



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

JAN 10 2012

CERTIFIED MAIL --
RETURN RECEIPT REQUESTED

Thomas J. Fucillo, Esq.
Menter, Rudin, & Trivelpiece, P.C.
308 Maltbie Street, Suite 200
Syracuse, NY 13204-1498

Re: **In the Matter of Schmitt Sales, Inc.**
Docket No. RCRA-02-2011-7508

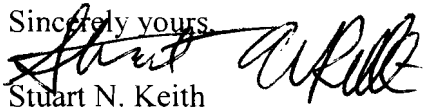
U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.11
2012 JAN 10 P 3:15
REGIONAL HEARING
CLERK

Dear Mr. Fucillo:

Enclosed is a copy of the Consent Agreement and Final Order in the above-referenced proceeding, signed by the Regional Administrator of the United States Environmental Protection Agency.

Please arrange for payment of this penalty according to the instructions given in the Order.

Sincerely yours,


Stuart N. Keith

Assistant Regional Counsel
Waste & Toxic Substances Branch
Office of Regional Counsel

Enclosures

Cc: Russ Brauksieck, Chief
Facility Compliance Section
NYSDEC
625 Broadway -11th floor
Albany, NY 12233

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

-----X
In the Matter of :
Schmitt Sales, Inc., :
d.ba. Brooks Super Duper; :
Dutch Hollow Market; :
Echoes on the Lake; :
Parkview Market; :
Pine Valley Busy Mart; :
Tubby's Corner Quick Stop; :
T-Burg Foodline, Inc.; :
Cassadaga Supermarket; :
Schmitt's Robo Mart; :
Ducky's, :
Respondent. :
Proceeding Under Section :
9006 of the Solid Waste :
Disposal Act, as amended. :
-----X

CONSENT AGREEMENT AND
FINAL ORDER

Docket No. RCRA-02-2011-7508

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2012 JAN 10 P 3:15
REGIONAL HEARING
CLERK

PRELIMINARY STATEMENT

This administrative proceeding was instituted pursuant to Section 9006 of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. §6901 *et seq.* (collectively referred to as "RCRA" or the "Act").

The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency, Region 2 ("EPA" or "Complainant") issued a "Complaint, Compliance Order, and Notice of Opportunity for Hearing" to Schmitt Sales, Inc. (the "Respondent") on June 30, 2011.

The Complaint alleged violations of Subtitle I of the Act and the regulations promulgated pursuant to the Act, codified in Volume 40 of the Code of Federal Regulations (“C.F.R.”) Part 280, applicable to Respondent’s underground storage tanks (“UST”s).

By entering into this Consent Agreement and Final Order (“CA/FO”) pursuant to 40 C.F.R. § 22.18, the parties agree 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 Schmitt Sales, Inc. d.b.a. Brooks Super Duper, Dutch Hollow Market, Echoes on the Lake, Parkview Market, Pine Valley Busy Mart, Tubby’s Corner Quick Stop, T-Burg Foodline, Inc., Cassadaga Supermarket, Schmitt’s Robo Mart, and Ducky’s.

2. Respondent is a "person" as that term is defined Section 9001(6) of RCRA, 42 U.S.C. § 6991(6), and 40 C.F.R. § 280.12.

3. Respondent was and continues to be an “owner” and an “operator” of multiple “underground storage tanks” (“UST”) or “UST systems” as those terms are defined in Section 9001 of the Act, 42 U.S.C. §6991, and 40 C.F.R. § 280.12.

4. Respondent’s UST systems are or were located at Brooks Super Duper, 1 Third Street, Cattaraugus, New York, 14719; Dutch Hollow Market, 6107 East Avon-Lima Road, Avon, New York 14414; Echoes on the Lake, 3301 County Route 6, Black Lake Road, Hammond, New York, 13646; Parkview Market, West Lake Road, Mayville, New York, 14757; Pine Valley Busy Mart, 4520 Watkins Road, Pine Valley, New York, 14872; Tubby’s Corner Quick Stop, 9299 Erie Road, Angola, New York, 14006; T-Burg Foodline, Inc., Route 96, Trumansburg, New York, 14886; Cassadaga Supermarket, Route 60, Cassadaga, New York, 14718; Schmitt’s Robo

Mart, 5095 Main Street and Royal Parkway, Williamsville, New York, 14221; and Ducky's, 28 Main Street, Friendship, New York, 14739 (the "Facilities").

5. On or about February 25, 2009, April 21, 2009, June 23, 2009, June 24, 2009, August 18, 2009, August 31, 2009, September 1, 2009, April 20, 2010 and April 21, 2010, pursuant to Section 9005 of the Act, 42 U.S.C. ' 6991d, an authorized representative(s) of EPA (ARepresentative@) inspected Brooks Super Duper, Dutch Hollow Market, Echoes on the Lake, Parkview Market, Pine Valley Busy Mart, Tubby's Corner Quick Stop, T-Burg Foodline, Inc., Cassadaga Supermarket, Schmitt's Robo Mart (Williamsville), and Ducky's. The purpose of the inspections was to determine whether Respondent Schmitt was in compliance with the Act and UST regulations (hereinafter referred to as the AFebruary 2009 Inspection,@ "April 2009 Inspection," " June 2009 Inspections," "August 2009 Inspections," "September 2009 Inspection," and "April 2010 Inspections" and collectively referred to as "The Inspections").

6. On or about December 23, 2009, and August 27, 2010, EPA sent Notices of Violations ("NOV"s) and Information Request Letters ("IRL"s) to Respondent to determine the status of its compliance with the Act and 40 C.F.R. Part 280.

8. In correspondence dated January 18, 2010, and September 14, 2010, Respondent provided responses to the NOV/IRL ("IRL Responses") with information about the USTs at Brooks Super Duper, Dutch Hollow Market, Echoes on the Lake, Parkview Market, Pine Valley Busy Mart, Tubby's Corner Quick Stop, T-Burg Foodline, Inc., Cassadaga Supermarket, Schmitt's Robo Mart, Ducky's, and other facilities.

9. Based on the Inspections and the IRL Responses, the Complainant issued a Complaint on June 30, 2011. Specifically, the Complaint alleged that Respondent failed to: 1) monitor, properly test and maintain records of testing for cathodic protection systems in violation

of 40 C.F.R. §280.31 (a) and (b); 2) maintain and provide records of compliance with release detection requirements in violation of 40 C.F.R. §280.45(b) and §280.34; 3) install overfill prevention equipment in violation of 40 C.F.R. §280.20(c) and §280.21(d); and 4) secure and cap a temporarily closed UST after three months in violation of 40 C.F.R. §280.70(b).

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 or Suspension of Permits, 40 C.F.R. §22.18, it is hereby agreed that:

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

2. Respondent shall pay a civil penalty to EPA in the total amount of **FORTY TWO THOUSAND SEVEN HUNDRED AND THIRTEEN DOLLARS (\$42,713.00)**. Payment of the civil penalty shall be made by cashier's or certified check or by Electronic Funds Transfer ("EFT"). If the payment is made by check, then the check shall be made payable to the **"Treasurer, United States of America"** and shall be mailed to:

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

The check shall be identified with a notation thereon listing **In the Matter of Schmitt Sales, Inc., Docket No. RCRA-02-2011-7508**. If Respondent chooses to make the payment by EFT, then Respondent shall provide the following information to its remitter bank:

- 1) Amount of Payment
- 2) SWIFT address: FRNYUS33, 33 Liberty Street, New York, NY 10045.
- 3) Account Code for Federal Reserve Bank of New York receiving payment:
68010727.
- 4) Federal Reserve Bank of New York ABA routing number: 021030004.
- 5) Field Tag 4200 of the Fedwire message should read "D 68010727
Environmental Protection Agency."
- 6) Name of Respondent: **In the Matter of Schmitt Sales, Inc.**
- 7) Case Number: **RCRA-02-2011-7508**

Payment of the civil penalty must be received on or before forty-five (45) calendar days after the Effective Date of this CA/FO (the due date). Whether the payment is made by check or EFT, Respondent shall promptly thereafter furnish reasonable proof that such payment has been made to both:

Stuart N. Keith
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

- a. Failure to pay the penalty in full according to the above provisions will result in referral of this matter to the United States Department of Justice or the United States Department of Treasury for collection or other appropriate action.
- b. Furthermore, if payment is not received on or before its due date, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to the Debt Collection Act, 31 U.S.C. § 3717, on the overdue amount from the due date through the date of payment. In addition, a late payment handling charge of fifteen dollars (\$15.00) will be assessed for each thirty (30) day period (or any portion thereof) following the due date in which the balance remains unpaid.
- c. A 6% per annum penalty also will be applied on any principal amount not paid within 90 days of the due date.

3. Respondent shall operate any UST or UST System that it owns or operates in full compliance with all applicable 40 C.F.R. Part 280 requirements, including the regulations cited in EPA's Complaint.

4. This CA/FO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.

5. This CA/FO is being voluntarily and knowingly entered into by the parties to resolve (upon full payment of the civil penalty) the civil and administrative claims alleged in the Complaint. However, nothing herein shall be read to preclude EPA or the United States from pursuing appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

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

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

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

9. By executing this Consent Agreement, Respondent waives its right to appeal the proposed Final Order accompanying the Consent Agreement.

10. This CA/FO and any provision herein shall not be construed as an admission of liability in any criminal or civil action or other administrative or legal proceeding except in one to enforce or achieve compliance with the terms of this Consent Agreement and its accompanying Final Order.

11. The undersigned signatory to this Consent Agreement for the Respondent certifies that he 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.

12. The provisions of this CA/FO shall be binding upon Respondent, its officials, officers, agents, authorized representatives and successors or assigns.

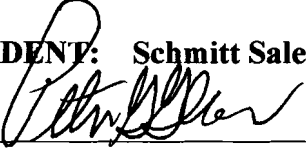
13. Respondent explicitly waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the EPA Regional Administrator, Deputy Regional Administrator, or Regional Judicial Officer for Region 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.

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

15. Respondent consents to service upon Respondent of a copy of this CA/FO by an EPA employee other than the Regional Hearing Clerk.

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

RESPONDENT: Schmitt Sales, Inc.

BY: 

Name: PETER G. CLOR

Title: PRESIDENT

Date: 12/19/11

COMPLAINANT: U.S. Environmental Protection Agency, Region 2

BY: 

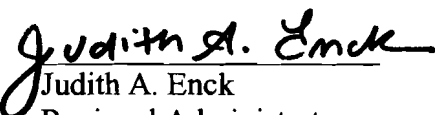
Dore LaPosta, Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, New York 10007-1866

DATE: JANUARY 4, 2012

**In the Matter of Schmitt Sales, Inc.
Docket No. RCRA-02-2011-7508**

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 parties 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. § 22.18(b)(3). The Effective Date of this Order shall be the date of its filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 2, New York, New York. 40 C.F.R. § 22.31(b).

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

DATE: 1-5-12

In the Matter of Schmitt Sales, Inc.
Docket No. RCRA-02-2011-7508

CERTIFICATE OF SERVICE

I certify that I have on this day caused to be sent the foregoing Consent Agreement, bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and one copy by hand to:

Office of the Regional Hearing Clerk.
U.S. EPA- Region II
290 Broadway, 16th floor
New York, New York 10007-1866

Copy by Pouch Mail:

The Honorable Barbara Gunning, Administrative Law Judge
EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, DC 20460-2001

Copy by Certified Mail Return Receipt Requested:

Thomas J. Fucillo, Esq.
Menter, Rudin, & Trivelpiece, P.C.
308 Maltbie Street, Suite 200
Syracuse, NY 13204-1498

Dated: JAN 7 0 2012
New York, New York

Mildred N. Bag