

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. Environmental
Protection Agency-Reg 2
2014 AUG - 1 12: 02
REGIONAL HEARING
CLERK

In The Matter of:

T.C. Dunham Paint Company, Inc.

Respondent,

Proceeding Under Section 3008 of the
Solid Waste Disposal Act, as amended.

**CONSENT AGREEMENT AND FINAL
ORDER**

Docket No.: **RCRA-02-2013-7105**

PRELIMINARY STATEMENT

This civil administrative proceeding was instituted pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation and Recovery Act, and the Hazardous and Solid Waste Amendments of 1984, 42 United States Code (U.S.C.) §§ 6901-6991 (together hereafter the "Act" or "RCRA").

The Complainant in this proceeding, Dore LaPosta, the Director of the Division of Enforcement and Compliance Assistance, Region 2 EPA, has been duly delegated the authority to institute and carry forward this proceeding.

The Respondent is T.C. Dunham Paint Company, Inc. (hereinafter "T.C. Dunham" or "Respondent"). Respondent is a manufacturer of paint products located at 581 Saw Mill River Road in Yonkers, New York.

Section 3006(b) of the Act, 42 U.S.C. ' 6926(b), provides that EPA=s Administrator may, if certain criteria are met, authorize a state to operate a hazardous waste program (within the meaning of Section 3006 of the Act, 42 U.S.C. ' 6926) in lieu of the regulations comprising the federal hazardous waste program (the Federal Program). The State of New York received final authorization to administer its base hazardous waste program on May 29, 1986. Since 1986, New York State has been authorized for many other hazardous waste requirements promulgated by EPA pursuant to RCRA. See 67 Fed. Reg. 49864 (August 1, 2002), 70 Fed. Reg. 1825 (January 11, 2005), 74 Fed. Reg. 31380 (July 1, 2009) and 78 Fed. Reg. 15299 (March 11, 2013). New York is authorized for most hazardous waste regulations issued by EPA as of January 22, 2002 and the Uniform Hazardous Waste Manifest Amendments issued by EPA on March 4, 2005 and June 16, 2005. EPA can enforce regulations comprising the authorized State Program.

The Complainant issued a Complaint, Compliance Order and Notice of Opportunity for Hearing (the "Complaint") to Respondent on or about September 26, 2013. The Complaint alleged that Respondent failed to comply with RCRA and federally authorized New York hazardous waste regulations at its Yonkers, New York, facility. Complainant and Respondent conducted settlement negotiations which led to this agreement.

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

EPA'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent

1. Respondent is T.C. Dunham Paint Company, Inc..
2. Respondent is a manufacturer of paint products located at 581 Saw Mill River Road in Yonkers, New York ("Respondent's facility").
3. The Facility is located next to the Saw Mill River.
4. Respondent is a for-profit corporation organized pursuant to the laws of the State of New York in 1989. Respondent is a "person" as that term is defined in Section 1004(15) of the Act, 42 U.S.C. § 6903(15), and in Title 6 of the New York Codes, Rules, and Regulations ("6 NYCRR") § 370.2(b).¹
5. Respondent manufactures oil-based and latex paints using batch-mixing operations at its Facility.
6. Operations by the Respondent at its Facility began after November 1980.
7. Respondent is a "person," as that term is defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).
8. Respondent is and has been the "owner" of the facility as that term is defined in 6 NYCRR ' 370.2(b).
9. Respondent is and has been the "operator" of the facility as that term is defined in 6 NYCRR ' 370.2(b).

Notification of Hazardous Waste Generation

10. Respondent did not inform EPA, through a notification, that it generated hazardous waste at its Facility.
11. For the off-site disposal of hazardous waste, Respondent assumed the EPA identification number NYD013417902 previously assigned to the site.

¹ All words or phrases that have been defined in reference to statutory and/or regulatory provisions are used throughout the Complaint as so defined.

Respondent's Generation of Solid Waste and Hazardous Waste

12. Hazardous wastes generated by Respondent through its paint batch mixing/blending, repackaging, and storage and handling activities, and in the course of normal building maintenance have included but are not limited to paint waste (listed on manifests as D035), ignitable waste (listed on manifests as D001), toxic waste (listed on manifests as D011), off-specification lacquers and resins, and spent mercury lamps.
13. Respondent is and has been a "generator" of "hazardous waste" as those terms are defined in NYCRR ' 370.2(b) and 6 NYCRR ' 371.1(d), respectively. The requirements for generators are set forth in 6 NYCRR Part 372.
14. Hazardous waste is and has been stored at various locations at the Facility,
15. Respondent's Facility is and has been a "storage" facility as that term is defined in 6 NYCRR ' 370.2(b).

EPA Investigation Activities

16. On or about May 24, 2012, a duly designated representative of EPA ("Inspector") conducted a RCRA Compliance Evaluation Inspection of Respondent at its Facility ("Inspection").
17. The Inspection was conducted in response to information from a federal Occupational Safety and Health Administration ("OSHA") inspector that a fire at the Facility's warehouse occurred on or about May 17, 2012, and that, during fire fighting operations, a large number of drums were observed haphazardly stored outdoors at the Facility, in poor condition, generally unlabeled, and were suspected to contain paint and related hazardous waste.
18. At the time of the Inspection, about one hundred (100) drums and numerous other containers were haphazardly stacked on wooden pallets, on bare ground, in an old truck trailer, and in two adjacent outdoor locations at the Facility.
19. At the time of the Inspection, many of the containers referred to in paragraph 18 were extremely corroded and some had leaked their contents; several of the drums were extensively deformed.
20. At the time of the Inspection, most of the containers referred to in paragraph 18 were unlabeled and their contents could not be specifically identified by the Respondent.
21. At the time of the Inspection, labels on some of the containers referred to in paragraph 18 indicated that they contained lacquers, and oil based paints and solvents; at least one drum contained cuttings from well drilling operations conducted in the mid-1990s.

22. At the time of the Inspection, a representative of the Respondent stated that these containers had “stood outside” for “about 20 years”.
23. At the time of the Inspection, and in reference to the drums and other containers referred to in paragraph 18, there were no aisle spaces between drums so that all the containers in poor condition could not be readily observed and assessed as to their potential for leaks and/or whether or not releases had already occurred. The lack of aisle space precluded the unobstructed movement of personnel, fire protection equipment, and/or spill control equipment, in an emergency.
24. At the time of the Inspection, three extensively corroded and unlabeled 55-gallon drums, whose contents could not be identified by the Respondent, were located in an outdoor area north of the two other outdoor hazardous waste storage areas.

Request for Information

25. On or about August 31, 2012, EPA issued to Respondent an Information Request Letter (“IRL”).
26. The IRL was issued pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, and sought, in part, information and documentation relating to Respondent’s management of the significant number of containers of waste and waste-like material being accumulated or stored, many of which had been observed to be corroded, leaking, or otherwise in poor condition, and many which were unlabeled; this information was needed to assist EPA in fully evaluating the Respondent’s compliance with RCRA regulations.
27. On November 13, 2012, Respondent submitted its Response to the IRL (“Response”).
28. In its Response, Respondent provided an inventory (“Inventory”) listing one hundred thirty one (131) 55-gallon “Non Fire Related Drums” that were on site at the time of the Inspection.
29. The Inventory submitted by the Respondent denoted those drums which contained reusable material and those that had been determined to contain either hazardous waste or non-hazardous waste.
30. Of the 131 drums denoted on the Inventory, 87 drums were determined by Respondent to contain ignitable (D001) hazardous waste and one drum was determined to contain corrosive hazardous waste; these were specifically described as containing “dirty solvents”, “rubbery, sticky cement like liquid”, “paint sludge”, “gasoline”, “old oil based paint”, “mixed old varnish/lacquer sealer/thinners”, “initially thought to be Dirty Solvents but upon 2nd review are paint-related liquids”, “Marked TBA”, “Amber color Resin”, and “acidic”.

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31. In its Response, Respondent provided copies of hazardous waste manifests for its off-site shipment of about 16,000 lbs of hazardous waste, and denoted an additional approximately 13,600 lbs (32 drums) of hazardous waste that were “awaiting proper offsite disposal”.
32. Pursuant to 6 NYCRR § 372.2(a)(2), a person who generates a solid waste must determine if that waste is a hazardous waste using the procedures specified in that provision.
33. Pursuant to 6 NYCRR § 371.1(c), subject to certain inapplicable exclusions, a “solid waste” is any “discarded material” that includes “abandoned”, “recycled” or “inherently waste-like materials” as those terms are further defined therein.
34. Pursuant to 6 NYCRR § 371.1(c)(3) materials are solid wastes if they are abandoned by being:
 - a. disposed of;
 - b. burned or incinerated; or
 - c. accumulated, stored, or treated before or in lieu of being abandoned by being disposed of, burned or incinerated.
35. In the course of its operations, both prior to and as of the date of the Inspection, Respondent had generated materials which: (a) are waste or waste-like due to their being stored in corroded, leaking, and/or crushed containers; and/or (b), were unlabeled; and/or (c) have been stored for an extensive period of time without reasonable prospects of being used or sold as a product or product ingredient; and/or (d) are being stored in lieu of disposal at its Facility.
36. As a result of the aforementioned activities, Respondent had generated waste at its Facility, including but not limited to ignitable, corrosive, and toxic wastes which were “discarded material” and a “solid waste” as defined in 6 NYCRR § 371.1(c).
37. In the course of its operations, both prior to and as of the date of the Inspection, Respondent had not determined whether its wastes, including those denoted in paragraph “18”, above, constituted hazardous waste.
38. Respondent’s failures to have made, or have a third-party make on its behalf, hazardous waste determinations for the aforementioned wastes at its Facility, constitute multiple violations of 6 NYCRR § 372.2(a)(2).
39. Pursuant to 6 NYCRR § 373-2.3(b) a facility must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment.
40. For at least one hundred and eighty (180) days prior to and at the time of the Inspection, Respondent failed to maintain and operate its Facility so as to minimize the possibility of

a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to the air, soil or surface water through numerous actions or inactions at its facility including the following:

1. The haphazard manner in which containers of hazardous waste were stored (see paragraphs 18 and 19 above);
 2. The prolonged outdoor storage of containers of hazardous waste, allowing their deterioration over time (see paragraphs 22, 23 and 24 above);
 3. The lack of aisle spaces between hazardous waste containers, preventing their inspection and preventative measures to minimize releases (see paragraph 23 above); and,
 4. The failure to label and identify the contents of individual drums to allow their proper management (see paragraph 20, above).
41. Respondent's aforementioned failures to maintain and operate its Facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents into the air, soil or surface water which could threaten human health or the environment, constitute multiple violations of 6 NYCRR § 373-2.3(b) or 6 NYCRR § 373-3.3(b).
42. Pursuant to 6 NYCRR § 373-2.9(b) and 6 NYCRR § 373-3.9(b) generators are required to keep containers in good condition and to transfer hazardous waste from a leaking container to a container that is in good condition.
43. Both prior to and at the time of the Inspection, Respondent stored hazardous waste in containers that were corroded or had already breached and released their contents at its Facility.
44. Respondent's failures to keep containers in good condition and to transfer hazardous waste from a leaking container to a container that is in good condition at its Facility, constitute multiple violations of 6 NYCRR § 373-2.9(b) or 6 NYCRR § 373-3.9(b).
45. The parties have agreed to settle this matter as per the terms noted below.

CONSENT AGREEMENT

Pursuant to Section 3008 of RCRA and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and Revocation or Suspension of Permits, 40 C.F.R. § 22.18, it is hereby agreed by and between the parties and Respondent knowingly and voluntarily agrees as follows:

1. Commencing on the effective date of this Consent Agreement, Respondent shall make any required determinations whether any and/or all of the solid wastes generated and/or stored at its Facility are hazardous wastes.

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2. Commencing on the effective date of this Consent Agreement, Respondent shall maintain and operate its Facility so as to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to the air, soil or surface water which could threaten human health or the environment.

3. Commencing on the effective date of this Consent Agreement, Respondent shall store hazardous waste only in containers that are in good condition.

4. Within thirty (30) calendar days of the effective date of this Consent Agreement, Respondent shall comply with all other applicable federal and state regulatory requirements for hazardous waste generators, including those provisions for the short-term on-site storage of hazardous waste by the generator of such waste, at its Facility.

5. All responses, documentation, and evidence submitted in response to this Consent Agreement should be sent to:

Ronald Voelkel
Environmental Scientist
RCRA Compliance Branch
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency - Region 2
290 Broadway, 21st Floor
New York, New York 10007-1866

6. For the purpose of this proceeding, Respondent admits the jurisdictional allegations of the Complaint and neither admits nor denies specific factual allegations contained in the Complaint.

7. Respondent shall pay a civil penalty to EPA in the total amount of ninety thousand dollars (\$90,000) in three separate payments according to the schedule set forth below. Such payments shall be made by cashier's or certified checks or by Electronic Fund Transfers ("EFT"). If the payments are made by checks, then the checks 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

8. Each check shall be identified with a notation thereon: **In the Matter of T.C. Dunham Paint Company, Inc.** and shall bear thereon the Docket Number: **RCRA-02-2013-7105**. 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

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- payment: 68010727.
- 4) Federal Reserve Bank of New York ABA routing number: 021030004.
 - 5) Field Tag 4200 of the Fedwire message should read: "D68010727 Environmental Protection Agency."
 - 6) Name of Respondent: **T.C. Dunham Paint Company, Inc**
 - 7) Case Number: **RCRA-02-2013-7105**

Whether the payments are made by checks or by EFT, the Respondent shall promptly thereafter furnish reasonable proof that such payments have been made to:

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

and

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

9. The initial payment of thirty thousand dollars (\$30,000.00) must be received 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 CA/FO. The date by which this payment must be received shall hereinafter be referred to as the "First Due Date."

10. The second payment of thirty thousand dollars (\$30,000.00) must be received on or before ninety (90) calendar days after the First Due Date.

11. The third and final payment of thirty thousand dollars (\$30,000.00) must be received on or before one hundred eighty (180) calendar days after the First Due Date.

- a. Failure to pay the civil 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.
- b. Further, if any payment is not received on or before the applicable due date described above, 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 any due date for which a balance remains unpaid. A six percent (6%) per annum penalty

will also be applied on any principal amount not paid within ninety (90) days of any due date.

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

13. If Respondent fails to make timely payment of any of the installment penalty payments described in paragraphs 9, 10 and 11, Respondent shall pay a stipulated penalty of \$5000 for each such failure. Payment of stipulated penalties shall be made in the same manner as prescribed in paragraphs 7 and 8 for payment of the civil penalty installment. EPA in its sole discretion may reduce or eliminate any stipulated penalty due under this paragraph.

14. The civil penalties and any stipulated penalties that come due under the terms of this Consent Agreement are penalties within the meaning of Title 26, Section 162(f) of the United States Code, 26 U.S.C. Section 162(f), and are not deductible expenditures for purposes of federal or state taxes.

15. 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 proceeding, except in an action, suit or proceeding to enforce this CA/FO or any of its terms and conditions.

16. Respondent waives its right to request a hearing on the Complaint, this Agreement, or the Final Order included herein, including any right to contest any allegations or EPA's Findings of Fact or Conclusions of Law contained within these documents.

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

18. This CA/FO does not waive, extinguish, or otherwise affect Respondent's obligation to comply with all applicable provisions of the Act and the regulations implementing it, nor shall it be construed as the issuance of a permit or a ruling on, or determination of, any issues related to any federal, state or local law, regulation or permit.

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

20. The representative of Respondent signing 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. The provisions of this Consent Agreement shall

be binding upon Respondent and its officials including authorized representatives and successors or assigns.

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

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

23. The effective date of this CA/FO shall be the date of filing with the Regional Hearing Clerk, U.S. EPA, Region 2, New York, New York.

RESPONDENT:

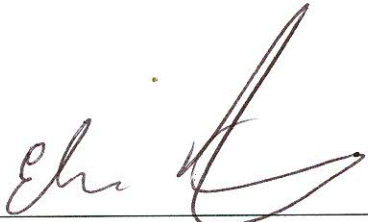
T.C. Dunham Paint Company, Inc.

BY:

NAME:

TITLE:

DATE:



ELY RISCH

VICE PRESIDENT

7-29-14

COMPLAINANT:


United States Environmental Protection
Agency – Region 2

BY:

NAME:

TITLE:

DATE:



Dore LaPosta

Director, Division of
Enforcement & Compliance
Assistance

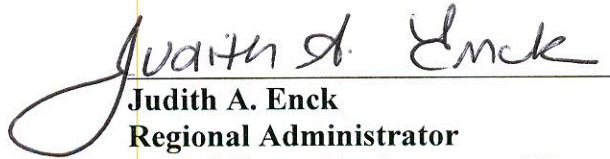
JULY 31, 2014

E.R.

In the Matter of: T.C. Dunham Paint Company, Inc.,
Docket No.: RCRA-02-2013-7105

FINAL ORDER

The Regional Administrator of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement. The Agreement entered into by the parties is hereby approved, incorporated herein, and issued as an Order pursuant to Section 3008 of the Act and 40 C.F.R. § 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 10007.



Judith A. Enck
Regional Administrator
United States Environmental Protection Agency,
Region 2

DATE: _____

7/31/14

E.F.

CERTIFICATE OF SERVICE

I hereby certify that on the August 1, 2014 I caused a copy of the Consent Agreement and Final Order in the proceeding identified as In the Matter of: T.C. Dunham Paint Company, Inc., Docket No.: RCRA-02-2013-7105 to be sent to the following persons in the manner indicated:

Original and One Copy by hand:

Office of Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 2.
290 Broadway
NY NY 10007-1866

Copy by Electronic and Regular Mail to:

The Honorable Christine D. Coughlin
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Email: OALJfiling@epa.gov

Copy by Electronic and Regular Mail to:

Frederick Eisenbud, Esq.
Law Office of Frederick Eisenbud
The Environmental Law Firm
6165 Jericho Turnpike
Commack, New York 11725-2803
Sent via:
fe@li-envirolaw.com

Date: August 1, 2014

Lynn Khoury

B.F.