFI to Mr. Unanue by facsimile on February 9, 2007, and that the FNFI required Respondent to notify him "immediately" in writing as to its intended actions at the Former Facility. Day Two Tr. at 152-55, 188. Respondent offered no evidence to rebut this testimony at the hearing. However, Mr. Rodríguez was ambiguous when he attempted to quantify the amount of time provided to Respondent to respond to the FNFI:

> [I]t is my usual practice to advise them, to let me know when I tell them immediately, within a 24 hour period so that means they had at least until 12 o'clock. I mean until 12 o'clock that day, at the end of the day, when the next day starts.

Day Two Tr. at 188. This testimony may reasonably be interpreted to mean that Respondent was required to notify Mr. González of

its intended actions at the Former Facility either within 24 hours of its receipt of the FNFI, by the end of the day on which it received the FNFI, or by the end of the following day. Assuming, *arguendo*, that the deadline for Respondent's response was February 10, 2007, the relevant time period to consider in determining whether the materials remaining at the Former Facility were "abandoned" ended *before* Respondent was required to respond to the FNFI. Moreover, Mr. Rodríguez admitted to speaking with Mr. Unanue about the activities performed by the PPA pursuant to the FNFI at an unspecified time. Day Two Tr. at 201-03; Day Three Tr. at 214-15. Accordingly, any reliance upon Respondent's failure to respond to the FNFI as support for the conclusion that Respondent "abandoned" the stored materials is problematic.

Thus, the additional considerations cited by Complainant's witnesses also fail to persuade that the stored materials remaining at the Former Facility were "abandoned" by Respondent for regulatory purposes from December 28, 2006, through February 9, 2007. Finally, Complainant's position on this issue is undermined by the uncontradicted evidence in the record supporting Respondent's claims that it only suspended its relocation activities due to lead contamination at the Former Facility and that it intended to remove materials remaining there once the lead contamination had been remediated.[16/]

As Respondent correctly points out, legal abandonment of property requires an intent to abandon the property at issue. *See API*, 216 F.3d at 57 ("Legal abandonment of property is premised on determining the intent to abandon, which requires an inquiry into facts and circumstances."); *Universal Metal and Ore Co.*, 1997 EPA ALJ LEXIS 60, at *24 n.15 (ALJ, Mar. 14, 1997) (Order Denying Motion to Dismiss and Setting Further Procedures) ("Among the definitions of 'abandon' is 'to cease a right or title to with intent of never again resuming or reasserting it.") (citing Webster's Third New International Dictionary (1986)); *Ashland Chemical Co.*, 1987 EPA ALJ LEXIS 19, at *41 (ALJ, June 22, 1987) ("'[A]bandonment,' at least with respect to property, normally requires an intent to abandon together with the an external act fulfilling that intent . . . ."). To support its

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[16/] I note that the AOC, which was signed by Respondent, states in its "Findings of Fact and Conclusions of Law" section, "In December of 2006, Respondent Aguakem ceased operations, relinquished the Site to Respondent Municipality of Ponce, and *abandoned its facility at the Site* . . . ." CEX 13, AOC at 4. However, the AOC also explicitly provides, "Respondents' participation in this Agreement and Order shall not constitute or be construed as an admission of liability or of EPA's findings of fact or determinations of law contained in this Agreement and Order." *Id.* at 1.

position that it lacked any intent to abandon materials at the Former Facility, Respondent first presented the Sampling Report generated by Envirorecycling, which states that "the lead samples taken show very high concentration [*sic*] of lead" at the Former Facility and recommends that the area be sealed and that warning signs be posted to prevent personnel from entering. REX 3, Sampling Report at 2.

Respondent also offered the testimony of Mr. Unanue to support its position. Mr. Unanue asserted that, in November and December of 2006, the PPA's contractor was performing activities in the vicinity of Building 6 that generated large quantities of dust, which entered Building 6 and led to complaints from Respondent's employees. Day Three Tr. at 72, 84-85, 171, 173-74. Mr. Unanue testified that, although he was not often present at the Former Facility during that time, he personally observed dust at the Former Facility and then learned of the presence of asbestos at the Puerto de Ponce, causing him to become concerned. *Id.* at 84-85. Mr. Unanue claimed that a communication from the PPA's contractor in late fall of 2006 first alerted him to the presence of asbestos in the buildings being demolished at the Puerto de Ponce, *id.* at 150-51, and a consultant hired by Mr. Unanue advised him that Building 6 also likely contained lead, *id.* at 84-85.

Mr. Unanue testified that he consequently hired Envirorecycling to conduct sampling of the dust within Building 6 in December of 2006 and that, upon his review of the Sampling Report on December 28, 2006, he directed Respondent's employees to suspend all relocation activities at the Former Facility. Day Three Tr. at 85-86, 88-89, 98-100. He further claimed that he informed Mr. Hernández of the PPA on December 28, 2006, and again in late January of 2007 that Building 6 was contaminated with lead, as evidenced by the Sampling Report. Day Three Tr. at 99-100, 102-03. Finally, Mr. Unanue testified that he represented on "several occasions" that he "wanted to complete bringing to [the Canas Facility] all the inventory that was in [Building 6]" and that "everything that was there had a lot of value to [him]." Day Three Tr. at 128-29. In particular, he claimed that he notified Mr. Hernández in late January of 2007 that Respondent would remove the materials remaining at the Former Facility once the PPA performed a lead abatement and certified that the lead contamination had been remediated. Day Three Tr. at 102-03. This testimony is consistent with Respondent's representations in the Second Response it submitted to EPA. *See* CEX 9, Second Response at 3-4, 9, 11.

Upon observation at the hearing, I find that Mr. Unanue was a credible witness. Nonetheless, the reliability of the evidence presented by Respondent is suspect. Mr. Unanue's testimony and Respondent's representations in the Second Response are undoubtedly self-serving, and the Board has consistently held

that such self-serving statements are entitled to little weight. *See, e.g., Cent. Paint & Body Shop*, 2 E.A.D. 309, 315 (EAB 1987) ("Self-serving declarations are entitled to little weight."); *A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 426 (EAB 1987) ("[U]ncorroborated self-serving statements . . . are entitled to little weight.").

While I am consequently skeptical of Respondent's position, I find that Complainant failed to offer any persuasive evidence in rebuttal.[17/] In particular, Complainant presented the written account of the February 2, 2007 inspection, in which the EPA inspectors documented the substance of their meeting with Mr. Quiñones and Mr. Hernández of the PPA at the beginning of the inspection. Complainant points out that, according to this account, Mr. Hernández represented to the EPA inspectors during the meeting that, in response to Mr. Unanue's allegations that Building 6 contained harmful levels of lead, the PPA conducted its own sampling, which confirmed that Building 6 contained lead-based paint and friable asbestos-containing materials but found that these materials did not pose any danger because they had not yet been disturbed by demolition activities. C's Reply at 4 (citing CEX 3, CEI Report at 4).

Complainant failed, however, to offer any testimonial or documentary evidence to substantiate these statements. Complainant did not call Mr. Hernández or another representative of the PPA as a witness. The record demonstrates that the EPA inspectors requested documentation from the PPA during the February 2, 2007 inspection to support the PPA's finding that lead-based paint and friable asbestos-containing materials did not pose any danger at Building 6. CEX 3, CEI Report at 4; Day Two Tr. at 84. Mr. Avilés testified, however, that the PPA did not provide the requested documentation at that time. Day Two Tr. at 84. EPA again sought information concerning lead and asbestos at Building 6 from the PPA in an undated Notice of Violation and RCRA § 3007 Request for Information ("NOV"). CEX 6, NOV.[18/] Mr. Avilés testified that, although the PPA's response

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[17/] In fact, Complainant has sought from the outset of this proceeding to exclude any evidence related to the alleged lead contamination of Building 6, claiming that such evidence is irrelevant and immaterial to the charges against Respondent. *See, e.g.*, Complainant's Motions at 4-5. As the alleged lead contamination forms the foundation of Respondent's defenses to liability and may be relevant to the determination of any penalty, I find Complainant's reluctance to address the subject very troubling.

[18/] According to the cover letter of this document, it includes four attachments. However, Complainant appears to have

(continued...)

to the NOV indicates that the PPA submitted documentation of the sampling it performed at Building 6 as an appendix to the response, Complainant did not produce a copy of the appendix at the hearing. Day Two Tr. at 87-91 (citing CEX 7 at 6). When questioned further, Mr. Avilés admitted that, while he recalls reviewing a report related to asbestos and lead sampling, he does not remember whether the report was provided to EPA by the PPA or Respondent. Day Two Tr. at 89, 91-92. In view of Complainant's failure to offer any evidence corroborating the statements of Mr. Hernández, I cannot attribute sufficient weight to those statements to find that they refute Respondent's claims.

Complainant also points out that the Sampling Report expressly states that the sampling results "do not meet EPA standards for sample matrix and are not recognized under the NLLAP accreditation program." C's Reply at 3 (quoting Day Three Tr. at 166 (quoting REX 3, Sampling Report at 4)). As noted by Complainant, Mr. Unanue testified that he did not question Envirorecycling about the meaning of this language and that he was not concerned about it. C's Reply at 3 (citing Day Three Tr. at 170). While Complainant appears to imply that the provision affects the reliability of the Sampling Report, such a suggestion, without more, is insufficient to refute the findings and recommendations set forth therein.

Finally, Complainant disputes Mr. Unanue's purported concern for Respondent's employees, arguing that he failed to take any steps to protect the employees before receiving the Sampling Report, despite his prior knowledge of the dust entering Building 6 and the asbestos levels at the Puerto de Ponce. C's Reply at 3, 6. I find, however, that Complainant failed to elicit testimony from Mr. Unanue that supports this claim or that otherwise contradicts Respondent's position.

In particular, Mr. Unanue maintained during cross-examination that Respondent's employees first complained about dust entering Building 6 in early November of 2006, Day Three Tr. at 173-74, and that he learned of the presence of asbestos at the Puerto de Ponce in late fall of 2006,[19] *id.* at 150-51. When

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[18] (...continued)
introduced into evidence only certain pages of Attachments I, III, and IV and excluded Attachment II altogether. Because this document appears to be incomplete, as admitted, I will refrain from citing to specific pages within the document to avoid confusion.

[19] Complainant states in its Reply, "Conveniently, Mr. Unanue could not indicate the exact month he became aware of such information." C's Reply at 3 (citing Day Three Tr. at 150-52). I do not find Mr. Unanue's inability to recall the precise month he
(continued...)

questioned about the measures he took in response, Mr. Unanue first testified that he did not take any specific actions, other than "questioning . . . what was going on." Day Three Tr. at 152-53. He later claimed that he instructed the employees to stop working if Building 6 became too dusty. *Id.* at 177. He testified, "[W]hen there was too much dust, [the employees] were not working. They were inside the office until they could work." *Id.* at 176.

Mr. Unanue also testified that he provided Respondent's employees with "protective gear," including "[g]lasses, masks, [and] gloves," to shield the employees from exposure to the dust. *Id.* at 202-03. While Mr. Unanue conceded that he never personally contacted the Occupational Safety and Health Administration ("OSHA") to report his concerns, he testified that Respondent's employees called OSHA and EPA, among other governmental entities, to seek guidance. *Id.* at 171-72, 177, 192-193. Finally, when asked about the amount of time that elapsed between the first complaints he received from Respondent's employees in early November and the sampling conducted by Envirorecycling in late December, Mr. Unanue explained:

> [Y]ou have to go through a process, an evaluation process and in that evaluation process we ended up with a second candidate which is the company that we used [Envirorecycling] because we first contacted the company that was hired by the port. These things take time and I know that you are fully aware that in Puerto Rico in December things move slow.[20/]

Day Three Tr. at 17-76. Complainant failed to offer any evidence to rebut this testimony.

Based upon the unrefuted evidence in the record, I find that Respondent credibly argues, in summary, that it did not abandon the materials at issue when it vacated the Former Facility on December 28, 2006, because the materials still had value to it at the Canas Facility, where it resumed the same type of operations manufacturing chemical products used by potable and wastewater treatment plants. Rather, Respondent credibly contends, it was

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[19/] (...continued)
learned of the presence of asbestos at the Puerto de Ponce to be compelling evidence that his testimony lacks veracity.

[20/] I note that the Commonwealth of Puerto Rico observes numerous official public holidays during the months of December and January, including Christmas, New Year's Day, Three Kings Day, the Birthday of Eugenio María de Hostos, and Martin Luther King, Jr. Day.

precluded from immediately returning to the Former Facility to retrieve the materials due to unsafe lead levels and the slowness of industrial activity during the holidays in Puerto Rico.

For the foregoing reasons, I find that Complainant has failed to satisfy its burden of demonstrating by a preponderance of the evidence that the contents of the containers, drums, and tanks at the Former Facility qualified as "solid waste" by virtue of being "abandoned" by Respondent from December 28, 2006, through February 9, 2007.[21/] Accordingly, the stored materials do not constitute regulated waste under RCRA, and no liability for the violations alleged in Counts 1 and 2 of the Complaint may attach with respect to those materials.

(ii) Spilled and leaking materials

I now turn to the spilled and leaking materials reported at the Former Facility. As previously recounted, the term "abandoned" is defined, in pertinent part, by reference to the phrases "*disposed of*" and "accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being *disposed of*." 40 C.F.R. § 261.2(a)(2)(i) (emphasis added). No precise definition of the phrase "disposed of" is provided by the regulations. However, a number of tribunals have found that its meaning is akin to that of the statutory term "disposal." *See, e.g.*, *Lee Brass Co.*, 2 E.A.D. 900, 904 (CJO 1989) (finding complainant's argument - that the phrase "disposed of," as used by the D.C. Circuit in *AMC I* to define the statutory term "discarded material," has a similar meaning to the broad statutory definition of the term "disposal" - to be persuasive); *N. Kramer & Co.*, EPA Docket No. RCRA-05-2000-014, 2001 EPA ALJ LEXIS 43, at *22 (ALJ, July 31, 2001) (Order Denying Cross Motions for Accelerated Decision and Motion for Oral Argument) (finding "[t]he question of whether [a particular material] was 'disposed of' [to be] essentially the same as the question of whether there was a 'disposal' of the [material]").

Section 1004(3) of RCRA defines the term "disposal" as:

> the discharge, deposit, injection, dumping, *spilling, leaking*, or placing of any solid waste or hazardous waste into or on any land or water so that the such solid waste

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[21/] This conclusion should not be read to suggest that Respondent could avoid liability under RCRA indefinitely by claiming that lead contamination prevented it from entering Building 6 and that it was not abandoning the given materials. The record, when viewed as a whole, simply does not support a finding that Respondent "abandoned" the contents of the containers, drums, and tanks at the Former Facility during the limited period of violation alleged by Complainant.

> or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3) (emphasis added). Consistent with this definition, the Agency has stated, "[M]aterials are solid wastes immediately upon being spilled because they have been abandoned . . . [T]he Agency's *prima facie* case is established by the fact of the spill itself, which is a type of disposal." Land Disposal Restrictions for Third Scheduled Wastes, 54 Fed. Reg. 48,372, 48,494 (Nov. 22, 1989). Similarly, the Environmental Appeals Board has held that a spill or release of stored materials constitutes "solid waste" for regulatory purposes by virtue of being discarded. *See Sandoz Pharm. Corp.*, 4 E.A.D. 75, 79 (EAB 1992) (Order Denying Review in Part and Remanding in Part) ("A spill or release of stored materials into the surrounding area would generally constitute 'solid waste' under RCRA."); *Amerada Hess Corp. Port Reading Refinery*, 2 E.A.D. 910, 911 (Adm'r 1989) (Order Denying Review) ("Despite the original status of the stored materials, . . . a spill or release . . . would be a 'solid waste' under RCRA because the spilled materials would be unquestionably discarded.").

Thus, having, *ipso facto*, met the statutory definition of the term "disposal," any spilled or leaking material has also necessarily been "abandoned" and rendered a "discarded material" and "solid waste," as those terms are defined by 40 C.F.R. § 261.2(a) and (b). Accordingly, in order to satisfy its prima facie burden of demonstrating that a particular material qualifies as a "solid waste," a complainant is simply required to demonstrate that a spill or leaking of that material has occurred. Any person claiming that the given material is not a "solid waste" then bears the burden of demonstrating that it is excluded or exempt from regulation. 40 C.F.R. § 261.2(f); *see also* 54 Fed. Reg. at 48,494 ("The person claiming that spill residues are not solid wastes would have the burden of showing that the spill will be recycled . . . .").

In the present proceeding, the record contains considerable evidence of spilled and leaking materials at the Former Facility. A number of the photographs taken by Mr. Avilés during the CEI on February 2, 2007, clearly depict solid materials, varying in color, spread on the floor in the southern portion of the Former Facility. CEX 3, CEI Report at Appendix III (Photographs 11-13). At the hearing, Mr. González and Mr. Avilés each described these spills as powders, the origin of which was uncertain. Day One Tr. at 47-50, 203, 207-208; Day Two Tr. at 16-20. In addition, the EPA inspectors documented in their written account of the CEI that they observed spills from drums and containers labeled as hydrochloric acid, sulfuric acid, low pH sump water, ferrous

chloride, ferric sulfate, and sodium aluminate, as well as spills from containers labeled only as corrosive.[22] *Id.* at 4.

While Mr. González testified that none of the photographs admitted into evidence at the hearing show materials leaking from the containers, drums, or tanks present at the Former Facility, Day One Tr. 261:22-25, the EPA inspectors described the totes depicted in Photographs 9 and 10 as "leaking on the warehouse floor" in their written account of the CEI,[23] CEX 3, CEI Report at 6. They also documented their discovery of two 55-gallon drums labeled as Sodium Aluminate and located on wooden pallets in the southeastern portion of Building 6 that were "leaking from [their] top openings." *Id.* Finally, the EPA inspectors documented totes stacked against the northern wall of Building 6, some of which were labeled as "SUMP WATER LOW pH." *Id.* at 6, Appendix III (Photograph 6). Mr. González testified that a number of these totes were leaking. Day One Tr. at 43.

Similarly, Mr. Rodríguez documented numerous spilled and leaking materials that he and the RST2 contractor observed during the February 7, 2007 removal assessment. CEX 11, 2007 Pollution Report at 1-2. In particular, Mr. Rodríguez recorded in his written account of the removal assessment that he and the RST2 contractor observed spills of materials identified as "hydrochloric acid, low pH (pH less than 1) liquids from sumps, ferrous chloride, ferric sulfate, [and] sodium aluminate, and spills of unknown solid chemicals, corrosive materials" throughout Building 6. *Id.* at 1-2. They also observed in the laboratory area of the Former Facility a number of containers, identified as storing acids, bases, and buffers, that were broken and spilled. *Id.* at 2.

The foregoing evidence clearly supports a finding that the above-described materials had spilled or were leaking from

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[22] The record does not contain any photographic evidence of these spills, and the manner in which the EPA inspectors determined that spilled materials had originated from particular containers is not evident from the written account or witness testimony. I note, however, that Mr. Rodríguez documented in his report of the February 7, 2007 removal assessment that "spills were observed around [containers]." Therefore, I may reasonably assume that the EPA inspectors identified the source of spilled materials based upon the proximity of the materials to particular containers.

[23] I note that Photograph 9 shows a solid material, white in color, on top of the partially open tote. CEX 3, CEI Report at Appendix III (Photograph 9). Notwithstanding Mr. González's testimony that none of the photographs depict leaking materials, this white material arguably consists of the tote's contents leaking from the top of the tote.

containers at the Former Facility, as of at least February 2, 2007. While Respondent generally denied any allegations related to spilled or leaking materials at the Former Facility in its Answer, the only evidentiary support for Respondent's position in the record is the Second Response it submitted to EPA, in which Respondent denies any knowledge of the "yellow or cream colored powder" described by EPA in the Second Request as having been observed on the floor of Building 6. CEX 9, Second Response at 6; *see also* CEX 8, Second Request at Attachment I.

As previously discussed, such a self-serving statement is entitled to little weight. Thus, it is insufficient to rebut the substantial evidence of spilled and leaking materials described above. Accordingly, I find at this time that Complainant has met its burden of demonstrating by a preponderance of the evidence that materials had spilled and were leaking from containers at the Former Facility, as of at least February 2, 2007. Because spilled and leaking materials fall within the statutory definition of the term "disposal," the preponderance of the evidence also necessarily supports a finding that the given materials constituted "discarded material" and "solid waste" by virtue of being "abandoned," as those terms are defined by 40 C.F.R. § 261.2(a) and (b).

With Complainant having met its prima facie burden of demonstrating that the spilled and leaking materials described above constituted "solid waste," the burden now shifts to Respondent to demonstrate that the materials are excluded or exempt from regulation as such. As previously recounted, 40 C.F.R. § 261.2(f) provides:

> Respondents in actions to enforce regulations implementing [S]ubtitle C of RCRA who raise a claim that a certain material is not solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so.

40 C.F.R. § 262.2(f); *see also* 54 Fed. Reg. at 48,494 ("The person claiming that spill residues are not solid wastes would have the burden of showing that the spill will be recycled . . . .").

Respondent failed to point to any documentation demonstrating that the spilled and leaking materials found at the Former Facility are not subject to regulation as "solid waste," as required by 40 C.F.R. § 262.2(f). Once again, the only evidentiary support for Respondent's position in the record is the Second Response. As Respondent states therein:

> Minor spills occurred at the facility during the years it operated at Building Number 6. All these spills occurred within the secondary containment areas . . . Any product that was spilled inside the secondary containment area was collected and extracted using diaphragm pumps into a container and then reused in the production process.

CEX 9, Second Response at 7.

As self-serving declarations, these statements are entitled to little weight. Moreover, Respondent's claim that it collected spilled materials to be reused in its production processes is directly contradicted by the testimony of Mr. Rodríguez. He asserted that, based upon his professional experience and his observation of opened bags of sodium hydroxide at Building 6 during the February 7, 2007 removal assessment,[24/] he believed that Respondent had spread sodium hydroxide on the floor of the Former Facility in an attempt to neutralize materials leaking from nearby tanks. Day Two Tr. at 157-58.

As a result, I find that Respondent failed to offer any compelling evidence that the spilled and leaking materials observed at the Former Facility are not subject to regulation as "solid waste."

2. Did Respondent Fail to Perform a Hazardous Waste Determination?

Having found that the spilled and leaking materials at the Former Facility constitute regulated solid waste, I now turn to the allegations set forth in Count 1 of the Complaint. Count 1 alleges that, as of at least February 2, 2007, Respondent violated 40 C.F.R. § 262.11 by failing to determine whether each solid waste generated at the Former Facility constituted a hazardous waste. Compl. ¶¶ 44, 45. As noted above, 40 C.F.R. § 262.11 instructs that "[a] person who generates a solid waste, as defined in 40 C.F.R. § 261.2, must determine if that waste is a hazardous waste" by following the steps set forth in the regulation. Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and

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[24/] I note that, in the Second Response it submitted to EPA, Respondent acknowledged that its inventory as of December 31, 2006, included 550 pounds of caustic soda. CEX 9, Second Response at 10.

the regulations at 40 C.F.R. § 260.10, define the term "person" as, among other entities, a corporation.

In order to comply with 40 C.F.R. § 262.11, the first step that the person should take is to determine whether the waste is excluded from regulation by 40 C.F.R. § 261.4. 40 C.F.R. § 262.11(a). If the waste is not excluded, the person is next required to determine whether the waste is specifically listed as a hazardous waste at 40 C.F.R. §§ 261.31-.33. 40 C.F.R. § 262.11(b). Finally, if the waste is not specifically listed as a hazardous waste, the person is required to determine whether the waste exhibits one or more of the characteristics of hazardous waste by either (1) testing the waste in accordance with the methods set forth at 40 C.F.R. §§ 261.21-.24, or an equivalent method approved by EPA, or (2) "applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used." 40 C.F.R. § 262.11(c).

The parties do not dispute that Respondent is a "person," as that term is defined by Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and the regulations at 40 C.F.R. § 260.10. Jt. Stips. I(b). Further, as discussed fully in a subsequent section of this Initial Decision, the preponderance of the evidence in this proceeding establishes that Respondent was the "generator" of the spilled and leaking materials found at the Former Facility, as that term is defined by 40 C.F.R. § 260.10. Therefore, the only question that remains with respect to Respondent's liability for Count 1 of the Complaint is whether Respondent performed a valid hazardous waste determination for those materials.

Respondent claims in its Brief that it made a hazardous waste determination by determining that it did not, in fact, generate solid waste.[25/] R's Brief at 14. Respondent argues that it "had a good faith basis for believing that it had not generated hazardous waste as it never believed that it had discarded [any materials]." *Id.* Respondent further contends that "the question of whether a determination of hazardous waste has been done is reserved for issues where there is no question regarding the generation of waste." *Id.* Apart from describing

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[25/] Arguably, evidence in the record suggests that Respondent possessed knowledge of the hazardous properties of materials present at the Former Facility. As noted above, Mr. Unanue described Respondent's materials as "corrosive" during the hearing. Day Three Tr. 82-83. In addition, a number of containers, drums, and tanks observed at the Former Facility during the February 2, 2007 inspection and February 7, 2007 removal assessment were labeled as "corrosive." CEX 3, CEI Report at 4-7; CEX 11, 2007 Pollution Report at 2. Respondent does not claim, however, to have performed a hazardous waste determination by applying any such knowledge in accordance with the regulation.

these claims as "a new twist to the definition of making a hazardous waste determination," Complainant fails to respond directly to Respondent's position. C's Reply at 7.

Respondent's arguments are unfounded. As a general matter, the Board has held that "RCRA is a strict liability statute . . . [that] authorizes the imposition of a penalty even if the violation is unintended." *Rybond, Inc.*, 6 E.A.D. 614, 638 (quoting *Humko Products, An Operation of Kraft, Inc.*, 2 E.A.D. 697, 703 (CJO 1988)). Additionally, in the preamble to the final rule establishing the requirement to make a hazardous waste determination, the Agency expressly rejected the suggestion "that a 'good faith' mistake provision . . . be included in the regulation to excuse inadvertent mistakes in the determination of whether a waste is hazardous." Standards Applicable to Generators of Hazardous Waste, 45 Fed. Reg. 12,724, 12,727 (Feb. 26, 1980). Rather, the Agency found that "[p]rosecutorial discretion [would] suffice to protect persons who, despite all conscientious efforts, erred in the determination." *Id.* Finally, a number of tribunals have held that a person complies with the requirements of 40 C.F.R. § 262.11 only if the person's determination as to the hazardous nature of a given material is correct. *See Morrison Bros. Co.*, EPA Docket No. VII-98-H-0012, 2000 EPA ALJ LEXIS 68, at *13 (ALJ, Aug. 31, 2000) ("Even if [the respondent] had performed a cognizable hazardous waste determination, it would not have complied with the regulatory requirements if [it] erroneously determined that the waste was not hazardous."); *Kuhlman Diecasting Co.*, EPA Docket No. RCRA-83-H-004, 1983 EPA ALJ LEXIS 10, at *28 (ALJ, Nov. 7, 1983) ("[I]f a[n] owner of a facility feels that his waste is not hazardous and treats it as such, and it is later determined, after testing, that the material was, in fact, hazardous[,] then obviously a violation of the statute and regulations has occurred . . . [I]n this case the [r]espondent gambled and won [because subsequent testing confirmed its belief that the waste was not hazardous] and, therefore, no penalty . . . is appropriate . . . .").

Consistent with these legal authorities, I find that Respondent is not shielded from liability simply because it erroneously believed that the solid waste generated at the Former Facility did not qualify as regulated waste and, therefore, never reached the question of whether the waste was hazardous in nature. Accordingly, I find that Respondent failed to perform a valid hazardous waste determination for each solid waste found at the Former Facility, in violation of 40 C.F.R. § 262.11.

3. <u>Was Respondent a "Generator" of "Hazardous Waste"</u>?

The regulations at 40 C.F.R. § 262.34(a)(4) authorize "a generator [to] accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status" provided that the generator complies with the requirements governing

owners or operators set forth in subparts C and D of 40 C.F.R. part 265. Count 2 of the Complaint alleges that Respondent violated one such requirement, found at 40 C.F.R. § 265.31. Thus, the next question presented in this proceeding is whether Respondent was subject to 40 C.F.R. § 262.34(a)(4), such that it was required to comply with 40 C.F.R. § 265.31. Two conditions must necessarily be met in order for those regulations to apply to Respondent: (1) the spilled and leaking materials must qualify as "hazardous waste," and (2) Respondent must have been the "generator" of such hazardous waste.[26/] I will consider each of these jurisdictional elements in turn.

a. Did the Spilled and Leaking Materials Qualify as "Hazardous Waste"?

As previously recounted, the regulations developed to implement Subtitle C of RCRA provide that a solid waste constitutes a "hazardous waste" when, subject to certain exceptions, it satisfies one of two conditions: (1) the waste material exhibits the hazardous characteristics of ignitability, corrosivity, reactivity, or toxicity as defined by 40 C.F.R. §§ 261.21-.24; or (2) the waste material is specifically listed as a hazardous waste at 40 C.F.R. §§ 261.31-.33 following a rulemaking proceeding. 40 C.F.R. §§ 261.3, 261.20(a), 261.30(a). Thus, to establish liability for Counts 1 and 2 of the Complaint, Complainant is required to demonstrate by a preponderance of the evidence that the spilled and leaking materials satisfy one of these conditions.

Arguing that Complainant failed to carry this burden, Respondent points out in its Brief that none of Complainant's witnesses testified to performing any sampling of the materials, other than "cursory" sampling performed during the February 7, 2007 removal assessment. R's Brief at 14-15. Thus, Respondent argues, "[t]he entirety of [Complainant's] evidence regarding the hazardous nature of the materials found at the [F]ormer Facility was the labels attached to the containers in which the materials were kept." *Id.* at 15. Respondent claims that this evidence is insufficient, however, to establish that the materials were hazardous for regulatory purposes. *See id.* In response, Complainant states only that "Respondent does not provide any insight in its Brief as to what it considers as 'hazardous.'" C's Reply at 7.

[26/] Additionally, Respondent must have accumulated such hazardous waste at the Former Facility for "90 days or less without a permit or without having interim status." Neither party directly addresses this issue. As discussed above, however, the alleged period of violation for Count 2 of the Complaint is 43 days. Further, nothing in the record suggests that Respondent had a RCRA permit or interim status.

As Respondent correctly observes, the testimonial evidence in the record establishes that representatives of EPA failed to perform any comprehensive sampling at the time of the February 2, 2007 inspection and February 7, 2007 removal assessment, relying instead upon any labels or other information attached to the containers, drums, and tanks found at the Former Facility to determine the chemical identity and hazardous nature of their contents.[27/] Specifically, Mr. Rodríguez testified that, although he and the RST2 contractor performed "field sampling" of the liquid materials found at Building 6 during the February 7, 2007 removal assessment using pH testing strips, they did not perform any comprehensive sampling of the materials at that time. Day Two Tr. at 213. Conceivably, the "field sampling" yielded information relevant as to the chemical identity or hazardous properties of the sampled materials. Whether Mr. Rodríguez or the RST2 contractor utilized the results of the field sampling for identification purposes, however, is not evident from the record. Rather, Mr. Rodríguez testified that he and the RST2 contractor prepared the inventory of materials observed at Building 6 "via labels." Day Two Tr. at 152. Likewise, Mr. González testified that, based upon labels, the chemical formulas of the materials, or other information provided on the containers found during the February 2, 2007 inspection, the EPA inspectors identified the contents of some of the containers and further determined that the materials consisted of corrosive solvents and oxidizers.[28/] Day One Tr. at 51, 53, 195, 231.

The precise identity and nature of each material found at the Former Facility during the inspection and removal assessment may be uncertain in the absence of comprehensive sampling and analysis. However, the preponderance of the evidence in this proceeding supports a finding that sulfuric acid, low pH sump water, and materials identified by representatives of EPA only as

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[27/] I note that the reliance of the representatives of EPA on such labels and other information to determine the hazardous nature of materials found at the Former Facility appears to be incongruous with their later assumption, described by Mr. Avilés at the hearing, that a laboratory analysis of the materials was the "best way" to perform a hazardous waste determination in this case. Day Two Tr. at 64. Based upon this assumption, Complainant calculated that Respondent's failure to perform a hazardous waste determination, as alleged in Count 1 of the Complaint, resulted in an economic benefit of $19,266 to Respondent as a result of its avoidance of the cost of a laboratory analysis to determine whether the materials at issue were characteristically hazardous. Compl. at Attachment I; C's Brief at 15; Day Two Tr. at 63-65.

[28/] According to 40 C.F.R. § 262.22(a)(4), "a solid waste exhibits the characteristic of ignitability if . . . [i]t is an oxidizer," as defined by the regulation.

"corrosive" had spilled or were leaking at the Former Facility and that these materials were hazardous for regulatory purposes, as of at least February 2, 2007.[29/]

First, while labels may not unequivocally identify the contents of a container, I still find this type of evidence to be persuasive. As the Board explained in *National Railroad Passenger Corp. (AMTRAK)*, 1 E.A.D. 708 (JO 1982) ("*AMTRAK*"):

> [C]ertain presumptions or inferences of fact may arise or be drawn in the course of proving a fact. Thus, absent evidence to the contrary, it may be presumed or inferred that things are what they purport to be. For example, in the present case, there are three transformers which bear Inerteen markings. It is of course possible that . . . the Inerteen markings have nothing to do with the contents of the transformers; however, one presumes that the transformers . . . contain Inerteen.

AMTRAK, 1 E.A.D. at 712. Thus, in the absence of evidence to the contrary, the representatives of EPA were reasonable to assume that the labels and other information attached to the containers, tanks, and drums at the Former Facility correctly depicted the chemical identity and hazardous nature of their contents.[30/]

[29/] Upon review of the record, I note that Complainant cites to material data safety sheets ("MSDSs") and CAS Numbers in the Complaint and its Brief to allege that the materials identified at the Former Facility exhibit certain physical and chemical properties. Compl. ¶ 50; C's Brief at 11-12. Pursuant to Section 22.26 of the Rules of Practice, 40 C.F.R. § 22.26, post-hearing briefs "shall contain adequate references to the record and authorities relied on." While the record suggests that Respondent provided copies of MSDSs for its materials to representatives of EPA at their request, CEX 9, Second Response at 5; Day Three Tr. at 112, 121, Complainant failed to point to any MSDSs in the record in its Brief. Moreover, a review of the record failed to uncover any documentary or testimonial evidence at the hearing to support the allegations related to the physical and chemical properties of the materials. Accordingly, I have not considered any such information in adjudicating the alleged violations.

[30/] This ability to identify the materials distinguishes this case from the initial decision underlying *Bil-Dry*. In ruling that the complainant had failed to establish that the drums at issue contained hazardous waste as of the date of the first inspection conducted at the facility, Administrative Law Judge Stephen J. McGuire reasoned, "No samples were taken and *no identification of Drums 2-4 was ever made* until the follow-up inspection and testing on April 9-10, 1996." *Bil-Dry Corp.*, EPA Docket No. RCRA-III-264,

(continued...)

More particularly, the representatives of EPA were reasonable to assume that the contents of containers labeled as sulfuric acid and low pH sump water did, in fact, consist of those substances and that labels indicating the hazardous nature of the contents were accurate in that representation. As I found in an earlier section of this Initial Decision, materials had spilled or were leaking from containers bearing such labels, at least as of the February 2, 2007 inspection of the Former Facility. Specifically, the EPA inspectors observed spills from containers labeled only as "corrosive." CEX 3, CEI Report at 4. They also observed spills from containers labeled as "low pH sump water." *Id.* According to the written account of the inspection, some of the totes stacked against the northern wall of Building 6 were labeled as "SUMP WATER LOW pH." *Id.* at 6, Appendix III (Photograph 6). At the hearing, Mr. González described these totes as being "labeled as corrosive substances" and "leak[ing]." Day One Tr. at 39, 43.

Additionally, the EPA inspectors observed spills from containers labeled as "sulfuric acid." CEX 3, CEI Report at 4. When questioned about the presence of sulfuric acid at the Former Facility, Mr. González surmised that it was one of the reagents observed by the EPA inspectors in the laboratory area of the facility. Day One Tr. at 286-87. As documented in their written account of the inspection, the EPA inspectors identified the contents of containers found in the laboratory area as "buffers solutions, acids, bases, flammable, corrosive, oxidizers, [and] toxics." CEX 3, CEI Report at 7. According to the report of the February 7, 2007 removal assessment, Mr. Rodríguez and the RST2 contractor discovered containers in the laboratory area of the Former Facility as well. CEX 11, 2007 Pollution Report at 2. The report relates that Mr. Rodríguez and the RST2 contractor identified the contents of these containers as "acids, bases, [and] buffers" and observed that some of the containers were "broken, spilled[,] or in deteriorated condition." CEX 11, 2007 Pollution Report at 2.

The extensive training and experience of the EPA inspectors and Mr. Rodríguez lend credibility to their conclusions regarding the identity and nature of the materials found at the Former Facility based upon labels such as those described above. Mr. González, for example, possesses a bachelor of science degree in chemical engineering from the University of Puerto Rico and a double masters degree in chemical engineering and applied chemistry from Columbia University, among other academic degrees. Day One Tr. at 20. He is a licensed professional engineer. *Id.*

[30/] (...continued)
1998 EPA ALJ LEXIS 114, at *51 (ALJ, Oct. 8, 1998) (emphasis added). Significantly, the drums at issue lacked labels. *Id.* at *16.

An employee of EPA for 23 years, *id.* at 19, he currently serves as a Senior Environmental Engineer for the RCRA Response and Remediation Branch at EPA's Caribbean Environmental Protection Division, CEX 3, CEI Report at 1. As part of his job duties, he has inspected between 250 and 300 facilities, Day One Tr. at 22, including two facilities engaged in operations similar to those of Respondent, *id.* at 54-55. Respondent does not dispute these credentials and, in fact, stipulated that Mr. González "has vast experience as an Inspector under the RCRA program." Jt. Stips. ¶ III.

The Second Response submitted to EPA by Respondent also corroborates the conclusions of the EPA inspectors and Mr. Rodríguez as to the identity of the materials. As discussed above, Respondent provided in the Second Response a list of its total inventory as of December 31, 2006, which it prepared using "inventory records on hand as of [that date]." CEX 9, Second Response at 10-11. Mr. González and Mr. Avilés each testified that the materials listed in the Second Response matched the materials identified by EPA inspectors at the Former Facility. Day One Tr. at 83-84; Day Two Tr. at 36, 39-40.

Finally, the Monthly Progress Report proffered by Complainant supports the conclusions of the EPA inspectors and Mr. Rodríguez as to the hazardous nature of the materials. As described above, the Monthly Progress Report includes seven shipping manifests for materials removed from Building 6 and certificates of disposal certifying that the materials were properly disposed following shipment to the United States. CEX 14, Monthly Progress Report at Appendix 1. Four of the manifests identify the shipped materials as "HAZARDOUS WASTE, SOLID, N.O.S."[31/] and list the EPA hazardous waste numbers assigned to solid wastes exhibiting the characteristic of corrosivity and the characteristic of toxicity for chromium *Id.*; 40 C.F.R. §§ 261.22, 261.24. Another manifest identifies the shipped materials as "WASTE, CORROSIVE LIQUIDS, BASIC, INORGANIC, N.O.S." and lists the EPA hazardous waste number assigned to solid wastes exhibiting the characteristic of corrosivity. CEX 14, Monthly Progress Report at Appendix 1; 40 C.F.R. § 261.22. Yet another manifest identifies the shipped materials as "Waste oxidizing liquid, corrosive, n.o.s." and lists the EPA hazardous waste numbers assigned to solid wastes exhibiting the characteristic of toxicity for chromium, the characteristic of corrosivity, and the characteristic of ignitability. CEX 14, Monthly Progress Report at Appendix 1; 40 C.F.R. §§ 261.24, 261.22, 261.21.

The final manifest identifies 10 categories of materials removed from the laboratory area of the Former Facility as

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[31/] Mr. Rodríguez testified that the acronym "N.O.S." stands for "Not Otherwise Specified." Day Two Tr. at 178.

characteristically hazardous. CEX 14, Monthly Progress Report at Appendix 1. Of those 10 categories, one in particular is listed as "WASTE CORROSIVE LIQUID . . . (Mercury Sulfate, Sulfuric Acid)," together with the EPA hazardous waste numbers assigned to solid wastes exhibiting the characteristic of corrosivity, the characteristic of toxicity for mercury, the characteristic of toxicity for chromium, and the characteristic of toxicity for silver. *Id.*; 40 C.F.R. §§ 261.22, 261.24. Thus, the entries on the shipping manifests are consistent with the conclusions of the EPA inspectors and Mr. Rodríguez that sulfuric acid was stored in the laboratory area of the facility and that materials found at the Former Facility consisted of regulated hazardous waste.

Although the foregoing evidence is entirely circumstantial, I find that it is sufficient to shift the burden to Respondent to demonstrate that the labels and other information attached to the containers, tanks, and drums at the Former Facility did not correctly depict the chemical identity and hazardous nature of their contents. Respondent failed to carry this burden. While Respondent strenuously argued against Complainant's position that the materials at the Former Facility qualified as "solid waste," Respondent offered little to defend against Complainant's position that the materials qualified as "hazardous waste." Indeed, Respondent produced no testimonial or documentary evidence in support of the position that the contents of the containers consisted of materials other than those indicated by their labels,[32/] and Respondent's bald legal arguments in its Brief are, by themselves, insufficient to rebut the opposing evidence described above.

Accordingly, I find that, when viewed in its entirety, the record adequately demonstrates that sulfuric acid, low pH sump water, and materials identified by representatives of EPA only as "corrosive" had spilled or were leaking from containers at the Former Facility and that these materials constituted "hazardous waste" by way of exhibiting one or more of the characteristics of hazardous waste described at 40 C.F.R. §§ 261.21-.24, as of at least February 2, 2007.

In contrast, I find that the record is insufficient to establish that any of the other spilled or leaking materials observed by representatives of EPA at the Former Facility during the February 2, 2007 inspection and February 7, 2007 removal assessment qualified as regulated hazardous waste. In particular, the EPA inspectors documented in their report of the

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[32/] To the contrary, Mr. Unanue himself described the materials used by Respondent in its operations as "corrosive," citing this consideration as a reason Respondent sought to "transport the chemicals in a safe and secure way to the new facility." Day Three Tr. at 82-83.

February 2, 2007 inspection that they observed spills from containers labeled as hydrochloric acid, ferrous chloride, sodium aluminate, and ferric sulfate at the Former Facility. CEX 3, CEI Report at 3. In keeping with the discussion above, I find that the preponderance of the evidence in this proceeding demonstrates that hydrochloric acid, ferrous chloride, sodium aluminate, and ferric sulfate had, in fact, spilled at the Former Facility as of at least February 2, 2007.

The record lacks sufficient evidence, however, that these particular materials were hazardous for regulatory purposes. First, Complainant has not cited in its Brief or Reply any evidence concerning the hazardous nature of the materials. Further, a review of the record fails to uncover any evidence that the containers from which these materials spilled were marked in any way to suggest that their contents were hazardous[33/] or that hydrochloric acid, ferrous chloride, sodium aluminate, and ferric sulfate are, as a general rule, hazardous by nature.[34/] I cannot assume such facts not in the record before me. Finally, a review of the lists of hazardous waste set forth at 40 C.F.R. §§ 261.31-.33 reveals that these particular substances are not specifically listed hazardous wastes. As I am bound by the limited record of this proceeding, I find that Complainant has simply failed to demonstrate by a preponderance of the evidence that the hydrochloric acid, ferrous chloride, sodium aluminate,

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[33/] In their report of the inspection, the EPA inspectors described a number of the drums and containers at the Former Facility that were labeled as hydrochloric acid, ferrous chloride, and sodium aluminate as also being labeled as "corrosive." CEX 3, CEI Report at 5-6. However, nothing in the record suggests that the EPA inspectors observed spills from those particular containers.

[34/] I note that the AOC states, "Hydrochloric acid (detected with a pH of less than or equal to 1), sodium hydroxide (detected with a pH of greater than or equal to 12), ferrous chloride, and ferric sulfate are 'hazardous substances' within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14)." CEX 13, AOC at 6. The term "hazardous substance" is defined by CERCLA, in pertinent part, as any hazardous waste having the characteristics identified under or listed pursuant to Section 3001 of RCRA. 42 U.S.C. § 9601(14). However, nothing in the record suggests that hydrochloric acid exhibiting a pH of less than or equal to 1 had spilled or leaked at the Former Facility. Further, as noted above, the AOC also provides, "Respondents' participation in this Agreement and Order shall not constitute or be construed as an admission of liability or of EPA's findings of fact or determinations of law contained in this Agreement and Order." CEX 13, AOC at 1.

and ferric sulfate that had spilled at the Former Facility were hazardous waste for regulatory purposes.

Likewise, I find that Complainant failed to demonstrate by a preponderance of the evidence that the solid materials observed on the floor of Building 6 were hazardous for regulatory purposes. As previously discussed, a number of the photographs taken by Mr. Avilés during the inspection on February 2, 2007, clearly depict solid materials, varying in color, spread on the floor in the southern portion of the building. CEX 3, CEI Report at Appendix III (Photographs 11-13). The EPA inspectors also documented in their written account of the inspection that they observed "granular material" that had spilled on the floor of the partially demolished wood shed located in the southeastern section of Building 6's interior, within the "tank farm" located in the southwestern section of Building 6's interior, and within the partially demolished secondary containment system adjacent to the tank farm. CEX 3, CEI Report at 6-7. Mr. Rodríguez recorded in his report of the February 7, 2007 removal assessment that he and the RST2 contractor similarly observed "white powder spills on the floor and warehouse entrance" of Building 6. CEX 11, 2007 Pollution Report at 2. The testimonial evidence in the record establishes, however, that the EPA inspectors were unable to determine the chemical identity of these materials at the time of the inspection. Day One Tr. at 203, 207-08; Day Two Tr. at 16-17. Nothing in the record suggests that, conversely, they were able to determine the hazardous nature of the materials.

b. Was Respondent a "Generator" of the Hazardous Waste at the Former Facility?

While Section 1004(6) of RCRA defines the phrase "hazardous waste generation" as "the act or process of producing hazardous waste," the statute does not specifically define the term "generator." 42 U.S.C. § 6903(6). The regulations found at 40 C.F.R. § 260.10 define the term, however, as "any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation." Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and the regulations at 40 C.F.R. § 260.10, define the term "person" as, among other entities, a corporation.

As previously noted, the parties agree that Respondent is a "person," as that term is defined by Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and the regulations found at 40 C.F.R. § 260.10. Jt. Stips. ¶ I(b). In its Brief, Complainant contends that Respondent became a "generator" of hazardous waste on or about December 28, 2006, at the time it abandoned the Former Facility. C's Brief at 10. Apart from disputing the allegation that it abandoned the Former Facility, Respondent does not address the issue of whether it was the person whose act or

process produced the hazardous waste or first caused the hazardous waste at the Former Facility to become subject to regulation.

The preponderance of the evidence in this proceeding supports a finding that Respondent first caused the hazardous waste at the Former Facility to become subject to regulation by handling the containers storing sulfuric acid, low pH sump water, and materials identified only as "corrosive" in such a way during its operations as to allow those materials to spill or leak from the containers. First, I note that Mr. González testified that Respondent was "the last one[] to leave the building when they moved out . . . ." Day One Tr. at 238. Mr. Avilés testified, in turn, that "no one . . . occupied the facility after Aguakem." Day Two Tr. at 118. Accordingly, Mr. Avilés asserted, "We reasonably presumed that the facility was in the same state as when [Respondent] left . . . ." Day Two Tr. at 118.

This conclusion is supported by the particular conditions observed at Building 6 by representatives of EPA during the February 2, 2007 inspection and February 7, 2007 removal assessment. For example, the EPA inspectors recorded in their report of the inspection that the totes stacked against the northern wall of Building 6 and labeled as "SUMP WATER LOW pH" were "severely deteriorated" and "stains were observed all over the concrete floor." CEX 3, CEI Report at 6. Mr. González also described these totes at the hearing as "rusted," "bent," and "leaking." Day One Tr. at 39, 43. Such observations suggest that the conditions at Building 6 existed long before the date of the inspection. In addition, as noted above, Mr. Rodríguez testified that, based upon his professional experience and his observation of opened bags of sodium hydroxide at Building 6, he believed that Respondent had spread sodium hydroxide on the floor of the Former Facility in an attempt to neutralize materials leaking from nearby tanks. Day Two Tr. at 157-58. While Mr. Rodríguez failed to identify the particular materials he believed Respondent sought to neutralize, his testimony suggests that spills had occurred prior to Respondent's departure from the Former Facility on December 28, 2006, and that Respondent acted to render the spilled materials less harmful.

As already discussed, Respondent generally denied the allegations in the Complaint related to the condition of containers and spilled or leaking materials observed at the Former Facility by representatives of EPA. The evidentiary record provides little support for Respondent's position, however. For example, in the Second Response, Respondent denies any knowledge of the "stained floor" and "yellow and cream colored powder" described by EPA in its Second Request as having been observed at Building 6. CEX 9, Second Response at 6; *see also* CEX 8, Second Request at Attachment I. As Respondent failed to offer any testimonial or documentary evidence to substantiate

these self-serving statements, they are entitled to little weight.

Further, the record lacks sufficient evidence that any third parties entered Building 6 between the time Respondent ceased its relocation activities on December 28, 2006, and the February 2, 2007 inspection and caused the materials to spill or leak. According to the written account of the inspection, Mr. Hernández of the PPA represented to the EPA inspectors during their meeting at the outset of the inspection that he had discovered numerous drums and containers remaining inside Building 6 after Respondent vacated the property. CEX 3, CEI Report at 4. Nothing in this account suggests, however, that Mr. Hernández caused any materials to spill or leak at that time. In addition, Mr. Unanue testified that, although the PPA's contractor used the eastern portion of Building 6 in November and December of 2006 to store lumber, he requested that the lumber be removed to facilitate Respondent's relocation process. Day Three Tr. at 72-73, 76-77, 156-57; *see also* CEX 9, CEI Report at 6. The record is devoid of evidence that the PPA's contractor resumed its use of Building 6 at any time thereafter.

Undoubtedly, the record does show that the PPA's contractor was performing activities in the vicinity of Building 6 following Respondent's relocation and that, although the PPA attempted to restrict entry to Building 6 with yellow caution tape on an indeterminate date, the entrance doors either had been removed or were unlocked, open, or damaged. CEX 3, CEI Report at 5; Day One Tr. at 237-38; Day Two Tr. at 93-94; Day Three Tr. at 180-81, 205. Therefore, a third party conceivably could have accessed Building 6 between the time Respondent ceased its relocation activities on December 28, 2006, and the February 2, 2007 inspection and caused materials to spill or leak. I find that the circumstantial evidence supporting such a claim is too tenuous, however, to refute the evidence in the record demonstrating that, at least as of Respondent's last day of operations at the Former Facility on December 28, 2006, Respondent handled the containers storing sulfuric acid, low pH sump water, and materials identified only as "corrosive" in such a way as to allow those materials to spill or leak, such that Respondent first caused them to become subject to regulation as hazardous waste.

As a result, I find that Respondent was a "generator" of the hazardous waste at the Former Facility, as that term is defined by the regulations found at 40 C.F.R. § 260.10, as of at least December 28, 2006. Having found that Respondent was a "generator" of "hazardous waste," I further conclude that Respondent is subject to the regulations at issue in Count 2 of the Complaint.

4. Did Respondent Fail to Maintain and Operate the Former Facility to Minimize Risks of a Fire, Explosion, or Release of Hazardous Waste?

Count 2 alleges that, prior to at least February 2, 2007, Respondent did not properly manage the contents of containers, protect containers from deterioration, or manage spills at the Former Facility, such that Respondent failed to maintain and operate the Former Facility to minimize the possibility of a fire, explosion, or release of hazardous waste, in "violation of 40 C.F.R. § 265.31[,] as referenced by 40 C.F.R. § 262.34(d)(4) [*sic*]."[35/] Compl. ¶¶ 50, 51.

As previously recounted, pursuant to 40 C.F.R. § 262.34(a)(4), a generator may accumulate hazardous waste at its facility for 90 days or less without obtaining a RCRA permit or interim status provided that the generator complies with certain requirements, including those imposed by 40 C.F.R. § 265.31. The regulations at 40 C.F.R. § 265.31 direct that "[f]acilities 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." The term "facility" is defined by the regulations at 40 C.F.R. § 260.10, in pertinent part, as "[a]ll contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste, or for managing hazardous secondary materials prior to reclamation."

The parties do not dispute that the Former Facility constitutes a "facility," within the meaning of 40 C.F.R. § 260.10. Jt. Stips. ¶ I(g). Complainant contends in its Brief that, between the date Respondent ceased its relocation activities and the date of the CEI, "Respondent failed to implement practices to satisfactorily maintain and operate its [F]ormer Facility to minimize the possibility of fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste." C's Brief at 10-11. In support of this position, Complainant points to evidence of the conditions observed by the

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[35/] The citation to 40 C.F.R. § 262.34(d)(4) appears to be a typographical error. The correct citation is 40 C.F.R. § 262.34(a)(4).

EPA inspectors during the February 2, 2007 inspection.[36] C's Brief at 10-12.

Respondent counters that the condition of the Former Facility, as observed during the inspection, was "entirely the responsibility of the Municipio of Ponce, the owner and operator of the [F]ormer Facility" between December 28, 2006 and the date of the inspection. R's Brief at 15. In support of this contention, Respondent reasons that the Municipio caused the lead contamination that required Respondent to suspend its relocation process on December 28, 2006; that the Municipio failed to abate the lead contamination or notify Respondent that the issue had been resolved; that the Municipio failed to allow Respondent to reenter the Former Facility to remove the remaining materials; and that the Municipio failed to secure the entrances to the Former Facility. *Id.* Complainant argues in response that "Respondent does not provide any reference as to evidence to support such statement." C's Reply at 7.

In considering whether the evidence in the record establishes a violation of 40 C.F.R. § 265.31, I note that former Chief Administrative Law Judge Jon G. Lotis held in *Jamaica Water Supply Co. & Dynamic Painting Corp.*, EPA Docket No. II RCRA-93-0212, 1996 EPA ALJ LEXIS 163 (ALJ, Nov. 25, 1996) ("*Jamaica Water Supply*"):

> It is reasonable to make a presumption that if an unplanned release occurs at a facility, it was not maintained and operated to minimize the possibility of such a release. Such a presumption is justified because there is a rational nexus between the release of hazardous waste and the maintenance and operation of a facility . . . This presumption is particularly appropriate where a significant amount of hazardous waste was released or where the release occurred for a significant duration of time.

Jamaica Water Supply, EPA Docket No. II RCRA-93-0212, 1996 EPA ALJ LEXIS 163, at *28-29 (ALJ, Nov. 25, 1996). Chief Judge Lotis concluded that the evidence that the hazardous waste in that case

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[36] In doing so, Complainant cites to MSDSs and CAS Numbers to describe certain physical and chemical properties of the materials found at the Former Facility. C's Brief at 11-12. As discussed above, Complainant failed to point to any MSDSs in the record, and a review of the record failed to uncover any documentary or testimonial evidence at the hearing that substantiates Complainant's description of the materials. As I am bound by the record of this proceeding, I have not considered Complainant's unsubstantiated description of the materials to adjudicate the alleged violation of 40 C.F.R. § 265.31.

had been released was sufficient for the complainant to satisfy its prima facie burden of demonstrating a violation of 40 C.F.R. § 265.31. *Id.*

As I previously informed the parties, while I am not bound by the rulings of other Administrative Law Judges as precedent, I may turn to such rulings as persuasive authority. With respect to the question presented here, I agree with the reasoning of Chief Judge Lotis in *Jamaica Water Supply*. In applying that reasoning to the instant proceeding, I find that Complainant has met its prima facie burden of demonstrating a violation of 40 C.F.R. § 265.31.

As found in an earlier section of this Initial Decision, the preponderance of the evidence establishes that sulfuric acid, low pH sump water, and materials identified only as "corrosive" had spilled or were leaking at the Former Facility and that these materials constituted regulated hazardous waste. Thus, I may reasonably presume that Respondent failed to maintain and operate the Former Facility to minimize the possibilities of those releases.

This presumption is supported by the finding that at least three separate releases of hazardous waste occurred at the Former Facility. *See United States v. Envtl. Waste Control, Inc.*, 710 F.Supp. 1172, 1237, 1239 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990) (finding neither a single incident in which the unidentified contents of a drum spilled nor the occurrence of a single fire, quickly contained, to be sufficient to establish a violation of 40 C.F.R. § 265.31). It is also supported by the testimony of Mr. Rodríguez, who stated that, based upon his professional experience and his observation of opened bags of sodium hydroxide at Building 6, he believed that Respondent had spread sodium hydroxide on the floor of the Former Facility in an attempt to neutralize materials leaking from nearby tanks. Day Two Tr. at 157-58. Mr. Rodríguez fails to identify the particular materials he believes Respondent sought to neutralize. However, his testimony suggests that materials had spilled prior to Respondent's departure from the Former Facility on December 28, 2006, meaning that spills had persisted at the Former Facility for weeks by the time representatives of EPA inspected the property.

While the record adequately demonstrates that the hazardous wastes had not yet entered the air, soil, or surface water,[37/] it

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[37/] Mr. González testified that, although releases of materials had occurred at the Former Facility, the releases were "contained inside the building." Day One Tr. at 114. Further, the RST2 contractor performed air monitoring at Building 6 during the

(continued...)

supports a finding that Respondent failed to minimize the possibility of such an occurrence. In particular, Mr. Unanue admitted that, to facilitate the removal of Respondent's materials from the Former Facility, its contractor demolished the containment systems existing in the northern and southern portions of Building 6. Day Three Tr. at 154-55, 160. The record contains conflicting evidence as to whether drains discharged any materials to Building 6's exterior.[38/] However, as discussed above, the record undoubtedly shows that, although the PPA attempted to restrict entry to Building 6 with yellow caution tape on an indeterminate date, the entrance doors either had been removed or were unlocked, open, or damaged. CEX 3, CEI Report at 5; Day One Tr. at 237-38; Day Two Tr. at 93-94; Day Three Tr. at 180-81, 205.

Complainant having satisfied its prima facie burden of demonstrating a violation of 40 C.F.R. § 265.31, Respondent now bears the burden of rebutting the foregoing evidence. As reasoned by Chief Judge Lotis:

> Information as to the maintenance and operation of a facility, and as to the causation of the release, is within the control of the facility owner or operator. The hazardous waste generator, or the facility owner or operator, may rebut the presumption with evidence that the facility was properly maintained and operated.

Jamaica Water Supply, EPA Docket No. II RCRA-93-0212, 1996 EPA ALJ LEXIS 163, at *29 (ALJ, Nov. 25, 1996). Chief Judge Lotis continued:

[37/] (...continued)
February 7, 2007 removal assessment and found that all initial readings were below background levels. Day Two Tr. at 152, 213; CEX 11, 2007 Pollution Report at 2; CEX 3, CEI Report at 7.

[38/] As the EPA inspectors documented in their report of the February 2, 2007 inspection, "three . . . discharge points coming from Building #6 towards [a ditch located outside the building] were identified. It was observed that overflows (i.e., hazardous chemical solutions) inside Building #6 were channeled and collected in this ditch." CEX 3, CEI Report at 5. The EPA inspectors described the ditch in their report as "concrete," with "overgrown vegetation . . . observed at the bottom." *Id.* Respondent, on the other hand, claimed in its Second Response, "There were no drains inside of Building Number 6 . . . Minor spills occurred . . . within the secondary containment areas . . . Non [*sic*] of the spill [*sic*] occurring with the secondary containment areas reached any drains since there were not drains inside the Building Number 6 facility." CEX 9, Second Response at 6-7.

> [I]t would appear that evidence that the release was of a very small amount, or evidence that the release was due to unforeseen and uncontrollable circumstances, may rebut the presumption that the facility, or containment system at the facility, was not adequately operated or maintained as required by [40 C.F.R. § 265.31].

Id. at *30.

Respondent produced no such evidence in the instant proceeding. Rather, as described above, Respondent contends that the condition of the Former Facility, as observed during the February 2, 2007 inspection, was "entirely the responsibility of the Municipio of Ponce, the owner and operator of the [F]ormer Facility" between December 28, 2006 and the date of the inspection. R's Brief at 15. This argument is baseless. The same considerations that support a finding that Respondent was the "generator" of the hazardous waste at the Former Facility, including that Respondent was the last tenant to occupy Building 6 and that the particular conditions observed at the property suggested that they were long-standing, also support a finding that the failure to implement practices to maintain and operate the Former Facility to minimize the possibility of a fire, explosion, or release falls squarely on Respondent, rather than the Municipio or a third party. Moreover, as the Agency explicitly advised in the preamble to a final rule establishing regulations to implement RCRA, "EPA considers the owner (or owners) and operator of a facility jointly and severally responsible to the Agency for carrying out the requirements of these regulations." Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 45 Fed. Reg. 33,154, 33,169 (May 19, 1980). Thus, Respondent may not avoid liability for its inactions by blaming others.

For the foregoing reasons, I find that Complainant has demonstrated by a preponderance of the evidence that Respondent violated 40 C.F.R. § 265.31, as referenced in 40 C.F.R. § 262.34(a)(4), by failing to maintain and operate the Former Facility to minimize the possibility of a fire, explosion, or release of hazardous waste, as of at least December 28, 2006.

B. COUNT 3

As noted above, 40 C.F.R. § 279.22(c)(1) requires used oil generators to label or mark clearly with the words "Used Oil" any containers or aboveground tanks used to store used oil at generator facilities. Count 3 of the Complaint alleges that Respondent violated this regulation by storing used oil in a 5-gallon drum at the Former Facility at least as of the February 2, 2007 inspection and failing to label the drum with the words "Used Oil." Compl. ¶¶ 54, 55.

The preponderance of the evidence supports a finding that Respondent violated 40 C.F.R. § 279.22(c)(1), as alleged. As noted by Complainant in its Brief, the EPA inspectors documented in their written account of the CEI that they observed a "5-gallon container unlabeled and containing an oily waste" located inside Building 6. C's Brief at 12 (citing CEX 3, CEI Report at 6). Mr. Avilés elaborated at the hearing, testifying that this container, among others, was specifically located near the northern entrance to Building 6. Day Two Tr. at 30. Mr. González also testified, "[W]e found a container without the proper label where the used oil was and that was part of the abandoned chemical waste." Day One Tr. at 92.

As previously discussed, the precise identify of the contents of the alleged 5-gallon container may be uncertain in the absence of comprehensive sampling and analysis. I find, however, that the evidence presented by Complainant is sufficient to shift the burden to Respondent to defend against the allegations. While Respondent denies the allegations related to Count 3 in its Answer, Respondent failed to present any legal or evidentiary support for this position at the hearing or in its Brief.

The bald denials offered by Respondent are insufficient to rebut the evidence in the record supporting the alleged violation of 40 C.F.R. § 279.22(c)(1). Accordingly, I find that Complainant met its burden of demonstrating by a preponderance of the evidence that, as of at least February 2, 2007, Respondent failed to label or mark clearly with the words "Used Oil" a container used to store used oil, in violation of 40 C.F.R. § 279.22(c)(1).

VI. CIVIL PENALTY AND COMPLIANCE ORDER

As liability has been established, I must now consider the appropriate relief to award in this proceeding. Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1), authorizes the Administrator to assess civil administrative penalties for violations of RCRA and its implementing regulations and to issue orders requiring compliance within a specified time period. Pursuant to Section 3008(a)(3) of RCRA, Complainant proposes the assessment of a civil administrative penalty of $114,598 for Count 1, $214,497 for Count 2, and $3,868 for Count 3, for a total penalty of $332,963. Complainant also seeks issuance of a Compliance Order. Found at page 10 of the Complaint, the proposed Compliance Order requires Respondent to take the following actions within the time periods specified therein: (1) make any required determinations as to whether solid waste generated by Respondent qualifies as hazardous waste; (2) take all necessary steps to minimize the possibility of fire, explosion, or any unplanned or non-sudden release of hazardous

waste; and (3) properly label containers storing used oil with the words "Used Oil."

As previously discussed, the Rules of Practice provide that the complainant bears the burden of proof to demonstrate that the relief sought is appropriate and that, once the complainant satisfies its initial burden of production and persuasion, the respondent bears the burden of presenting "any response or evidence with respect to the appropriate relief." 40 C.F.R. § 22.24(a). Here, Respondent does not challenge the terms of the Compliance Order sought by Complainant but, rather, confines its arguments to disputing the proposed penalty. I note, however, that the proposed Compliance Order merely restates the requirements imposed by the regulations at issue in this proceeding, which are generally applicable by law.[39] Therefore, specifically imposing these requirements by order is unnecessary. *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0019, 2007 EPA ALJ LEXIS 20, at *115 (ALJ, June 4, 2007). Accordingly, I find that issuance of the proposed Compliance Order is not warranted.

I now turn to the appropriate penalty to assess against Respondent for the violations found above.

A. STATUTORY AND REGULATORY PENALTY CRITERIA

Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), provides that "[a]ny penalty assessed shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subtitle . . . ." Set forth at 40 C.F.R. part 19, the rules for Adjustment of Civil Monetary Penalties for Inflation[40] increased the maximum allowable penalty assessed under Section 3008(a)(3) of RCRA to $32,500 per day of noncompliance for each violation occurring after March 15, 2004, through January 12, 2009.

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[39] Additionally, the record indicates that a removal action was performed at the Former Facility and that the building was scheduled for demolition.

[40] EPA promulgated these rules pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373 (1996) (codified at 31 U.S.C. § 3701 note) ("DCIA"). These statutes direct federal agencies such as EPA to adjust the maximum civil penalties that may be imposed pursuant to the agency's statutory authorities on a periodic basis to reflect inflation. Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7,121, 7,121 (Feb. 13, 2004) ("2004 Penalty Inflation Rule").

Within that framework, the statutory and regulatory provisions governing this proceeding impose a number of considerations for the determination of an appropriate penalty. In particular, the statute provides that, in assessing a penalty pursuant to Section 3008(a)(3), "the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." 42 U.S.C. § 6928(a)(3). In turn, the Rules of Practice provide:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty imposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b).

B. METHODOLOGY OF THE RCRA PENALTY POLICY

In proposing the administrative civil penalty to be assessed against Respondent, Complainant considered the statutory criteria set forth at Section 3008(a)(3) of RCRA, in addition to employing EPA's RCRA Civil Penalty Policy, dated June 2003 ("RCRA Penalty Policy" or "Policy"). Compl. at 9-10; Day One Tr. at 95. The RCRA Penalty Policy was designed by EPA to guide its implementation of the statutory criteria. *Carroll Oil Co.*, 10 E.A.D. 635, 653 (EAB 2002) ("*Carroll Oil*"). Its stated purposes are to ensure the following:

> [T]hat RCRA civil penalties are assessed in a manner consistent with Section 3008; that penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

RCRA Penalty Policy at 5. While the Policy is not binding on Administrative Law Judges, *see* 40 C.F.R. § 22.27(b), the EAB has emphasized "that the Agency's penalty policies should be applied whenever possible because such policies 'assure that statutory

factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner,'" *Carroll Oil*, 10 E.A.D. at 656 (quoting *M.A. Bruder & Sons, Inc., d/b/a M.A.B. Paints, Inc.*, 10 E.A.D. 598, 613 (EAB 2002)).

A penalty calculation employing the RCRA Penalty Policy calls for the following steps: (1) determining a gravity-based component for each violation to measure the seriousness of the violation; (2) adding a multi-day component, as appropriate, to account for a violation's duration or multiple violations of the same statutory or regulatory requirement; (3) adjusting the sum of the gravity-based and multi-day components upward or downward based upon case specific circumstances; and (4) adding to this amount the appropriate economic benefit gained by the violator due to its failure to comply. RCRA Penalty Policy at 1-3, 22.

More specifically, the gravity-based component required by the Policy considers two factors, the potential for harm resulting from the given violation and the extent of deviation from the statutory or regulatory requirement, each of which forms an axis of the "penalty assessment matrix" provided in the Policy. RCRA Penalty Policy at 2, 12-19. The gravity-based component is determined by ranking the potential for harm factor and extent of deviation factor as "major," "moderate," or "minor"; locating the cell of the matrix where those rankings intersect; and selecting a dollar figure from the penalty range specified in the appropriate cell. *Id.* The Policy instructs that an assessment of the potential for harm resulting from the given violation should be based on two criteria: (1) the risk of human or environmental exposure to hazardous waste and (2) the adverse effect that the violation may have on the implementation of the RCRA regulatory program. *Id.* at 12-16. In turn, an assessment of the extent of deviation resulting from the violation "relates to the degree to which the violation renders inoperative the requirement violated." *Id.* at 16.

Where the duration of a particular violation exceeds one day, a multi-day component may be calculated by (1) determining the length of time the violation continued; (2) determining whether a multi-day penalty is mandatory, presumed, or discretionary in accordance with the guidance provided by the Policy; (3) selecting the same matrix cell location in the "multi-day matrix" that was used to calculate the gravity-based component; and (4) multiplying the dollar amount selected from the appropriate cell by the number of days the violation continued beyond the first day, which is assessed at the gravity-based penalty rate. RCRA Penalty Policy at 2, 20-27. The Policy advises that, where multiple violations of the same statutory or regulatory requirement have occurred, each violation after the first in the series may also be treated as a multi-day violation. *Id.* at 22-23.

Once the gravity-based and multi-day components have been calculated for a given violation, a number of factors may be applied to adjust the sum of those components. RCRA Penalty Policy at 3, 33-42. The purpose of these factors is to "to make adjustments that reflect legitimate differences between separate violations of the same provision." *Id.* at 33. The Policy identifies several adjustment factors to consider, including good faith efforts to comply/lack of good faith, degree of willfulness and/or negligence, history of noncompliance, ability to pay, environmentally beneficial projects to be performed by the violator, and other unique factors. *Id.* at 3, 35-41.

Finally, the Policy directs that an economic benefit component should be added to the penalty for a given violation where the violation results in a "significant" economic benefit to the violator, as that term is defined by the Policy. RCRA Penalty Policy at 3, 28-33. Several types of economic benefit may accrue to a violator, including the benefit of delayed costs, which are expenditures that are deferred by the violation but will be incurred in order to achieve compliance, and the benefit of avoided costs, which are the periodic operational and maintenance expenditures that a violator should have incurred but did not because of the violation. *Id.* at 29-30. The Policy identifies two methodologies for calculating the economic benefit from delayed or avoided costs, the BEN computer model or the "rule of thumb" approach, which are available to Agency personnel. *Id.* at 30-32.

C. APPROPRIATE CIVIL PENALTY AMOUNT

1. Arguments of the Parties

a. Complainant's Arguments

Before proceeding to Complainant's application of the RCRA Penalty Policy for each count of the Complaint, I note that, pursuant to the 2004 Penalty Inflation Rule, the maximum allowable penalty that may be imposed pursuant to the Agency's statutory authorities was increased by 17.23 percent for violations occurring after the effective date of the Rule, March 15, 2004, to account for inflation.[41/] *See* 69 Fed. Reg. at 7,121. Issued prior to the promulgation of the 2004 Penalty Inflation Rule, the RCRA Penalty Policy and its penalty assessment and

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[41/] As previously recounted, this adjustment increased the maximum allowable penalty that may assessed under Section 3008(a)(3) of RCRA to $32,500 per day of noncompliance for each violation occurring after March 15, 2004, through January 12, 2009, the effective date of the Civil Monetary Penalty Inflation Adjustment Rule promulgated on December 11, 2008.

multi-day matrices do not reflect this 17.23 percent inflationary increase.

However, by memorandum dated September 21, 2004, EPA's Office of Enforcement and Compliance Assurance ("OECA") modified the Agency's existing civil penalty policies, including the RCRA Penalty Policy, to increase the initial gravity-based component of the penalty calculation by 17.23 percent to conform to the 2004 Penalty Inflation Rule for those violations subject to the Rule. Memorandum from Thomas V. Skinner, Acting Assistant Administrator, OECA, U.S. EPA, to Regional Administrators, U.S. EPA, "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)" (Sept. 21, 2004). Subsequently, by memorandum dated January 11, 2005, OECA revised the dollar figures contained in the RCRA Penalty Policy's penalty assessment and multi-day matrices to reflect the 17.23 percent inflationary increase. Memorandum from Rosemarie Kelley, Director, RCRA Enforcement Division, Office of Regulatory Enforcement, OECA, U.S. EPA, to Addresses List, "Revised Penalty Matrices for the RCRA Civil Penalty Policy" (Jan. 11, 2005) ("2005 Memorandum").

In calculating the proposed penalties in this proceeding, Complainant employed matrices identical to those found in the 2005 Memorandum, without specifying whether the 2005 Memorandum was the source of that information. Compl. at Attachment II. Respondent does not challenge the particular matrices utilized by Complainant.

I now turn to Complainant's application of the RCRA Penalty Policy for each count of the Complaint.

(i) Count 1

For Count 1 of the Complaint, Complainant seeks a penalty for 15 violations of 40 C.F.R. § 262.11 based upon its conclusion that Respondent failed to make a hazardous waste determination for at least 15 distinct categories of solid waste at the Former Facility. Compl. at Attachment I; C's Brief at 14; Day Two Tr. at 45, 49-51. Mr. González testified that the EPA inspectors grouped the materials found at the Former Facility into these "waste streams" based upon their characteristics and that the waste streams correspond to the categories of materials listed in Paragraph 41 of the Complaint.[42/] Day One Tr. at 247-49.

[42/] During cross-examination, Mr. González acknowledged that Paragraph 41 lists 17 categories of materials, not 15. Day One Tr. at 248. He testified, however, that certain categories may be further grouped by characteristic, such as the categories listed at

(continued...)

In calculating the proposed penalty, Complainant considered the potential for harm of the alleged violations of 40 C.F.R. § 262.11 to be major. Compl. at Attachment I; C's Brief at 15. To support this determination, Complainant claims that the failure to make a hazardous waste determination increases the likelihood that hazardous waste is improperly managed as nonhazardous waste, which contravenes the RCRA regulatory program and increases the risk of human and environmental exposure to hazardous waste. Compl. at Attachment I; C's Brief at 15. At the hearing, Mr. González described the requirement to make a hazardous waste determination as "the cornerstone of the statutory program" because the determination controls the manner in which a material may be disposed. Day One Tr. at 84, 87-88, 226. He further testified that Respondent's failure to make hazardous waste determinations in the instant proceeding posed a substantial risk of exposure because Building 6 was open, workers were present in the vicinity of Building 6, and the materials remaining at Building 6 had spilled or were stored in deteriorated containers. *Id.* at 230, 234-35, 237. Likewise, Mr. Avilés testified that "[e]verything that RCRA regulates is based on making a hazardous waste determination . . . . If a hazardous waste determination is not made properly or is not made at all, the whole program just falls apart." Day Two Tr. at 42. He further testified that the improper management of the Former Facility and the quantity of materials remaining there posed a threat of human exposure and release of hazardous waste to the environment. *Id.* at 45-46, 48-49.

Complainant also considered the extent of deviation from the regulatory requirement to be major. Compl. at Attachment I; C's Brief at 15. In support of this determination, Mr. Avilés reasoned that over 200 containers of materials were present at the Former Facility and each was subject to 40 C.F.R. § 262.11. Day Two Tr. at 49-50.

Complainant selected the highest figure available in the corresponding cell of the penalty assessment matrix, $32,500, as the gravity-based component of the penalty calculation for the first alleged violation of 40 C.F.R. § 262.11. Compl. at Attachment I; C's Brief at 15; Day Two Tr. at 53-54. With respect to the remaining 14 alleged violations, Complainant exercised the discretion afforded by the RCRA Penalty Policy to treat these violations as multi-day violations and calculate a multi-day component using the multi-day matrix. Compl. at Attachment I; C's Brief at 15. Complainant selected the midpoint of the appropriate cell of the multi-day matrix, $3,869, for each of the remaining 14 alleged violations based upon "the amount of

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[42/] (...continued)
subparagraphs (c) and (p), to arrive at 15 waste streams. *Id.* at 248-49.

solid waste for which hazardous waste determinations were not made." Compl. at Attachment I. Thus, Complainant calculated the total multi-day component to be $54,166. Compl. at Attachment I; C's Brief at 15.

Complainant chose to adjust the sum of the gravity-based and multi-day components, $86,666, upward by 10 percent to reflect Respondent's alleged negligence in failing to correct the alleged violations or demonstrate any intention of complying with the applicable regulations, despite "knowledge of EPA investigation's outcome." Compl. at Attachment I. Complainant chose not to make any additional adjustments to the sum of the gravity-based and multi-day components. *Id.*

Finally, Complainant used the BEN model to calculate that Respondent's failure to comply with 40 C.F.R. § 262.11 resulted in an economic benefit of $19,266 to Respondent based upon its avoidance of the cost of a laboratory analysis of the materials to determine whether they were characteristically hazardous. Compl. at Attachment I; C's Brief at 15; Day Two Tr. at 63-65. Mr. Avilés testified that the EPA inspectors assumed that laboratory analysis of the materials was the "best way" to make a hazardous waste determination in this case because of the uncertainty that Respondent would be able to make the determination based only upon its knowledge of the materials, particularly as material data safety sheets "don't always provide all the information necessary to make a hazardous waste determination." Day Two Tr. at 64. Mr. Avilés continued, "It was reasonable to suspect that Aguakem could have made a laboratory analysis to make a hazardous waste determination so we accrued for each of the instances in which a hazardous waste determination was requested an amount which totaled . . . $19,266." *Id.* at 69-70.

As a result, Complainant calculated the total penalty for Count 1 to be $114,598.60. Compl. at Attachment I; C's Brief at 15.

(ii) Count 2

Complainant alleges that the conditions at the Former Facility supporting a violation of 40 C.F.R. § 264.31 "are presumed to have existed at least during the period covered in which Respondent moved out from the facility, December 28, 2006 until the EPA Removal Support Team stabilized the site on February 9, 2007." Compl. at Attachment I; *see also* Day Two Tr. at 58. Mr. Avilés testified, "We reasonably presumed that the facility was in the same state as when [Respondent] left the facility because no one had occupied the facility after Aguakem." Day Two Tr. at 118. Accordingly, Complainant seeks a penalty for 43 days of violation of 40 C.F.R. § 264.31 for Count 2 of the Complaint. Compl. at Attachment I; Day Two Tr. at 59.

In calculating the gravity-based component of the proposed penalty, Complainant considered the potential for harm of the alleged violation to be major. Compl. at Attachment I; Brief at 16. To support this determination, Complainant contends that the RCRA regulatory program is undermined by a failure to comply with 40 C.F.R. § 264.31. Compl. at Attachment I; C's Brief at 16. Complainant further claims that Respondent's storage of hazardous and non-hazardous waste in open and deteriorated containers, several of which were leaking and surrounded by spills, posed a "grave" risk of human and environmental exposure due to the proximity of the Caribbean Sea and workers at the Puerto de Ponce. C's Brief at 16; *see also* Compl. at Attachment I. Mr. Avilés testified that the large number of containers and quantity of materials remaining at the Former Facility created a "very high" potential for harm to people and the environment. Day Two Tr. at 56.

Complainant also considered the extent of deviation from the regulatory requirement to be major, claiming that "Respondent failed to prevent any unplanned or sudden release of hazardous waste at every possible aspect." Compl. at Attachment I; *see also* C's Brief at 16.

Complainant selected the highest figure available in the corresponding cell of the penalty assessment matrix, $32,500, as the gravity-based component of the penalty calculation for Count 2. Compl. at Attachment I; C's Brief at 16. Mr. Avilés testified that this dollar amount was selected based upon the amount of waste found at the Former Facility, the degree to which the Former Facility had been improperly managed by Respondent, and the proximity of the Caribbean Sea to the Former Facility. Day Two Tr. at 57.

Turning to the multi-day component of the penalty calculation, Complainant selected the midpoint of the appropriate cell of the multi-day matrix, $3,869, for the 42 days that the violation allegedly continued beyond the first day. Compl. at Attachment I. Mr. González explained that this figure was selected, in part, because, although releases of materials had occurred at the Former Facility, the releases were "contained inside the building." Day One Tr. at 114. Thus, Complainant calculated the total multi-day component to be $162,498. Compl. at Attachment I; C's Brief at 16.

Complainant chose to adjust the sum of the gravity-based and multi-day components, $194,998, upward by 10 percent to reflect Respondent's alleged negligence in failing to act upon the information provided by EPA as to the "risks associated [with] the abandonment of a large quantity of chemical materials." Compl. at Attachment I. Mr. González testified that this adjustment accounted for Respondent's failure to take "strong action" regarding the materials at the Former Facility, despite

EPA providing the opportunity to do so. Day One Tr. at 114-15. Complainant chose not to make any additional adjustments to the sum of the gravity-based and multi-day components. Compl. at Attachment I; C's Brief at 16. Complainant also did not determine whether Respondent received any economic benefit from the alleged failure to comply with 40 C.F.R. § 264.31. Compl. at Attachment I; C's Brief at 16.

As a result, Complainant calculated the total penalty for Count 2 to be $214,497.80. Compl. at Attachment I; C's Brief at 16.

(iii) Count 3

For Count 3 of the Complaint, Complainant seeks a penalty for one violation of 40 C.F.R. § 279.22. In calculating the gravity-based component of the proposed penalty, Complainant contends that the failure to handle used oil in accordance with the applicable regulations undermines the RCRA regulatory program and increases the risk of human and environmental exposure. Compl. at Attachment I; C's Brief at 16-17. Notwithstanding these considerations, Mr. Avilés testified that the potential for harm of the alleged violation was considered "very minor" because only one container was at issue. Day Two Tr. at 61. In turn, Complainant considered the extent of deviation from the regulatory requirement to be major on the basis that Respondent failed to identify a container storing used oil. Compl. at Attachment I; C's Brief at 17. Complainant selected the highest figure available in the corresponding matrix cell, $3,868, as the gravity-based component of the penalty calculation. Compl. at Attachment I; C's Brief at 17.

Complainant did not calculate any multi-day component for Count 3. Compl. at Attachment I. Further, Complainant chose not to make any adjustments to the gravity-based component of the penalty calculation, claiming that it lacked any information that could serve as a basis for an adjustment and that any economic benefit of noncompliance was negligible. Compl. at Attachment I; C's Brief at 17.

As a result, Complainant calculated the total penalty for Count 3 to be $3,868. Compl. at Attachment I; C's Brief at 17.

b. Respondent's Arguments

(i) Challenges to Complainant's Penalty Calculation

Respondent challenges Complainant's application of the RCRA Penalty Policy in its Brief. R's Brief at 16-23. In particular, Respondent claims that Complainant misapplied the Policy's methodology for determining the gravity-based component of the

penalty calculation on the basis that Complainant failed to consider the particular circumstances of this case, including that the Former Facility was under the control and supervision of the Municipio of Ponce, rather than Respondent, after December 28, 2006; that Respondent was precluded from reentering the Former Facility by court order; and that Respondent suspended its relocation efforts due to lead contamination of the Former Facility. *Id.* at 17-20. Respondent argues that, had Complainant properly applied the Policy's methodology, "the violations would have been deemed inadvertent and minor and the lowest penalty would have been assessed." *Id.* at 20.

Respondent next questions Complainant's calculation of a multi-day component for Count 2 of the Complaint, again claiming that Complainant failed to consider that the Former Facility was no longer under Respondent's control after December 28, 2006. R's Brief at 20-21. Respondent contends that Complainant also failed to offer documentary evidence demonstrating that the violation continued for the period alleged by Complainant, in contravention of the Policy. *Id.*

Respondent also objects to Complainant's application of the adjustment factors on several grounds. R's Brief at 21-23. First, Respondent disputes Complainant's upward adjustment of the proposed penalties for Counts 1 and 2 to account for Respondent's alleged negligence, arguing that Complainant never informed Respondent of any risks associated with the Former Facility, as claimed by Complainant, or of Respondent's ability to retrieve its materials. *Id.* at 21-22. Second, Respondent claims that Complainant was required to consider its inability to pay the proposed penalty and failed to do so. *Id.* at 22. Third, Respondent objects to Complainant's determination that Respondent received an economic benefit from the violation alleged in Count 1, arguing that Complainant failed to consider that Respondent lost at least $75,000 worth of materials at the Former Facility. *Id.* Finally, Respondent contends that Complainant failed to consider the circumstances unique to this case in calculating the proposed penalty, in violation of the Policy. *Id.* at 22-23.

(ii) Inability to Pay Claim

Respondent contends that uncontroverted evidence in the record demonstrates that "a penalty that even approaches the amounts sought by EPA is impossible for Aguakem to pay." R's Brief at 15-16. To support this "inability to pay" claim, Respondent proffered audited financial statements, dated June 30, 2009, and June 30, 2010, and the testimony of Mr. Edgardo Guzman, a certified public accountant and business analyst who prepared the financial statements. REX 2A, Audited Financial Statements dated June 30, 2009 ("2009 Financial Statement"); REX 2B, Audited Financial Statements dated June 30, 2010 ("2010 Financial Statement"); Day Three Tr. at 6-55. Respondent claims that the

financial statements "speak for themselves" and that Mr. Guzman's testimony that Respondent "has a negative balance in its cash accounts" was "unequivocal and uncontroverted." R's Brief at 16. Accordingly, Respondent argues, it "would be put out of business" if the penalty sought by Complainant was imposed, and Respondent lacks "the wherewithal to pay even a fraction of what EPA seeks." *Id.*

c. Complainant's Arguments in Reply

In response to Respondent's objections to its application of the RCRA Penalty Policy, Complainant asserts that, in arguing that the Former Facility was no longer under its control after December 28, 2006, Respondent "fails to recognize that [it] was responsible for the condition at the Facility when it abandoned the materials and deteriorated containers and when it did not address the spills all over the floor of the Facility." C's Brief at 9. Complainant further asserts that Respondent failed to raise as a defense to the Complaint that the materials remaining at the Former Facility had a value of at least $75,000 or offer any evidence at the hearing to support this claim. *Id.*

To counter Respondent's inability to pay claim, Complainant argues in its Reply that, according to Mr. Guzman's testimony, Respondent has a cash flow generated by its operational activities of $297,000; Respondent invested in its manufacturing operations and line of products; and of its $320,000 in liabilities, Respondent was required to pay $128,000 in a 12 month period and $191,000 in the future. C's Reply at 8 (citing Day Three Tr. at 28-29, 49-51). Complainant further argues that "Mr. Guzman's testimony reveals that Respondent has money for investments, for paying its liabilities and has a credit line with a major bank." *Id.* Complainant concludes that "Respondent very well can ask for an increase in its line of credit and pay the proposed penalty." C's Reply at 8.

2. <u>Discussion</u>

a. Gravity-Based and Multi-Day Components of the Proposed Penalties for Counts 1 and 2

In considering the appropriate civil penalty to assess in this proceeding, I note at the outset that Complainant relied heavily upon the quantity of materials found at the Former Facility to rank the potential for harm and extent of deviation factors applicable to the proposed penalties for Counts 1 and 2 as "major" and to choose a dollar amount from the penalty range in the corresponding cell of the penalty assessment and multi-day matrices. The quantity of materials subject to regulation in this proceeding is unquestionably less than that alleged by Complainant because of the findings above that Complainant failed to carry its burden of demonstrating by a preponderance of the

evidence that (1) the stored materials at the Former Facility qualified as "solid waste" during the alleged period of violation and (2) each of the spilled and leaking materials qualified as "hazardous waste."

Notwithstanding the reduction in the amount of materials subject to regulation in this proceeding, I find that Complainant fairly and reasonably applied the RCRA Penalty Policy's methodology in calculating the gravity-based and multi-day components of the proposed penalties for Counts 1 and 2, and I find no reason to alter the total penalty on that basis. Respondent may consider its failure to perform a hazardous waste determination and failure to maintain and operate the Former Facility to minimize the possibility of a fire, explosion, or release as "inadvertent" and "minor," in view of factors specific to this case. R's Brief at 19-20. However, such factors and their bearing on the degree of Respondent's willfulness or negligence are more appropriately considered as adjustment factors to the sum of the gravity-based and multi-day components of the proposed penalties, rather than as factors relevant in evaluating the potential for harm of the violations and the extent of deviation from the regulatory requirements. Even if these factors were appropriate to consider at this stage of the penalty calculation, Respondent's contention that Complainant should have characterized the violations as "minor" is unfounded.

As discussed above, an assessment of the potential for harm resulting from a given violation is based upon two criteria: the risk of human or environmental exposure to hazardous waste and the adverse effect that the violation may have on the implementation of the RCRA regulatory program. RCRA Penalty Policy at 58. Unquestionably, the failure to perform a hazardous waste determination may have a substantial adverse effect on the implementation of the RCRA regulatory program as it is vital to ensure that hazardous waste is not mishandled as solid waste under the less rigorous requirements of Subtitle D. As described by the Agency, the hazardous waste determination is "the crucial, first step in the regulatory system." 45 Fed. Reg. at 12,727. Accordingly, the Agency has instructed that the determination is "one of the major responsibilities of the generator," which "the generator must undertake . . . seriously," 45 Fed. Reg. at 12,726-27. As a result, I find that Complainant appropriately characterized the potential for harm resulting from Respondent's violation of 40 C.F.R. § 262.11 as "major." With respect to the extent of deviation factor, the RCRA Penalty Policy instructs that it "relates to the degree to which the violation renders inoperative the requirement violated." RCRA Penalty Policy at 16. Here, Respondent failed to satisfy any of the requirements of 40 C.F.R. § 262.11. Thus, I find that Complainant also appropriately characterized this factor as "major."

Turning to Respondent's violation of 40 C.F.R. § 265.31, I note that the Environmental Appeals Board has held, "The RCRA rules require facilities to do whatever is necessary to minimize even the *possibility* of a release . . . Operating conditions that lead to an actual release of substantial proportions plainly constitute a major deviation." *Ashland Chemical Co., Division of Ashland Oil, Inc.*, 3 E.A.D. 1, 8 (CJO 1989) (emphasis in original). In addition, the releases at the Former Facility clearly posed a substantial risk of exposure to hazardous waste. According to the Penalty Policy, "the risk of exposure presented by a given violation depends on both the likelihood that human or other environmental receptors may be exposed to hazardous waste . . . and the degree of such potential exposure." RCRA Penalty Policy at 13. In describing the likelihood of exposure criteria, the Penalty Policy further instructs, "Where a violation involves the actual management of waste, a penalty should reflect the probability that the violation could have resulted in, or has resulted in a release of hazardous waste . . . ." *Id.* The probability of exposure to hazardous waste is undoubtedly raised when a release of hazardous waste has already occurred. Moreover, as discussed above, the record in this proceeding demonstrates that Respondent had demolished the containment systems existing in Building 6, that the entrances to Building 6 were not secured, and that workers were present in the vicinity of the property. For the foregoing reasons, I find that Complainant appropriately characterized the potential for harm and extent of deviation factors related to Respondent's violation of 40 C.F.R. § 265.31 as "major."

Respondent also questioned Complainant's calculation of a multi-day component for Count 2 of the Complaint. R's Brief at 20-21. As the Penalty Policy advises on the subject, "[i]n most instances, the Agency should only seek to obtain multi-day penalties, if a multi-day is appropriate, for the number of days it can document that the violation in question persisted. However, in some circumstances, reasonable assumptions as to the duration of a violation can be made." RCRA Penalty Policy at 23. Focusing upon the first sentence of this excerpt, Respondent claims that Complainant failed to offer documentary evidence demonstrating that the violation of 40 C.F.R. § 265.31 continued for the period alleged by Complainant. R's Brief at 20 (citing RCRA Penalty Policy at 23). However, as found in an earlier section of this Initial Decision, several considerations provided a reasonable basis for Complainant to conclude that the violation of 40 C.F.R. § 265.31 began on at least December 28, 2006, including that Respondent was the last tenant to occupy Building 6 and that the particular conditions observed at the property suggested that they were long-standing.

Accordingly, I find that Complainant appropriately calculated the gravity-based and multi-day components of the proposed penalties for Counts 1 and 2 of the Complaint. To

account for the reduction in the quantity of regulated waste at issue in this proceeding, I consider two approaches to be reasonable: (1) reducing the sum of the gravity-based and multi-day components of the proposed penalty for Count 1 by calculating a penalty only for waste streams associated with the spilled and leaking materials at the Former Facility, rather than the 15 alleged by Complainant;[43/] and (2) reducing the proposed penalty for Count 2 of the Complaint by the percentage of the total volume of materials found at the Former Facility that consisted of hazardous waste, as determined above. The second approach is problematic as the record lacks any evidence of the volume of spilled and leaking materials found at the Former Facility. Thus, I would be required to engage in conjecture to determine the percentage of the total volume of materials found that consisted of hazardous waste. This issue need not be resolved, however, inasmuch as I find that Respondent sustained its burden of demonstrating that it is unable to pay a substantial penalty in this proceeding.[44/]

[43/] As previously found, Complainant appropriately ranked the potential for harm and extent of deviation factors of the proposed penalty for Count 1 as "major." Complainant selected the highest figure available in the corresponding cell of the penalty assessment matrix, $32,500, as the gravity-based component of the penalty calculation. Treating the remaining 14 alleged violations of 40 C.F.R. § 262.11 as multi-day violations, Complainant selected the mid-point of the appropriate cell of the multi-day matrix, $3,869, and calculated the multi-day component to be $54,166.

Following the approach described above, the spilled and leaking materials may be grouped into seven distinct waste streams, at a minimum, based upon the EPA inspectors' observation during the February 2, 2007 inspection of "spills from drums and containers labeled as hydrochloric acid, sulfuric acid, low pH sump water, ferrous chloride, ferric sulfate and sodium aluminate," as well as "spills from containers with unknown contents labeled only as corrosive." CEX 3, CEI Report at 4. Using the same dollar amounts from the penalty assessment and multi-day matrices selected by Complainant, I find that the appropriate gravity-based component of the penalty for Respondent's violations of 40 C.F.R. § 262.11 is $32,500 and that the appropriate multi-day component of the penalty is at least $23,214. Thus, without further consideration of the appropriateness of adjusting the sum of the gravity-based and multi-day components to account for any adjustment factors or economic benefit resulting from Respondent's violations, I find that the appropriate penalty for Count 1 is at least $55,714.

[44/] In view of this finding, I also do not reach Respondent's other challenges to the penalty proposed by Complainant, including its objections to Complainant's upward adjustment of the sum of the

(continued...)

b. Respondent's Inability to Pay

Because the statutory penalty criteria set forth at Section 3008(a)(3) of RCRA are restricted to "the seriousness of the violation" and "good faith efforts to comply with the applicable requirements," a respondent's ability to pay is not a factor that a complainant must consider as part of its prima facie burden of establishing the appropriateness of its proposed penalty. *Carroll Oil*, 10 E.A.D. at 662. Accordingly, in order to be considered by the complainant, a claim of an "inability to pay" the proposed penalty must be raised and substantiated as an "affirmative defense" by the respondent.[45] *Id.* at 663. As noted above, the Rules of Practice provide that the respondent bears the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R. § 22.24(a).

According to the RCRA Penalty Policy:

> The Agency generally will not assess penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability of a violator to pay a penalty. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, to seek penalties that might put a company out of business.

RCRA Penalty Policy at 38. The Policy further provides, "The burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances . . . If the

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[44] (...continued)
gravity-based and multi-day components to account for Respondent's alleged negligence and Complainant's calculation of an economic benefit. Additionally, I need not engage in a lengthy discussion of the penalty proposed by Complainant for the violation alleged in Count 3. Respondent does not challenge this proposed penalty, and I find that Complainant fairly and reasonably applied the RCRA Penalty Policy's methodology in calculating it. Accordingly, I find no reason to alter the proposed penalty of $3,868 for Respondent's violation of 40 C.F.R. § 279.22, as alleged in Count 3 of the Complaint.

[45] While the Board treated the respondent's inability to pay claim in *Carroll Oil* as an affirmative defense, it recognized that such a claim is not an affirmative defense "in the traditional sense that financial hardship, if demonstrated, would completely bar the imposition of a penalty." *Carroll Oil*, 10 E.A.D. at 663 n.25. Rather, the Board viewed the claim as a potential mitigating factor to consider when assessing a civil penalty. *Id.*

respondent fails to fully provide sufficient information, then enforcement personnel should disregard this factor in adjusting the penalty." *Id.* at 39.

As previously noted, Respondent contends that uncontroverted evidence in the record demonstrates that "a penalty that even approaches the amounts sought by EPA is impossible for Aguakem to pay." R's Brief at 15-16. Respondent proffered audited financial statements, dated June 30, 2009, and June 30, 2010, and the testimony of Mr. Edgardo Guzman, to support this claim. REX 2A, 2009 Financial Statement; REX 2B, 2010 Financial Statement; Day Three Tr. at 6-55. A certified public accountant and business analyst, Mr. Guzman testified that he has served as an independent auditor of Respondent since it began operations and that he prepared the audited financial statements introduced into evidence by Respondent. Day Three Tr. at 6-7. The audited financial statements reflect that the accounting firm conducting the audit did so "in accordance with generally accepted auditing standards." REX 2A, 2009 Financial Statements at 1; REX 2B, 2009 Financial Statements at 1.

During his testimony, Mr. Guzman first referred to the 2009 Financial Statement, asserting that Respondent had sustained a net accumulated loss of $690,430 as of June 30, 2009. Day Three Tr. at 10-11 (citing 2009 Financial Statement at 1, 8). Mr. Guzman testified that he rendered the opinion in the accompanying notes of the 2009 Financial Statement that this net accumulated loss:

> raises substantial doubt about [Respondent's] ability to continue as a going concern. Although management is working with its indebtedness and is currently evaluating methods to reduce costs, improve profit margins and increase capital, the ability of [Respondent] to continue as a going concern is dependent on increasing gross sales and gross margins, obtaining additional capitalization and or restructuring of debt. The financial statements do not include any adjustments that might result from the outcome of this uncertainty.

Id. at 11-12 (quoting 2009 Financial Statement at 8).

The 2009 Financial Statement also reflects that, for the year ending June 30, 2009, Respondent had net sales of $1,964,966; a gross profit of $199,976; a net loss of $52,664; and an accumulated deficit of $367,491. REX 2A, 2009 Financial Statement at 4. In addition, the 2009 Financial Statement shows increases in Respondent's bank overdraft by $26,033 and Respondent's long-term debt by $299,730. *Id.* at 6.

Turning to the 2010 Financial Statement, Mr. Guzman testified that Respondent had sustained a net accumulated loss of

$680,834 as of June 30, 2010. Day Three Tr. at 12-13 (REX 2B, 2010 Financial Statement at 1, 8). The accompanying notes of the 2010 Financial Statement relate:

> [Respondent's] management believes that approximately $441,000 of such accumulated loss, representing 64.6% of total loss, is attributable to the damages claimed against Checkpoint for breach of contract. In addition, during 2007 and 2008, [Respondent] had to moves [*sic*] their [*sic*] production facilities from the Port de Ponce to new facilities leased to La Huella Taina, an affiliated company, affecting their production output.

REX 2B, 2010 Financial Statement at 8. The notes then reiterate the language cited above from the accompanying notes of the 2009 Financial Statement, including that Respondent's position "raises substantial doubt about its ability to continue as a going concern." *Id.*

The 2010 Financial Statement reflects that, for the year ending June 30, 2010, Respondent had net sales of $1,246,291; a gross profit of $300,236; a net income of $7,470, and an accumulated deficit of $360,021. REX 2B, 2010 Financial Statement at 4. The 2010 Financial Statement also shows decreases in Respondent's bank overdraft by $142 and Respondent's long-term debt by $175,247. *Id.* at 6.

When questioned about the effect that the proposed penalty of $332,963 would have on Respondent, if assessed, Mr. Guzman stated, "As the financial statement shows, the financial position of the company is very weak and the company has not been able to provide a profitable operation for recent years." Day Three Tr. at 13-14. Referring to the total shareholders' equity represented in the 2010 Financial Statement, Mr. Guzman continued, "[Y]ou can see as of June 30, 2010, that the company only have [*sic*] $93,990 of capital so the company will be decapitalized and it will be somehow insolvent with an amount or claim like that." *Id.* at 14 (citing REX 2B, 2010 Financial Statement at 3). When asked whether Respondent could continue as a going concern, Mr. Guzman responded, "[I]t is very doubtful . . . [W]ith this financial position, the company cannot pay an amount like that." *Id.* Accordingly, Mr. Guzman concluded that Respondent lacks the ability to pay the proposed penalty. *Id.*

Mr. Guzman's testimony as to the adverse impact that paying the proposed penalty would have on Respondent is compelling evidence that Respondent lacks the ability to pay such a sum, as argued by Respondent. The 2009 and 2010 Financial Statements are also persuasive. The Board has considered financial statements such as those submitted by Respondent to be sufficient evidence to support an "inability to pay" claim. *See Bil-Dry*, 9 E.A.D. at 613 ("Financial statements would have provided a detailed picture

of Bil-Dry's financial state and showed whether it could pay the proposed penalty"). Here, the 2009 and 2010 Financial Statements provide the type of detailed analysis necessary to substantiate Respondent's claim, and the opinion rendered based upon that analysis - that "substantial doubt" exists as to Respondent's ability to continue as a going concern - suggests that payment of a penalty of at least $60,000[46/] would weaken Respondent's already troubled financial position to such a degree that Respondent would go out of business. Accordingly, I find that Respondent has carried its initial burden of demonstrating that it lacks the ability to pay such a penalty. The burden now shifts to Complainant to rebut it.

Complainant presented a number of challenges to Respondent's inability to pay claim at the hearing and in its Reply. Among other arguments, Complainant touched upon the relationship between Respondent and Huella Taina at the hearing. Day Three Tr. at 16-19. Complainant requested that Mr. Guzman read the following excerpt from Note 6 of the 2010 Financial Report:

> On December 2006, the Company relocated its operations to a new facility owned by La Huella Taina, Inc. (an affiliate company) . . . . Since January 2008, a monthly rent charge of $8,400 was recorded for the use of the 8,400 square feet building and facilities; rent amounted to $100,800 in 2010. No formal lease agreement has been made.

Day Three Tr. at 16 (quoting REX 2B, 2010 Financial Report at 10). Mr. Guzman testified that he obtained information related to Respondent's lease of the Canas Facility from records maintained by Respondent. *Id.* at 17. When asked whether it represented an arm's length transaction, Mr. Guzman responded, "Yes, yes. It could be considered because in order to be an arm length transaction, what it has to be taken into consideration is that the amount that is fixed as if rent, is comparable to the market." Day Three Tr. at 17-18. Mr. Guzman continued, "For me it is not questionable. It is common." *Id.* at 18.

While Complainant failed to pursue this line of questioning any further, I consider Respondent's lease of the Canas Facility from Huella Taina to be suspect, notwithstanding Mr. Guzman's testimony to the contrary. The Board has held that, when

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[46/] Calculating the appropriate penalty to assess for Respondent's violation of the regulation at issue in Count 2 of the Complaint is highly speculative due to the lack of evidence in the record related to the volume of spilled and leaking materials at the Former Facility. However, as I found above, the appropriate penalty for Count 1 is at least $55,714 and the appropriate penalty for Count 3 is $3,868.

calculating a civil penalty, EPA may under certain circumstances examine the financial condition of a related company or individual to determine whether they may be a legitimate source of funds affecting the respondent's ability to pay the proposed penalty. *Carroll Oil*, 10 E.A.D. at 665-68 (holding that the close financial relationship between the respondent and another company was relevant in considering the respondent's alleged inability to pay the proposed penalty, as their joint arrangement presumably conferred a financial advantage and possible source of financial support to the respondent); *New Waterbury, Ltd.*, 5 E.A.D. 529, 547-49 (EAB 1994) (holding that the respondent's relationship with a financially sound company from which it had been receiving financial support suggested that the respondent had the ability to pay a penalty).

In the instant proceeding, Mr. Unanue testified that he is the owner of both Respondent and Huella Taina.[47] Day Three Tr. at 56. Describing Huella Taina as a "land company" or "real estate company," he noted that it owns only one property, which was valued at approximately two million dollars as of 2006 and which it currently leases to Respondent. *Id.* at 56-57, 131. Mr. Unanue testified that he has a mortgage on the property and that he either amended this mortgage or obtained a second mortgage at a later date. *Id.* at 131-32. When asked how the rental fee of $8,400 was calculated, Mr. Unanue responded, "[I]t was a factor of what the market will bear and also is what Huella Taina pays on its loan to buy the property." *Id.* at 57. Finally, Mr. Unanue testified that Huella Taina reports a loss of an unknown amount. *Id.*

Respondent failed to present any documentation to substantiate the testimony of Mr. Guzman and Mr. Unanue, such as records memorializing the mortgage on Huella Taina's property or specifying the manner in which the rental fee for the property was calculated. Thus, at a minimum, questions exist as to the validity of the lease agreement between Respondent and Huella Taina and whether their agreement constitutes an arm's length transaction. While I am particularly troubled by the lack of a formal lease agreement, I nevertheless find that the evidence in the record of the link between the companies is insufficient to establish that Huella Taina's resources may be a legitimate source of funds affecting Respondent's ability to pay a penalty in this proceeding.

Complainant next challenged the accuracy of the 2010 Financial Statement at the hearing by questioning Mr. Guzman

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[47] Mr. Guzman testified that the companies are "affiliated" because of this common ownership. Day Three Tr. at 26. He further testified that he was not aware of any other companies affiliated with Respondent and Huella Taina. *Id.* at 25.

about the time frame he identified in Note 1(B) for Respondent's relocation from the Former Facility. Day Three Tr. at 19-24. As quoted above, Note 1(B) provides, in pertinent part: "[D]uring *2007 and 2008*, [Respondent] had to moves [*sic*] their [*sic*] production facilities from the Port de Ponce to new facilities leased to La Huella Taina, an affiliated company, affecting their production output." REX 2B, 2010 Financial Statement at 8 (emphasis added). Undoubtedly, a discrepancy exists between this statement and the date on which Respondent vacated the Former Facility, as established by the record in this proceeding. I find this discrepancy to be immaterial, however. As Respondent later pointed out, Note 6 of the 2010 Financial Statement identifies the correct time frame for Respondent's relocation, providing, in pertinent part: "On *December 2006*, [Respondent] relocated its operations to a new facility owned by La Huella Taina, Inc. (an affiliated company) . . . ." REX 2B, 2010 Financial Statement at 10 (emphasis added). Moreover, Mr. Guzman explained that Note 1(B) "is really emphasizing the effect of the movement to the production, not to the date exactly of the move." Day Three Tr. at 42 Thus, Complainant's attempt to discredit the 2010 Financial Statement is unpersuasive.

Finally, in its Reply, Complainant points to certain testimony that it elicited from Mr. Guzman as additional support for its position that Respondent is able to pay the proposed penalty. Complainant first notes that Mr. Guzman testified to Respondent's efforts to improve its financial position. C's Reply at 8 (citing Day Three Tr. at 28-29). In particular, Mr. Guzman cited to the 2010 Financial Statement to testify that Respondent's operations generated approximately $297,000 in net cash and that Respondent had invested resources in its line of products and manufacturing operations. Day Three Tr. at 28-29 (citing REX 2B, 2010 Financial Statement at 6). He explained:

> They are developing a new line of business related to the acids. They are trying to sell more products to private companies in order to diminish the concentration of sales to the [Puerto Rico Aqueduct and Sewer Authority] . . . [T]hey have been also working with the production lines making changes to improve the output and provide more operational profit margins for the products that they prepare.

Id. at 27. Mr. Guzman later testified that, relative to the period of time in which Respondent was relocating to the Canas Facility:

> [Respondent] is better organized in terms of the line of production because they have been investing on the facility, on the line of production, and they are organized. At the beginning of the move there was a mess of items around outside the building, and in the floor,

> unclassified materials everywhere and they rearranged that.

Id. at 39.

Complainant contends that Mr. Guzman's testimony also "reveals that Respondent . . . has a credit line with a major bank." C's Reply at 8. Indeed, Mr. Guzman testified that Respondent had borrowed $92,751, as shown by the 2010 Financial Statement, and that he believes that Respondent's demand line of credit is limited to $100,000. *Id.* at 30 (citing REX 2B, 2010 Financial Statement at 9). Finally, Complainant points to testimony from Mr. Guzman regarding certain liabilities of Respondent. C's Reply at 8 (citing Day Three Tr. at 49-51). In particular, Mr. Guzman referred to the 2010 Financial Statement and testified that Respondent has seven loans amounting to approximately $320,000, of which Respondent owed approximately $128,000 in the next 12 month period and approximately $191,000 over the course of subsequent years. Day Three Tr. at 50-52 (citing REX 2B, 2010 Financial Statement at 9-10).

While the testimony cited by Complainant suggests that Respondent has the ability to pay *some* penalty in this proceeding, I find that it alone does not refute the evidence in the record supporting a finding that Respondent lacks the ability to pay a penalty of at least $60,000. Accordingly, I find that Respondent has sustained its burden of demonstrating by a preponderance of the evidence that it lacks the ability to pay a substantial penalty in this proceeding and that a penalty reduction based upon Respondent's inability to pay is warranted.

The precise amount of penalty reduction is difficult to ascertain. When questioned at the hearing about the amount Respondent was able to pay and continue as an ongoing business, Mr. Guzman failed to answer directly. Day Three Tr. at 44-45. Instead, he referred to the 2010 Financial Statement to testify that Respondent has total current assets of approximately $240,000 and total current liabilities of approximately $482,000. Day Three Tr. at 44 (citing REX 2B, 2010 Financial Statement at 2-3). Thus, Mr. Guzman testified, Respondent has "a deficiency of working capital right now. So this company has no capacity of cash flow and working capital, . . . even to assume the payments in the ordinary course of business." *Id.* at 44-45.

I note, however, that Mr. Guzman testified that Respondent's total current liabilities as of June 30, 2010, included the approximately $128,000 Respondent owed on its loans by June of 2011. Day Three Tr. at 48, 50-52 (citing REX 2B, 2010 Financial Statement at 3, 9-10). The 2010 Financial Statement reflects that, in contrast, Respondent owes only $11,474 on its loans by June of 2012. REX 2B, 2010 Financial Statement at 10. This considerable reduction in Respondent's current payments on its

loans frees resources for Respondent to use to pay a civil penalty. In addition, as pointed out by Complainant, Mr. Guzman testified that Respondent had borrowed $92,751, as shown by the 2010 Financial Statement, and that he believes that Respondent's demand line of credit is limited to $100,000. Day Three Tr. at 30 (citing REX 2B, 2010 Financial Statement at 9). Therefore, Respondent may still borrow approximately $7,000 against its demand line of credit for the purpose of paying a penalty. Finally, the 2009 Financial Statement shows that the total shareholders' equity as of June 30, 2009, was $86,520. REX 2A, 2009 Financial Statement at 3. The 2010 Financial Statement, in turn, shows that the shareholders' equity increased as of June 30, 2010, to $93,990. REX 2B, 2010 Financial Statement at 3. According to the financial statements, these figures were treated as liabilities to offset Respondent's assets. However, shareholders' equity is an ideal resource for covering the costs of environmental liability.

In view of the foregoing considerations, I find that a reduction in the penalty to $32,500 is appropriate. I believe that this amount appropriately reflects Respondent's inability to pay a penalty of at least $60,000. Furthermore, this amount is sufficient to serve as a deterrent without putting Respondent out of business, which I find to be unwarranted in this case. Accordingly, Respondent is hereby assessed a civil penalty of $32,500 for the violations found above.

VII. ULTIMATE CONCLUSIONS OF LAW

1. Respondent is a "person," as that term is defined by Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and 40 C.F.R. § 260.10.

2. The Former Facility is a "facility," as that term is defined by 40 C.F.R. § 260.10.

3. The PPA and the Municipio of Ponce are the "owners" of the Former Facility, as that term is defined by 40 C.F.R. § 260.10.

4. Between approximately June 28, 1995, and December 28, 2006, Respondent was the "operator" of the Former Facility, as that term is defined by 40 C.F.R. § 260.10.

5. Complainant failed to demonstrate by a preponderance of the evidence that the contents of containers, drums, and tanks at the Former Facility qualified as "solid waste" by virtue of being "abandoned," as those terms are defined by 42 U.S.C. § 6903(27) and 40 C.F.R. § 261.2, from December 28, 2006, through February 9, 2007.

6. Spilled and leaking materials were present at the Former Facility as of at least February 2, 2007.

7. The spilled and leaking materials constituted "solid waste," as that term is defined by 42 U.S.C. § 6903(27) and 40 C.F.R. § 261.2.

8. Respondent failed to perform a hazardous waste determination for each solid waste generated at the Former Facility as of at least February 2, 2007, in violation of 40 C.F.R. § 262.11.

9. Sulfuric acid, low pH sump water, and materials identified by representatives of EPA only as "corrosive" had spilled or were leaking from containers at the Former Facility, and these materials constituted "hazardous waste" by way of exhibiting one or more of the characteristics of hazardous waste described at 40 C.F.R. § 261.21-.24, as of at least February 2, 2007.

10. Respondent was a "generator" of the hazardous waste a the Former Facility, as that term is defined by 40 C.F.R. § 260.10, as of at least December 28, 2006.

11. Respondent failed to maintain and operate the Former Facility to minimize the possibility of a fire, explosion, or release of hazardous waste, as of at least December 28, 2006, in violation of 40 C.F.R. § 265.31, as referenced by 40 C.F.R. § 262.34(a)(4).

12. Respondent failed to label or mark clearly with the words "Used Oil" a container used to store used oil at the Former Facility, as of at least February 2, 2007, in violation of 40 C.F.R. § 279.22(c)(1).

13. Complainant appropriately calculated the gravity-based and multi-day components of the proposed penalties for Counts 1 and 2 of the Complaint.

14. Complainant appropriately calculated the proposed penalty for Count 3 of the Complaint.

15. Respondent sustained its burden of demonstrating the "affirmative defense" of inability to pay so as to reduce the amount of the appropriate penalty to $32,500.

16. The total civil penalty of $32,500 is authorized by Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3).

VIII. ORDER

1. Respondent Aguakem Caribe, Inc., is assessed a civil administrative penalty in the amount of $32,500.

2. Payment of the full amount of this civil penalty shall be made within 30 days of the date on which this Initial Decision becomes a final order pursuant to Section 22.27(c) of the Rules of Practice, 40 C.F.R. § 22.27(c), by submitting a cashier's check or a certified check in the amount of $32,500, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Contacts: Craig Steffen (513-487-2091),
Eric Volck (513-487-2105)[48]

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[48] Alternatively, Respondent may make payment of the penalty as follows:

WIRE TRANSFERS:

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

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
(Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency")

OVERNIGHT MAIL:

U.S. Bank
Government Lockbox 979077
US EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

Contact: (314-418-1028)

(continued...)

3. A transmittal letter identifying the subject case and EPA docket number (RCRA-02-2009-7110), as well as Respondent's name and address, must accompany the check.

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

IX. APPEAL RIGHTS

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 days after its service upon the parties, unless a party moves to reopen the hearing under 40 C.F.R. § 22.28, an appeal is taken to the Environmental Appeals Board within 30 days of service of this Initial Decision pursuant to 40 C.F.R. § 22.30(a), or the Board elects to review this Initial Decision, *sua sponte*, as provided by 40 C.F.R. § 22.30(b).

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Barbara A. Gunning
Administrative Law Judge

Dated: December 22, 2011
Washington, D.C.

[48/] (...continued)

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

U.S. Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account No. 310006
Environmental Protection Agency
CTX Format
Transaction Code 22 - checking
Contact: Jesse White (301-887-6548)

ON LINE PAYMENT:

This payment option can be accessed from the information below:

Visit http://www.pay.gov
Enter "sfo 1.1" in the search field.
Open form and complete required fields.