UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ENVIRONMENTAL APPEALS BOARD

IN THE MATTER OF	)	
	)	
Kmart Holding Corporation,	)	
doing business as Kmart Corporation	)	Docket No. CWA-HQ-2006-6001
3100 West Big Beaver	)	Docket No. RCRA-HQ-2006-6001
Troy, MI 48084	)	Docket No. EPCRA-HQ-2006-6001
	)	
Respondent	)	

CONSENT AGREEMENT

I. Preliminary Statement

A. Complainant, the United States Environmental Protection Agency (EPA), and Kmart Holding Corporation, doing business as Kmart Corporation (Kmart or Respondent), having consented to the terms of this Consent Agreement (Agreement), and before the taking of any testimony and without the adjudication of issues of law or fact herein, agree to comply with the terms of this Agreement and attached proposed Final Order, hereby incorporated by reference.

B. On January 20, 2004; March 11, 2004; March 17, 2004; March 25, 2004; and March 30, 2004, pursuant to EPA's Policy on Incentives for Self-Policing (Audit Policy), 65 Fed. Reg. 19,618 (April 11, 2000), Respondent submitted initial voluntary disclosures to EPA. These disclosures were later determined to relate to potential violations of:

1. Clean Water Act (CWA) § 311, 33 U.S.C. § 1321;

2. CWA § 402, 33 U.S.C. § 1342;

3. Emergency Planning and Community Right-to-Know Act (EPCRA) § 302, 42 U.S.C. § 11002;

4. EPCRA § 303, 42 U.S.C. § 11003;

5. EPCRA § 311, 42 U.S.C. § 11021;

6. EPCRA § 312, 42 U.S.C. § 11022;

7. Resource Conservation and Recovery Act (RCRA) § 3001, 42 U.S.C. § 6921;

8. RCRA § 3002, 42 U.S.C. § 6922;

9. RCRA § 3004, 42 U.S.C. § 6924;

10. RCRA § 3014, 42 U.S.C. § 6935; and

11. RCRA § 9001, 42 U.S.C. § 6991.

C. Respondent submitted a final audit report to EPA on June 7, 2004 and supplemental reports thereafter, with a final supplemental report on July 26, 2005. The disclosures from Kmart's seventeen (17) distribution centers have resulted in a final list of disclosed violations found in Attachments A and B, hereby incorporated by reference, which are the subject of this Agreement.

D. Seventy-six (76) violations from the seventeen (17) distribution centers listed in Attachment A have been determined by EPA to satisfy all the conditions set forth in the Audit Policy. These violations thereby qualify for a 100% reduction of the gravity component of the civil penalty, described further in Paragraphs III-IV of this Agreement.

E. Five (5) violations from five (5) of the seventeen (17) distribution centers listed in Attachment B have been determined by EPA to have failed to satisfy one or more of the conditions set forth in the Audit Policy. These violations are therefore subject to the gravity component of the civil penalty, as described further in Paragraph V of this Agreement.

II. Jurisdiction

A. The parties agree to the commencement and conclusion of this cause of action by issuance of this Agreement, as prescribed by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, and more specifically by 40 C.F.R. § 22.13 and § 22.18(b).

B. Respondent agrees that Complainant has the jurisdiction to bring an administrative action, based upon the facts that Respondent disclosed, for these violations and for the assessment of civil penalties pursuant to CWA § 311, 33 U.S.C. § 1321; CWA § 309, 33 U.S.C. § 1319; CWA § 402, 33 U.S.C. § 1342; RCRA § 3008a, 42 U.S.C. § 6928a; and EPCRA § 325, 42 U.S.C. § 11045.

C. Respondent hereby waives its right to request a judicial or administrative hearing on any issue of law or fact set forth in this Agreement and its right to appeal the Final Order accompanying this Agreement.

D. For purposes of this proceeding, Respondent admits that EPA has jurisdiction over the subject matter which is the basis of this Agreement.

E. Respondent neither admits nor denies the conclusions of law set forth in this Agreement.

III. Statements of Fact

A. Respondent is Kmart Holding Corporation doing business as Kmart Corporation, a retail company. Kmart Holding Corporation is owned by Sears Holdings Corporation, a retail company located at 3333 Beverly Road, Hoffman Estates, IL 60179, and Respondent is incorporated in the state of Delaware.

B. Respondent hereby certifies and warrants as true the facts referenced in this Section and in Attachments A and B, hereby incorporated by reference.

C. Pursuant to EPA's Audit Policy, Respondent hereby certifies, with respect to Attachment A of this Agreement, as to the accuracy of the following facts upon which this Agreement is based:

1. the violations were discovered through an audit or through a compliance management system reflecting due diligence;

2. the violations were discovered voluntarily;

3. the violations were promptly disclosed to EPA in writing;

4. the violations were disclosed prior to commencement of an Agency inspection or investigation, notice of a citizen suit, filing of a complaint by a third party, reporting of the violations by a "whistle blower" employee, or imminent discovery by a regulatory agency;

5. the violations have been corrected and the Respondent is, to the best of its knowledge and belief, in full compliance with CWA § 311, 33 U.S.C. § 1321; CWA § 402, 33 U.S.C. § 1342; EPCRA § 302, 42 U.S.C. § 11002; EPCRA § 303, 42 U.S.C. § 11003; EPCRA § 311, 42 U.S.C. § 11021; EPCRA § 312, 42 U.S.C. § 11022; RCRA § 3001, 42 U.S.C. § 6921; RCRA § 3002, 42 U.S.C. § 6922; RCRA § 3004, 42 U.S.C. § 6924; RCRA § 3014, 42 U.S.C. § 6935; RCRA § 9001, 42 U.S.C. § 6991; and the implementing regulations with respect to the violations of such Acts, as set forth in Attachment A;

6. appropriate steps have been taken to prevent a recurrence of the violations;

7. the specific violations (or closely related violations), identified in Attachment A have not occurred within three years of the date of disclosure identified in Paragraph I(B) and (C) above, at the same facilities that are the subject of this Agreement, and have not occurred within five years of the date of disclosure identified in Paragraph I(B) and (C) above, as part of a pattern at multiple

facilities owned or operated by the Respondent. For the purposes of subparagraph 7, a violation is:

(a) any violation of federal, state, or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency; Respondent has no knowledge that violations other than those covered in this Agreement (or closely related violations), have occurred within the past three years at the same facilities; nor are the specific violations that are the subject of this Agreement part of a pattern of violations by the entity's parent organization which have occurred over the past five years;

8. the violations have not resulted in serious actual harm nor presented an imminent and substantial endangerment to human health or the environment and they did not violate the specific terms of any judicial or administrative Final Order or Agreement; and

9. Respondent has cooperated as requested by EPA.

D. Respondent disclosed additional violations that have been determined by EPA to have failed to satisfy certain conditions set forth in the Audit Policy. These violations are described in Attachment B, hereby incorporated by reference.

IV. Conclusions of Law for Disclosures Identified in Attachment A that Meet the Audit Policy Conditions

CWA/SPCC

A. For purposes of this Agreement, Respondent is a person within the meaning of CWA § 311(a)(7), 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2, and is or was the owner or operator, as defined by CWA § 311(a)(6), 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of its distribution centers.

B. The regulations at 40 C.F.R. § 112.3 through § 112.7, which implement § 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), set forth procedures, methods, and requirements to prevent the discharge of oil from non-transportation-related facilities into or upon the navigable waters of the United States or adjoining shorelines in such quantities that by regulation have been determined may be harmful to the public health or welfare or environment of the United States by owners or operators who are engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil and oil products.

C. 40 C.F.R. § 112.3(a) requires owners and operators of onshore and offshore facilities that have discharged or, due to their location, could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines, to prepare a Spill Prevention Control and Countermeasure (SPCC) Plan.

D. Respondent is engaged in storing or consuming oil or oil products located at its distribution centers in quantities such that discharges may be harmful, as defined by 40 C.F.R. § 110.3.

E. Respondent's distribution centers are onshore facilities within the meaning of § 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2, which, due to their location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by § 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1) or its adjoining shoreline that may either (1) violate applicable water quality standards or (2) cause a film or sheen or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

F. Based on the above, and pursuant to § 311(j)(1)(C) and its implementing regulations, Respondent is subject to the requirements of 40 C.F.R. § 112.3 through § 112.7, at certain distribution centers listed in Attachment A, hereby incorporated by reference.

G. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent has violated the CWA at eleven (11) distribution centers identified in Attachment A by failing to prepare and implement an SPCC Plan, as required by CWA § 311(j)(1)(C), 33 U.S.C. § 1321 (j)(1)(C), and the requirements found in 40 C.F.R. § 112.3 through § 112.7.

H. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for the SPCC violations listed in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that would otherwise apply to these violations.

CWA/NPDES

A. For purposes of this Agreement, Respondent is a person within the meaning of CWA § 502(5), 33 U.S.C. § 1362(5), and 40 C.F.R. § 112.2, and is or was the owner or operator, as defined by 40 C.F.R. § 112.2, of its distribution centers.

B. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the National Pollutant Discharge Elimination System (NPDES) program for the discharge of pollutants from point sources to waters of the United States. Any such discharge is subject to the specific terms and conditions prescribed in the applicable permit.

C. Section 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), and 40 C.F.R. § 122.21(a) and § 122.26(a) provide that facilities that have storm water discharges associated with industrial activities are point sources subject to NPDES permitting requirements under § 402(a) of the CWA, 33 U.S.C. § 1342(a), unless the facility obtains a waiver under 40 C.F.R. § 122.26(g).

D. 40 C.F.R. § 122.26(b)(14)(xi) defines industrial activities to include inter alia facilities under Standard Industrial Classifications (SIC Code 4225).

E. Respondent is engaged in industrial activities at its distribution centers because they have an SIC Code of 4225, and because they serve as storage and distribution centers for Respondent's retail stores.

F. Respondent's distribution centers are facilities subject to § 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), and 40 C.F.R. § 122.21(a) and § 122.26(a), because, due to their activities, they could reasonably be expected to discharge storm water associated with industrial activities.

G. Based on the above, and pursuant to § 402(p) and implementing regulations, Respondent is subject to the requirements of 40 C.F.R. § 122.21(a) and § 122.26(a) at certain distribution centers listed in Attachment A, hereby incorporated by reference.

Storm Water Permit Violations

A. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent has violated the CWA at thirteen (13) distribution centers identified in Attachment A by failing to obtain a NPDES or storm water permit or apply for a waiver under 40 C.F.R. § 122.26(g), which allows for a conditional exclusion for "no exposure" of industrial activities and materials to storm water, as required by § 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), and 40 C.F.R. § 122.21(a), § 122.26(a), and § 122.26(b)(14)(xi).

B. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for the storm water permit violations listed in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that would otherwise apply to these violations.

Storm Water Pollution Prevention Plan Violations

A. Under § 402(p)(3)(A) of the CWA, 33 U.S.C. § 1342(p)(3)(A), and 40 C.F.R. § 122.26(a) and § 122.26(b)(14)(xi), facilities subject to a NPDES storm water permit must implement a storm water pollution prevention plan (SWPPP).

B. Based on the above, and pursuant to § 402(p)(3)(A) and implementing regulations, Respondent is subject to the requirements of 40 C.F.R. § 122.26(b)(14)(xi) at certain distribution centers listed in Attachment A, hereby incorporated by reference.

C. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent has violated the CWA at ten (10) distribution centers by failing to prepare and implement a SWPPP, as required by § 402(p)(3)(A) of the CWA, 33 U.S.C. § 1342(p)(3)(A), and 40 C.F.R. § 122.26(b)(14)(xi) and § 122.26(a).

D. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for the SWPPP violations listed in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that would otherwise apply to these violations.

EPCRA

A. For purposes of this Agreement, Respondent is a person as defined in EPCRA § 329(7), 42 U.S.C. § 11049(7), and is or was the owner or operator, as defined in EPCRA § 329(4), 42 U.S.C. § 11049(4), of its distribution centers.

B. Section 302(c) of EPCRA, 42 U.S.C. § 11002(c), and the regulations found at 40 C.F.R. Part 355, require owners and operators of facilities at which an extremely hazardous substance is present, at or above stated designated threshold quantities, to notify the State Emergency Response Commission (SERC) that such facility is subject to the requirements of EPCRA § 302(c).

C. Section 303(d) of EPCRA, 42 U.S.C. § 11003(d), and the regulations found at 40 C.F.R. Part 355, require owners and operators of facilities at which an extremely hazardous substance is present, at or above stated designated threshold quantities, to notify the Local Emergency Planning Committee (LEPC) of the facility representative who will participate in the emergency planning process as a facility emergency coordinator.

D. Section 311(a) of EPCRA, 42 U.S.C. § 11021(a), and the regulations found at 40 C.F.R. Part 370, require the owner or operator of a facility, which is required to prepare or have available a material safety data sheet (MSDS) for a hazardous chemical under the Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 651 et. seq., ("OSH Act") and regulations promulgated under the OSH Act, to submit a MSDS, or a list of chemicals to the LEPC, the SERC, and to the fire department with jurisdiction over the facility by October 17, 1987, or within three months of first becoming subject to EPCRA § 311 requirements.

E. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and the regulations found at 40 C.F.R. Part 370, require the owner or operator of a facility, which is required to have an MSDS for a hazardous chemical under the OSH Act of 1979, 29 U.S.C.A. § 651 et. seq., and regulations

promulgated under the OSH Act, to prepare and submit an emergency and hazardous chemical inventory form (Tier I or Tier II as described in 40 C.F.R. Part 370) containing the information required by those sections to the LEPC, SERC, and to the fire department with jurisdiction over the facility by March 1, 1988 (or March 1 of the first year after the facility becomes subject to EPCRA § 312 requirements), and annually thereafter.

F. Sulfuric acid is an extremely hazardous substance, and lead and propane are hazardous chemicals, as defined under EPCRA § 312, 42 U.S.C. § 11022 and 40 C.F.R. § 370.2.

G. As set forth in 40 C.F.R. § 370.20, the reporting threshold amount for hazardous chemicals present at a facility at any one time during the preceding calendar year is ten thousand (10,000) pounds. The reporting threshold, therefore, for lead and propane are ten thousand (10,000) pounds. For extremely hazardous substances present at the facility, the reporting threshold is five hundred (500) pounds or the threshold planning quantity (TPQ) as defined in 40 C.F.R Part 355, whichever is lower. Here, because the reporting threshold is lower than the TPQ, the reporting threshold for sulfuric acid is five hundred (500) pounds.

H. Based on the above, and pursuant to § 302(c), § 303(d), and § 311(a) and implementing regulations, Respondent is subject to the requirements of 40 C.F.R. Part 355 and Part 370 at certain distribution centers listed in Attachment A , hereby incorporated by reference.

I. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent has violated the following requirements:

1. EPCRA § 302(c), 42 U.S.C. § 11002(c), and the regulations found at 40 C.F.R. Part 355, when they failed to notify the SERC at seventeen (17) distribution centers, identified in Attachment A;

2. EPCRA § 303(d), 42 U.S.C. § 11003(d), and the regulations found at 40 C.F.R. Part 355, when they failed to notify the LEPC of the identity of the emergency coordinator who would participate in the emergency planning process at seventeen (17) distribution centers, identified in Attachment A;

3. EPCRA § 311(a), 42 U.S.C. § 11021(a) and the regulations found at 40 C.F.R. Part 370, when they failed to submit an MSDS for a hazardous chemical(s) or, in the alternative, a list of such chemicals, for seventeen (17) distribution centers, to the LEPC, SERC, and the fire department with jurisdiction over these distribution centers, identified in Attachment A;

4. EPCRA § 312(a), 42 U.S.C. § 11022(a) and the regulations found at 40 C.F.R. Part 370 at one (1) facility, by failing to prepare and submit emergency and chemical inventory forms to the LEPC, SERC, and the fire department with jurisdiction over these distribution centers, identified in Attachment A.

J. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for the EPCRA violations listed in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that would otherwise apply to these violations.

RCRA

A. For purposes of this Agreement, Respondent is a person within the meaning of 42 U.S.C. § 6903(15), and is or was the owner and operator, within the meaning of 40 C.F.R. § 260.10, at its distribution centers. Respondent is or was also a generator of hazardous waste at certain distribution centers within the meaning of 40 C.F.R. § 260.10. Respondent generates and stores hazardous waste, and as such is subject to the requirements of 40 C.F.R. Parts 264, 265, and 270. Under 40 C.F.R. § 264.1(g), § 265.1(c) and § 270.1(c), generators accumulating waste on-site may be exempt from the requirements of 40 C.F.R. Parts 264, 265, and 270, if they comply with 40 C.F.R. § 262.34, and the specific requirements of 40 C.F.R. Part 265 referenced in 40 C.F.R. § 262.34.

B. Section 3006 of RCRA, 42 U.S.C. § 6926, provides that states may be authorized to issue and enforce permits for the storage, treatment and disposal of hazardous waste, and to administer EPA-authorized hazardous waste programs within their state. Massachusetts (1985), Michigan (1986), Colorado (1984), North Carolina (1984), Kansas (1985), Pennsylvania (1986), Georgia (1984), Florida (1985), and Ohio (1989), where Respondent's distribution centers are located, have been authorized to administer their own hazardous waste programs. The dates that each state received base-program authorization have been provided above.

C. Pursuant to RCRA § 3006(g), 42 U.S.C. § 6926(g), and § 3008(a) and (g), 42 U.S.C. § 6928(a) and (g), EPA may enforce the federally approved state hazardous waste programs, as well as the federal regulations promulgated pursuant to the Hazardous and Solid Waste Amendments.

Identifying and Listing Hazardous Waste

A. 40 C.F.R. § 262.10 and § 261.5 requires a generator of hazardous waste to comply with requirements for conditionally exempt small quantity generators (CESQG), and to change its status if generating more than 100 kilograms of hazardous waste in a calendar month.

B. Based on the above, and pursuant to RCRA § 3001(d)(1) and its implementing regulations, Respondent is subject to the requirements of 40 C.F.R. Parts 262 and 265 at certain distribution centers listed in Attachment A, hereby incorporated by reference.

C. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent violated a hazardous waste

requirement at one (1) distribution center identified in Attachment A when Respondent failed to report its change of generator status, as required by RCRA § 3001(d)(1), 42 U.S.C. § 6921(d)(1) and § 3002(a), 42 U.S.C. § 6922(a), and the requirements found in 40 C.F.R. Parts 262 and 265.

D. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for the identifying and listing hazardous waste violation listed in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that would otherwise apply to these violations.

Hazardous Waste Generators

A. 40 C.F.R. § 265.174, (referenced by 40 C.F.R. § 262.34(a)), requires generators of hazardous waste to conduct weekly inspections of their hazardous waste storage areas.

B. Based on the above, and pursuant to § 3002(a) and its implementing regulations, Respondent is subject to the requirements of 40 C.F.R. Parts 262 and 265 at certain distribution centers listed in Attachment A, hereby incorporated by reference.

C. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent did not comply with hazardous waste requirements of RCRA § 3002(a), 42 U.S.C. § 6922(a), and 40 C.F.R. Parts 262 and 265, including but not limited to, generating and storing extremely hazardous waste and hazardous waste, specifically sulfuric acid, lead, and propane, failure to identify hazardous waste, failure to obtain an EPA ID number, exceeding the hazardous waste accumulation time, failure to properly package and label waste, failure to maintain proper records, failure to meet preparedness and prevention standards, failure to meet training requirements, and failure to follow emergency procedure standards, at six (6) distribution centers identified in Attachment A.

D. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for the hazardous waste generator violations listed in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that would otherwise apply to these violations.

Universal Waste

A. 40 C.F.R. Part 273 Subpart B requires small quantity handlers of universal waste to develop and implement a universal waste management program for such wastes to prevent releases of any universal waste to the environment. 40 C.F.R. Part 273 Subpart C requires large quantity handlers of universal waste to develop and implement a universal waste management program for such wastes to prevent releases of any universal waste to the environment.

B. Based on the above, and pursuant to § 3002(a) and its implementing regulations,

Respondent is subject to the requirements of 40 C.F.R. Parts 273 at certain distribution centers listed in Attachment A, hereby incorporated by reference.

C. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent, a generator of universal waste, specifically fluorescent light bulbs and batteries, did not comply with universal waste requirements of RCRA § 3002(a), 42 U.S.C. § 6922(a) and 40 C.F.R. § 273 when it failed to develop and implement a universal waste management program, applicable pursuant to 40 C.F.R. § 273.2 and § 273.5, at one (1) distribution center listed in Attachment A.

D. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for the universal waste violations listed in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that would otherwise apply to these violations.

Treatment, Storage, and Disposal (TSD) of Hazardous Waste

A. RCRA § 3004(d)(1), 42 U.S.C. § 6924 and 40 C.F.R. § 268.1(a)-(b) and § 268.7(a) requires generators of hazardous waste to determine if the waste has to be treated before it can be land disposed.

B. Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent, a generator of hazardous waste, failed to meet land disposal requirements at one (1) distribution center listed in Attachment A, hereby incorporated by reference, in accordance with 40 C.F.R. § 268.1(a) and (b) and § 268.7(a).

C. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for the TSD violations listed in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that would otherwise apply to these violations.

Used Oil Violations

A. 40 C.F.R. § 279.22 (c)(1) requires used oil generators to use containers and aboveground tanks to store used oil at generator facilities which must be labeled or marked clearly with the words "Used Oil."

B. Based on information provided to Complainant by Respondent, Respondent, a generator of used oil, failed to correctly label used oil containers at three (3) distribution centers, in accordance with 40 C.F.R. § 279.22(c)(1), as described in Attachment A, hereby incorporated by reference.

C. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for the Used Oil violations listed in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that would otherwise apply to these violations.

Underground Storage Tanks (UST) Violations

A. For purposes of this Agreement, Respondent is a person within the meaning of RCRA § 9001(6), 42 U.S.C. § 6991(6), and 40 C.F.R. § 280.12, and is or was the owner or operator, as defined by RCRA § 9001(3) and (4), 42 U.S.C. § 6991(3) and (4) and in 40 C.F.R. § 280.12 of UST systems.

B. Under RCRA § 9002, 42 U.S.C. § 6991, each owner of an UST shall notify the State or local agency or department designated pursuant to § 9002(b)(1) of the existence of such tank by May 8, 1986. Under 40 C.F.R. § 280.22(a), any owner who brings an UST into use after May 8, 1996, must within 30 days of bringing such tank into use, submit a notice of existence of such tank system to the state or local agency or department designated to receive such notice.

C. Under 40 C.F.R. § 280.21(a), as of December 22, 1998, owners and operators of UST systems must comply with either: (1) the new UST system performance standards under 40 C.F.R. § 280.20; (2) the upgrading requirements in 40 C.F.R. § 280.21(b) through (d); or (3) closure requirements under 40 C.F.R. Part 280, Subpart G and applicable corrective action requirements under 40 C.F.R. Part 280, Subpart F for all their existing UST systems.

D. Based on the above, and pursuant to § 9002(a), and implementing regulations, Respondent is subject to the requirements of 40 C.F.R. Part 280 at certain distribution centers listed in Attachment A, hereby incorporated by reference.

E. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent has violated the following requirements at one (1) distribution center, identified in Attachment A:

1. RCRA § 9003, 42 U.S.C. § 6991b, and the regulations found at 40 C.F.R. § 280.22 when it failed to provide an updated notice of a tank system to the state or local agency designated to receive such notice, thereby failing to maintain a current UST registration certificate; and when it failed to re-certify its compliance regarding the installation of tanks and piping, cathodic protection of steel tanks and piping, financial responsibility, and release detection at one (1) distribution center;

2. RCRA § 9003, 42 U.S.C. § 6991b, and the regulations found at 40 C.F.R. § 280.40(a)(2) when it failed to provide routine maintenance and service checks for operability or running condition of the UST.

F. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for the UST violations listed in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that would otherwise apply to these violations.

V. Conclusions of Law for Disclosures Identified in Attachment B that Failed to Meet the Audit Policy Conditions

CWA/SPCC

A. For purposes of this Agreement, Respondent is a person within the meaning of CWA § 311(a)(7), 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2, and is or was the owner or operator, as defined by CWA § 311(a)(6), 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of its distribution centers listed in Attachment B, hereby incorporated by reference.

B. The regulations at 40 C.F.R. § 112.3 through § 112.7, which implement § 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), set forth procedures, methods, and requirements to prevent the discharge of oil from non-transportation-related facilities into or upon the navigable waters of the United States or adjoining shorelines in such quantities that by regulation have been determined may be harmful to the public health or welfare or environment of the United States by owners or operators who are engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil and oil products.

C. 40 C.F.R. § 112.3(a) requires owners and operators of onshore and offshore facilities that have discharged or, due to their location, could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines, to prepare a SPCC Plan.

D. Respondent is engaged in storing or consuming oil or oil products located at its distribution centers in such quantities that discharges may be harmful, as defined by 40 C.F.R. § 110.3.

E. Respondent's distribution centers are onshore facilities within the meaning of § 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2, which, due to their location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by § 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1) or its adjoining shoreline that may either (1) violate applicable water quality standards or (2) cause a film or sheen or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

F. Based on the above, and pursuant to § 311(j)(1)(C) and its implementing regulations, Respondent is subject to the requirements of 40 C.F.R. § 112.3 through § 112.7, at the distribution centers listed in Attachment B, hereby incorporated by reference.

G. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent has violated the CWA at two (2) distribution centers identified in Attachment B by failing to prepare and implement an SPCC Plan, as required by CWA § 311(j)(1)(C), 33 U.S.C. § 1321 (j)(1)(C), and the requirements found in 40 C.F.R. § 112.3 through § 112.7.

H. As set forth in Attachment B, the disclosures of CWA SPCC violations at two (2) distribution centers failed to meet Condition 5 of the Audit Policy, which requires correction of violations within 60 calendar days from the date of discovery. As a result, gravity-based penalties will be assessed.

CWA/Storm Water Violations

A. For purposes of this Agreement, Respondent is a person within the meaning of CWA § 502(5), 33 U.S.C. § 1362(5), and 40 C.F.R. § 112.2, and is or was the owner or operator, as defined by 40 C.F.R. § 112.2, of its distribution centers listed in Attachment B, hereby incorporated by reference.

B. Section 402(a) of the CWA, 33 U.S.C. § 1342(a) provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States. Any such discharge is subject to the specific terms and conditions prescribed in the applicable permit.

C. Section 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), and 40 C.F.R. § 122.21(a) and § 122.26(a) provide that facilities that have storm water discharges associated with industrial activities are point sources subject to NPDES permitting requirements under § 402(a) of the CWA, 33 U.S.C. § 1342(a), unless the facility obtains a waiver under 40 C.F.R. § 122.26(g).

D. 40 C.F.R. § 122.26(b)(14)(xi) defines industrial activities to include inter alia facilities under Standard Industrial Classifications (SIC Code 4225).

E. Respondent is engaged in industrial activities at its distribution centers because they have an SIC Code of 4225, and because they serve as storage and distribution centers for Respondent's retail stores.

F. Respondent's distribution centers are facilities subject to § 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), and 40 C.F.R. § 122.21(a) and § 122.26(a), because, due to their activities, they could reasonably be expected to discharge storm water associated with industrial activities.

G. Based on the above, and pursuant to § 402(p) and implementing regulations, Respondent is subject to the requirements of 40 C.F.R. § 122.21(a) and § 122.26(a) at certain distribution centers listed in Attachment B.

H. Facilities subject to storm water discharge permits under CWA § 402(p), 33 U.S.C. § 1342(p) and 40 C.F.R. § 122.26 and § 122.28, must conduct storm water monitoring and submit annual discharge monitoring reports (DMRs) in accordance with the permit.

I. Pursuant to CWA §§ 402(b) and (p), 33 U.S.C. §§ 1342(b) and (p), and corresponding state regulations, the State of North Carolina issued a General Permit to one (1) of Respondent's distribution centers which authorize storm water discharges associated with industrial activity into waters of the United States (including discharges to or through municipal separate storm sewer systems), but only in accordance with the conditions of the permit.

J. Based on the above, and pursuant to § 402(p) and implementing regulations, Respondent is subject to the requirements of 40 C.F.R. § 122.26 and § 122.28 at certain distribution centers listed in Attachment B.

K. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent has violated the CWA at one (1) distribution center identified in Attachment B, by failing to conduct storm water sampling or submit DMRs, in accordance with the conditions of the storm water permit required by § 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), and 40 C.F.R. § 122.21(a) and § 122.26(a).

L. For purposes of this Agreement, Complainant hereby states and alleges that, based on the information supplied by Respondent to EPA, Respondent has violated the CWA at one (1) distribution center identified in Attachment B, by failing to either obtain a stormwater permit or file a No Exposure Certification, 40 C.F.R. § 122.26(g), which allows for a conditional exclusion for "no exposure" of industrial activities and materials to storm water, as required by § 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(B), and 40 C.F.R. § 122.21(a) and § 122.26(a).

M. As set forth in Attachment B, the disclosures of CWA storm water permit violations from two (2) of the distribution centers identified in Attachment B failed to meet Condition 3 of the Audit Policy, which requires written disclosure of a violation within 21 calendar days of discovery. As a result, gravity-based penalties will be assessed.

RCRA/Used Oil Violations

A. For purposes of this Agreement, Respondent is a person within the meaning of 42 U.S.C. § 6903(15), and is or was the owner and operator, within the meaning of 40 C.F.R. § 260.10, of its distribution centers.

B. 40 C.F.R. § 279.22 (c)(1) requires used oil generators to use containers and aboveground tanks to store used oil at generator facilities which must be labeled or marked clearly with the words "Used Oil."

C. Based on information provided to Complainant by Respondent, Respondent, a generator of used oil, failed to correctly label used oil containers at one (1) distribution center, in accordance with 40 C.F.R. § 279.22(c)(1), as described in Attachment B, hereby incorporated by reference.

D. As set forth in Attachment B, the disclosures of a RCRA used oil labeling violation failed to meet Condition 5 of the Audit Policy, which requires which requires correction of violations within 60 calendar days from the date of discovery.

VI. Civil Penalty

A. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy for those violations described in Attachment A and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that otherwise would apply to these violations. Complainant alleges that the gravity component of the civil penalty for violations described in Attachment A would ordinarily be $1,608,382. Of that potential penalty, $211,776 is attributable to EPCRA violations; $530,001 is attributable to CWA violations; and $866,605 is attributable to RCRA violations. EPA alleges that this gravity component is potentially assessable against Respondent for the violations described in Attachment A. Pursuant to the Audit Policy, however, EPA will waive 100% of the gravity-based penalties assessed for violations listed in Attachment A.

B. EPA had determined, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has failed to satisfy one or more of the conditions set forth in the Audit Policy for those violations described in Attachment B and therefore does not qualify for 100% reduction of the gravity component of the civil penalty associated with those violations. Complainant alleges that the gravity component of the civil penalty for violations described in Attachment B is $78,625, all of which is attributable to CWA violations. Of that penalty, $44,625 is attributable to CWA/SPCC violations and $34,000 is attributable to CWA/NPDES violations. EPA alleges that this gravity component is potentially assessable against Respondent for the violations described in Attachment B. Pursuant to the Audit Policy, and pursuant to CWA § 311(6)(B)(ii), having considered the nature of the violations and other relevant factors, Complainant has determined that an appropriate and fair gravity-based civil penalty to settle this action, for the violations described in Attachment B, is $78,625.

C. Under the Audit Policy, EPA has discretion to assess a penalty equivalent to the economic benefit Respondent gained as a result of its noncompliance. Based on information provided by Respondent and use of the Economic Benefit (BEN) computer model, for the violations described in Attachment A, EPA has determined that Respondent obtained an economic benefit of $21,967 as a result of its noncompliance in this matter. Of this amount, $8,260 is attributable to CWA/SPCC violations, $7,117 is attributable to CWA/NPDES

violations, $190 is attributable to EPCRA violations, and $6,400 is attributable to the RCRA violations. Pursuant to the Audit Policy, EPA will assess the penalty equivalent to the economic benefit for violations listed in Attachment A.

D. Under the Audit Policy, EPA has discretion to assess a penalty equivalent to the economic benefit Respondent gained as a result of its noncompliance. Based on information provided by Respondent and use of the Economic Benefit (BEN) computer model, for the violations described in Attachment B, EPA has determined that Respondent obtained an economic benefit of $1,830 as a result of its noncompliance in this matter. Of this amount, $1,830 is attributable to CWA/SPCC violations.

E. EPA assesses a civil penalty of $102,422, which is comprised of (1) an economic benefit of $21,967 that Respondent gained as a result of its noncompliance for disclosures listed in Attachment A, (2) an economic benefit of $1,830 that Respondent gained as a result of its noncompliance for disclosures listed in Attachment B, and (3) a gravity-based penalty of $78,625 for violations described in Attachment B which fail to satisfy certain conditions set forth in the Audit Policy.

F. Accordingly, the civil penalty agreed upon by the parties for settlement purposes is $102,422.

VII. Terms of Settlement

A. Respondent agrees to pay ONE HUNDRED AND TWO THOUSAND, FOUR HUNDRED AND TWENTY-TWO dollars ($102,422), in satisfaction of the civil penalty.

B. For payment of the civil penalties related to the CWA NPDES, EPCRA and RCRA violations, Respondent shall send, within thirty (30) days of the issuance of the Final Order, a cashier's check or a certified check in the amount of FORTY-SEVEN THOUSAND, SEVEN HUNDRED AND SEVEN dollars ($47,707) made payable to the "Treasurer of the United States of America," and shall be sent to the following address:

United States Environment Protection Agency
Hearing Clerk
P.O. Box 360277M
Pittsburgh, PA 15251

Alternatively, Respondent shall pay FORTY-SEVEN THOUSAND, SEVEN HUNDRED AND SEVEN dollars ($47,707) by wire transfer with a notation of "Kmart Holding Corporation, doing business as Kmart Corporation, Civil Penalty Docket Nos. CWA-HQ-2006-6001, RCRA-HQ-2006-6001, and EPCRA-HQ-2006-6001" by using the following instructions:

Name of Beneficiary:	EPA
Number of Account for deposit:	68010099
The Bank Holding Acct:	Treas NYC

The ABA routing Number: 021030004

The check or wire transfer shall bear the case docket numbers.

C. In payment of the civil penalty related to the CWA SPCC violations, Respondent shall, within thirty (30) days of issuance of the Final Order, forward a cashier's or certified check, in the amount of FIFTY-FOUR THOUSAND, SEVEN HUNDRED AND FIFTEEN dollars ($54,715) made payable to the "Oil Spill Liability Trust Fund," to:

Commander, National Pollution Funds Center
United States Coast Guard
Ballston Common Office Building Suite 1000
4200 Wilson Boulevard
Arlington, VA 22203

The check shall indicate that it is for In re: Kmart Holding Corporation, doing business as Kmart Corporation, Docket No. CWA-HQ-2006-6001

Alternatively, Respondent shall pay FIFTY-FOUR THOUSAND, SEVEN HUNDRED AND FIFTEEN dollars ($54,715) by wire transfer with a notation of "Kmart Holding Corporation, doing business as Kmart Corporation, Docket No. CWA-HQ-2006-6001" by using the following instructions:

Bank's ABA Number:	021030004 Treas NYC
Coast Guard Beneficiary Number:	69025102
Type/Subtype Code:	10 00

D. Respondent shall forward copies of these checks or wire transfers to EPA, within five (5) business days of payment, to the attention of:

Beth Cavalier
Multimedia Enforcement Division (2248-A)
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, N.W.
Ariel Rios Building, Room 3119
Washington, DC 20460

E. Respondent's obligations under this Agreement shall end when it has paid the civil penalties as required by this Agreement and the Final Order, and complied with its obligations under Sections VII(B-D) of this Agreement.

F. For the purposes of state and federal income taxation, Respondent shall not be entitled, and agrees not to attempt, to claim a deduction for any civil penalty payment made pursuant to

the Final Order. Any attempt by Respondent to deduct any such payments shall constitute a violation of this Agreement.

G. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty from the date that the Environmental Appeals Board (EAB) files the Final Order, if the penalty is not paid by the date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11. A charge will be assessed to cover the costs of debt collection, including processing and handling costs and attorney fees. In addition, a penalty charge of 12 percent (12%) per year compounded annually will be assessed on any portion of the debt that remains delinquent more than ninety (90) days after payment is due.

VIII. Severability and Public Comment

A. The parties acknowledge that the settlement portions of this Agreement which pertain to the CWA violations are, pursuant to CWA § 311(b)(6)(C)(i), 33 U.S.C. § 1321(b)(6)(C)(i), subject to public notice and comment requirements. Furthermore, the parties acknowledge and agree that at that time, EPA will also provide notice of the CAA and RCRA portions of this Agreement. Should EPA receive comments regarding the issuance of the Final Order assessing the civil penalty agreed to in Paragraph VI(A), EPA shall forward all such comments to Respondent within ten (10) days of the receipt of the public comments.

B. As part of this Agreement, and in satisfaction of the requirements of the Audit Policy, Respondent has certified to certain facts. The parties agree that should EPA receive, through public comments or in any way, information that proves or demonstrates that these facts are other than as certified by Respondent, the portion of this Agreement pertaining to the affected facility, including mitigation of the proposed penalty, may be voided or this entire Agreement may be declared null and void at EPA's election, and EPA may proceed with an enforcement action.

C. The parties agree that Respondent reserves all of its rights should this Agreement be voided in whole or in part. The parties further agree that Respondent's obligations under this Agreement will cease should this Agreement be rejected by the EAB.

IX. Reservation of Rights

This Agreement and the Final Order, when issued by the EAB, and upon payment by Respondent of civil penalties in accordance with Section VI, shall resolve only the federal civil claims specified in Attachments A and B. Nothing in this Agreement and the Final Order shall be construed to limit the authority of EPA and/or the United States to undertake any action against Respondent, in response to any condition which EPA or the United States determines may present an imminent and substantial endangerment to the public health, welfare, or the environment. Furthermore, issuance of the Final Order does not constitute a waiver by EPA

and/or the United States of its right to bring an enforcement action, either civil or criminal, against Respondent for any other violation of any federal or state statute, regulation or permit.

X. Other Matters

A. Each party shall bear its own costs and attorney fees in this matter.

B. The provisions of this Agreement and the Final Order, when issued by the EAB, shall apply to and be binding on the Complainant and the Respondent, as well as Respondent's officers, agents, successors and assigns. Any change in ownership or corporate status of the Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Agreement, including the obligation to pay the civil penalty referred to in Paragraph VI.

C. Nothing in this Agreement shall relieve Respondent of the duty to comply with all applicable provisions of the CWA, EPCRA and RCRA or other federal, state, or local laws or regulations, nor shall it restrict EPA's authority to seek compliance with any applicable laws, nor shall it be construed to be a ruling on, or a determination of, any issue related to any federal, state, or local permit.

D. Except as provided in Section VIII(C), Respondent waives any rights it may have to contest the allegations contained herein and its right to appeal the Final Order accompanying this Agreement.

E. The undersigned representatives of each party to this Agreement certify that each is duly authorized by the party whom he represents to enter into these terms and bind that party to it.

FOR RESPONDENT:

8/9/06
Vice President, Distribution Centers Date
Sears Holding Management Corporation
as Agent for:
Kmart Holding Corporation, doing business
as Kmart Corporation

FOR COMPLAINANT:

Robert A. Kaplan 8/18/06
Robert A. Kaplan Date
Director
Special Litigation and Projects Division
U.S. Environmental Protection Agency