

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)
)
Rail Car America, Inc.)
Formerly d/b/a/ Special Metal Services)
)
4617 South 29th Plaza)
Omaha, Nebraska 68107)
)
RCRA I.D. NED981507908)
)
Respondent)
_____)

Docket No RCRA-07-2008-0002

ORDER

Pursuant to 40 C.F.R. § 22.5(a)(1), facsimile filing of page 14 of the Consent Agreement and Final Order is authorized in this proceeding. Counsel for Complainant shall file the original page 14, which shall replace the facsimile of page 14, within one day of receipt of the document from Respondent.

Dated:

September 29, 2008



Robert L. Patrick
Regional Judicial Officer

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

08 SEP 20 AM 8:07
ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
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IN THE MATTER OF:)
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Rail Car America, Inc.)
Formerly d/b/a/ Special Metal Services.)
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4617 South 29th Plaza)
Omaha, Nebraska 68107)
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RCRA I.D. No. NED981507908)
)
Respondent.)
)
Proceeding under Section 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-07-2008-0002

I. PRELIMINARY STATEMENT

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and Rail Car America, Inc., formerly d/b/a Special Metal Services (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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules of Practice), 40 Code of Federal Regulations (C.F.R.) §§ 22.13(b) and 22.18(b)(2).

II. ALLEGATIONS

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 or the Act), and the Hazardous and Solid Waste Amendments of 1984 (HSWA), 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.

Parties

3. The Complainant is the Chief of the RCRA Enforcement and State Programs Branch in the Air and Waste Management Division of EPA, Region 7, as delegated from the Administrator of EPA pursuant to EPA Delegation No. 8-9-A, dated March 20, 1985; EPA Delegation No. R7-8-9-A, dated January 1, 1995 and R-DIV-8-9-A, dated June 15, 2005.

4. The Respondent is Rail Car America, Inc. (RCA), formerly d/b/a Special Metal Services (SMS). Rail Car America, Inc. is a corporation organized under the laws of the State of California and active and in good standing in the state of Nebraska.

Statutory and Regulatory Framework

5. The State of Nebraska has been granted authorization to administer and enforce a hazardous waste program pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, and the State of Nebraska has adopted by reference the federal regulations cited herein at pertinent parts of Title 128, Chapter 4 of the Nebraska Administrative Code. Section 3008 of RCRA, 42 U.S.C. § 6928, authorizes EPA to enforce the provisions of the authorized State program and the regulations

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promulgated thereunder. 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.

Factual Background

7. Respondent is a California corporation in good standing and active in the state of Nebraska. Respondent formerly conducted business in the state of Nebraska under the name Special Metal Services (SMS) and is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

8. At all times relevant to this CAFO, SMS, located at 4617 South 29th Plaza, Omaha, Douglas County, Nebraska, conducted hard chrome plating, primarily on shafts for new and used railcar hydraulic cushioning units. At the SMS location in Omaha, Respondent employed approximately 4 people. SMS has operated at its present location for approximately 20 years. On September 8, 2006, SMS was sold to Gunderson Rail Services, LLC.

9. Respondent generated hazardous waste as a result of its plating operations. Specifically, Respondent generated spent copper plating solution, and at the time of EPA’s inspection of the facility, Respondent had large quantities of outdated chemicals in storage at the

In the matter of Rail Car America, Inc., formerly d/b/a Special Metal Services

Facility, including Copper Plating Solution, Nickel Plating Solution, Aluminum Conditioner and Dygleam 78.

10. Each of the wastes listed in paragraph 9 is a “solid waste” within the meaning of Neb. Admin. Code Title 128, Ch. 2-003, and also a “hazardous waste” within the meaning of Neb. Admin Code Title 128, Ch. 2-004.

11. Once a waste is classified a hazardous waste, it is assigned a waste code pursuant to Neb. Admin. Code Title 128, Ch.3. The waste codes for the wastes listed in paragraph 9 are D002, D006, and D007.

12. Respondent filed a notification of hazardous waste activity on or about July 28, 1986, as a small quantity generator (generating between 100 and 1000 pounds of hazardous waste per month).

13. On or about January 11, 2005, an EPA representative conducted a Compliance Evaluation Inspection at the SMS facility (hereinafter “the January 2005 inspection”).

14. At the time of the January 2005 inspection, Respondent had generated more than 1000 kilograms of hazardous waste at its Facility and was therefore classified as a large quantity generator pursuant to Neb. Admin. Code Title 128, Ch. 1-079. During the inspection, the inspector noted several violations of RCRA, including the violations set forth below.

Alleged Violations

Failure to Perform Hazardous Waste Determinations

15. Complainant hereby incorporates the allegations contained in paragraphs 1 through 14 above, as if fully set forth herein.

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16. Neb. Admin. Code, Title 128, Ch. 4,002.01 requires generators of solid waste to determine whether their waste is a hazardous waste.

17. At the time of the January 2005 inspection, Facility representatives told the inspector that the outdated chemicals, spent copper plating solution and spent nickel plating solution referenced in paragraph 9 above had been at the Facility since the decorative chrome plating line had been discontinued in approximately January, 1995. Some of the containers of outdated chemicals had expiration dates of 1994 or 1995.

18. At the time of the January 2005 inspection, Respondent had not performed hazardous waste determinations on the outdated chemicals and spent copper and nickel plating solutions in storage at the Facility, in violation of Neb. Admin. Code, Title 128, Ch. 4,002.

Operating a hazardous waste storage facility without a permit

19. Complainant hereby incorporates the allegations contained in paragraphs 1 through 14 above, as if fully set forth herein.

20. Section 3005 of RCRA, 42 U.S.C. § 6925, and Neb.Rev.Stat. § 81-1505(13) state that operation of a hazardous waste storage facility without a permit is prohibited.

21. Neb. Admin. Code, Title 128, Ch. 10, 004.01 provides that generators of over 1000 kg (2,200 pounds) per month of hazardous waste may store the waste at their facility for 90 days without a permit, provided certain conditions are met.

22. At the time of the January 2005 inspection, Respondent was storing approximately 3,400 pounds of hazardous plating waste at its facility.

23. Respondent had been storing the hazardous plating waste for at least eight years.

24. Respondent did not have a permit to operate a hazardous waste storage facility.

25. Respondent's storage of 3,400 pounds of hazardous waste for over 90 days is a violation of 3005 of RCRA, 42 U.S.C. § 6925, and Neb.Rev.Stat. § 81-1505(13).

CONSENT AGREEMENT

1. Respondent and EPA agree to the terms of this CAFO 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 set forth below.
3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this CAFO. Respondent's entry into this Consent Agreement shall not be construed as an admission of liability, or otherwise, for the factual allegations and legal conclusions set forth in paragraphs 2 and 5 through 25 of Section II (Allegations).
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 attorney's fees.
6. This CAFO addresses all civil administrative claims for the RCRA violations 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 Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

In the matter of Rail Car America, Inc., formerly d/b/a Special Metal Services

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 \$72,842.00, as set forth in paragraph 1 of the Final Order.

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

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

12. This CAFO shall remain in full force and effect until Complainant provides Respondent with written notice, in accordance with paragraph 18 of the Final Order, that all requirements hereunder have been satisfied.

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 \$72,842.00.

2. Payment of the penalty shall be by cashier or certified check made payable to “Treasurer of the United States” and remitted to:

U.S. EPA Region 7
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000

The Respondent shall reference the Docket Number on the check. A copy of the check shall also be mailed to EPA’s representative identified in paragraph 10 below.

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. Compliance Actions

4. Within thirty (30) days of the effective date of the Final Order, Respondent shall provide documentation to EPA’s representative identified below that Respondent properly disposed of all hazardous waste that had been in storage at the Facility at the time of the January 2005 inspection. Such documentation shall be sent to EPA’s representative identified in paragraph 10 below.

5. Within thirty (30) calendar days of the effective date of this Final Order, Respondent shall submit to EPA a sampling plan which, at a minimum, shall include the following:

a. The sampling plan must set forth a plan for sampling the concrete pad where a pole barn was formerly standing, and where the drums of plating solution were stored. At a minimum, the plan shall provide for a representative number of samples, including wipe samples of the concrete and soil samples from around the concrete pad. In addition, if there are any

In the matter of Rail Car America, Inc., formerly d/b/a Special Metal Services

cracks or breaches in the concrete pad, soil samples from beneath the breached areas will be obtained for analysis.

b. The sampling plan will contain a health and safety plan and shall provide that the samples will be analyzed for chrome and cadmium using EPA-approved sampling methods. In addition, the plan shall contain a quality assurance plan for analysis of the samples.

c. The sampling plan shall contain a schedule for completion of all activities, and shall provide a schedule for submission of a report at the completion of all sampling activities.

d. The sampling plan shall contain a statement of qualifications of any consultant retained to perform the work required by this Final Order.

e. The sampling plan shall provide that Respondent will notify EPA's representative identified in paragraph 10 below fourteen (14) days prior to initiating sampling activities.

f. Respondent shall exercise best efforts to obtain access for all activities from the current owner of the Special Metal Services facility, and shall notify EPA in the event that access is denied. In the event that access is denied, deadlines for submission of deliverables under this paragraph may be extended by written notification of EPA's representative identified in paragraph 10 below.

6. The sampling plan shall be reviewed and approved in accordance with the procedures set forth in paragraph 11 below.

7. Within fourteen (14) days of EPA's approval of the plan, Respondent shall implement the plan in accordance with the schedules contained therein. Once the plan has been approved by EPA, the plan shall be incorporated into and become an enforceable part of this Final Order.

In the matter of Rail Car America, Inc., formerly d/b/a Special Metal Services

8. Based on the final report, EPA, in consultation with the Nebraska Department of Environmental Quality (NDEQ), will determine whether closure of the former drum storage area is necessary.

9. Within thirty (30) days of receipt of notification to Respondent by EPA that closure activities are necessary, if any, Respondent shall submit a closure plan to NDEQ for the area that conforms to the requirements of 40 C.F.R. Part 265, Subparts G and H. Any such closure plan shall be reviewed, commented on and approved by NDEQ, and any work beyond submission of the closure plan shall be supervised and directed by NDEQ, in consultation with EPA. The plan shall be submitted to:

Bill Gidley
Supervisor, Waste Management Section
Nebraska Department of Environmental Quality
1200 "N" Street, Suite 400
P.O. Box 98922
Lincoln, Nebraska 68509

A copy of the closure plan shall also be provided to EPA's representative identified in paragraph 10 below.

C. Submittals

10. All documents required to be submitted to EPA pursuant to this Final Order shall be sent to:

Deborah Finger AWMD/RESP
U.S. EPA Region VII
901 N. 5th Street
Kansas City, Kansas 66101
Phone: (913) 551-7164
Fax: (913) 551-9164
E-mail: Finger.Deborah@epa.gov.

11. All documents, plans or other submittals requiring EPA review and approval shall be reviewed pursuant to the procedures outlined in this paragraph. EPA's representative will review the document, plan or other submittal and provide comments to Respondent regarding any deficiencies noted in the document. Respondent shall correct any such noted deficiencies within thirty (30) days of the receipt of EPA's comments. If any such deficiencies are not corrected within thirty (30) days of receipt of comments, EPA may unilaterally modify the document, plan or other submittal and return it to Respondent. Once a document, plan or other submittal has been approved or modified by EPA, Respondent shall implement the plan or submit any documents required as set forth in the modified submittal. All references to "days" shall mean calendar days for the purposes of this Final Order.

12. Respondent may assert a business confidentiality claim pursuant to 40 C.F.R. 2.203(b) with respect to all or part of any information submitted to EPA pursuant to this Final Order. EPA shall disclose information covered by a business confidentiality claim only to the extent permitted by, and by means of the procedures set forth at, 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to Respondent.

C. Parties Bound

13. This Final Order portion of this CAFO shall apply to and be binding upon Respondent and Respondent's agents, successors, and/or assigns. Respondent shall 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.

D. Reservation of Rights

14. 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 Thirty-two Thousand Five Hundred Dollars (\$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.

15. 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.

16. 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.

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

18. 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.

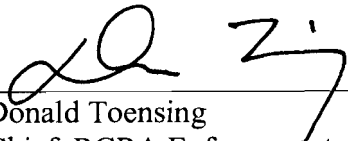
In the matter of Rail Car America, Inc., formerly d/b/a Special Metal Services

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

9-26-08

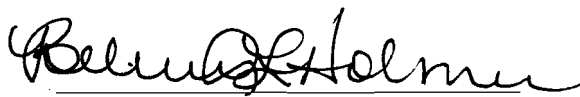
Date



Donald Toensing
Chief, RCRA Enforcement and State Programs Branch
Air and Waste Management Division
U.S. Environmental Protection Agency
Region 7

9/26/08

Date



Belinda L. Holmes
Senior Counsel
U.S. Environmental Protection Agency
Region 7

For Respondent Rail Car America, Inc., formerly d/b/a/ Special Metal Services:

Date

Signature _____

Harold A. Whitbeck, President
Printed name and title

In the matter of Rail Car America, Inc., formerly d/b/a Special Metal Services

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date

Donald Toensing
Chief, RCRA Enforcement and State Programs Branch
Air and Waste Management Division
U.S. Environmental Protection Agency
Region 7

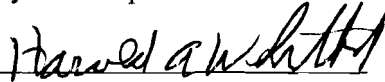
Date

Belinda L. Holmes
Senior Counsel
U.S. Environmental Protection Agency
Region 7

For Respondent Rail Car America, Inc., formerly d/b/a/ Special Metal Services:

9-23-08

Date

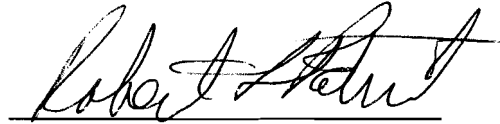
Signature 

Harold A. Whitbeck, President

Printed Name & Title

IN THE MATTER of Rail Car America, Inc. Formerly d/b/a Special Metal Services
Docket No. RCRA-07-2008-0002

IT IS SO ORDERED. This Order shall become effective immediately.



Robert L. Patrick
Regional Judicial Officer
U.S. Environmental Protection Agency
Region VII

September 29, 2008
Date

IN THE MATTER OF Rail Car America, Inc., Formerly d/b/a Special Metal Services,
Respondent
Docket No. RCRA-07-2008-0002

CERTIFICATE OF SERVICE

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


Copy hand delivered to
Attorney for Complainant:

Belinda L. Holmes
Senior Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Original by Certified Mail Return Receipt to:

Mark E. Johnson, Esq.
Stinson Morrison Hecker LLP
1201 Walnut, Suite 2900
Kansas City, Missouri 64106-2150

Dated: 9/29/08


Kathy Robinson
Hearing Clerk, Region 7