UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

IN THE MATTER OF: Kmart Corporation Respondent Kmart 26A Tutu Park Mall, St. Thomas, VI 00802 (known as "Kmart #3829"); Kmart Space 1 Sunny Isles Shopping Center, St. Croix, VI 00820 (known as "Kmart #3972"); and Kmart Sunshine Mall #1 Estate Cane, Frederiksted, St. Croix, VI 00840 (known as "Kmart #7413") Proceeding under Section 3008 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6928	COMPLAINT, COMPLIANCE ORDER, AND NOTICE OF OPPORTUNITY FOR HEARING Docket No. RCRA-02-2009-7147

I. COMPLAINT

This is a civil administrative proceeding instituted pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. §§ 6901 et seq. (referred to collectively as the Act or RCRA). The United States Environmental Protection Agency (EPA) has promulgated regulations governing the handling and management of hazardous waste and used oil at 40 C.F.R. Parts 260 through 279.

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING (Complaint) serves notice of EPA's preliminary determination that Kmart Corporation (hereinafter "Respondent" or "Kmart") has violated requirements of RCRA and regulations implementing RCRA, concerning the management of hazardous waste at its facilities in Saint Thomas and Saint Croix, United States, Virgin Islands.

Pursuant to Section 3006(b) of the Act, 42 U.S.C. § 6926(b), whereby the Administrator of EPA may, if certain criteria are met, authorize a state to operate a "hazardous waste program" (within the meaning of Section 3006 of the Act, 42 U.S.C. § 6926) in lieu of the federal hazardous waste program. The United States Virgin Islands are not authorized by EPA to conduct a hazardous waste management program under Section 3006 of RCRA, 42 U.S.C. § 6926. Therefore, EPA retains primary responsibility for requirements promulgated pursuant to RCRA. As a result, all requirements in 40 C.F.R. Parts 260 through 268, and 270 through 279 relating to hazardous

waste are in effect in the United States Virgin Islands and EPA has the authority to implement and enforce these regulations.

Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1), provides, in part, that "whenever on the basis of any information the Administrator [of EPA] determines that any person has violated or is in violation of any requirement of this subchapter [Subtitle C of RCRA], the Administrator may issue an order assessing a civil penalty for any past or current violation."

Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), "[a]ny penalty assessed in the order [issued under authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a)] shall not exceed $25,000 per day of noncompliance for each violation of a requirement of [Subtitle C of RCRA]." Under authority of the Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, Public Law 101-410 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, 110 Stat. 1321, Public Law 104-134 (codified at 31 U.S.C. § 3701 note), EPA has promulgated regulations, codified at 40 C.F.R. Part 19, that, inter alia, increased to $27,500 the maximum penalty EPA might obtain pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) for violations occurring between January 31, 1997 and March 15, 2004 and the maximum penalty to $32,500 for violations occurring after March 15, 2004.

The Complainant in this proceeding, the Director of the Caribbean Environmental Protection Division, EPA, Region 2, who has been duly delegated the authority to institute this action, hereby alleges:

General Allegations

Jurisdiction

1. This Tribunal has jurisdiction over the subject matter of this action pursuant to Section 3008(a) of RCRA, 42 U.S.C. §§ 6928(a), and 40 C.F.R. § 22.1(a)(4).

Respondent's background

2. Respondent is Kmart Corporation, which is duly authorized to conduct business in the Virgin Islands of the United States.

3. Kmart, a wholly owned subsidiary of Sears Holdings Corporation, is a general merchandise retailing company. Kmart also offers photo developing services.

4. Respondent operates three facilities in the Virgin Islands. The "facilities" or "Virgin Islands Facilities", are located at:

   a. 26A Tutu Park Mall, St. Thomas, VI 00802 (known as "Kmart #3829")

   b. Space 1 Sunny Isles Shopping Center, St. Croix, VI 00820 (known as "Kmart #3972") and

c. Sunshine Mall #1 Estate Cane Frederiksted, St. Croix, VI 00840 (known as "Kmart #7413")

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

6. Respondent has conducted retail sales, photo developing services and maintenance operations at its three facilities. During the course of these activities, solid and hazardous waste has been generated and continues to be generated.

7. The facilities, although located in different areas, have several areas that are commonly identified between the three of them under the same name. These areas are:

a. Photo Lab;

b. Hazardous Waste Storage Area; and

c. Fluorescent Lamp Storage Area.

8. Each of Respondent's Facilities constitutes a "facility," within the meaning of 40 C.F.R. § 260.10.

9. Upon information and belief, Respondent has been and remains the "operator" of the three facilities as that term is defined in 40 C.F.R. § 260.10.

Notification of Hazardous Waste Generation

10. Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, Respondent informed EPA, through three Notifications of Regulated Waste Activity Form under Respondent's name "Kmart Corporation" and dated November 10, 2005 (Kmart #3829), November 10, 2005 (Kmart #3972) and November 10, 2005 (Kmart #7413) (hereinafter the "Notifications") that in the course of carrying out its activities, Respondent generated hazardous waste in its operations at the facilities mentioned under Paragraph 4 above.

11. The notifications were prepared by an employee and/or agent of Respondent in the course of carrying out his/her employment or duties.

12. In the Notifications, Respondent reported itself as generating one characteristic hazardous waste described by EPA waste code D001. In the Notifications Respondent indicated it generated between 100 and 1,000 kg/month of hazardous waste.

13. In response to the Notifications, EPA provided Respondent with EPA Identification Number VIR000000760 for Kmart #3829, VIR000000778 for Kmart #3972 and VIR000000786 for Kmart #7413.

14. The locations described in the Notifications are the Virgin Islands Facilities as set forth in paragraph "4" above.

Respondent's Generation and Storage of Waste

15. Respondent, in carrying out its retailing operations, application of photo developing products and in the course of conducting normal maintenance operations, has been generating "solid waste", as that term is defined in 40 C.F.R. § 261.2, in various retailing areas, warehouses, maintenance areas, and other areas of the Facilities.

16. As part of the above activities, pursuant to records provided by Respondent to EPA, Respondent has generated solid waste in various areas of the Facilities since at least 2005 and it continues to do so.

17. As part of the above activities and maintenance operations, Respondent has generated, in the photo developing areas and other areas of the Facilities, "hazardous waste," as that term is defined in 40 C.F.R. § 261.3.

18. At all times mentioned in this Complaint and subsequent thereto, Respondent has been a hazardous waste "generator," at its Virgin Islands Facilities as that term is defined in 40 C.F.R. § 260.10.

19. A generator may accumulate, for a limited period of time, specified small or large quantities of hazardous waste generated on site without obtaining a permit or without having interim status provided it complies with all applicable conditions set forth in 40 C.F.R. § 262.34.

20. Since at least the time when it notified EPA that it was a hazardous waste generator, Respondent has stored hazardous wastes on site for at least 180 days but has not complied with all applicable conditions set forth in 40 C.F.R. § 262.34

21. The Virgin Islands Facilities constitute a "new hazardous waste management facility" as that term is defined in 40 C.F.R. § 260.10.

22. The Virgin Islands Facilities are and have been a "storage" facility for "hazardous waste," as those terms are defined in 40 C.F.R. § 260.10.

23. Respondent, at all times mentioned in this Complaint and subsequent thereto, was the operator of hazardous waste facilities that store hazardous waste in containers as those terms are defined in 40 C.F.R. § 260.10.

EPA Investigative Activities

24. Duly designated representatives of EPA conducted a compliance evaluation inspection under Section 3007 of RCRA, 42 U.S.C. § 6927, at each of the facilities (the

"Inspections"). The purpose of the inspections was to evaluate Respondent's compliance at each facility with applicable requirements of RCRA and its implementing regulations. The dates of the inspections are as follows:

a. August 19, 2008 at Kmart #3829

b. August 21, 2008 at Kmart #3972

c. August 22, 2008 at Kmart #7413

25. On or about the dates set forth above in Paragraph "24", duly designated representatives of EPA also held at each facility an inspection closing conference with Respondent's representatives.

26. During the closing conference, EPA discussed the preliminary findings of the compliance evaluation inspections.

27. On or about September 30, 2008, EPA sent Respondent, pursuant to Section 3008 of RCRA, 42 U.S.C. §§ 6927 and 6928, three Notices of Violation ("NOV"), one for each facility, regarding its Virgin Islands Facilities, citing RCRA violations discovered during the Inspections and requiring the submission of certain information.

28. On or about December 9, 2008, Respondent submitted a response to each NOV. The Responses acknowledge the existence of the violations cited in the NOV and documents Respondent's efforts to correct them.

29. The Response was prepared by an employee or agent of Respondent's Virgin Islands Facilities in the course of carrying out his/her employment or duties.

30. The violations described below are common for the three Virgin Islands Facilities unless stated otherwise.

COUNT 1. FAILURE TO MAKE HAZARDOUS WASTE DETERMINATIONS

31. Complainant re-alleges each applicable allegation contained in paragraphs "1" through "30", as if fully set forth herein.

32. Pursuant to 40 C.F.R. § 262.11, a person who generates "solid waste," as defined in 40 C.F.R. § 261.2, must determine if the solid waste is a hazardous waste using the procedures specified in that provision.

33. Pursuant to 40 C.F.R. § 261.2, subject to certain exclusions, a "solid waste" is any "discarded material" that includes "abandoned," "recycled" or "inherently waste-like materials," as those terms are further defined therein.

34. Pursuant to 40 C.F.R. § 261.2(b), materials are solid wastes if they are "abandoned" by

being "disposed of," "burned or incinerated" or "accumulated, stored, or treated before or in lieu of being abandoned by being disposed of, burned or incinerated."

35. Prior to at least the time of the first Inspection, August 19, 2008, Respondent generated at its Virgin Islands Facilities at least the following waste materials, numerous discarded spent ballasts from fluorescent lighting fixtures. At the time of the inspections, Kmart representatives informed EPA inspectors that a hazardous waste determination had not been made for this waste.

36. To the best of EPA's knowledge, from at least February 28, 2008, Respondent's representatives informed EPA at the time of the Inspections, that it had accumulated or stored at its Virgin Islands Facilities the material identified in paragraph "35" before or in lieu of it being disposed of.

37. To the best of EPA's knowledge, from at least February 28, 2008, Respondent discarded or disposed of the waste material identified in paragraph "35" in its Virgin Islands Facilities, by either accumulating them in a trailer or in the Fluorescent Lamp Storage Areas.

38. The materials identified in paragraph "35" above is a "discarded material" and "solid waste," as defined in 40 C.F.R. § 261.2.

39. As of August 19, 2008, Respondent had not determined if the materials identified in paragraph "35" constituted hazardous wastes.

40. Respondent's failure to determine if the solid waste generated at the Virgin Islands Facilities constitutes a hazardous waste is a violation of 40 C.F.R. § 262.11.

COUNT 2. STORAGE OF HAZARDOUS WASTE WITHOUT A PERMIT

41. Complainant re-alleges each allegation contained in paragraphs "1" through "30", inclusive, as if fully set forth herein.

Legal requirements for permits

42. Pursuant to each of the below provisions in this paragraph, the owner or operator of an existing hazardous waste management facility must obtain a permit or qualify for interim status in order to treat, store or dispose of such waste:
    a. Section 3005 of the Act, 42 U.S.C. § 6925; 40 C.F.R. § 270.1(c) and
    b. 40 C.F.R. § 270.70.

43. To be exempt from permit requirements, a generator who generates greater than 100 kg but less than 1,000 kg of hazardous waste in a calendar month, must comply with all applicable provisions of 40 C.F.R. § 262.34.

Storage of hazardous waste

44. At the time of the Inspections, Respondent was storing hazardous waste in containers at its Virgin Islands Facilities, including, but not limited to the Hazardous Waste Storage Areas and the Photo Labs. Respondent stored hazardous waste before or in lieu of the waste being disposed of.

45. During at least the period from May 26, 2008 (the date of a label posted on a wall) until August 19, 2008 (the date of the first Inspection), Respondent was storing hazardous waste at its Virgin Islands Facilities. Respondent stored hazardous waste before or in lieu of the waste being disposed of.

Respondent's failure to qualify for an exemption from the permitting requirements

46. Respondent did not comply with all applicable conditions set forth in 40 C.F.R. § 262.34 for Small Quantity Generators (SQGs). Respondent's failure to comply with such conditions meant that it could not accumulate, for a limited period of time, hazardous waste generated on site without a permit.

Failure to mark containers with the "accumulation start dates" and the with the words "hazardous waste"

47. Pursuant to 40 C.F.R. § 262.34(a)(2), a generator may accumulate hazardous waste on-site without being subject to permitting requirements provided that, inter alia, the date upon which each period of accumulation begins is clearly marked and visible for inspection on each container.

48. At the time of the Inspections and, at times prior thereto, Respondent failed to have hazardous waste labels with an accumulation start date (i.e., the date when the hazardous waste started to be stored in the container) on at least the following containers:

    a. Two 55-gallon drums and one 5-gallon container containing waste silver bearing solution at the Hazardous Waste Storage Area of the Kmart 3972 facility;

    b. Three 55-gallon drums containing waste silver bearing solution at the Hazardous Waste Storage Area of the Kmart 3829 facility;

    c. Two 5-gallon containers with waste silver bearing solution at the Hazardous Waste Storage Area of the Kmart 7413 facility;

49. Pursuant to 40 C.F.R. § 262.34(a)(3), a generator may accumulate hazardous waste on-site without being subject to permitting requirements provided, inter alia, that while being accumulated on-site, containers in which hazardous waste are stored at a facility are marked clearly with the words, "Hazardous Waste".

50. At the time of the Inspections and, at times prior thereto, the following containers which

were being stored at the facilities were not labeled or marked with the words "Hazardous Waste":

a. Two 55-gallon drums and, one 5-gallon container containing waste silver bearing solution at the Hazardous Waste Storage Area of the Kmart 3972 facility;

b. Three 55-gallon drums containing waste silver bearing solution at the Hazardous Waste Storage Area of the Kmart 3829 facility;

c. Two 5-gallon containers with waste silver bearing solution at the Hazardous Waste Storage Area of the Kmart 7413 facility;

Respondent's failure to have required Permit

51. During at least the period from May 26, 2008 until August 19, 2008, and at times prior thereto, Respondent had failed to meet conditions necessary to accumulate hazardous waste without having obtained a permit or qualifying for interim status.

52. During at least the period from May 26, 2008 until August 19, 2008:

a. Respondent was storing hazardous waste at the facilities without a permit;

b. Respondent was operating hazardous waste storage facilities without having obtained a RCRA permit for its facilities; and

c. Respondent was operating existing hazardous waste management facilities without having qualified for interim status at its facilities

53. Respondent's operation of its facilities, existing hazardous waste management facilities, without having obtained a permit or qualifying for interim status constitutes a violation of Section 3005 of the Act, 42 U.S.C. § 6925; and 40 C.F.R. § 270.1(c).

COUNT 3. FAILURE TO COMPLY WITH UNIVERSAL WASTE REQUIREMENTS

54. Complainant re-alleges each allegation contained in paragraphs "1" through "30", inclusive, as if fully set forth herein.

55. Pursuant to 40.C.F.R. § 273.9, a "small quantity handler of universal waste" means a universal waste handler (i.e., a generator of universal waste) who does not accumulate 5,000 kilograms or more of universal waste (batteries, pesticides, mercury-containing equipment or lamps, calculated collectively) at any time

Universal Waste Handling

56. Pursuant to 40 C.F.R. § 273.13(d)(1), a small quantity handler of universal waste must manage lamps in a way that prevents releases of any universal waste or component of

universal waste to the environment as follows:

a. Contain any lamp in containers or packages that are structurally sound, adequate to prevent breakage, and compatible with the contents of the lamps. The containers must remain closed and must lack evidence of leakage, spillage or damage that could cause leakage, and
b. Immediately clean up and place in a container any lamp that is broken and must place in a container any lamp that shows evidence of breakage, leakage or damage.

57. At the time of the Inspections, Respondent was storing universal waste lamps at the Fluorescent Lamp Storage Areas. Some of these lamps were not stored in containers or packages. According to Respondent's response to each of the NOVs, Respondent was storing 8,931 lamps as follows:

a. Kmart #3829

1. Four foot lamps – 720
2. eight foot lamps – 2,265

b. Kmart #3972

1. U-tube lamps – 60
2. Two foot lamps – 30
3. Four foot lamps – 240
4. eight foot lamps – 465

c. Kmart #7413

1. Four foot lamps – 1,216
2. Eight foot lamps – 3935

58. Respondent's response to the NOV also indicated that 282 lamps were broken.

Universal Waste Labeling

59. Pursuant to 40 C.F.R. §273.14(e), a small quantity handler of universal lamps must label or mark each lamp or a container or package in which such lamps are contained with one of the following phrases: "Universal Waste – Lamp(s)," or "Waste Lamp(s)," or "Used Lamp(s)".

60. At the time of the Inspections, EPA found that Respondent had failed to label the containers with waste lamps with the words "Universal Waste – Lamp(s)," or "Waste Lamp(s)," or "Used Lamp(s)".

Universal Waste Accumulation Time Limits

61. Pursuant to 40 C.F.R. § 275.15(a), a small quantity handler of universal waste may accumulate universal waste for no longer than one year from the date the universal waste is generated, or received from another handler.

62. Pursuant to 40 C.F.R. § 275.15(c), the universal waste handler must be able to demonstrate the length of time that the universal waste has been accumulated from the date it becomes a waste or is received by:

    a. Placing the universal waste in a container and marking or labeling the container with the earliest date that the universal waste became a waste or was received;
    b. Marking or labeling each individual item of universal waste (e.g. each battery or thermostat) with the date it became a waste or was received;
    c. Maintaining an inventory system on-site that identifies the earliest date that any universal waste in a group of universal waste items or a group of containers of universal waste became a waste or was received;
    d. Placing the waste in a specific accumulation area and identifying the earliest date that any waste in the area became a waste or was received; or
    e. Any other method, which clearly demonstrates the length of time that the universal waste has been accumulated, from the date it becomes a waste or is received.

63. At the time of the Inspections, containers and lamps were not labeled or marked with the date the lamps were accumulated at each of the three facilities.

64. At the time of the Inspections, Respondent failed to demonstrate to EPA's representatives that it had complied with at least one of the requirements mentioned under 40 C.F.R. § 275.15(c) to demonstrate the length of time it had been accumulating universal waste.

65. As a small quantity handler of universal waste, Respondent failed to comply with the regulations under 40 C.F.R. Part 273, Subpart B, for management of universal waste.

II. PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 3008(a)(3) of the Act, 42 U.S.C. § 6928(a)(3). For purposes of determining the amount of any penalty assessed, Section 3008(a)(3) requires EPA to "take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." To develop the proposed penalty in this complaint, the Complainant has taken into account the particular facts and circumstances of this case and used EPA's 2003 RCRA Civil Penalty Policy, a copy of which is available upon request or can be found on the Internet at the following address:

http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf

This policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors to particular cases.

The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, required EPA to adjust its penalties for inflation on a periodic basis. The penalty amounts were amended for violations occurring between January 31, 1997 and March 14, 2004. The maximum civil penalty under Sections 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), for those violations is $27,500 per day of violation. For violations after March 15, 2004, the maximum penalty is $32,500 per day of violations.

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

In view of the above-cited violations, and pursuant to the authority of Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), and the RCRA Civil Penalty Policy, including the seriousness of the violations and any good faith efforts by the Respondent to comply with applicable requirements, the Complainant herewith proposes the assessment of a civil penalty in the total amount of One Hundred Twenty Four Thousand Five Hundred Sixteen ($124,516.00) dollars as follows:

Count 1: $3,868.00
Count 2: $52,554.00
Count 3: $68,094.00
Total Proposed Penalty: $124,516.00

III. COMPLIANCE ORDER

Based upon the foregoing, and pursuant to the authority of Section 3008 of the Act, Complainant herewith issues the following Compliance Order to the Respondent, which shall take effect (i.e., the effective date) thirty (30) days after service of this Order, unless by that date Respondent has requested a hearing pursuant to 40 C.F.R. § 22.15. See 42 U.S.C. § 6928(b) and 40 C.F.R. §§ 22.37(b) and 22.7(c):

1. Within thirty (30) calendar days of the effective date of this Compliance Order, Respondent shall, to the extent it has not already done so, and to the extent still possible, make the required determinations whether solid wastes previously generated at the Virgin Islands Facilities are hazardous wastes. Respondent shall comply with 40 C.F.R. § 262.11 for any newly generated solid waste at each of its Facilities in the US Virgin Islands. This shall be extended to any facility not included in this Complaint, Compliance Order and Opportunity for Hearing.

2. Within ten (10) calendar days of the effective date of this Compliance Order, Respondent

shall, to the extent it has not already done so, at its Virgin Islands Facilities:

a. Place spill control material at the Hazardous Waste Storage Area.

b. Only use containers that are clearly labeled with the words "Hazardous Waste" and with other words that identify their contents to accumulate and/or store hazardous wastes;

c. Only use containers that are clearly labeled with the words "Universal Waste – Lamp(s)," or "Waste Lamp(s)," or "Used Lamp(s)" and with other words that identify their contents to accumulate and/or store universal wastes;

d. Only use containers that are clearly marked with the accumulation start date to accumulate or store hazardous waste and universal waste.

e. Clean up and properly manage any spill of hazardous waste or universal waste. This includes but is not limited to cleaning up and placing broken lamps in containers that are properly labeled.

3. No later than ten (10) calendar days of the effective date of this Compliance Order, if it has not already been doing so, Respondent shall conduct weekly inspections at its Virgin Islands Facilities, of areas in which hazardous wastes are being stored.

4. Within thirty (30) calendar days of the effective date of this Compliance Order, Respondent shall comply with all other applicable federal and state regulatory requirements for hazardous waste generators for its Virgin Islands Facilities.

5. Respondent shall submit to EPA within forty (40) calendar days of the effective date of this Compliance Order written notice of its compliance (accompanied by a copy of all appropriate supporting documentation) or noncompliance for each of the requirements cited in Paragraphs "1" through "4" of this Compliance Order, above. If Respondent is in noncompliance with a particular requirement, the notice shall state the reasons for noncompliance and shall provide a schedule for achieving prompt compliance with the requirement.

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

Jesse Avilés
U.S. Environmental Protection Agency, Region 2
Caribbean Environmental Protection Division
Response & Remediation Branch
Centro Europa Building, Suite 417
1492 Ponce de Leon Avenue
San Juan, Puerto Rico 00907

Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all other applicable RCRA statutory or regulatory (federal and/or local) provisions, nor does such compliance release Respondent from liability for any violations at the Facility. In addition, nothing herein waives, prejudices or otherwise affects EPA's right to enforce any applicable provision of law, and to seek and obtain any appropriate penalty or remedy under any such law, regarding Respondent's generation, handling and/or management of hazardous waste at the Facility.

IV. NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

Pursuant to the terms of Section 3008(c) of RCRA and the Debt Collection Improvement Act of 1996, a violator failing to take corrective action within the time specified in a compliance order is liable for a civil penalty of up to $32,500 for each day of continued noncompliance. Such continued noncompliance may also result in suspension or revocation of any permits issued to the violator whether issued by EPA.

V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

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

A. Answering the Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty and/or the Compliance Order is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within 30 days after service of the Complaint (40 C.F.R. §§ 22.15(a) and 22.7(c)). The address of the Regional Hearing Clerk of EPA, Region 2, is:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor - Room 1631,
New York, New York 10007-1866

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and the Assistant Regional Counsel mentioned in Section VI below and any other party to the action (40 C.F.R. § 22.15(a)).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent

has any knowledge (40 C.F.R. § 22.15(b)). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied (40 C.F.R. § 22.15(b)).

The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing (40 C.F.R. § 22.15(b)).

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

B. Opportunity To Request A Hearing

If requested by Respondent, a hearing upon the issues raised by the Complaint and Answer may be held (40 C.F.R. § 22.15(c)). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication (40 C.F.R. § 22.15(c)). With regard to the Compliance Order in the Complaint, unless Respondent requests a hearing pursuant to 40 C.F.R. § 22.15 within thirty (30) days after the Compliance Order is served, the Compliance Order shall automatically become final (40 C.F.R. § 22.37).

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

C. Failure To Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation (40 C.F.R. § 22.15(d)). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion (40 C.F.R. § 22.17(a)). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations (40 C.F.R. § 22.17(a)). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c) as set forth in 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court. Any default order requiring compliance action shall be effective and enforceable against Respondent without further proceedings on the date the default order becomes final under 40

C.F.R. § 22.27(c) as set forth in 40 C.F.R. § 22.17(d).

D. Exhaustion Of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Agency's Environmental Appeals Board ("EAB"; see 40 C.F.R. § 1.25(e)) pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review.(40 C.F.R. § 22.27(d)).

To appeal an initial decision to the EAB, Respondent must do so "[w]ithin thirty (30) days after the initial decision is served" (40 C.F.R. § 22.30(a)). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, "five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document." Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

VI. INFORMAL SETTLEMENT CONFERENCE

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

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

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

Lourdes del Carmen Rodríguez, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
Centro Europa Building, Suite 417
1492 Ponce de León Avenue
San Juan, PR 00907
Telephone: (787) 977-5819

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing (40 C.F.R. § 22.18(b)(1)). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c). A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

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

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

VII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

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

COMPLAINANT:

DATE: September 25, 2009

Carl Axel-Peter Soderberg
Director
Caribbean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2

To: William K. Phelan
Director
Kmart Corporation
3333 Beverly Road, B5-362A
Hoffman Estates, Illinois 60179

cc: Michael B. Olsen, PG
Sears Holdings Management Corporation
3333 Beverly Road, B5-362A
Hoffman Estates, Illinois 60179

cc: Ms. Clanicia J. Pelle, Ph.D.
Solid Waste Supervisor
Department of Planning and Natural Resources
Division of Environmental Protection
45 Mars Hill, Frederiksted
St. Croix, USVI 00840

bcc: Carl-Axel P. Soderberg (2CEPD-Director)
Ariel Iglesias (2CEPD-RRB)
Lourdes del Carmen Rodríguez (2ORC)
William K. Sawyer (2ORC-WTSB)
Jesse Avilés (2CEPD-RRB)
Hanna Maciejko (DECA-RPB)
Phillips Flax, DECA-RCB

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

IN THE MATTER OF: K-Mart Corporation Respondent: 26A Tutu Park Mall St. Thomas, VI 00802 (known as "Kmart #3829") Space 1 Sunny Isles Shopping Center St. Croix, VI 00820 (known as "Kmart #3972"); and Sunshine Mall #1 Estate Cane Frederiksted, VI 00840 (known as "Kmart #7413") Proceeding under Section 3008 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6928	COMPLAINT, COMPLIANCE ORDER, AND NOTICE OF OPPORTUNITY FOR HEARING Docket No. RCRA-02-2009-7147

CERTIFICATE OF SERVICE

This is to certify that I have on this day caused to be mailed a copy of the foregoing Complaint, with attachments, bearing docket number RCRA-02-2009-7147 and a copy of the Consolidated Rules of Practice which are codified at 40 C.F.R. Part 22, as follows:
Certified Mail/Return Receipt Requested, to:

William K. Phelan
Director
Kmart Corporation
3333 Beverly Road, B5-362A
Hoffman Estates, Illinois 60179

Michael B. Olsen, PG
Director, Environmental Affairs
Law Department
Sears Holdings Management Corporation
3333 Beverly Road, B5-362A
Hoffman Estates, Illinois 60179

Original and a copy of the Complaint for filing by Fed Ex:
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2,
290 Broadway, 16th floor,
New York, New York 10007-1866

Dated: September 25, 2009

ORC-CT, San Juan, Puerto Rico