



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

290 BROADWAY

NEW YORK, NEW YORK 10007-1866

Via Federal Express

January 6, 2010

Gary S. Bowitch, Esq.
119 Washington Avenue
Albany, NY 12210

Re: Manley's Mighty-Mart, LLC
Docket No. RCRA-02-2009- 7503

Dear Mr. Bowitch:

Enclosed please find a fully executed Order. This Order is effective upon the date of filing with the Regional Hearing Clerk. Please note that the first payment is due within forty-five (45) days of the date the Order was signed by the Regional Administrator.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Howard".

Carl R. Howard
Assistant Regional Counsel

cc: Helen S. Ferrara, Regional Judicial Officer
Karen Maples, RHC

Enc.

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2010 JAN - 6 PM 3:35
REGIONAL HEARING
CLERK

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

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In the Matter of	:	
	:	
Manley's Mighty-Mart, L.L.C.	:	CONSENT AGREEMENT AND FINAL ORDER
	:	
Respondent.	:	Docket No. RCRA-02-2009-7503
	:	
Proceeding Under Section 9006	:	
of the Solid Waste Disposal Act,	:	
as amended	:	
-----X	:	

U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 2
2010 JAN -6 PM 3:35
REGIONAL HEARING CLERK

PRELIMINARY STATEMENT

This administrative proceeding was instituted pursuant to Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. §6901 et seq. (hereinafter referred to as the "Act"). The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, Region 2, United States Environmental Protection Agency ("EPA" or "Complainant"), issued a "Complaint, Compliance Order, and Notice of Opportunity for Hearing" on March 31, 2009 to Manley's Mighty-Mart, L.L.C.

The Complaint alleged violations of the Act. Specifically, the Complaint alleged violations of the regulations requiring that Respondent perform line tightness testing or monthly monitoring for pressurized pipe, maintain and provide for inspection records of the test or monthly monitoring, conduct annual tests of the automatic line leak detectors and maintain and provide for inspection records of such tests at many of Respondent's facilities.

The Complainant and Respondent have reached an amicable resolution of this matter and agree, by entering into this Consent Agreement and Final Order ("CA/FO") pursuant to 40 C.F.R. subsections 22.18(b)(2) and (3), that settlement of this matter upon the terms set forth in this CA/FO is an appropriate means of resolving this case without further litigation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is Manley's Mighty-Mart, L.L.C.
2. Respondent is a corporation organized pursuant to the laws of the State of New York.
3. Respondent is a "person" within the meaning of Section 9001(5) of the Act, 42 U.S.C. § 6991(5), and 40 C.F.R. § 280.12.
4. Respondent was and is the "owner" and "operator" of "underground storage tanks," as those terms are defined in Section 9001 of the Act, 42 U.S.C. §6991, and in 40 C.F.R. §280.12.

5. Pursuant to 40 C.F.R. § 280.12, EPA is the “implementing agency” responsible for enforcing the requirements of the Act and the regulations promulgated pursuant thereto which are the subject of the Complaint issued in this case.
6. Pursuant to Sections 2002, 9002, and 9003 of the Act, 42 U.S.C. §§ 6912, 6991a, and 6991b, EPA promulgated rules setting forth requirements applicable to owners and operators of underground storage tank (UST) systems, set forth at 40 C.F.R. Part 280.
7. Forty C.F.R. Section 280.12 defines an underground storage tank or UST as any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 percent or more beneath the surface of the ground.
8. Pursuant to 40 C.F.R. § 280.44(a), an annual test of the operation of the automatic line leak detector for piping must be conducted in accordance with the manufacturer's requirements.
9. Pursuant to 40 C.F.R. § 280.41(b)(1)(ii) pressurized pipes must have an annual line tightness test conducted in accordance with §280.44(b), or have monthly monitoring conducted in accordance with §280.44(c).
10. Pursuant to 40 C.F.R. §§ 280.34 and 280.45, owners and operators of UST systems must maintain records demonstrating compliance with the release detection requirements.
11. Pursuant to 40 C.F.R. § 280.34(c) owners and operators must keep the records required either: (1) at the UST site and immediately available for inspection by the implementing agency; or (2) at a readily available alternative site and be provided for inspection to the implementing agency upon request.
12. Respondent has owned and operated, and continues to own and operate, USTs at locations known as Manley’s Mighty-Mart, each facility having its own numeric designation (hereinafter MMM #1, MMM #2, MMM #3, etc.).
13. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, during November 2006 and November 2007 authorized representatives of EPA inspected several Manley’s Mighty-Mart facilities, to determine their compliance with respect to the Act and 40 C.F.R. Part 280.
14. Pursuant to Section 9005(a) of the Act, 42 U.S.C. § 6991d(a), and 40 C.F.R. § 280.34, EPA sent an Information Request Letter dated December 27, 2007, (2007 Information Request Letter) to Respondent to determine the status of its compliance with the Act and 40 C.F.R. Part 280, for USTs at all Manley’s Mighty-Mart facilities in EPA, Region 2, including New York State and New Jersey.
15. In EPA’s Information Request Letter, EPA specifically requested that Respondent

provide documentation for all USTs that contain pressurized fuel pipes that are equipped with an automatic line leak detector showing that the line leak detectors located at Respondent's facilities were tested each year dating back to the time of their installation.

16. In EPA's Information Request Letter, EPA specifically requested that Respondent provide documentation for all USTs that contain pressurized fuel pipes that are equipped with an automatic line leak detector showing that Respondent had performed an annual line tightness test or had performed monthly monitoring.
17. On or about January 25, 2008, Respondent sent EPA a reply to EPA's Information Request Letter ("Respondent's Reply").
18. Respondent has owned and operated, and continues to own and operate USTs located at the following New York locations:
 - MMM #2, 4005 Vestal Parkway, Vestal;
 - MMM #3, 1343 Front Street, Binghamton;
 - MMM #4, 715 Upper Court Street, Binghamton;
 - MMM #5, 733 Harry L. Drive, Johnson City;
 - MMM #9, 684 Conklin Road, Binghamton;
 - MMM #10, 143 Riverside Drive, Johnson City;
 - MMM #11, 3225 East Main Street, Endwell;
 - MMM #13, 150-156 Conklin Avenue, Binghamton;
 - MMM #14, 2965 NYS Rt 26, Glen Aubrey;
 - MMM #15, 77 Main Street, Binghamton;
 - MMM #17, 215 Clinton Street, Binghamton; and,
 - MMM #24, 1000 Pennsylvania Avenue, Binghamton.
19. Based on EPA's inspections and Respondent's reply to the Information Request Letter, EPA determined that for a period of time between 2005 and 2007 Respondent failed:
 - to perform an annual line tightness test or to perform monthly monitoring in 2007 for at least one pressurized pipe at the MMM #2 facility in violation of 40 C.F.R. § 280.41(b)(1)(ii);
 - for at least the calendar year of 2007 to maintain, and to provide to EPA for inspection, records of either the annual line tightness test or monthly monitoring on at least one pressurized pipe at the MMM #2 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;
 - for at least one year to perform the required annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #3 facility in violation of 40 C.F.R. § 280.44(a);
 - for at least one year to maintain, and to provide to EPA for inspection, records of the annual test of the three automatic line leak detectors on the pressurized pipes of the

UST systems located at the MMM #3 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;

- for at least one year to perform the required annual test of the four automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #4 facility in violation of 40 C.F.R. § 280.44(a);

- for at least one year to maintain, and to provide to EPA for inspection, records of the annual test of the four automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #4 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;

- for at least one year to perform the required annual test of the two automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #5 facility in violation of 40 C.F.R. § 280.44(a);

- for at least one year to maintain, and to provide to EPA for inspection, records of the annual test of the two automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #5 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;

- for at least one year to perform the required annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #9 facility in violation of 40 C.F.R. § 280.44(a);

- for at least one year to maintain, and to provide to EPA for inspection, records of the annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #9 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;

- for at least one year to perform the required annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #10 facility in violation of 40 C.F.R. § 280.44(a);

- for at least one year to maintain, and to provide to EPA for inspection, records of the annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #10 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;

- for at least one year to perform the required annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #11 facility in violation of 40 C.F.R. § 280.44(a);

- for at least one year to maintain, and to provide to EPA for inspection, records of the annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #11 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;

- for at least one year to perform the required annual test of the four automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #13 facility in violation of 40 C.F.R. § 280.44(a);
- for at least one year to maintain, and to provide to EPA for inspection, records of the annual test of the four automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #13 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;
- for at least one year to perform the required annual test of the two automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #14 facility in violation of 40 C.F.R. § 280.44(a);
- for at least one year to maintain, and to provide to EPA for inspection, records of the annual test of the two automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #14 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;
- to perform an annual line tightness test or to perform monthly monitoring for at least one year for the pressurized pipe from the five thousand gallon UST at the MMM #14 facility in violation of 40 C.F.R. § 280.41(b)(1)(ii);
- for at least one year to maintain, and to provide to EPA for inspection, records of either the annual line tightness test or monthly monitoring for the pressurized pipe from the five thousand gallon UST at the MMM #14 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;
- for at least one year to perform the required annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #15 facility in violation of 40 C.F.R. § 280.44(a).
- for at least one year to maintain, and to provide to EPA for inspection, records of the annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #15 facility in violation of 40 C.F.R. §§ 280.34 and 280.45;
- for at least one year to perform the required annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #17 facility in violation of 40 C.F.R. § 280.44(a); and,
- for at least one year to maintain, and to provide to EPA for inspection, records of the annual test of the three automatic line leak detectors on the pressurized pipes of the UST systems located at the MMM #17 facility in violation of 40 C.F.R. §§ 280.34 and 280.45.

Subsequent to the issuance of the Complaint in this matter, Respondent informed EPA that it

had also failed to perform an annual test of the automatic line leak detectors at eleven of its facilities during 2008, in violation of 40 C.F.R. § 280.44(a). Respondent informed EPA that it had performed the required tests of the automatic line leak detectors at its facilities in 2009.

20. The parties have agreed to settle this matter and have agreed this settlement will include a Supplemental Environmental Project, as described further below.

21. The twelve (12) facilities owned by Respondent that are covered by this SEP include those selected based on the environmental sensitivity of the area in which the facility is located as well as several of the facilities originally named in the Complaint. The twelve (12) facilities are:

- MMM #20 1103 Danby Road, Ithaca;
- MMM #18, 3117 Watson Blvd. Endwell;
- MMM #19, 53 Downs Ave., Binghamton;
- MMM #2, 4005 Vestal Parkway, Vestal;
- MMM #5, 733 Harry L. Drive, Johnson City;
- MMM #17, 215 Clinton Street, Binghamton;
- MMM #14, 2965 NYS Rt 26, Glen Aubrey;
- MMM #3, 1343 Front Street, Binghamton;
- MMM #9, 684 Conklin Road, Binghamton;
- MMM #10, 143 Riverside Drive, Johnson City;
- MMM #11, 3225 East Main Street, Endwell;
- MMM #13, 150-156 Conklin Avenue, Binghamton;

CONSENT AGREEMENT

Based upon the foregoing, and pursuant to Section 9006 of the Act, 42 U.S.C. § 6991e, and Section 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §22.18, it is hereby agreed by and between the Complainant and the Respondent that:

1. For purposes of this proceeding, Respondent (a) admits the jurisdictional basis for this proceeding, as specified in this Consent Agreement and Final Order (“Final Order”); (b) neither admits nor denies the above Findings of Fact and Conclusions of Law, and (c) consents to the terms of this Consent Agreement.

2. Respondent shall, within thirty (30) days after the effective date of this Final Order, comply with all applicable release detection and testing requirements of 40 C.F.R. Sections 280.41(b)(1)(ii) and 280.44 for all applicable UST systems at all of Respondent’s facilities and maintain such compliance.

3. Respondent shall, within thirty (30) days after the effective date of this Final Order, comply with all applicable record-keeping requirements of 40 C.F.R. Sections 280.34 and 280.45 for all applicable UST systems at all of Respondent’s Facilities and maintain such compliance.

4. Respondent, by the signature of its representative, at the end of this Consent Agreement and Final Order, certifies that based on inspections conducted in 2009, Respondent is, based on information and belief, in compliance with the regulations cited in paragraphs 2 and 3, above.

5. Respondent shall pay, by cashiers or certified check, a total civil penalty in the amount of Seventeen Thousand Eight Hundred Dollars (\$17,800). The penalty shall be paid in two equal installments, payable to the "Treasurer, United States of America." The checks shall be identified with a notation of the name and docket number of this case as follows: In the Matter of Manley's Mighty-Mart L.L.C, Docket No. RCRA-02-2009-7503. The check shall be mailed to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO. 63197-9000

If overnight delivery is preferred, Respondent may mail the check to the following address:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
Attn: USEPA Box #979077
St. Louis, MO. 63101

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

Carl R. Howard
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, N.Y. 10007-1866

and

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, N.Y. 10007-1866
Attn: Karen Maples

The first payment must be received at the above address on or before forty-five (45) calendar days after the date of signature of the Final Order, which is located at the end of this Final Order (the date by which the first payment must be received shall hereafter be referred to as the "due date").

The second payment must be received at the above address on or before ninety (90) calendar days after the due date and shall include interest computed in the manner described below.

- a. Failure to pay the penalty in full according to the above provisions may result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for collection; and
- b. Further, if any payment is not received on or before the due date interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, on the unpaid 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 payment for each 30 day period (or any portion thereof) following the deadline for the payment should any balance remain unpaid. A 6% per annum penalty also will be applied on any principal amount not paid within 90 days of the deadline for the payment.

6. As part of the settlement of this matter, Respondent agrees to implement a Supplemental Environmental Project ("SEP") in accordance with the "EPA Supplemental Environmental Projects Policy" ("SEP Policy") which became effective on May 1, 1998. The implementation of the SEP, which is set forth in the following paragraphs, is expected to cost approximately \$164,000. Respondent has committed to spend at least \$160,000 on the SEP described in paragraphs 8 and 9 ("Required SEP Expenditure").

7. Respondent agrees to implement the SEP in accordance with the terms and the schedule set forth in this Final Order. For purposes of this Consent Agreement, days shall mean calendar days. Any proposed changes to the SEP must be approved by EPA.

8. Respondent shall perform a SEP in accordance with the following requirements: The SEP will involve Respondent's replacement of all their automatic line leak detectors at the twelve (12) facilities noted in paragraph 21 of the Findings section, above, with electronic line leak detectors (ELLDs) on all their pressurized pipes at these facilities. The ELLDs must be capable of conducting self functionality tests, as well as testing for catastrophic leaks, and sensitive leak tests of 0.1 gph and 0.2 gph to satisfy current federal requirements for monthly and yearly piping integrity tests. Test results from the ELLDs shall be electronically recorded each month at each MMM facility via the electronic release detector. In addition, monthly printout slips from the release detector showing the test results shall be maintained at each UST location or at a readily available alternative site.

9. Respondent shall perform the SEP activities in accordance with the schedule set forth below.

Activity**Date Deliverable Due**

<p>Submittal of a detailed SEP Workplan to EPA for review and comment. The Workplan will provide the general schedule of the installation of the ELLDs at each facility. The plan will include the scope of work, and specific field procedures associated with the installation of each ELLD which will include blueprints, drawings, schematics, etc., detailing the installation of each ELLD including its connection to the existing electronic release detector or to other electronic release detection components. Respondent shall commit to the installation of ELLDs at the twelve (12) facilities noted in paragraph 21, above (unless EPA approves Respondent's written request to substitute another facility).</p> <p>Due date: The ELLDs shall be installed and operational as follows:</p> <p>December 31, 2010: -MMM #20 1103 Danby Road, Ithaca; -MMM #18, 3117 Watson Blvd. Endwell; -MMM #19, 53 Downs Ave., Binghamton;</p> <p>December 31, 2011 -MMM #2, 4005 Vestal Parkway, Vestal; -MMM #5, 733 Harry L. Drive, Johnson City; -MMM #17, 215 Clinton Street, Binghamton;</p> <p>December 31, 2012 -MMM #14, 2965 NYS Rt 26, Glen Aubrey; -MMM #3, 1343 Front Street, Binghamton; -MMM #9, 684 Conklin Road, Binghamton;</p> <p>December 31, 2013 -MMM #10, 143 Riverside Drive, Johnson City; -MMM #11, 3225 East Main Street, Endwell; -MMM #13, 150-156 Conklin Avenue, Binghamton.</p> <p>Respondent shall operate each ELLD for at least one (1) full year following the complete installation of each ELLD at each facility.</p>	<p>Due date: the SEP Workplan shall be submitted no later than sixty (60) days from the Regional Administrator's signature of the Final Order.</p>
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Respondent shall submit annual Progress Reports ending in 2013.	Due Date: By December 31, each year starting in 2010 and ending 2013r.
SEP Completion Report	Date Due: By December 31, 2013

10. Within 30 days of receipt of EPA's comments, if any, on the SEP Workplan, Respondent shall revise the SEP Workplan to address EPA's comments.

11. Respondent shall provide EPA with annual Progress Reports in a form approved by EPA, starting one year after the date of the Regional Administrator's signature of the Final Order and continuing until the SEP is completed. The Progress Reports shall inform EPA of Respondent's efforts to achieve milestones for the SEP, shall report on the implementation of the SEP, shall identify any issues or problems that have arisen in the implementation of the SEP and how issues or problems were addressed, and shall itemize and document the expenditures that Respondent has made in connection with the SEP. Unless otherwise approved by EPA, copies of all invoices and a copy of documents related to the SEP and created or paid or received by Respondent during the reporting period shall be enclosed with the Progress Reports when transmitted to EPA. Respondent shall send the Progress Reports to the addressees in paragraph 12, below.

12. Respondent shall provide EPA a SEP Completion Report for the SEP, documenting the completion of the SEP and the expenditures made in connection with the performance of the SEP. All SEP expenditures are subject to approval by EPA. Said documentation shall be mailed to:

Frank Spina
Environmental Protection Specialist
RCRA Compliance Branch, UST Team
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency, Region 2
290 Broadway, 20st Floor
New York, N.Y. 10007-1866

and

Carl R. Howard, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency- Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866.

13. The SEP Completion Report for the SEP, which shall be submitted to EPA (to the addressees in paragraph 12, above) on or before December 1, 2013, or by another date if approved by EPA, shall contain the following information:

- a) Detailed description of the SEP as implemented;

- b) Description of any problems encountered and the solutions thereto;
- c) Itemization of costs incurred which Respondent feels are eligible for SEP credit, accompanied by copies of invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods and services for which payment is being made (if the itemization and documentation have been previously provided with a Progress Report, it will suffice to refer to the prior submittal);
- d) Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement and Final Order; and,
- e) Description of the environmental and public health benefits resulting from implementation of the SEP.

14. Respondent agrees that failure to timely submit the Progress Reports or SEP Completion Report for the SEP shall be deemed a violation of this Consent Agreement and Final Order, and Respondent shall become liable for stipulated penalties pursuant to paragraph 20B, below.

15. Following receipt of any Progress Report and the SEP Completion Report, EPA will:

- a) accept the report;
- b) reject the report, notify Respondent in writing of deficiencies in the report and grant Respondent an additional thirty (30) days in which to correct any deficiencies and to resubmit the report to EPA. If EPA, after allowing Respondent thirty (30) days to correct any deficiencies, finds that the same type of deficiencies remain, then EPA may seek stipulated penalties in accordance with paragraph 20B, below.

16. If EPA elects to exercise option 15(b) above, EPA shall permit Respondent the opportunity to object in writing to the notification of deficiency pursuant to this paragraph within 10 days of receipt of such notification. EPA and Respondent will have an additional thirty (30) days (or such time as the parties may agree to) from the due date of Respondent's notification of objection to reach agreement. If agreement cannot be reached on any such issue within this thirty (30) day period, Respondent may ask that the Complainant or her representative review the matter. Thereafter, EPA shall provide a written statement of its decision to Respondent, which decision shall be final and binding upon Respondent. In the event the SEP is not completed as contemplated herein, stipulated penalties shall be due and payable by Respondent to EPA in accordance with paragraph 20B., below.

17. In all documents or reports, including without limitation, Progress Reports for the SEP and the SEP Completion Report, which are submitted to EPA pursuant to this CA/FO, the following certification shall be signed by a responsible agency official (i.e., officer) of Respondent:

I certify that, to the best of my knowledge and belief, the information contained in this written certification and in any documents accompanying this certification is true, accurate and complete. In making this statement, I have not made an independent review of all statements contained therein and have relied in good-faith on information, statements, and representations furnished to me by employees or contractors. Based on

my inquiry of the person or persons (or the supervisors of such persons) directly responsible for gathering the information contained in this written certification and in any documents accompanying this certification, this document is, to the best of my knowledge and belief, true accurate and complete. I am aware that there are significant potential penalties for submitting materially false information, including the possibility of fines and imprisonment for knowing violations.

18. Whether Respondent has complied with the terms of this Consent Agreement and Final Order through the implementation of the SEP project as herein required, whether the SEP has been satisfactorily completed, whether the Respondent has made good faith, timely effort to implement the SEP, and whether costs expended are creditable to the SEP shall be the sole determination of EPA. Should EPA have any concerns about the satisfactory completion of the SEP, EPA will communicate those concerns to Respondent and provide it with an opportunity to respond, and/or correct the deficiencies. If EPA makes a determination that the SEP has been satisfactorily completed, it will provide Respondent with written confirmation of the determination within a reasonable amount of time.

19. Respondent shall maintain in one central location legible copies of documentation concerning the development, implementation, and financing of the SEP and documentation supporting information in documents or reports submitted to EPA pursuant to this CA/FO, including the reports required to be submitted for the SEP, such as the Annual Progress Reports and the SEP Completion Report for the SEP required pursuant to this CA/FO. Respondent shall grant EPA and its authorized representatives access to such documentation and shall provide copies of such documentation to EPA within thirty (30) days of Respondent's receipt of a request by EPA for such information, or within such additional time as is approved by EPA in writing. The provisions of this paragraph shall remain in effect for five (5) years from the effective date of this CA/FO or from three (3) years from the satisfactory completion of the required SEP, whichever is later.

20. Stipulated penalties for non-compliance with the SEP will be calculated as follows:

A. In the event that EPA determines, in its sole discretion, that Respondent failed to comply with any of the terms or provisions of this Consent Agreement and Final Order relating to the performance of the SEP described in paragraphs 8 and 9, above (but excluding the violations specifically described in paragraph 20B) and/or to the extent that the actual creditable expenditures for the SEP do not equal or exceed the Required SEP Expenditure, Respondent shall be liable for stipulated penalties (except as provided in subparagraphs (ii) and (iii), immediately below) according to the following provisions:

- i) If EPA determines, in its sole discretion, that the SEP has not been completed satisfactorily, as defined below, Respondent shall pay a stipulated penalty in the amount of **Sixty Thousand Dollars (\$60,000)**. Payment shall be transmitted using the same procedure specified in paragraph 5, above.
- ii) If EPA determines, in its sole discretion, that the SEP is not completed satisfactorily, but:

- (a) EPA determines that Respondent made good faith and timely efforts to complete the project; and
- (b) Respondent certifies, with supporting documentation, that at least ninety (90) percent of the amount of money which was required pursuant to paragraph 6 to be spent was expended on the SEP and EPA accepts that such expenditures are creditable for the SEP, then Respondent shall not pay any stipulated penalty.
- iii) If EPA determines, in its sole discretion, that the SEP is satisfactorily completed, but:
 - (a) Respondent spent less than ninety (90) percent of the amount of money required to be spent for the SEP, and
 - (b) Respondent certifies, with supporting documentation, the costs that were expended on the SEP and EPA accepts that such expenditures are creditable for the SEP, then: Respondent shall pay a stipulated penalty in an amount equal to two (2) times the difference between the Required SEP Expenditure as set forth in Paragraph 6 above and the amount the Respondent has expended that EPA determines is properly credited toward the SEP.
- iv) The SEP shall be deemed by EPA to be complete when:
 - (a) Respondent has fully installed at all twelve (12) facilities fully functional ELLDs on all of its pressurized pipes; and,
 - (b) Respondent has operated each ELLD for at least one (1) full year following the complete installation of each ELLD at each facility.

B. Notwithstanding any other provision of this Consent Agreement, stipulated penalties shall accrue per day per violation for the following types of matters: failure to comply with any schedule to submit records and documentation, including but not limited to reports (including progress report(s) and completion report(s)), and the original Workplan and any additional and/or modified plans, failure to include the required certifications or public statement and/or to revise any documents on schedule following receipt of comments; and/or failure to maintain and/or provide records. If deviation from the due dates/schedule in this Consent Agreement for the documents/reports/records described in this paragraph, has not been approved by EPA in writing pursuant to paragraph 27, below, and if Respondent is determined by EPA to be liable to EPA for a stipulated penalty, such liability shall commence on the first day of noncompliance and continue through the final date of completion of the activity for which compliance is achieved. Simultaneous penalties shall accrue for separate violations of the Consent Agreement. The stipulated penalties shall accrue as follows:

STIPULATED PENALTY AMOUNTS

<u>Period of Failure to Comply</u>	<u>Penalty Per Day</u>
1st to 10th day	\$250
11 th to 30 th day	\$500
31st to 60th day	\$1,000
Each day in excess of 60 days	\$2,000

C. Unless Respondent provides EPA with a written explanation in accordance with subparagraph D, below, all stipulated penalties are due and payable within sixty (60) calendar days of the Respondent's receipt from EPA of a written demand for payment of

the penalties. Respondent agrees that such demand may be mailed to Respondent via its counsel, Gary S. Bowitch, The Law Office of Gary S. Bowitch, 119 Washington Avenue, Albany, New York 12210. All stipulated penalty payments shall be made in accordance with the payment instructions in Paragraph 5 of this Consent Agreement. Penalties shall accrue as provided above regardless of whether EPA has notified the Respondent of the violation or made a demand for payment, but need only be paid upon demand.

D. After receipt of a demand from EPA for stipulated penalties pursuant to the preceding paragraph, Respondent shall have thirty (30) calendar days in which to provide Complainant with a written explanation of why it believes that a stipulated penalty is not appropriate for the cited violation(s) of this Consent Agreement (including any technical, financial or other information that Respondent deems relevant). Pursuant to paragraph 21, below, EPA shall evaluate the written explanation provided by the Respondent.

21. The Complainant may, at her sole discretion, reduce or eliminate any stipulated penalty due if Respondent has, in writing, demonstrated to EPA's satisfaction good cause for such action by EPA. If, after review of Respondent's submission pursuant to the preceding paragraph, Complainant determines that Respondent has failed to comply with the provisions of this Consent Agreement, and Complainant does not, in her sole discretion, eliminate the stipulated penalties demanded by EPA, Complainant will notify Respondent, in writing, that either the full stipulated penalty or a reduced stipulated penalty must be paid by Respondent. Respondent shall pay the stipulated penalty amount indicated in EPA's notice within thirty (30) calendar days of its receipt of such written notice from EPA. Failure of Respondent to pay any stipulated penalty demanded by EPA pursuant to this Consent Agreement may result in referral of this matter to the United States Department of Justice or the Department of the Treasury for collection.

22. At any time prior to Respondent's payment of stipulated penalties, the Director, may, for good cause as independently determined by her, reduce or eliminate the stipulated penalty(ies). If the Director makes such determination, EPA shall notify Respondent in writing of any such action.

23. Any public statement, oral or written, made by Respondent making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of RCRA and regulations concerning the management of underground storage tanks."

24. Delays:

a) If any event occurs which causes or may cause delays in the completion of the SEP as required under this Consent Agreement, Respondent shall notify EPA in writing within thirty (30) days of the delay or Respondent's knowledge of the anticipated delay, whichever is earlier. The notice shall describe in detail the anticipated length of delay, the precise cause of delay, the measures taken by Respondent to prevent or minimize delay, and the timetable by which those measures will be implemented. Respondent shall adopt all reasonable measures to avoid or minimize any such delay. Failure by Respondent to comply with the notice requirements of this paragraph shall render this paragraph void and of no effect as to the particular incident involved

and may constitute a waiver of Respondent's right to request an extension of its obligation under this Consent Agreement based on such incident.

b) If the parties agree that the delay or anticipated delay in the completion of the SEP has been or will be caused by circumstances beyond the control of Respondent, the time for performance hereunder may be extended for a period no longer than the delay resulting from such circumstances. In such event, the parties shall stipulate to such extension of time.

c) In the event that EPA does not agree that a delay in completing the SEP in accordance with the requirements of this Consent Agreement has been or will be caused by circumstances beyond the control of Respondent, EPA will notify Respondent in writing of its decision and any delays in completion of the SEP shall not be excused.

d) The burden of proving that any delay is caused by circumstances entirely beyond the control of Respondent shall rest with Respondent. Increased cost or expenses associated with performance of the SEP under this Consent Agreement shall not, in any event, be a basis for changes in this Consent Agreement or extensions of time under section b) of this paragraph. Delay in achievement of one interim step shall not necessarily justify or excuse delay in achievement of subsequent steps.

25. The civil penalties and stipulated penalties provided for herein are penalties within the meaning of Title 26, Section 162(f) of the United States Code, 26 U.S.C. § 162(f), and are not deductible expenditures for purposes of federal, state or local law. For federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

26. The SEP to be completed by Respondent, described in paragraphs 8 and 9 of this Consent Agreement, has been accepted by Complainant solely for purposes of settlement of this civil administrative proceeding.

27. EPA Region 2 may grant an extension of the date(s) of performance or such other dates as are established in this Consent Agreement with regard to any of the SEP components, if Respondent has first demonstrated in writing good cause for such extension. If Respondent submits a request for extension, such request shall be accompanied by supporting documentation and submitted to EPA no later than thirty (30) calendar days prior to any due date set forth in this Consent Agreement, or other deadline established pursuant to this Consent Agreement. Such extension, if any, shall be approved in writing.

28. Respondent hereby certifies that, as of the date of this Consent Agreement and Final Order, Respondent is not required to perform or develop the SEP described in paragraphs 8 and 9 above by any federal, state law, local law, or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant, or as injunctive relief in this or any other case or in compliance with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP. Respondent certifies that it had not committed to perform the SEP prior to the commencement of this action.

29. If EPA determines that Respondent's certification in paragraph 28 is inaccurate, then Respondent shall pay a stipulated penalty in the amount of Sixty Thousand dollars (\$60,000). Payment shall be transmitted using the same procedure specified in paragraph 5, above.

30. If in the future EPA believes that any of the information certified to, pursuant to Paragraphs 4 and 17 is inaccurate, EPA will advise Respondent of its belief and its basis for such, and will afford Respondent an opportunity to respond to EPA. If the certification is materially inaccurate with respect to compliance with the requirements set forth in the Consent Agreement and/or the SEP(s), EPA may, in addition to seeking stipulated penalties pursuant to paragraph 20, above, for noncompliance, initiate a separate criminal investigation pursuant to 18 U.S.C. § 1001 *et seq.*, or any other applicable law.

31. This Consent Agreement is being voluntarily and knowingly entered into by the Complainant and Respondent to resolve the civil and administrative claims alleged in the Complaint, and described in paragraph 19 of the above Findings of Fact and Conclusions of Law, (upon full payment of the penalty and any stipulated penalty that comes due and the performance of obligations set forth in the Consent Agreement). Nothing herein shall be read to preclude EPA or the United States, on behalf of EPA, however, from pursuing the remedies mentioned in 40 C.F.R. Section 22.18(c) for any violations of law.

32. Respondent has read the Consent Agreement, understands its terms, finds it to be reasonable and consents to the issuance and its terms. Respondent consents to the issuance of the accompanying Final Order. Respondent agrees that all terms of settlement are set forth herein.

33. Respondent explicitly and knowingly consents to the assessment of the civil penalty and stipulated penalties as set forth in this Consent Agreement and agrees to pay these penalties in accordance with the terms of this Consent Agreement.

34. Respondent explicitly waives its right to request or to seek any Hearing on the Complaint or any of the allegations therein asserted, on this Consent Agreement or on the Findings of Fact and Conclusions of Law herein, or on the accompanying Final Order.

35. Respondent waives its right to appeal the proposed Final Order accompanying the Consent Agreement.

36. This Consent Agreement and any provision herein shall not be construed as an admission of liability in any criminal or civil action or other administrative proceeding, except in an action or proceeding to enforce or seek compliance with this Consent Agreement and its accompanying Final Order.

37. Respondent explicitly 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 Regional Administrator, Deputy Regional Administrator, or Regional Judicial Officer for Region 2, 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 attached Final Order.

38. This Consent Agreement and Final Order does not waive, extinguish, or otherwise affect Respondent's obligation to comply with all applicable provisions of Federal, State, or local law concerning USTs, nor shall it be construed to be a ruling on or determination of any issue related to a federal or State or local permit.

39. Each undersigned signatory to this Consent Agreement certifies that he or she is duly and fully authorized to enter into and ratify this Consent Agreement and all the terms and conditions set forth in this Consent Agreement.

40. The provisions of this Consent Agreement and Final Order shall be binding upon both EPA and Respondent, its officers, directors, officials, agents, servants, authorized representatives and successors or assigns.

41. Each party hereto agrees to bear its own costs and fees in this matter.

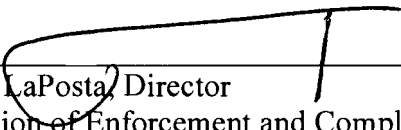
42. Respondent consents to service upon itself of a copy of this Consent Agreement and Final Order by an EPA employee other than the Regional Hearing Clerk.

43. Pursuant to 40 C.F.R. § 22.31(b), the effective date of the Final Order herein shall be the date when filed with the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2.

RESPONDENT: **Manley's Mighty-Mart L.L.C**

BY: *August O. Kutchinski*
(signature)
NAME August O. Kutchinski
(Please Print)
TITLE: PRESIDENT
DATE: 12-24-09

COMPLAINANT: **United States Environmental Protection Agency
Region 2**

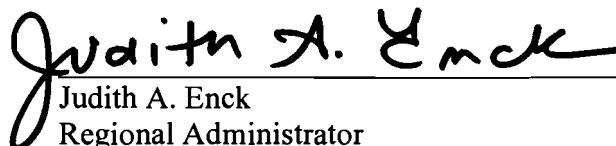
BY: 
Dore LaPosta Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection
Agency - Region 2
290 Broadway
New York, N.Y. 10007-1866

DATE: December 29, 2009

In the Matter of Manley's Mighty-Mart L.L.C.
Docket No. RCRA-02-2009-7503

FINAL ORDER

The Regional Administrator of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement. The Consent Agreement, entered into by the Complainant and Respondent Manley's Mighty-Mart L.L.C to this matter, is hereby approved, incorporated herein, and issued as an Order pursuant to Section 9006 of the Act and 40 C.F.R. Section 22.18(b)(3). The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. EPA, Region 2, New York, New York.



Judith A. Enck
Regional Administrator
U.S. Environmental Protection
Agency – Region 2
290 Broadway
New York, New York 10007-1866

DATE: 12/30/09

**In the Matter of Manley's Mighty-Mart, LLC,
Docket No. RCRA-02-2009-7503**

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing fully executed CONSENT AGREEMENT and FINAL ORDER, bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and One Copy
by Hand:

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

Copy by Hand:

Helen S. Ferrara
Regional Judicial Officer
U.S. Environmental Protection Agency
290 Broadway
New York, NY 10007-1866

Copy by Certified Mail,
Return Receipt Requested:

Gary S. Bowitch, Esq.
Attorney for Respondent
119 Washington Avenue
Albany, NY 12210

JAN - 6 2010

Smildred N. Baerz