

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 N. 5TH STREET

KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

Big Dog Motorcycles, LLC)

1212 North Mosely)

Wichita, Kansas 67214)

RCRA ID: KSD073329153)

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-07-2009-0014

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and Big Dog Motorcycles, LLC (Respondent or Big Dog) 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).

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 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 (CA/FO) serves as notice that the EPA has reason to believe that Respondent violated Section 3005 of RCRA, 42 U.S.C. § 6925.

Section II

Parties

3. The Complainant is the Chief of the RCRA Enforcement and State Programs Branch in the Air and Waste Management Division of the EPA, Region 7, as duly delegated from the Administrator of the EPA.

4. The Respondent is Big Dog Motorcycles, LLC, a company organized under the laws of Arizona and licensed to do business in the state of Kansas.

Statutory and Regulatory Framework

5. The state of Kansas 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 Kansas has adopted by reference the federal regulations cited herein at pertinent parts of Title 28, Article 31 of the Kansas Administrative Regulations (hereinafter "K.A.R. 28-31"). Section 3008 of RCRA, 42 U.S.C. § 6928, authorizes the EPA to enforce the provisions of the authorized state program and the regulations promulgated thereunder. When the 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 though 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 Arizona limited liability company authorized to conduct business in the state of Kansas and is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

8. Respondent has a facility located at 1212 North Mosley, Wichita, Kansas. Respondent is a manufacturer of custom built motorcycles and currently employs less than 100 people.

9. As part of its operations at the 1212 North Mosely facility, Respondent generates waste, including hazardous wastes with the hazardous waste numbers D001, F003 and F005. Respondent also generates universal waste, as defined at 40 CFR § 273.9 from its fluorescent lamps.

10. The regulations for determining whether a waste is a solid and/or hazardous waste are set forth at K.A.R. 28-31-1(a)(2) and (3), which incorporate by reference the regulations at 40 C.F.R. Parts 260 and 261. Each of the wastes listed in paragraph 9 above is a “solid waste” and

all of the wastes except the universal waste are also “hazardous wastes” within the meaning of these regulations.

11. Respondent has filed a notification of hazardous waste activity with the Kansas Department of Health and Environment (KDHE) stating that Big Dog was a “Kansas generator” within the meaning of K.A.R. 28-31-2(d). This hazardous waste notification was last updated January 16, 2008.

12. On or about November 18, 2008, an EPA representative conducted a Compliance Evaluation Inspection at Respondent’s facility located at 1212 North Mosley, Wichita, Kansas (hereinafter “the EPA inspection”).

13. During the EPA inspection, the inspector observed that Respondent had generated and had in storage at the facility between 55 lbs and 2,200 lbs of hazardous waste. Therefore, at the time of the EPA inspection, Respondent was a “Kansas generator” pursuant to K.A.R. 28-31-2(d).

Violations

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

Count 1

OPERATION AS A HAZARDOUS WASTE TREATMENT, STORAGE OR DISPOSAL FACILITY WITHOUT A PERMIT BY FAILING TO MEET THE STANDARDS FOR GENERATORS OF HAZARDOUS WASTE

15. Section 3005 of RCRA, 42 U.S.C. § 6925, and K.S.A. 65-3437 state that operation of a hazardous waste treatment, storage or disposal facility without a permit is prohibited. The

Respondent does not have a permit to treat, store or dispose of hazardous waste.

Failure to Comply with Generator Requirements

16. The regulations at K.A.R. 28-31-4(h) state that Kansas generators may accumulate hazardous waste in containers on-site for ninety (90) days without a permit or without interim status, provided certain conditions are met. These conditions require compliance with other hazardous waste regulatory requirements.

17. At the time of the EPA inspection, Respondent was classified as a "Kansas generator", but was not complying with the following requirements:

Failure to Label Satellite Accumulation Containers with the Words "Hazardous Waste"

18. The regulations at KAR 28-31-4(j)(1)(B) require that a Kansas generator mark containers with the words "Hazardous Waste."

19. At the time of the EPA inspection, Respondent failed to label one hazardous waste satellite accumulation container with the words "Hazardous Waste."

Failure to Post Kansas Generator's Emergency Preparedness Information

20. The regulations at KAR 28-31-4(h)(7) require that Kansas generators post the name and telephone number of the emergency coordinator(s), the location of the fire extinguishers, the locations of spill-control material, fire alarm availability information, and the telephone number of the fire department next to at least one telephone.

21. At the time of the EPA inspection, Respondent failed to post the aforementioned emergency preparedness information as required.

Failure to Train Employees in Proper Hazardous Waste Handling

22. The regulations at KAR 28-31-4(h)(8) require Kansas generators to train employees with waste handling and emergency procedures.

23. At the time of the EPA inspection, Respondent's employees had not been trained in waste handling and emergency procedures as required by regulation.

Failure to familiarize local emergency response authorities with the facility

24. KAR 28-31-4(h)(5) incorporating 40 CFR 265.37(a)(1) requires Kansas generators to make arrangements with local fire departments, police and other emergency response agencies for responding to emergencies at their facilities.

25. At the time of the EPA inspection, the Respondent had not properly familiarized the local emergency response agencies with information necessary to respond to emergencies at the facility.

Failure to make agreements with local emergency response authorities, contractors and equipment suppliers

26. KAR 28-31-4(h)(5) incorporating 40 CFR 265.37(a)(3) requires Kansas generators make agreements with local emergency response authorities, contractors and equipment suppliers appropriate for the waste at the facility.

27. At the time of the EPA inspection, the Respondent had not made the type of agreements set forth in the paragraph above.

Failure to familiarize the local hospitals with waste at the facility

28. KAR 28-31-4(h)(5) incorporating 40 CFR 265.37(a)(4) requires Kansas generators to familiarize the local hospitals with the properties of hazardous wastes handled and types of injuries which could result from fires, explosions, or releases at the facility.

29. At the time of the inspection, Respondent had not familiarized the local hospitals with the properties of hazardous wastes handled and types of injuries which could result from fires, explosions, or releases at the facility.

Count 2

Offering Hazardous Waste For Transport Without A Hazardous Waste Manifest

30. 40 C.F.R. § 265.71(c), which is incorporated by reference at K.A.R. 28-31-1(a)(6), states that owners and operators of hazardous waste treatment, storage or disposal facilities must comply with the requirements of 40 C.F.R. Part 262.

31. 40 C.F.R. § 262.20 requires a generator who offers hazardous waste for transportation to an off-site treatment, storage or disposal facility to prepare a hazardous waste manifest.

32. At the time of the EPA inspection, Respondent was accumulating paper wipes with solvents, which were listed F003 and F005 hazardous waste, and disposing of them in the general trash which was collected and taken to the sanitary landfill.

33. Respondent did not prepare a hazardous waste manifest for the disposal of the above mentioned wipes in the general trash and transport to the sanitary landfill.

34. Respondent's failure to prepare a hazardous waste manifest when offering hazardous waste for transportation to an off-site disposal facility is a violation of K.A.R. 28-31-1(a)(6).

Count 3

Failure to Properly Manage Universal Waste

35. At the time of the EPA inspection, Respondent had more than 500 spent lamps, which are defined at 40 C.F.R. Part 273.9 as "universal waste", stored at its facility. These universal waste lamps were not stored in closed containers, as required by 40 C.F.R. § 273.13(d)(1); they were not labeled "Universal Waste Lamps", as required by 40 C.F.R. § 273.14(e); and the containers were not dated, and Respondent could not establish the length of time they had been stored by any other means, as required by 40 C.F.R. §§ 273.15.

36. K.A.R. 28-31-15 requires owners/operators of facilities that manage universal waste to comply with 40 C.F.R. Part 273, which is also incorporated by reference at K.A.R. 28-31-1(8). Respondent's failure to properly manage its universal waste lamps is a violation of K.A.R. 28-31-1(a) and K.A.R. 28-31-15.

CONSENT AGREEMENT

1. Respondent and Complainant agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order portion of this CA/FO.
2. Respondent admits the jurisdictional allegations of this CA/FO 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 CA/FO set forth below.
3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this CA/FO.
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 CA/FO.
5. Respondent and Complainant agree to conciliate the matters set forth in this

CA/FO without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

6. This CA/FO 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 CA/FO 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 CA/FO and to execute and legally bind Respondent to it.

9. Respondent agrees that, in settlement of the claims alleged in this CA/FO, Respondent shall pay a penalty of \$19,103 (Nineteen Thousand One-Hundred Three Dollars) 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. Respondent understands that failure to complete the Compliance Actions described in the Final Order within the designated timeframes may, among other things, subject Respondent to civil penalties of up to \$32,500 per day of non-compliance. Pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, penalties of up to \$32,500 per

day are now authorized for violations of Subchapter III of RCRA that occur after March 15, 2004, though 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.

12. This CA/FO 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.

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

14. The effect of this settlement is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in this consent agreement and final order.

15. This CA/FO shall remain in full force and effect until Complainant provides Respondent with written notice, in accordance with the Consent Agreement, that all requirements hereunder have been satisfied.

Reservation of Rights

16. Notwithstanding any other provision of this CA/FO, EPA reserves the right to enforce the terms of the Final Order portion of this CA/FO 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. Pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, penalties of up to \$32,500 per day are now authorized for violations of Subchapter III of RCRA that occur after March 15, 2004, though 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.

17. 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 CA/FO.

18. Except as expressly provided herein, nothing in this CA/FO 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.

19. Notwithstanding any other provisions of the CA/FO, 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.

20. The headings in this CA/FO are for convenience of reference only and shall not

affect interpretation of this CA/FO.

21. The provisions of this CA/FO 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 CA/FO, IT IS HEREBY ORDERED THAT:

A. Payment of Civil Penalty

1. Within thirty (30) days of the effective date of this CA/FO, Respondent will pay a civil penalty of \$19,103 (Nineteen Thousand One-Hundred Three Dollars). The civil penalty, which includes 3% interest, will be paid in six (6) monthly payments of \$3,211.75 each, for a total of \$19,270.50. The first payment must be received at the address below on or before 30 days after the effective date of the Final Order (the date by which payment must be received shall hereafter be referred to as the "due date"). Each succeeding payment will be due 30 days after the previous payment. 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:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

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

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

3. A copy of the payment documentation shall also be mailed to EPA's representative identified in paragraph 8 below, and to:

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

4. And to:

Raymond C. Bosch
Office of Regional Counsel
U.S. EPA Region 7
901 N. 5th Street
Kansas City, Kansas 66101

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

B. Compliance Actions

6. Within sixty (60) days of the effective date of the Final Order, Respondent shall provide to the EPA documentation to indicate that all applicable employees have been trained for Proper Hazardous Waste Handling procedures; to document that the Local Emergency

Authorities are Familiar with Waste(s) Handled, Entrances, and Exits of the facility; to document that Agreements have been made with Local Emergency Response Teams, Emergency Response Contractors, and Equipment Suppliers; and to document that Local Hospitals are familiar with the Properties of Hazardous Waste(s) Handled at the facility.

7. Within sixty (60) days of the effective date of the Final Order Respondent shall provide to the EPA a description of the procedures in place that insure that wipes with solvent used in Respondent's operations are properly laundered or disposed of in accordance with all applicable laws and regulations.

C. Submittals

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

Marc Matthews, AWMD/RESP
U.S. EPA Region 7
901 N. 5th Street
Kansas City, Kansas 66101
E-mail: Matthews.Marc@epa.gov

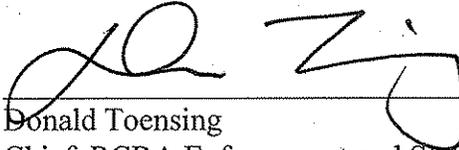
D. Parties Bound

9. This Final Order portion of this CA/FO shall apply to and be binding upon Complainant and 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 CA/FO.

FOR COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

9-28-09

Date



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

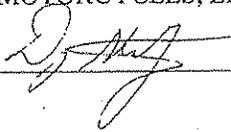
9-28-09

Date



Raymond C. Bosch
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7

FOR RESPONDENT
BIG DOG MOTORCYCLES, LLC

Signature 

9-28-09
Date

Doug Stuhlsatz Vice President
Printed Name and Title

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

September 29, 2009
Date

Robert Patrick
Robert Patrick
Regional Judicial Officer

IN THE MATTER OF Big Dog Motorcycles, LLC, Respondent
Docket No. RCRA-07-2009-0014

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:

Raymond C. Bosch
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Andrew C. Brought
Attorney at Law
Spencer Fane Britt & Browne LLP
1000 Walnut, Suite 1400
Kansas City, Missouri 64106-2140

Dated: 9/29/09


Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7