

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION 2
2010 JUN -8 AM 10:37
REGIONAL HEARING
CLERK

IN THE MATTER OF:
K-Mart 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, VI 00840 (known
as "Kmart #7413")

Docket No. RCRA-02-2009-7147

Proceeding under Section 3008
of the Solid Waste Disposal
Act, as amended,
42 U.S.C. § 6928

CONSENT AGREEMENT AND FINAL ORDER

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 at 40 C.F.R. Parts 260 through 279.

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 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.

The Complainant in this proceeding, the Director of the Caribbean Environmental Protection Division, (CEPD) EPA, Region 2, issued a "Complaint, Compliance Order and Notice of Opportunity for Hearing" ("Complaint") bearing Docket Number RCRA-02-2009-7147, to Kmart Corporation ("Respondent"), on September 25, 2009, and Respondent served an answer on or about November 25th, 2009. The Complaint alleged that Respondent had 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.

Complainant and Respondent agree by entering into this Consent Agreement and Final Order ("CA/FO"), that settlement of this matter upon the terms set forth in this CA/FO is an appropriate means of resolving the claims raised in the Complaint against Respondent at its CDT, without further litigation.

This CA/FO is being issued pursuant to, and under the authority of, 40 C.F.R. § 22.18(b). No adjudicated findings of fact or conclusions of law have been made. The following constitute EPA's Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Respondent is Kmart Corporation, ("Kmart") which is duly authorized to conduct business in the Virgin Islands of the United States.
2. Kmart, a wholly owned subsidiary of Sears Holdings Corporation, is a general merchandise retailing company. Kmart also offers photo developing services.
3. 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, VI
00840 (known as "Kmart #7413".)
4. 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.
 5. The facilities, although located in different areas, have several areas that are commonly identified among 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.
 6. 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 and at the operations located as specified in Paragraph 3 above.
 7. The notifications were prepared by an employee and/or agent of Respondent in the course of carrying out his/her employment or duties.
 8. In the Notifications, Respondent reported itself as generating one characteristic hazardous wastes described by EPA waste code D001. In the Notifications Respondent indicated it generated less than between 100 and 1,000 kg/month of hazardous waste, and therefore it was a Conditionally Exempt Small Quantity Generator.
 9. 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.
 10. The locations described in the Notifications are the Virgin Islands Facilities as set forth in paragraph "3" above.

11. Duly designated representatives of EPA conducted a compliance evaluation inspection under Section 3007 of RCRA, 42 U.S.C. § 6927 (the "Inspections") at each of the facilities. 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 were as follows:
 - a. August 19, 2008 at Kmart #3829
 - b. August 21, 2008 at Kmart #3972
 - c. August 22, 2008 at Kmart #7413
12. On or about the dates set forth above, duly designated representatives of EPA also held at each facility an inspection closing conference with Respondent's representatives.
13. During the closing conference, EPA discussed the preliminary findings of the compliance inspection.
14. 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.
15. 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.
16. 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.
17. The violations were common for the three Virgin Islands Facilities unless stated otherwise.

EPA'S CONCLUSIONS OF LAW

18. 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.

19. Respondent's Facilities constitute a "facility," within the meaning of 40 C.F.R. § 260.10.
20. 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.
21. 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.
22. 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.
23. 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.
24. 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.
25. 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
26. The Virgin Islands Facilities constitute a "new hazardous waste management facility" as that term is defined in 40 C.F.R. § 260.10.
27. 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.
28. 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.

29. Based on EPA's Inspections and Respondent's response, EPA issued a Complaint to Respondent alleging three counts of violations:

Count 1 -Failure to Make a Hazardous Waste Determination, 40 C.F.R. § 262.11

Count 2 -Storage of Hazardous Waste without a Permit, 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, 40 C.F.R. Part 273, Subpart B.

CONSENT AGREEMENT

Based upon the foregoing, and pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, and 40 C.F.R. § 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, it is hereby agreed by and between Complainant, and voluntarily and knowingly accepted by Respondent, that Respondent, for purposes of this Consent Agreement and in the interest of settling this matter expeditiously without the time, expense or uncertainty of a formal adjudicatory hearing on the merits: (a) admits the jurisdictional allegations of the Complaint; (b) neither admits nor denies the allegations set forth in the Complaint; (c) neither admits nor denies the above "Findings of Fact" and/or "Conclusions of Law"; (d) consents to the assessment of the civil penalty as set forth below; (e) consents to the issuance of the Final Order accompanying this Consent Agreement; (f) consents to comply, to the extent that it has not already done so, with the terms and conditions of the Compliance Order that was issued as part of the Complaint, Compliance Order and Notice of Opportunity for Hearing to Respondent, on this matter, bearing Docket Number RCRA 02-2009-7147; and (g) waives its right to contest or appeal that Final Order.

It is further hereby agreed by and between Complainant and Respondent, and voluntarily and knowingly accepted by Respondent, that the parties shall comply with the following terms and conditions:

1. Respondent shall submit payment of a civil

penalty in the total amount of **TWENTY-EIGHT THOUSAND EIGHT HUNDRED AND TWELVE DOLLARS AND TWENTY FOUR CENTS (\$28,812.24)**, by cashier's or certified check, or wire transfer. The payment shall be made within thirty (30) days from the date of signature of the Final Order.

2. Respondent shall make the payment by cashier's or certified check, payable to the "Treasurer of the United States of America", identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document or by wire transfer. The date by which the payment must be received shall hereafter be referred to as the "due date". Respondent shall perform the payment pursuant to the following:

CHECK PAYMENTS

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

WIRE TRANSFERS

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"

OVERNIGHT MAIL

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
ATTN Box 979077
St. Louis, MO 63101
Contact: Natalie Peterson
314-418-4087

In the Matter of Kmart Corporation
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Consent Agreement and Final Order

Respondent shall also send copies of the payment to each of the following:

Jesse Avilés
Response and Remediation Branch
U.S. Environmental Protection Agency, Region 2
Caribbean Environmental Protection Agency
1492 Ponce de León Ave., Suite 417
San Juan, PR 00907-4127
Fax Number: (787) 289-7104

and

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007

- a. failure to pay the penalty in full according to the above provisions will result in a referral of this matter to the United States Department of Justice or the United States Department of the Treasury for collection;
- b. further, if the payment is not received on or before the due date, interest will be assessed at the annual rate established by the Secretary of Treasury pursuant to the Debt Collection Act, 31 U.S.C. § 3717, on the overdue amount from the due date through the date of payment. In addition, a late payment handling charge of \$15.00 will be assessed for each 30 day period (or any portion thereof) following the due dates in which the balance remains unpaid. A 6% per annum penalty also will be applied on any principal amount not paid within 90 days of the due dates;
- c. the civil penalty provided for in this paragraph constitutes a penalty within the meaning of 26 U.S.C. § 162(f); and
- d. Respondent also may be required to pay attorneys fees and costs for collection proceedings in connection with nonpayment.

The penalty to be paid is a civil penalty assessed by the EPA and shall not be deductible from the Respondent's federal or state taxes.

GENERAL PROVISIONS

The Respondent waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Director or the Regional Administrator where the purpose of such discussion, memorandum, or communication is to discuss a proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the accompanying Final Order.

Except as specifically provided herein, nothing in this agreement 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 agreement or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any applicable provision of law.

This Consent Agreement and Final Order constitute a Settlement by EPA of all claims for civil penalties pursuant to RCRA, for the violations alleged in the Complaint. Nothing in this Consent Agreement and Final Order is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondent. Compliance with this Consent Agreement and Final Order shall not be a defense to any actions subsequently commenced pursuant to Federal laws and regulations administered by EPA, and it is the responsibility of Respondent to comply with such laws and regulations.

Each undersigned representative of the parties to this Consent Agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this Consent Agreement and to execute and legally bind that party to it.

Each party shall bear its own costs and attorney's fees in connection with the action resolved by this Consent Agreement and Order.


RESPONDENT:

MARY Tortorella
NAME

VP / Deputy General Counsel
POSITION

DATE: 4/19/10

COMPLAINANT:


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

DATE: 05-18-10

FINAL ORDER

The Regional Judicial Officer of EPA, Region 2, concurs in the foregoing Consent Agreement in the case of In the Matter of the Kmart Corporation, bearing Docket Number RCRA-02-2009-7147. Said Consent Agreement, having been duly accepted and entered into by the parties, is hereby ratified, incorporated into and issued, as this Final Order, which shall become effective when filed with the Regional Hearing Clerk of EPA, Region 2. 40 C.F.R. § 22.31(b). This Final Order is being entered pursuant to the authority of 40 C.F.R. § 22.18(b)(3) and shall constitute an order issued under the authority of Section 3008 of RCRA, 42 U.S.C. § 6928.

DATED: 5/27/10



Helen Ferrara
Regional Judicial Officer
U.S. Environmental Protection Agency,
Region 2
Office of Regional Counsel, 16th Floor
290 Broadway
New York, New York 10007-1866

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

IN THE MATTER OF:
 K-Mart Corporation

Respondent

Proceeding under Section 3008
 of the Solid Waste Disposal
 Act, as amended,
 42 U.S.C. § 6928

CONSENT AGREEMENT AND FINAL
 ORDER

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 Consent Agreement and Final Order, bearing docket number RCRA-02-2009-7147, as follows:

Copy by Federal Express:

Hon. Susan L. Biro, Chief
 Office of the Administrative Law Judges
 U.S. EPA
 1099 14th Street, N.W., Suite 350
 Washington, DC 20005

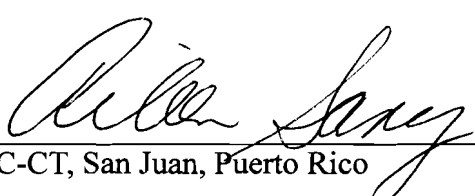
Michael B. Olsen, PG
 Director, Environmental Affairs
 Law Department
 Sears Holdings Management Corporation
 3333 Beverly Road, B5-362A
 Hoffman Estates, Illinois 60179

Original and a copy of the Consent Agreement and Final order 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: _____

6/2/2010



 ORC-CT, San Juan, Puerto Rico