

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 N. 5TH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)
)
Palmer Mfg. & Tank, Inc.)
)
2814 West Jones (A))
Garden City, Kansas 67846)
)
RCRA I.D. No. KSD084845023)
)
Respondent.)
)
Proceeding under Section 3008(a) and (g) of)
the Resource Conservation and Recovery)
Act as amended, 42 U.S.C. § 6928(a) and (g))
_____)

**CONSENT AGREEMENT
AND FINAL ORDER**

Docket No. RCRA-07-2008-0014

I. PRELIMINARY STATEMENT

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and Palmer Mfg. & Tank, Inc. (Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules of Practice), 40 Code of Federal Regulations (C.F.R.) §§ 22.13(b) and 22.18(b)(2).

II. ALLEGATIONS

Jurisdiction

1. This administrative action is being conducted pursuant to Sections 3008(a) and (g) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA or the Act), and the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. § 6928(a) and (g), and in accordance with the Consolidated Rules of Practice.

2. This Consent Agreement and Final Order (CA/FO) serves as notice that the EPA has reason to believe that Respondent violated Section 3005 of RCRA, 42 U.S.C. § 6925.

Parties

3. The Complainant is the Chief of the RCRA Enforcement and State Programs Branch in the Air, RCRA, and Toxics Division of the EPA, Region 7, as duly delegated from the Administrator of the EPA.

4. The Respondent is Palmer Mfg. & Tank, Inc. (Palmer), a company incorporated under the laws of Kansas and licensed to do business in the state of Kansas.

Statutory and Regulatory Framework

5. The State of Kansas has been granted authorization to administer and enforce a hazardous waste program pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, and the State of Kansas has adopted by reference the federal regulations cited herein at pertinent parts of Title 28, Article 31 of the Kansas Administrative Regulations (hereinafter "K.A.R. 28-31"). Section 3008 of RCRA, 42 U.S.C. § 6928, authorizes the EPA to enforce the provisions of the authorized State program and the regulations promulgated thereunder. When the EPA determines that any person has violated or is in violation of any RCRA requirement, EPA may issue an order assessing a civil penalty for any past or current violation and/or require immediate compliance or compliance within a specified time period pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928.

6. Section 3008(g) of RCRA, 42 U.S.C. § 6928(g), authorizes a civil penalty of not more than \$25,000 per day for violations of Subchapter III of RCRA (Hazardous Waste Management). This figure has been adjusted upward for inflation pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, so that penalties of up to \$32,500 per day are now authorized for violations of Subchapter III of RCRA that occur after March 15, 2004.

Factual Background

7. Respondent is a Kansas corporation authorized to conduct business in the State of Kansas and is a "person" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

8. Respondent, located at 2814 West Jones (A), Garden City, Finney County, Kansas, 67846, manufactures steel and fiberglass tanks designed to store fuels, water and chemicals. Palmer employs approximately 135 people and has been at its present location since approximately 1966.

9. As part of its operations, Respondent generates hazardous waste. Once a waste is classified a hazardous waste, it is assigned a waste code pursuant to the regulations set forth in paragraph 10. Hazardous wastes generated by Respondent, along with their waste codes, include: spent acetone and acetone still bottoms (D001/F003); spent methylene chloride and

methylene chloride still bottoms (F002); spent toluene and toluene still bottoms (D001/F003/F005); and paint shop rags and filters. Respondent also generates used oil and universal waste.

10. The regulations for determining whether a waste is a solid and/or hazardous waste are set forth at K.A.R. 28-31-1(a)(2) and (3), which incorporate by reference the regulations at 40 C.F.R. Parts 260 and 261. Each of the wastes listed in paragraph 9 is a "solid waste" and all of the wastes except the used oil and universal waste are also "hazardous waste" within the meaning of these regulations.

11. Respondent filed a notification of hazardous waste activity on May 12, 1990 stating that Palmer was an "EPA Generator" within the meaning of K.A.R. 28-31-2(c). The hazardous waste notification was last updated on January 16, 2007.

12. On or about April 11, 2007, an EPA representative conducted a Compliance Evaluation Inspection at Respondent's facility (hereinafter "the April 2007 inspection").

13. During the April 2007 inspection, the inspector observed that Respondent had generated and had in storage at the facility greater than 1,000 kg of hazardous waste. Therefore, at the time of the April 2007 inspection, Respondent was an "EPA Generator" pursuant to K.A.R. 28-31-2(c).

14. During the April 2007 inspection, the inspector observed several violations of RCRA, which are set forth below.

Violations

15. Complainant hereby incorporates the allegations contained in paragraphs 1 through 14 above, as is fully set forth herein.

I. Failure to Perform An Adequate Hazardous Waste Determination

16. K.A.R. 28-31-4(b) requires generators of solid waste to perform hazardous waste determinations using methods prescribed in the regulations.

17. At the time of the April 2007 inspection, Respondent was disposing of rags that had been soaked with toluene by placing them into 55-gallon drums and then hauling the rags to the county landfill.

18. During the April 2007 inspection, the paint shop manager told the EPA inspector that the toluene-soaked rags were dry when disposed and were therefore not hazardous.

19. Rags soaked with spent toluene are a hazardous waste carrying the waste code F005, regardless of whether the rags are still wet or dry.

20. Respondent failed to adequately characterize its toluene-soaked shop rags as a hazardous waste, in violation of K.A.R. 28-31-4(b).

II. Operation of a Hazardous Waste Storage Facility Without a RCRA Permit

21. Section 3005 of RCRA and Section 65-3437 of the Kansas Statutes, Annotated (K.S.A.) require each person owning or operating a facility for the treatment, storage, or disposal of hazardous waste identified or listed under Subchapter C of RCRA to have a permit for such activities.

A. Failure to Comply with Generator Requirements

22. The regulations at K.A.R. 28-31-4 (g) state that EPA generators may accumulate hazardous waste in containers on-site for ninety (90) days without a permit or without interim status, provided certain conditions are met. These conditions include compliance with other hazardous waste regulatory requirements.

23. At the time of the April 2007 inspection, Respondent had not met the following requirements:

Failure to conduct and document weekly inspections of hazardous waste container storage area

24. K.A.R. 28-31-4(g)(1)(A) requires that EPA generators of hazardous waste conduct weekly inspections of their storage areas.

25. Respondent failed to conduct a weekly inspection of its hazardous waste storage area the week of November 11, 2006.

26. K.A.R. 28-31-4(k) requires that generators of hazardous waste document weekly inspections of hazardous waste storage areas.

27. Respondent failed to document an inspection of the hazardous waste storage area the week of November 11, 2006.

Failure to document a hazardous waste training program

28. K.A.R. 28-31-4(g)(4) requires EPA generators to maintain certain documentation of their personnel training plans as set forth in 40 C.F.R. § 265.16(d).

29. At the time of the April 2007 inspection, Respondent did not have documentation of a hazardous waste training program.

30. As a result of Respondent's failure to comply with applicable generator requirements, Respondent is not allowed to store hazardous waste at its facility unless it obtains a permit for such storage.

31. Respondent does not have a permit to store hazardous waste.

32. Therefore, Respondent is in violation of Section 3005 of RCRA, 42 U.S.C. § 6925, and K.S.A. 65-3437.

III. Offering Hazardous Waste For Shipment To A Transporter Without A Hazardous Waste Manifest

33. 40 C.F.R. § 265.71(c), which is incorporated by reference at K.A.R. 28-31-1(a)(6), states that owners and operators of hazardous waste treatment, storage or disposal facilities must comply with the requirements of 40 C.F.R. Part 262.

34. 40 C.F.R. § 262.20 requires a generator who offers hazardous waste for transportation to an off-site treatment, storage or disposal facility to prepare a hazardous waste manifest.

35. At the time of the April 2007 inspection, Respondent was accumulating toluene-soaked rags at the rate of approximately one-tenth of a 55-gallon drum per day, then emptying the rags into a dumpster and shipping them to the Finney County sanitary landfill.

36. Toluene-soaked rags are a hazardous waste bearing the waste code F005.

37. Respondent did not prepare a hazardous waste manifest for shipment of the toluene-soaked rags to the landfill.

38. Respondent's failure to prepare a hazardous waste manifest when offering hazardous waste for transportation to an off-site disposal facility is a violation of K.A.R. 28-31-1(a)(6).

CONSENT AGREEMENT

1. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order portion of this CA/FO.

2. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO set forth below.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this CA/FO.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the proposed Final Order portion of the CA/FO.

5. Respondent and Complainant agree to conciliate the matters set forth in this CA/FO without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

6. This CA/FO addresses all civil administrative claims for the RCRA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of RCRA or any other applicable law.

7. Nothing contained in the Final Order portion of this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

8. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

9. Respondent agrees that, in settlement of the claims alleged in this CA/FO, Respondent shall pay a penalty of \$16,015.25 as set forth in Paragraph 1 of the Final Order.

10. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

11. Respondent consents to the issuance of this Consent Agreement and consents for the purposes of settlement to the payment of the civil penalty cited in paragraph 9, above, and to the performance of a Supplemental Environmental Project (SEP).

12. In settlement of this matter, Respondent agrees to complete the following SEP, which the parties agree is intended to secure significant environmental and/or public health benefits.

13. Respondent shall complete the SEP, which includes implementation of an Environmental Management System. The SEP is more specifically described in the scope of work (hereinafter the "Scope of Work"), attached hereto as Appendix A and incorporated herein by reference. All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations.

14. The total expenditure for the SEP is estimated to be \$153,000. The development of the Environmental Management System shall be completed according to the following schedule, in accordance with the specifications set forth in the Scope of Work. Respondent shall include documentation of the completed benchmarks and related expenditures within thirty (30) days of the completion of each of the following benchmarks:

- (i) An Environmental Management System audit shall be completed within six (6)

months of the effective date of this CA/FO.

- (ii) An Environmental Management System Manual and Action Items shall be completed within eighteen (18) months of the effective date of this CA/FO.
- (iii) A second Environmental Management System audit shall be completed within twenty four (24) months of the effective date of this CA/FO.

Documentation of the completed benchmarks shall be submitted via first class mail to:

Edwin Buckner
Environmental Engineer
United States Environmental Protection Agency - Region VII
901 N. Fifth Street
Kansas City, Kansas 66101.

15. Respondent certifies that it is not required to perform or develop the SEP by any federal, state, or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant, or as injunctive relief in this or any other case or to comply with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

16. For federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

17. Within sixty (60) days of completion of the SEP, Respondent shall submit a SEP Completion Report to EPA. The SEP Completion Report shall contain the following:

- (i) A detailed description of the SEP as implemented;
- (ii) Itemized costs;
- (iii) A description of any operating problems encountered and the solutions thereto;
- (iv) A certification that the SEP has been fully implemented pursuant to the provisions of this CA/FO; and
- (v) A description of the environmental and public health benefits resulting from implementation of the SEP (with quantification of the benefits and pollutant reductions, if feasible).
- (vi) The report shall be submitted via first class mail to:

Edwin Buckner
Environmental Engineer
United States Environmental Protection Agency - Region VII
901 N. Fifth Street
Kansas City, Kansas 66101.

18. In itemizing its costs in the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the SEP Completion Report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this paragraph, "acceptable documentation" includes

invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

19. After receipt of the SEP Completion Report described in paragraph 17, above, EPA will notify Respondent, in writing, regarding:

- (i) any deficiencies in the SEP report itself along with a grant of an additional thirty (30) days for Respondent to correct any deficiencies; or
- (ii) indicate that EPA concludes that the project has been completed satisfactorily; or
- (iii) determine that the project has not been completed satisfactorily and seek stipulated penalties in accordance with paragraph 45 herein.

If EPA elects to exercise option (i) above, i.e., if the SEP report is determined to be deficient, but EPA has not yet made a final determination about the adequacy of SEP completion itself, EPA shall permit Respondent the opportunity to object in writing to the notification of deficiency given pursuant to this paragraph within ten (10) days from the receipt of such notification. EPA and Respondent shall have an additional thirty (30) days from the receipt by EPA of the notification of objection to reach agreement on changes necessary to the SEP report. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision on adequacy of the completion of the SEP to Respondent, which decision shall be final and binding upon Respondent. Respondent agrees to comply with any requirements imposed by EPA as a result of any failure to comply with the terms of this CA/FO. In the event the SEP is not completed as contemplated herein, as determined by EPA, stipulated penalties shall be due and payable by Respondent to EPA in accordance with paragraph 21 herein.

20. Respondent agrees that failure to submit the SEP Completion Report required by paragraph 17 above, shall be deemed a violation of this CA/FO and Respondent shall become liable for stipulated penalties pursuant to paragraph 21 below.

21. Stipulated Penalties

a) In the event that Respondent fails to comply with any of the terms or provisions of this Agreement relating to the performance of the SEP described in paragraph 13 above, and/or to the extent that actual expenditures for the SEP do not equal or exceed the cost of the SEP described in paragraph 14 above, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

- (i) Except as provided in subparagraph (ii) immediately below, for a SEP which has not been completed satisfactorily pursuant to this CA/FO, Respondent shall pay a stipulated penalty to the United States in the amount of \$48,046.
- (ii) If the SEP is not completed in accordance with paragraph 13, but the Complainant determines that the Respondent: a) made good faith and

- timely efforts to complete the project; and b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, Respondent shall not be liable for any stipulated penalty.
- (iii) If the SEP is completed in accordance with paragraph 13, but the Respondent spent less than 90 percent of the amount of money required to be spent for the project, Respondent shall pay a stipulated penalty to the United States in the amount of \$6,000.
 - (iv) If the SEP is completed in accordance with paragraph 13, and the Respondent spent at least 90 percent of the amount of money required to be spent for the project, Respondent shall not be liable for any stipulated penalty.
 - (v) For failure to submit the SEP Completion Report required by paragraph 17 above, Respondent shall pay a stipulated penalty in the amount of \$50 for each day after the due date of the Completion Report stated in paragraph 17 above, until the report is submitted.

b) The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA.

c) Stipulated penalties for paragraph (v) above shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity.

d) Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of paragraph 1 below. Interest and late charges shall be paid as stated in paragraph 23 herein.

22. Respondent understands that the failure to pay any portion of the mitigated civil penalty as stated in paragraph 14, or any portion of a stipulated penalty as stated in paragraph 21, in accordance with the provisions of this order may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest at the applicable statutory rate.

23. Pursuant to 31 U.S.C. §3717, EPA is entitled to assess interest and penalties on debts owed to the United States and charge to cover the costs of processing and handling delinquent claims. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States tax and loan rate in accordance with 31 C.F.R. § 901.9(b). A charge will be assessed to cover the debt collection, including processing and handling costs and administrative costs. In addition, a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. Any such

non-payment penalty charge on the debt will accrue from the date the penalty becomes due and is not paid, 31 C.F.R. §§ 901.9(c) and (d).

24. Any public statement, oral or written, in print, film, or other media, made by Respondent making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency."

25. This CA/FO shall not relieve Respondent of its obligation to comply with all applicable federal, state, and local laws, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit, nor shall it be construed to constitute EPA approval of the equipment or technology installed by Respondent in connection with the SEP undertaken pursuant to this Agreement.

26. This Final Order portion of this CA/FO shall apply to and be binding upon Respondent, and Respondent's agents, successors, and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CA/FO.

27. This CA/FO shall be effective upon entry of the Final Order by the Regional Judicial Officer for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

28. This CA/FO shall remain in full force and effect until Complainant provides Respondent with written notice, in accordance with Paragraph 11 of the Final Order, that all requirements hereunder have been satisfied.

FINAL ORDER

Pursuant to the authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and according to the terms of this CA/FO, IT IS HEREBY ORDERED THAT:

A. Payment of Civil Penalty

1. Within thirty (30) days of the effective date of this CA/FO, Respondent will pay a civil penalty of \$16,015.25.

2. Payment of the penalty shall be by cashier or certified check made payable to "Treasurer of the United States" and remitted to:

U.S. EPA Region 7
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000

The Respondent shall reference the Docket Number on the check. A copy of the payment shall also be mailed to EPA's representative identified in paragraph 4 below, and to:

Regional Hearing Clerk
U.S. EPA Region 7
901 N. 5th Street
Kansas City, Kansas 66101

And to:

Chris Muehlberger
Assistant Regional Counsel
U.S. EPA Region 7
901 N. 5th Street
Kansas City, Kansas 66101

3. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

B. Compliance Actions

4. Within 30 days following the end of each calendar quarter, for a period not to exceed two years, Respondent shall provide documentation for that quarter, such as copies of manifests or invoices, to EPA which demonstrates that Respondent is continuing to perform proper hazardous waste determinations for any hazardous waste generated. Such documentation shall be sent to:

Edwin G. Buckner, PE
Environmental Engineer
U.S. EPA Region 7, AWMD/RESP
901 N. 5th Street
Kansas City, Kansas 66101.

C. Parties Bound

5. This Final Order portion of this CA/FO shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CA/FO.

D. Reservation of Rights

6. Notwithstanding any other provision of this CA/FO, EPA reserves the right to enforce the terms of the Final Order portion of this CA/FO by initiating a judicial or administrative action under Section 3008 of RCRA, 42 U.S.C. § 6928, and to seek penalties against Respondent in an amount not to exceed Thirty-two Thousand Five Hundred Dollars (\$32,500) per day per violation pursuant to Section 3008(c) and/or Section 3008(g) of RCRA, for each day of non-compliance with the terms of the Final Order, or to seek any other remedy allowed by law.

7. Complainant reserves the right to take enforcement action against Respondent for any future violations of RCRA and its implementing regulations and to enforce the terms and conditions of this CA/FO.

8. Except as expressly provided herein, nothing in this CA/FO shall constitute or be construed as a release from any claim (civil or criminal), cause of action, or demand in law or equity by or against any person, firm, partnership, entity, or corporation for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous constituents, hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from Respondent's facility.

9. Notwithstanding any other provisions of the CA/FO, an enforcement action may be brought pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, or other statutory authority, should EPA find that the future handling, storage, treatment, transportation, or disposal of solid waste or hazardous waste at Respondent's facility may present an imminent and substantial endangerment to human health and the environment.

10. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

11. The provisions of this CA/FO shall be deemed satisfied upon a written determination by Complainant that Respondent has fully implemented the actions required in the Final Order.

In the matter of Palmer Mfg. & Tank, Inc.

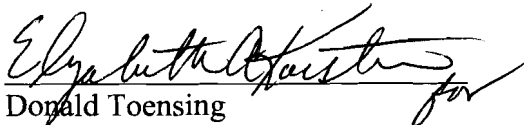
- 13 -

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

9/29/08

Date



Donald Toensing

Chief, RCRA Enforcement and State Programs Branch

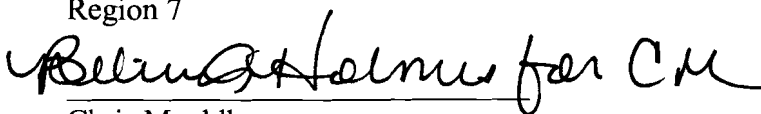
Air and Waste Management Division

U.S. Environmental Protection Agency

Region 7

9/29/08

Date



Chris Muehlberger

Assistant Regional Counsel

U.S. Environmental Protection Agency

Region 7

For Respondent Palmer Mfg. & Tank, Inc.:

Date

Cecil O'Brate

President

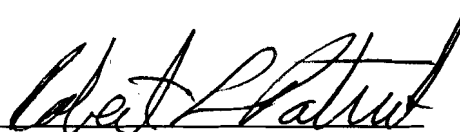
Palmer Mfg. & Tank, Inc.

IN THE MATTER of Palmer Mfg. & Tank, Inc.

Docket No. RCRA-07-2008-0014

- 14 -

IT IS SO ORDERED. This Order shall become effective immediately.



Robert L. Patrick
Regional Judicial Officer
U.S. Environmental Protection Agency
Region VII

September 30, 2008
Date

Attachment A



1200 N. Meridian St., Suite 400
Indianapolis, IN 46204
ph: 317.916.8000 | f: 317.916.8001
www.augustmack.com

August 8, 2008

Mr. Chris Muehlberger
Assistant Regional Counsel
United States Environmental Protection Agency
901 North Fifth Street
Kansas City, Kansas 66101

**Re: *Proposal for Supplemental Environmental Project
Environmental Management System
Settlement Negotiations for RCRA violations
Palmer Manufacturing & Tank Company
2814 West Jones Avenue
Garden City, Kansas
August Mack Project Number JI0282.220***

Dear Mr. Muehlberger:

On behalf of Palmer Manufacturing & Tank Company (Palmer), August Mack Environmental, Inc. (August Mack) is submitting the following draft proposal for a Supplemental Environmental Project (SEP) to be included in settlement negotiations in order to mitigate the monetary penalty associated with violations of the Resource Conservation and Recovery Act (RCRA) outlined in the draft Consent Agreement and Final Order received by Palmer on March 28, 2008. This draft Consent Agreement was in response to the RCRA Inspection performed at Palmer on April 11, 2007.

The United States Environmental Protection Agency's (USEPA) Supplemental Environmental Projects Policy (effective May 1, 1998) outlines the types of projects that are permissible as SEPs, the appropriate penalty mitigation, and the terms and conditions under which the SEP can become part of a settlement. Proposed SEPs are evaluated based on the following five steps:

- (1) Ensure that the project meets the basis definition of a SEP.
- (2) Ensure that all legal guidelines, including nexus, are satisfied.
- (3) Ensure that the project fits within one (or more) of the designated categories of SEPs.
- (4) Determine the appropriate amount of penalty mitigation.
- (5) Ensure that the project satisfies all of the implementation and other criteria.

Compliance. Innovation. Commitment.
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This proposal will provide information in order to assist the USEPA in evaluating the proposed SEPs according to the criteria listed in the 1998 SEP Policy.

Proposed SEP: Implementation of an Environmental Management System

In July of 2007, Palmer contracted August Mack to begin implementation of their Compliance Assurance Program, eCAPSM, at the Palmer facility in Garden City, Kansas. eCAPSM is being developed as an Environmental Management System (EMS) that incorporates routine third party, multi-media compliance audits with mechanisms for follow-up and correction of noted deficiencies.

The eCAPSM program is a system of maintaining environmental compliance with applicable regulations. The system, however, goes beyond just compliance. The eCAPSM program also provides a system of checks and balances for a facility. Once a facility is involved with the eCAPSM program a site manager makes routine (monthly) site visits to the facility. During these site visits, all aspects of the facility's environmental program are reviewed, records are checked and updated, training is conducted and documented, deficiencies are recorded, reporting to appropriate agencies is completed if required, and a closeout meeting is conducted with upper management where any issues noted during the inspection are reviewed. Any issues requiring further attention are disseminated to the appropriate departments where they are addressed. The eCAPSM program checks on the status of the actions conducted in the subsequent monthly site inspection. Following the completion of the site visit, a formal report is submitted to the facility with written documentation as to the issues discussed in the closeout meeting. Action items and responsible parties are spelled out clearly as part of the report, as are consequences of non-compliance. All documentation for the eCAPSM program is placed on a site specific, password protected website. Since program development was initiated at Palmer, great strides have been taken to improve environmental compliance at the facility and increase management and employee awareness and responsibility in regards to environmental regulations.

The e-CAPSM system is being developed for use as an EMS for Palmer. As indicated in the USEPA Office of Criminal Enforcement, Forensics and Training manual titled "Compliance-Focused Environmental Management System - Enforcement Agreement Guidance (Revised August 2002)", an EMS shall be organized into the following key elements: Environmental Policy; Organization, Personnel, and Oversight of EMS; Accountability and Responsibility; Environmental Requirements; Assessment, Prevention, and Control; Environmental Incident and Noncompliance Investigations; Environmental Training, Awareness, and Competence; Environmental Planning and Organizational Decision-Making; Maintenance of Records and Documentation; Pollution Prevention Program; Continuing Program Evaluation and Improvement; and Public Involvement/Community Outreach. Although, eCAPSM was not initially developed specifically to meet the 12 key elements listed above, several aspects of the

eCAPSM program currently reflect these guidelines. Therefore, an initial EMS audit will be performed by August Mack in order to determine how the program needs to be expanded to meet these key elements. As a result of this audit, August Mack will prepare an Environmental Management System Manual outlining the EMS at Palmer according to these 12 key elements and develop a list of action items that need to be performed in order to improve this system. The eCAPSM program will provide yearlong assistance in implementing and maintaining the items addressed in the EMS Manual. In addition, an annual EMS audit will be performed in order to periodically evaluate the overall status of the EMS.

(1) Ensure that the project meets the basis definition of a SEP.

SEPs are defined as environmentally beneficial projects, which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform.

In order to be considered "environmentally beneficial" the SEP must improve, protect, or reduce risks to public health, or the environment at large. Implementation of eCAPSM at Palmer is environmentally beneficial in that it is continually assessing Palmer's impact to the environment as well as providing training and assessments to increase employee awareness of environmental regulations. This subsequently reduces risk to the environment due to detection of potential threats in various environmental medias and increased awareness of environmental regulations and hazards onsite.

Palmer implemented eCAPSM in response to the initial RCRA inspection and notice of violation in April of 2007 and is willing to work with the USEPA during this settlement process in order to further clarify the scope for the upcoming contract years. Therefore, implementation of eCAPSM should be considered "in settlement of an enforcement action".

Although the entire eCAPSM contract includes completion of regulatory reporting requirements, annual training requirements, and assistance with required recordkeeping, these portions of the program are not being included in the SEP cost as defined in a later section of this proposal. In addition, any costs associated with activities performed in order to return to compliance following the April 2007 RCRA inspection violations will not be included in the SEP cost. Therefore, the remainder of eCAPSM is a supplemental activity that Palmer implemented in order to take a proactive approach to environmental compliance and is considered "not otherwise legally required to perform". Annual auditing of the EMS and development of the EMS Manual would also be considered supplemental activities.

(2) Ensure that all legal guidelines, including nexus, are satisfied.

The 1998 SEP Policy uses five legal guidelines to ensure that the proposed SEP is within the USEPA's and federal court's authority, and do not run afoul of any Constitutional or statutory requirements. These guidelines are listed below and include a description of how eCAPSM falls within these guidelines.

1. *A project cannot be inconsistent with any provision of the underlying statutes.*

eCAPSM is a multimedia environmental compliance inspection and assistance program which will be developed to meet all the key elements of an EMS and, therefore, is not inconsistent with the underlying statutes.

2. *All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if:*
 - a. *the project is designed to reduce the likelihood that similar violations will occur in the future; or*
 - b. *the project reduces the adverse impact to public health or the environment which the violation at issue contributes; or*
 - c. *the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.*

The violations observed at Palmer include failure to perform an adequate hazardous waste determination, operation of a hazardous waste storage facility without a RCRA permit (based on failure to perform one weekly hazardous waste inspection and keep documentation of RCRA training activities), and offering hazardous waste for shipment to a transporter without a hazardous waste manifest.

eCAPSM greatly reduces the likelihood that these violations would occur in the future due to third-party involvement in the environmental compliance success of Palmer. eCAPSM provides Palmer with a group of experienced environmental professionals that are available to address questions that may arise involving hazardous waste determinations or other multimedia environmental compliance issues onsite. In addition, August Mack conducts a site visit on a monthly basis in order to identify any environmental compliance issues that Palmer may not be aware of and works with management to determine corrective actions in order to

reduce risk to the environment. Development of eCAPSM as an EMS will further expand this program according to the 12 key elements.

3. *EPA may not play any role in managing or controlling funds that may be set aside or escrowed for the performance of a SEP. Nor may EPA retain authority to manage or administer the SEP. EPA may, of course, perform oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.*

Palmer is aware of this guideline and will work with the USEPA to ensure that the SEPs agreed upon in the settlement agreement are carried out appropriately.

4. *The type and scope of each project are defined in the signed settlement agreement.*

Palmer is prepared to work with the USEPA over the course of these settlement negotiations in order to adequately define the type and scope of the proposed SEPs within the settlement agreement.

5.
 - a. *A project cannot be used to satisfy EPA's statutory obligation of another federal agency's obligation to perform a particular activity. Conversely, if a federal statute prohibits the expenditure of federal resources on a particular activity, EPA cannot consider projects that would appear to circumvent that prohibition.*
 - b. *A project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds or has earmarked funds in an appropriations committee report. Further, a project cannot be used to satisfy EPA's statutory or earmark obligation, or another federal agency's statutory obligation, to spend funds on a particular activity. A project, however, may be related to a particular activity for which Congress has specifically appropriated or earmarked funds.*
 - c. *A project may not provide additional resources to support specific activities performed by EPA employees or EPA contractors.*
 - d. *A project may not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement.*

eCAPSM is a service performed by August Mack, an independent environmental consulting firm, at the Palmer facility located in Garden City, Kansas. The program is paid for by Palmer for the Garden City facility and does not involve any activities designated to be performed by a federal agency or with federal funds. All further development of eCAPSM as an EMS will also meet these criteria.

(3) Ensure that the project fits within one (or more) of the designated categories of SEPs.

August Mack's eCAPSM, described as an EMS, would fit within the "Other Types of Projects" SEP category according to the June 2003 USEPA "Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects".

(4) Determine the appropriate amount of penalty mitigation.

August Mack's eCAPSM is most often performed according to annual contracts with invoices provided monthly. The first year contract ran from July 1, 2007 to June 30, 2008. Palmer is in the process of contracting the service for at least 2 additional years. The monthly cost for eCAPSM (excluding all tasks performed under the contract that would be considered regulatory requirements) is \$3,700.00 (or \$44,400.00 annually). Therefore, the total SEP costs for 3 years of eCAPSM (July 1, 2007 - June 30, 2010) would be \$133,200.00. In addition, the initial EMS audit cost would be \$9,925.00. Cost for development of the EMS Manual would be \$4,925.00. It is assumed that one annual audit will be completed during the duration of the agreed order outlining this SEP at a cost of \$4,950.00. Therefore, total cost for the development and implementation of the SEP would be \$153,000.00.

Palmer understands that according to the 1998 SEP Policy, a minimum penalty amount will be required and that the USEPA will determine the SEP mitigation percentage during settlement negotiations. Please note that Palmer and August Mack are willing to work with the USEPA in order to achieve the highest mitigation percentage allowable. Palmer is willing to extend the eCAPSM for additional years, if necessary to achieve the minimum penalty amount. Palmer is committed to improving operations at their facility in order to reduce potential risks to the environment.

(5) Ensure that the project satisfies all of the implementation and other criteria.

1. Liability for Performance

Palmer understands that they are responsible and legally liable for ensuring that the agreed upon SEPs are completed satisfactorily.

2. Oversight and Drafting Enforceable SEPs

August 8, 2008

Palmer understands that the SEPs agreed upon with the USEPA need to be drafted to accurately and completely describe the SEP and completion will need to be verified. Palmer will work with the USEPA during settlement negotiations to properly describe the requirements of the SEP in the settlement agreement.

3. *Failure of a SEP and Stipulated Penalties*

Palmer understands that a SEP must be completed as outlined in the settlement agreement and an additional penalty may be incurred if the SEP is not completed satisfactorily.

4. *Community Input*

Palmer understands that the USEPA may seek community input during settlement negotiations.

5. *EPA Procedures*

Palmer understands that the appropriate parties must approve the proposed SEPs and a detailed explanation of the SEP will be included in the case documentation and may constitute confidential settlement information.

If you have any questions or comments, or require additional information, please do not hesitate to contact us at (317) 916-8000.

Sincerely,



Krista Booth
Staff Engineer



Charles J. Staehler
Senior Engineer

cc: Steve O'Brate - Palmer Manufacturing & Tank Company
Gerald O. Schultz

IN THE MATTER OF Palmer Mfg. & Tank, Inc., Respondent
Docket No. RCRA-07-2008-0014

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:


Copy hand delivered to
Attorney for Complainant:

Christopher Muehlberger
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Original by Certified Mail Return Receipt to:

Cecil O'Brate, President
Palmer Mfg. & Tank, Inc.
2814 West Jones (A)
Garden City, Kansas 67846

Dated: 9/30/08


Kathy Robinson
Hearing Clerk, Region 7