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ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

IN THE MATTER OF:)
)
Bomgaars Supply, Inc.)
1805 Zenith Drive)
Sioux City, Iowa 51103-5208)
)
RCRA I.D. Nos. IAD000686899)
IAD984601534)
)
Respondent.)
)
Proceeding under Sections 3008(a) and (g) of)
the Resource Conservation and Recovery Act,)
as amended, 42 U.S.C. §§ 6928(a) and (g))
)

**CONSENT AGREEMENT
AND FINAL ORDER**

Docket No. RCRA-07-2011-0013

**COMPLAINT AND
CONSENT AGREEMENT/FINAL ORDER**

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and Bomgaars Supply, Inc. (Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits (Consolidated Rules of Practice), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Section I

Jurisdiction

1. This administrative action is being conducted pursuant to Sections 3008(a) and (g) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6928(a) and (g), and in accordance with the Consolidated Rules of Practice.

2. This Consent Agreement and Final Order (CAFO) serves as notice that EPA has reason to believe that Respondent violated Section 3005 of RCRA, 42 U.S.C. § 6925, and the regulations found at 40 C.F.R. §§ 262 and 273.

Section II

Parties

3. The Complainant is the Chief of the Waste Enforcement and Materials Management Branch in the Air and Waste Management Division of EPA, Region 7, who has been duly delegated the authority to bring this action by the Administrator of EPA.

4. The Respondent is Bomgaars Supply, Inc. (Bomgaars), a company incorporated under the laws of Iowa and licensed to do business in the state of Iowa, Colorado, Nebraska, Minnesota, South Dakota, and Wyoming.

Statutory and Regulatory Framework

5. When EPA determines that any person has violated or is in violation of any RCRA requirement, EPA may issue an order assessing a civil penalty for any past or current violation and/or require immediate compliance or compliance within a specified time period pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928.

6. Section 3008(g) of RCRA, 42 U.S.C. § 6928(g), authorizes a civil penalty of not more than \$25,000 per day for violations of Subchapter III of RCRA (Hazardous Waste Management). This figure has been adjusted upward for inflation pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, so that penalties of up to \$32,500 per day are now authorized for violations of Subchapter III of RCRA that occur after March 15, 2004, through January 12, 2009. For violations of Subchapter III of RCRA that occur after January 12, 2009, penalties of up to \$37,500 per day are now authorized.

General Factual Allegations

7. Respondent is an Iowa corporation authorized to conduct business in the States of Iowa, Colorado, Nebraska, Minnesota, South Dakota, and Wyoming, and is a "person" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

8. Respondent's corporate office and distribution center are located at 1805 Zenith Drive, Sioux City, Iowa (Zenith Facility). Respondent also operates a warehouse at 2901 Floyd Boulevard, Sioux City, Iowa (Floyd Facility). Respondent employs approximately 1,400 people.

9. Respondent operates fifty-nine stores, stocking over 50,000 items in ten major departments, including Lawn and Garden plus Nursery, Clothing and Footwear, Farm, Pet, and Automotive Supplies, Paint, Hardware, Tools, Housewares, and Toys.

10. On or about April 15 and 16, 2009, EPA representatives conducted a Compliance Evaluation Inspection at Respondent's Zenith and Floyd Facilities (Inspection).

11. The hazardous wastes at these facilities were damaged and unsellable materials that were once products at Bomgaars retail stores. At the time of the Inspection, Bomgaars was storing other wastes at the facilities.

12. The hazardous wastes generated by Respondent include waste pesticides (liquid toxic, D016/ D008/U279 characteristic), hydrochloric acid (D002), flammable liquids (D001), waste paint related material (D001), waste aerosols (D001), waste corrosive liquid (basic inorganic, D002), waste corrosive liquid (acidic organic, D002), and waste mercury (D009).

13. Respondent has been assigned RCRA facility identification numbers of IAD000686899 and IAD984601534.

14. Based on a review of the Inspection Report, information provided during the Inspection by Facility personnel, and additional discussions with the Respondent it was determined that Respondent was operating, as a small quantity generator of hazardous wastes and handler of universal wastes at the Zenith and Floyd Facilities.

Alleged Violations

15. Complainant hereby states and alleges that Respondent has violated RCRA and federal and state regulations promulgated thereunder, as follows:

Count 1

Failure to Conduct Hazardous Waste Determinations on Multiple Waste Streams

16. The allegations stated in paragraphs 7 through 14 are realleged and incorporated as if fully set forth herein.

17. The regulation at 40 C.F.R. § 262.11 requires that solid waste generators make a hazardous waste determination on their waste streams.

18. During the April 2009 Inspection, personnel observed containers of waste stored at the Respondent's Facilities. Following the Inspections, Respondent performed hazardous waste determinations at the two Facilities. Based on these determinations, Respondent was producing 231 hazardous waste streams. Further discussions with the Respondent identified four hazardous waste codes: D001, D002, D009, and D016/D008/U279. At the time of EPA's inspection, Respondent had not performed hazardous waste determinations.

19. Failure to perform a hazardous waste determination is a violation of 40 C.F.R. § 262.11.

Count 2

Failure to Manage Universal Waste in Accordance with RCRA

20. The allegations stated in paragraphs 7 through 14 are realleged and incorporated as if fully set forth herein.

21. The regulation at 40 C.F.R. § 273.13(d) requires a small quantity handler of universal waste to manage lamps in a way that prevents release of any universal waste or component thereof into the environment.

22. 40 C.F.R. § 273.13(d)(1) further specifies that lamps must therefore be stored in containers that are structurally sound and adequate to prevent breakage. The regulation describes the manner in which this must be accomplished.

23. According to 40 C.F.R. § 273.14(e), each lamp or a container or package in which such lamps are contained must be labeled or marked clearly with one of the following phrases: "Universal Waste – Lamp(s)," or "Waste Lamp(s)," or "Used Lamp(s)".

24. Nearly all of the spent fluorescent lamps observed were not labeled or dated in accordance with 40 C.F.R § 273.14(e).

25. The small quantity handler must also store the waste in accordance in 40 C.F.R. § 273.15(c)(1)-(6) to be able to clearly demonstrate the length of time that universal waste has been accumulated from the date it becomes waste or is received.

26. Nearly all of the containers of spent fluorescent lamps observed were not dated in accordance with 40 C.F.R § 273.15(c).

27. Respondent accumulated more than 1,415 spent fluorescent lamps at the Floyd Facility. The lamps were not managed in a way that would prevent the release of universal waste or components of universal waste into the environment, thus violating 40 C.F.R § 273.13(d).

28. Nearly all of the spent fluorescent lamps observed were not contained in boxes or other containers that were structurally sound and adequate to prevent breakage, in violation of 40 C.F.R. §273.13(d)(1).

CONSENT AGREEMENT

1. Respondent and Complainant agree to the terms of this CAFO subject to paragraph 3 of this Consent Agreement section, and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.

2. Respondent admits the jurisdictional allegations of this CAFO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CAFO.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this CAFO.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the proposed Final Order portion of the CAFO.

5. Respondent and Complainant agree to conciliate the matters set forth in this CAFO without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

6. This CAFO resolves the Complainant's civil administrative claims for the allegations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of RCRA or any other applicable law.

7. Nothing contained in the Final Order portion of this CAFO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

8. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

9. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of \$10,387.00 as set forth in Paragraph 1 of the Final Order.

10. Respondent understands that failure to pay any portion of the civil penalty on or before the date the same is due may result in the commencement of a civil action in United States District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

11. Respondent shall complete the following Supplemental Environmental Project (SEP), which the parties agree is intended to secure significant environmental or public health protection and improvements. The pollution prevention/reduction SEP consists of: (1) replacing silver-tipped, mercury containing light bulbs with green-tipped light bulbs in five of Bomgaars' Iowa retail stores. This SEP will reduce the amount of universal waste at the five Bomgaars' facilities.

12. The SEP will take place at the following Bomgaars facilities:

- a. Sheldon #12 located at 528 2nd Avenue in Sheldon, Iowa 51201;

- b. Storm Lake #4 located at 1628 N. Lake Avenue in Storm Lake, Iowa 50588;
 - c. Algona #39 located at 1609 Norwood Drive in Algona, Iowa 50511;
 - d. Cherokee #8 located at 1000 N. 2nd in Cherokee, Iowa 51012; and
 - e. Orange City #14 located at 207 Central Avenue in Orange City, Iowa 51041.
13. The SEP will be completed within twelve (12) months of the effective date of this Order.
14. Respondent will spend a minimum of \$31,161.00 in approvable costs on the above described SEP. Approvable costs shall only include supplies, materials, and labor costs that are directly related to the SEP described in above.
15. Respondent will submit an Interim SEP Report three (3) months from the effective date of this Order. The Interim SEP Report shall contain the following:
- a. The number of silver-tipped light bulbs that will be replaced at each of the five Facilities listed above in Paragraph 12.
16. Respondent will submit a SEP Completion Report thirty (30) days after the completion of the SEP. The Final SEP Report shall contain the following:
- a. A description of the SEP that has been completed, the category of the SEP project per EPA's SEP Policy, and a description of the specific environmental and/or public health benefits resulting from the implementation of the SEP.
 - b. A calculation showing the amount of mercury that could potentially be released in to the air from mismanagement and or breakage of the silver-tipped light bulbs compared to the amount of mercury that could be released into the air with green-tipped light bulbs.
 - c. The documentation of all costs associated with the completed SEP. These costs should be broken down into labor costs and material costs for each facility.
 - d. Copies of all rebates received by Respondent in relation to this SEP.
 - e. Documentation showing that all of the light bulbs being replaced per this SEP were silver-tipped light bulbs and that they were replaced with green-tipped light bulbs.
17. In itemizing its costs in the Interim SEP Report and the SEP Completion

Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this Paragraph, "acceptable documentation" includes invoices, purchase orders, canceled checks, or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Cancelled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

18. The Interim SEP Report and the SEP Completion Report shall include the statement of Respondent, through an officer, signed and certifying under penalty of law the following:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

19. The Interim SEP Report and the SEP Completion Report shall be submitted on or before the due date to:

Kevin Snowden
AWMD/WEMM
U.S. Environmental Protection Agency
901 North 5th Street
Kansas City, Kansas 66101.

20. Any public statement, oral or written, in print, film, internet, or other media, made by Respondent making reference to the SEP shall include the following language:

This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of the Resource Conservation and Recovery Act. 42 U.S.C. § 6901 *et. seq.*

21. Respondent hereby certifies that, as of the date of this CAFO, Respondent is not required to perform or develop the SEP by any federal, state, or local law or regulation; nor is Respondent required to perform or develop the SEP by any other agreement, grant or as injunctive relief in this or any other case. Respondent further certifies that it has not received and is not presently negotiating to receive credit in any other enforcement action for the SEP.

22. Respondent certifies that it is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP. Respondent further certifies that, to the best of its knowledge and belief after reasonable inquiry, there is no

such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For the purposes of this certification, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not yet expired.

23. Respondent agrees not to claim any funds expended in the performance of the SEP as deductible business expenses for the purpose of federal, state, or local taxes.

24. Respondent agrees to pay the stipulated penalty as follows:

- a. In the event that Respondent fails to comply with any of the material terms or provisions of this CAFO relating to the performance of the SEP described above and/or to the extent that the actual expenditures for the SEPs do not equal or exceed the cost of the SEPs described in above, Respondent shall be liable for stipulated penalties according to the provisions set forth below:
 - (i) Except as provided in subparagraph (ii) immediately below, for a SEP which has not been completed satisfactorily pursuant to this CAFO, Respondent shall pay a stipulated penalty to the United States. The stipulated penalty shall be the difference between \$31,161.00 and the amount that Respondent invests in the SEP before Complainant notifies Respondent of its determination that the SEP was not completed satisfactorily.
 - (ii) If Respondent fails to timely and completely submit the Interim SEP Report or the SEP Completion Report required by Paragraphs 52-56, Respondent shall be liable for and shall pay a stipulated penalty in the amount of \$100.00 for each day after the due date until a complete report is submitted; and
 - (ii) If the SEP is not completed as described above, but the EPA determines that the Respondent: a) made good faith and timely efforts to complete that project; and b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on that project, Respondent shall not be liable for any stipulated penalty.
- b. The determination of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of the EPA.
- c. Stipulated penalties shall begin to accrue on the day after performance is due,

and shall continue to accrue through the final day of the completion of the activity.

- d. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Interest and late charges shall be paid as stated in paragraph 25 herein.
- e. Nothing in this CAFO shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this CAFO or of the statutes and regulations upon which this CAFO is based, or for Respondent's violation of any applicable provision of law.

25. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A charge will be assessed to cover the costs of debt collection, including processing and handling costs and attorneys fees. In addition, a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. Any such non-payment penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid. 4 C.F.R. §§ 102.13(d) and (e).

26. This CAFO shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

27. By signing this CAFO, Respondent certifies that, to best of its knowledge, Respondent's facility is in compliance with all requirements of RCRA, 42 U.S.C. § 6901 *et. seq.* and all regulations promulgated thereunder.

28. The effect of settlement is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in this CAFO.

29. This CAFO shall remain in full force and effect until Complainant provides Respondent with written notice that all requirements hereunder have been satisfied.

Reservation of Rights

30. Notwithstanding any other provision of this CAFO, EPA reserves the right to enforce the terms of the Final Order portion of this CAFO by initiating a judicial or administrative action under Section 3008 of RCRA, 42 U.S.C. § 6928, and to seek penalties against Respondent in an amount not to exceed \$32,500 per day per violation pursuant to Section 3008(c) and/or Section 3008(g) of RCRA, for each day of non-compliance with the terms of the

Final Order, or to seek any other remedy allowed by law. Pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, penalties of up to \$32,500 per day is now authorized for violations of Subchapter III of RCRA that occur after March 15, 2004, through January 12, 2009. For violations of Subchapter III of RCRA that occur after January 12, 2009, penalties of up to \$37,500 per day are now authorized.

31. Complainant reserves the right to take enforcement action against Respondent for any future violations of RCRA and its implementing regulations and to enforce the terms and conditions of this CAFO.

32. Except as expressly provided herein, nothing in this CAFO shall constitute or be construed as a release from any claim (civil or criminal), cause of action, or demand in law or equity by or against any person, firm, partnership, entity, or corporation for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous constituents, hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from Respondent's facility.

33. Notwithstanding any other provisions of this CAFO, an enforcement action may be brought pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, or other statutory authority, should EPA find that the future handling, storage, treatment, transportation, or disposal of solid waste or hazardous waste at Respondent's Facility may present an imminent and substantial endangerment to human health and the environment.

34. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

35. The provisions of this CAFO shall be deemed satisfied upon a written determination by Complainant that Respondent has fully implemented the actions required in the Final Order.

FINAL ORDER

Pursuant to the authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and according to the terms of this CAFO, IT IS HEREBY ORDERED THAT:

A. Payment of Civil Penalty

1. Within thirty (30) days of the effective date of this CAFO, Respondent will pay a civil penalty of \$10,387.00. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

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

2. A copy of the payment documentation shall also be mailed to:

Regional Hearing Clerk
U.S. EPA Region 7
901 North 5th Street
Kansas City, Kansas 66101

and to:

Jennifer Trotter, CNSL
U.S. EPA Region 7
901 North 5th Street
Kansas City, Kansas 66101.


3. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

B. Parties Bound

4. This Final Order portion of this CAFO shall apply to and be binding upon Complainant and Respondent, and Respondent's agents, successors and/or assigns. Respondent shall take steps to ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CAFO.


FOR COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

8-16-11
Date



Donald Toensing
Chief
Waste Enforcement and Materials Management Branch
Air and Waste Management Division

8/15/2011
Date



Jennifer Trotter
Assistant Regional Counsel
Office of Regional Counsel

FOR RESPONDENT
BOMGAARS SUPPLY, INC.

8-9-11
Date

David Meyer
Signature

DAVID MEYER
Printed Name

SR. V.P. COO
Title

IN THE MATTER OF
BOMGAARS SUPPLY, INC.
Docket No. RCRA-07-2011-0013

IT IS SO ORDERED. This Final Order is effective upon its final entry by the Regional Judicial Officer.

Aug. 17, 2011
Date

Robert Patrick
Robert Patrick
Regional Judicial Officer

IN THE MATTER OF Bomgaars Supply, Inc., Respondent
Docket No. RCRA-07-2011-0013

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Jennifer Trotter
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Mr. Patterson
Attorney at Law
Bomgaars Supply, Inc.
25043 Little Water Lane
Custer, South Dakota 57730

and

David Meyer
Senior Vice President, COO
Bomgaars Supply, Inc.
1805 Zenith Drive
Sioux City, Iowa 51103

Dated: 8/18/11



Kathy Robinson
Hearing Clerk, Region 7