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Ontario

TELECOPIER COVER SHEET

TO: Ms. Rosalind H. Cooper - Counsel

FROM: KRISTOPHER CRAWFORD-DICKINSON, Counsel

RE: Environmental Penalty Order Issued to Liqui-Box Canada Inc.

COMMENTS: Rosalind, attached to this fax is the Environmental Penalty Order issued by the Ministry of the Environment to Liqui-Box Canada Inc. Note that the Order was signed on September 25, 2008 but is being served today (September 30, 2008).

DATE: September 30, 2008

TIME: 12:50

NO. OF PAGES: 14 (including this page)

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MINISTRY OF THE
ENVIRONMENT
HAMILTON

Order Number: 002

Environmental Penalty Order

Environmental Protection Act, R.S.O. 1990, c. E 19 (EPA)
Ontario Water Resources Act, R.S.O. 1990, c. O. 40 (OWRA)

To: Liqui-Box Canada Inc.

Site: 201 South Blair Street,
Whitby Ontario

PART 1: DEFINITIONS

For the purposes of this Environmental Penalty Order ("**EP Order**"), the following terms shall have the meanings described below:

"**Director**" means the undersigned Director or, in the event that the undersigned is unable to act, any other director authorized to act pursuant to the EPA;

"**EP**" means environmental penalty;

"**EP Order**" means this Environmental Penalty Order 002;

"**EPA**" means the Environmental Protection Act, R.S.O. 1990, c. E. 19, as amended;

"**ERT**" means the Environmental Review Tribunal;

"**Guideline**" means "Guideline for Implementing Environmental Penalties (Ontario Regulations 222/07 and 223/07, May 2007".

"**Liqui-Box**" means Liqui-Box Canada Inc.

"**Ministry**" means the Ontario Ministry of the Environment;

"**NOI**" means the Notice of Intent to issue an EP Order (NOI-002) issued to Liqui-Box on May 16, 2008.

"O. Reg. 222/07" means Environmental Penalties – Ontario Regulation 222/07, made under the EPA;

"Regulated Person" means a person who owns or operates a plant that falls under section 3 of O. Reg. 222/07;

"Site" means the property municipally known as 201 South Blair Street, Whitby, Ontario.

PART 2: LEGAL AUTHORITY AND REASONS

Legal Authority

Authority to Issue EP Order

2.1 Subsection 182.1(1) of the Environmental Protection Act, R.S.O. 1990, c. E. 19, as amended ("**EPA**") authorizes the Director to issue an environmental penalty ("**EP**") to a regulated person ("**Regulated Person**") that:

A. Contravenes or has contravened:

- i. Section 14 of the EPA,
- ii. Section 93 of the EPA,
- iii. A provision of a regulation that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment,
- iv. A provision of an order under the EPA that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment, or
- v. A provision of a certificate of approval, provisional certificate of approval, certificate of property use, licence or permit under the EPA that establishes or has the effect of establishing a numerical limit, including the limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment; or

B. The Regulated Person contravenes a provision of,

- i. The EPA or the regulations,

- ii. An order under the EPA, other than an order under sections 99.1, 100.1 or 150 of the EPA or an order of a court,
- iii. A certificate of approval, provisional certificate of approval, certificate of property use, licence or permit under the EPA,
- iv. A report under section 29 of the EPA, or
- v. An agreement under subsection 182.1(9) of the EPA.

Agreements

- 2.2 Subsection 182.1(9) of the EPA allows the Director and the Regulated Person against whom a Notice of Intention or an EP Order has been issued to enter into an agreement that:
- A. Identifies the contravention in respect of which the Notice of Intention or an EP Order has been issued;
 - B. Requires the Regulated Person against whom the Notice of Intention or an EP Order has been issued to take steps specified in the agreement within the time specified in the agreement, and
 - C. Provides that the obligation to pay the penalty may be cancelled in accordance with O. Reg. 222/07 or the amount of the penalty may be reduced in accordance with O. Reg. 222/07.

Publication of Agreements

- 2.3 Subsection 182.1(10) of the EPA requires the Ministry of the Environment ("**Ministry**") to publish every agreement entered into under subsection 182.1(9) of the EPA in the environmental registry established under section 5 of the Environmental Bill of Rights, 1993.

Penalty Does Not Prevent Prosecution

- 2.4 Subsection 182.1(11) of the EPA allows a Regulated Person to be charged, prosecuted and convicted of an offence under the EPA in respect of a contravention referred to in subsection 182.1(1) of the EPA even if an EP has been imposed or paid by the Regulated Person in respect of the contravention.

No Admission of Liability

- 2.5 Under subsection 182.1(12) of the EPA, a Regulated Person that pays the EP imposed under subsection 182.1(1) of the EPA in respect of a contravention or enters into an agreement under subsection 182.1(9) of the EPA in respect of a contravention does not represent an admission that the Regulated Person

committed the contravention for the purposes of any prosecution for the contravention.

Failure to Pay When Required

- 2.6 Subsection 182.1(13) of the EPA allows the Ministry to enforce an EP Order where a Regulated Person who is required to pay an EP fails to comply with the requirement by,
- A. Filing the EP Order or decision with the local registrar of the Superior Court of Justice and enforcing the EP Order or decision as if it were an order of the Superior Court of Justice,
 - B. The Director may by order suspend any certificate of approval, provisional certificate of approval, licence or permit that has been issued to the Regulated Person under the EPA until the EP is paid, and
 - C. The Director may refuse to issue any certificate of approval, provisional certificate of approval, licence or permit to the Regulated Person under the EPA until the EP is paid.

Key Background Facts Regarding the Issuance of This Environmental Penalty Order

- 2.7 The following outlines the key background facts, issues and concerns regarding this matter which provide me with the reasons for issuing this EP Order:

Details of the Orderee

- 2.7.1 Liqui-Box Canada Inc. ("**Liqui-Box**") is a company incorporated under the laws of Canada (Corporation Number 1385683). Liqui-Box was incorporated on September 13, 1999.

The Site

- 2.7.2 The plant, formerly owned by Liqui-box, is located in Whitby several kilometres north of Lake Ontario. The property comprises one building which houses the manufacturing plant and offices and is municipally known as 201 South Blair Street, Whitby, Ontario ("**Site**"). This Site was used to manufacture plastic film such as; polyethylene and nylon film for the packaging of various products including vexar for use in rope, netting and fencing. Liqui-Box had a sampling point which consisted of two non-contact cooling water streams and was identified as control point 1300 that was discharged on a continuous basis to a ditch on the south east side of the property, which drains into Lake Ontario. This sampling point is regulated under the Effluent Monitoring and Effluent Limit – Organic Chemical Manufacturing

Sector Regulation – Ontario Regulation 63/95, as amended (“O. Reg. 63/95”).

Events Leading Up To Issuing Environmental Penalty Order

- 2.7.3 On November 30, 2007, Exopack advised the Ministry that a limit exceedance occurred on November 27, 2007, while the plant was still under the ownership of Liqui-Box. The analytical results identified 100% mortality for *Daphnia Magna* as a result of the acute lethality test.

Application of Case-Specific Factors Listed in Paragraph 3 of s. 9(1) of O. Reg. 222/07

- 2.7.4 Based on a review of Liqui-box history none of the factors outlined above apply to Liqui-box and therefore a score of zero (0) points is assigned in this case. Under Appendix 3 of the Guideline for Implementing Environmental Penalties (Ontario Regulations 222/07 and 223/07, May 2007 (“**Guideline**”), a ten thousand (\$10,000) gravity component is imposed for a score of zero (0) points or less.

Director's Response to Regulated Person's Request for Review of Notice of Intention

- 2.7.5 On May 16, 2008, I issued a Notice of Intention to issue an EP Order to you. You responded on June 2, 2008, and asked me to review the Notice of Intention.

A copy of the Notice of Intention issued on May 16, 2008 is attached to and forms part of this EP Order.

A copy of your written request that I review the Notice of Intention dated June 2, 2008, is attached to this EP Order.

- 2.7.6 I have reviewed both your written request and the additional materials you provided. My responses to your request(s) are as follows:

- A. Reductions For Prevention:** Reductions to the gravity component are determined in accordance with section 16 of O. Reg. 222/07 on the grounds that the Regulated Person took steps to prevent the contravention or mitigate its effects. Section 4.1 in Appendix 4 of the Guideline specifically lists the preventive measure modifiers considered for discharge violations. A regulated person is eligible for up to a 20% reduction to the gravity component of a penalty for the steps the person took to prevent the discharge violations. For each consideration that has a “yes” answer in Table A1, the

appropriate point value from the last 3 columns is assigned. The points are totalled and Table A2 is used, based on the violation type to determine the percentage reduction for the preventive measures taken by the Regulated Person.

In your letter dated June 2, 2008, you have asked for several reductions to the EP amount based on the preventive measures Liqui-Box had in place. Each of your requests will be addressed individually below.

- i. **Risk Analysis:** Under this factor, you asked that Liqui-Box be given three (3) points for the steps it took to identify and reduce the risks of acute lethality failures as a result of chlorinated water being discharged by Liqui-Box. An agreement between the Region of Durham and Liqui-Box was reached whereby the Region of Durham agreed to install and operate a dechlorinator on the raw water supply line at the expense of Liqui-box.

I have reviewed your request and concur that a three (3) point reduction under paragraphs a and b of section 1 of Table A1 of the Guideline is warranted in this case for this factor. Liqui-Box took steps to identify the potential problems caused by the chlorinated water supplied the Region of Durham. Further, Liqui-Box attempted to deal with these problems by having de-chlorination equipment installed and operated at its expense by the Region of Durham.

- ii. **Preventive Maintenance:** Under this factor, you have asked that Liqui-Box be given three (3) points for the preventive steps Liqui-Box took to have the Region of Durham install and operate the dechlorination equipment.

I have reviewed your request and do not concur that Liqui-Box should receive any points under paragraphs a and b of section 2 of Table A1 of the Guideline in this case for this factor. As a contractor of services, Liqui-Box had the opportunity and obligation to ensure the de-chlorination equipment is properly maintained and/or operated. This does not appear to be the case here and therefore, no points will be awarded.

- iii. **Preventive Monitoring System:** Under this factor, you have asked that Liqui-Box be given three (3) points for the preventive steps it took to have the Region of

Durham install and operate the de-chlorination equipment. This request is based on your conclusion that Liqui-Box could not implement any further preventive monitoring systems at the Site.

I have reviewed your request and do not concur that Liqui-Box should receive any points under paragraphs a and b of section 4 of Table A1 of the Guideline in this case for this factor. Liqui-Box could have identified and implemented other means of monitoring at the Site to determine the concentration of chlorine in the water supply. For example, Liqui-Box could have installed monitoring devices at the discharge point to warn of an unlawful discharge.

- iv. **Process and Pollution Control:** Under this factor, you have asked that Liqui-Box be given four (4) points for the arrangement it had with the Region of Durham to install and operate the de-chlorination equipment.

I have reviewed your request and do not concur that Liqui-Box should receive four (4) points under paragraphs a and b of section 5 of Table A1 of the Guideline. Rather, I am of the opinion that Liqui-Box should receive two (2) points since it does not have pollution control equipment above and beyond legislative requirements (as outlined in paragraph b of section 5 of Table A1 of the Guideline). I have, however, granted two (2) points for the arrangement Liqui-Box has with the Region of Durham to operate the de-chlorination equipment since it falls under paragraph a of section 5 of Table A1 of the Guideline.

- v. **Training:** Under this factor, you have requested that Liqui-Box be granted one (1) point even though no employees of Liqui-Box received training in this area. The basis of this request is that Liqui-Box should not be "denied the benefit" of a reduction for this "unique" situation.

I have reviewed your request and do not concur that Liqui-Box should receive one (1) point under paragraph a of section 6 of Table A1 of the Guideline in this case for this factor. Documentation has not been provided to me to indicate that Liqui-Box trained any employees, contractors (i.e. operators at the Region of Durham) or suppliers on the prevention of unlawful discharges.

- vi. **Other Preventive Measures:** Under this factor, you have requested Liqui-Box be granted the maximum available points, which happens to be two (2) points on the basis of the arrangement that Liqui-Box with the Region of Durham to operate the de-chlorination equipment and informal communications with the Region of Durham concerning the acute lethality failures.

I have reviewed your request and do not concur that Liqui-Box should receive two (2) points under paragraph a of section 7 of Table A1 of the Guideline in this case for this factor. Although, Liqui-box and the Region of Durham have an agreement points have been previously allocated, as stated above, for this agreement. Therefore, no additional points are going to be awarded for this factor.

- vii. Based on the above, I have awarded Liqui-Box a total of five (5) points for the preventive steps it took. According to Table A2 of the Guideline, five (5) points results in an overall reduction of 8% to the EP (which equals eight hundred dollars (\$800)).

- B. **Mitigative Measures:** Reductions to the gravity component are determined in accordance with section 16 of O. Reg. 222/07 on the grounds that the Regulated Person took steps to prevent the contravention or mitigate its effects. Section 4.2 in Appendix 4 of the Guideline lists all the mitigative measures that may be considered. A regulated person is eligible for up to a 10% reduction to the gravity component of a penalty for the steps the person took to mitigate the effects of the discharge violation. For each consideration in Table B1, the appropriate point value from the last 3 columns is assigned. Points are totalled and Table B2 is used to determine the percentage reduction for the mitigative measures taken by the Regulated Person.

In your letter dated June 2, 2008, you have asked for several reductions to the EP amount based on the mitigative measures Liqui-Box had in place. Each of your requests will be addressed individually below.

- i. **Implementation of Procedures:** Under this factor, you have requested Liqui-Box be granted one (1) point based on its response procedure, which included

contacting of the Region of Durham to assess the chlorine levels in the event of a toxicity failure.

I have reviewed your request and do not completely concur with the reasoning. Assessing chlorine levels after the fact is not necessarily a mitigative measure. However, I am going to award one (1) point under paragraph b of section 1 of Table B1 of the Guideline for the process that Liqui-Box had in place to contact the Region of Durham to find out if there was a chlorination problem at the facility that provided Liqui-Box its water.

- ii. **Response:** Under this factor, you have requested Liqui-Box be granted the maximum available points, which is seven (7) points. The basis of this request is that Liqui-box conducted a cause analysis to determine the source of the toxicity failures and implemented a solution.

I have reviewed your request and do not concur that Liqui-Box should receive seven (7) points under paragraphs c, d, e and f of section 2 of Table B1 of the Guideline. The transfer of ownership to another company did not resolve the cause of the toxicity failure. Further, it does not appear that Liqui-Box made any further changes to address the problem (i.e. it relied on the current system in place, which has proven not to be as effective as it could be).

However, I do accept that Liqui-Box conducted a cause analysis to determine the reason for the violation (as outlined in paragraph c of section 2 of Table B1 of the Guideline) and therefore grant one (1) point in this regard.

- iii. **Training:** Under this factor, you have requested Liqui-Box be granted one (1) point based on the reasoning that training efforts could not be undertaken to the specific process area where the incident occurred as the water discharged is non-contact cooling water and Liqui-Box had no ability to control the toxicity failure.

I have reviewed your request and do not concur that Liqui-Box should receive one (1) point under paragraph a of section 4 of Table B1 of the Guideline in this case for this factor. I do not accept the argument that Liqui-Box had absolutely no ability to control the toxicity failure. Liqui-Box could have required closer monitoring

by the Region of Durham to ensure that a toxicity failure did not occur. Additionally, Liqui-Box could have provided training to the Region of Durham staff operating the de-chlorinator to identify the importance of its need for non-chlorinated water.

- iv. **Other Mitigative Measures:** Under this factor, you have requested Liqui-Box be granted two (2) points for the arrangement it had with the Region of Durham to install and operate the de-chlorination equipment.

I have reviewed your request and do not concur that Liqui-Box took other actions (i.e. the use of best available technology or the implementation of an environmental management system) beyond those required by legislation that served to mitigate the discharge. However, I recognize the situation at Liqui-Box as being "unique" and grant one (1) point under paragraph a of section 5 of Table B1 of the Guideline in this regard.

- v. Based on the above, I have awarded Liqui-Box a total of three (3) points for the mitigative steps it took. According to Table B2 of the Guideline, three (3) points results in an overall reduction of 6% to the EP (which equals six hundred dollars (\$600.00)).

Amount of Environmental Penalty

- 2.7.7 Under section 7 of O. Reg. 222/07, the amount of the EP for a contravention is calculated by adding the monetary benefit (section 8 of O. Reg. 222/07) to the gravity component (section 9 of O. Reg. 222/07), which includes subtracting the reduction for prevention or mitigation measures (section 15 of O. Reg. 222/07), the reduction for an environmental management system (section 16 of O. Reg. 222/07) and the reduction for an agreement (section 17 of O. Reg. 222/07), as applicable.
- 2.7.8 For the contravention, no monetary benefit component is being determined for this EP. The gravity component, as identified in paragraph 2.7.4, is ten thousand dollars (\$10,000). The reduction for prevention measures as identified in paragraph 2.7.6 is eight hundred dollars (\$800) and the reduction for mitigation measures is six hundred dollars (\$600). These reductions result in a total reduction of one thousand four hundred dollars (\$1,400) to the amount of the EP. Based on this reduction, the total amount of the EP is eight thousand six hundred dollars (\$8,600).

PART 3: ORDER TO PAY ENVIRONMENTAL PENALTY

- 3.1 For the reasons stated above and pursuant to my authority under subsection 182.1(1) of the EPA, I order you to pay an EP in the amount of eight thousand six hundred dollars (\$8600) by **December 10, 2008**. This payment shall be made by certified cheque made payable to the Minister of Finance and sent to the following address: District Manager, York Durham District Office, 230 Westney Rd S, Ajax, Ontario, L1S 7J5.

PART 4: GENERAL

- 4.1 All orders are issued in the English language and may be translated into the French language. In the event that there should be a conflict between the English original and the French translation, the English original shall prevail.
- 4.2 Subsection 19(1) of the EPA provides that an order of the Director is binding upon the successor or assignee of the person to whom it is directed.
- 4.3 The requirements of this order are minimum requirements only and do not relieve you from:
- complying with any other applicable order, statute, regulation, municipal, provincial or federal law
 - obtaining any approvals or consents not specified in this order
- 4.4 Notwithstanding the issuance of this order, further or other orders may be issued in accordance with legislation as circumstances require.
- 4.5 In the event that any party to this order is, in the opinion of the Director, rendered unable to perform or comply with any obligations herein because of
- natural phenomena of an exceptional, inevitable or irresistible nature, or insurrections, or
 - strikes, lockouts or other labour disturbances
 - any other cause whether similar to or different from the foregoing beyond the reasonable control of the parties,

the obligations hereof, as they are affected by the above shall be adjusted in a manner defined by the Director. To obtain such an adjustment, the party must notify the Director immediately of any of the above occurrences, providing details that demonstrate that no practical alternatives are feasible in order to meet the compliance dates in question.

- 4.6 Failure to comply with a requirement of this order by the date specified does not absolve the parties from compliance with the requirement. The obligation to complete the requirement shall continue each day thereafter.
- 4.7 This order has no expiry date.

PART 5: APPEAL RIGHTS

- 5.1 Under section 140 of the EPA, you may require a hearing before the Environmental Review Tribunal ("ERT"), if, within fifteen days after service upon you of this order, you serve written notice upon the Review Tribunal and the Director.
- 5.2 Section 142 of the EPA provides that the notice requiring the hearing must include a statement of the portions of the order for which the hearing is required and the grounds on which you intend to rely at the hearing. Except by leave of the ERT, you are not entitled to appeal a portion of the order or to rely on grounds of appeal that are not stated in the notice requiring the hearing.
- 5.3 Written notice requiring a hearing shall be served in accordance with the applicable Act(s) or Service Regulations on the following:

The Secretary
Environmental Review Tribunal
655 Bay Street, 15th Floor
Toronto, ON M5G 1E5

and Director
Ministry of the Environment
5775 Yonge St. 8th Floor
Toronto, ON M2M 4J1
416-325-6345 (fax)


Where service is made by mail, the service shall be deemed to be made on the fifth day after the day of mailing and the time for requiring a hearing is not extended by choosing service by mail.

Refer to Service of Documents Regulation 227/07 for further rules regarding service by fax.

PART 6: PROCESS OF APPEAL BEFORE ENVIRONMENTAL REVIEW TRIBUNAL

- 6.1 Subsection 145.4(1) of the EPA provides that the regulations made under clause 182.1(15)(d) governing the determination of the amounts of an EP apply to the ERT.

- 6.2 Subsection 145.4(2) of the EPA provides that the ERT shall not substitute its opinion for that of the Director with respect to the amount of the EP Order unless the ERT considers the amount to be unreasonable.
- 6.3 Subsection 145.5(2) of the EPA places the onus on the Regulated Person requesting the hearing before the ERT to prove that the contravention of section 14 of the EPA did not cause or could not have caused an adverse effect.
- 6.4 Subsection 145.5(3) of the EPA places the onus on the Regulated Person requesting the hearing before the ERT to prove that a contravention of section 93 of the EPA that:
- i. The discharge of the pollutant was not abnormal in quality or quantity in light of all the circumstances of the discharge;
 - ii. The pollutant that was spilled did not cause and was not likely to cause an adverse effect; or
 - iii. Forthwith after the pollutant was spilled, the person did everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.
- 6.5 Subsection 145.5(4) of the EPA places the onus on the Regulated Person requesting the hearing before the ERT to prove that a contravention of a provision referred to in subclause 182.1(a)(iii), (iv) or (v) that the Regulated Person did not contravene the provision.


George Rocoski
Director
Central Region
5775 Yonge St. 8th Floor
Toronto, ON M2M 4J1

Date: Sept 25, 2008