

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5<sup>TH</sup> STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

IN THE MATTER OF )

Gardner, Berry Painting, Inc. )  
2015 NE 58th Avenue )  
Des Moines, Iowa 50313 )

CONSENT AGREEMENT AND  
FINAL ORDER

EPA ID No. None )

Respondent. )

Proceeding under Section )  
3005 and 3008(g) of the Resource )  
Conservation and Recovery Act, )  
as amended, 42 U.S.C. § 6928(a) and (g). )

Docket No. RCRA-07-2009-0002

**I. PRELIMINARY STATEMENT**

This administrative action is being conducted pursuant to Section 3008(a) and (g) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA") and the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. §6928(a) and (g), and in accordance with the United States Environmental Protection Agency's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), Title 40 Code of Federal Regulations ("C.F.R.") Part 22.

The Complainant is the Chief of the RCRA Enforcement & State Programs Branch of the Air and Waste Management Division of the United State Environmental Protection Agency ("EPA"), Region VII, who has been duly delegated the authority to bring this action. The Respondent is Gardner, Berry Painting, Inc., incorporated under the laws of and authorized to conduct business in the State of Iowa.

Complainant and Respondent have agreed to a settlement of the following Factual Allegations, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b), 22.18(b)(2) and 22.18(b)(3) of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and 22.18(b)(3). This Consent Agreement and Final Order ("CA/FO") is a complete and final settlement of all civil and administrative claims and causes of action for the violations set forth in this CA/FO

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 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. Based upon the facts alleged in this Consent Agreement and Final Order and upon those facts which Complainant must consider pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), as discussed in the RCRA Civil Penalty Policy issued by EPA in June 2003, the Complainant and Respondent agree to the payment of a civil penalty pursuant to Section 3008(g) of RCRA, 42 U.S.C. § 6928(g), for the violations of RCRA alleged in this CA/FO.

## **II. ALLEGATIONS**

### **Jurisdiction, Statutory and Regulatory Requirements**

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 3008(a) and (g) of RCRA, 42 U.S.C. §6928(a) and (g).
2. This CA/FO serves as notice that EPA has reason to believe that Respondent has violated Section 3005 of RCRA, 42 U.S.C. §6925, and the regulations found at 40 C.F.R. Parts 261, 262 and 265.
3. Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), provides that if EPA determines that any person has violated or is in violation of any requirement of Subchapter III, EPA may issue an order assessing a civil penalty for any past or current violation, require compliance, or both.
4. Respondent is an Iowa corporation authorized to operate in the State of Iowa and is a "person" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

### **Factual Background**

5. Prior to 2007, Respondent was known as Gardner Sandblasting and Painting. On or about March 23, 2007, Respondent filed Articles of Amendment to its Articles of Incorporation to change its corporate name to Gardner, Berry Painting, Inc.
6. Respondent operates a facility known as Gardner, Berry Painting, Inc., in Des Moines, Iowa. This facility performs sandblasting on-site and at off-site project locations. Respondent also provides painting services to customers at off-site project locations.
7. Respondent has been in operation at this location since 1983, and currently employs two employees.
8. Respondent generates hazardous waste as a result of its sandblasting and painting operations. Specifically, Respondent generates waste from use of Methyl Ethyl Ketone, Xylol, Lacquer Thinner and Mineral Spirits.

9. The wastes listed are solid wastes and are also hazardous wastes within the meaning of 40 C.F.R. Parts 260 and 261.

10. Once a waste is classified as hazardous, it is assigned a code pursuant to the regulations listed in paragraph 9. The waste codes for the wastes listed in paragraph 8 are D035 and F003.

11. On or before July 9, 2004, EPA determined Respondent to be a Conditionally Exempt Small Quantity Generator (less than 100 kilograms per month) of hazardous waste subject to Respondent's ability to meet the requirements of 40 C.F.R. § 261.5(g).

12. On July 9, 2004, EPA conducted a Compliance Evaluation Inspection at Respondent's facility.

13. Based on information obtained during and subsequent to the inspection, EPA issued a Notice of Violations to Respondent for failing to comply with a number of requirements of RCRA.

#### Violations

14. Complainant hereby incorporates the allegations contained in paragraphs 1 through 13 above, as if fully set forth herein.

#### COUNT I

#### FAILURE TO MAKE A HAZARDOUS WASTE DETERMINATION ON SPENT SOLVENT

15. Pursuant to 40 C.F.R. § 261.5(b), a conditionally exempt small quantity generator's hazardous waste is excluded from full regulation under 40 C.F.R. Parts 262 through 266, if the generator complies with the regulations of 40 C.F. R. § 261.5(g).

16. Pursuant to 40 C.F.R. § 261.5(g), in order to be excluded from full regulation, the generator must comply with the requirements of 40 C.F.R. § 262.11.

17. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste, as defined in 40 C.F.R. 261.2, must determine if that waste is a hazardous waste by first determining if the waste is excluded from regulation under 40 CFR 261.4. The person generating waste must then determine if the waste is listed as a hazardous waste in subpart D of 40 CFR part 261.

18. At the time of the July 2004 inspection, the facility representative stated the facility generated approximately eight (8) to twenty-five (25) gallons of waste from use of Methyl Ethyl Ketone, Xylol, Lacquer Thinner and Mineral Spirits ("solvents").

19. During the July 2004 inspection, the facility representative showed the inspector the Material Safety Data Sheets ("MSDS") for the four solvents used at the facility. The MSDS information indicated each solvent used in the facility is a hazardous waste when disposed.

20. During the July 2004 inspection, the facility representative stated Respondent had made no hazardous waste determination on any of the four solvent wastes listed in paragraph 16.

21. Therefore, Respondent failed to comply with the requirements of 40 C.F.R. § 262.11 and became subject to the regulations of part 262 applicable to generators of hazardous waste who treat, store, or dispose of hazardous waste on-site. Respondent is further subject to the compliance requirements and penalties prescribed in §3008 of RCRA for generators of hazardous waste.

## COUNT II

### OPERATING A HAZARDOUS WASTE TREATMENT, STORAGE OR DISPOSAL FACILITY WITHOUT A RCRA PERMIT OR INTERIM STATUS

22. Section 3005 of RCRA requires each person owning or operating a facility for treatment, storage, or disposal of hazardous waste identified or listed under Subtitle C of RCRA to have a permit for such activities.

23. Pursuant to 40 C.F.R. § 264.1(b), the standards for owners and operators of all facilities which treat, store, or dispose of hazardous waste apply unless the specific exceptions of part 261 are met by the facility.

24. Pursuant to 40 C.F.R. § 261.5(b), a conditionally exempt small quantity generator's hazardous waste is excluded from full regulation under 40 C.F.R. Parts 262 through 266, if the generator complies with the special requirements of 40 C.F.R. § 261.5(g).

25. Pursuant to 40 C.F.R. § 261.5(g), in order to be excluded from full regulation, the generator must comply with the requirements of Part 262.11.

26. Complainant hereby incorporates by reference the allegations of paragraphs 15 through 21, as if fully set forth herein, to establish that Respondent has failed to meet the specific exceptions of 40 C.F.R. 261.5(g) and is thus subject to regulation as an owner or operator of a facility which treats, stores or disposes of hazardous waste

27. At the time of the July 2004 inspection, EPA observed Respondent was engaging in the practice of collecting spent solvent hazardous waste in its facility and allowing the solvent to evaporate into the ambient air.

28. Allowing the waste solvent to evaporate is "treatment" under 40 C.F.R. § 260.10.

29. At the time of the July 2004 inspection, EPA observed Respondent was engaging in the practice of pouring the remainder of spent solvent directly onto the ground.

30. Pouring the waste on the ground is "disposal" under 40 C.F.R. § 260.10.

31. Respondent has not obtained a permit to operate as a treatment, storage or disposal facility under Section 3005 of RCRA and is not authorized to manage hazardous waste by EPA or the State of Iowa. Respondent also has not met the requirements for interim status as a treatment, storage, or disposal facility.

32. Respondent's treatment and disposal of hazardous waste constitutes operation of a treatment, storage, or disposal facility ("TSD") without a permit, in violation of Section 3005 of RCRA, 42 U.S.C. § 6925.

### **III. CONSENT AGREEMENT**

33. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order. The terms of this CA/FO shall not be modified except by a subsequent written agreement between the parties.

34. 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 set forth below.

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

36. Respondent waives its right to further contest the factual allegations and legal conclusions set forth in this CA/FO and agrees not to appeal the Final Order set forth below.

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

38. 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.

39. Respondent certifies by the signing of this CA/FO that to the best of Respondent's knowledge and after thorough investigation, it is presently in compliance with all requirements of subchapter III of RCRA (Hazardous Waste Management). 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.

40. The parties agree that Respondent shall pay a penalty of One Thousand, Five Hundred and Forty-Eight Dollars (\$1,548).

41. The effect of settlement described in paragraph 38 above is conditioned upon the accuracy of the Respondent's representations to EPA, memorialized in paragraphs 39 and 40 above.

42. Respondent understands that failure to complete the Compliance Actions described in the Final Order within the designated time frames may, among other things, subject Respondent to civil penalties of up to \$32,500 per day of non-compliance.

43. 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.

44. This CA/FO shall remain in full force and effect until Complainant provides Respondent with written notice, in accordance with paragraph 58 of the Final Order, that all requirements hereunder have been satisfied.

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

#### **IV. FINAL ORDER**

Pursuant to the authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and according to the terms of the Consent Agreement set forth above, IT IS HEREBY ORDERED THAT:

##### **A. Payment of Civil Penalty**

46. Within thirty (30) days of the effective date of this Consent Agreement and Final Order, Respondent will pay a civil penalty of \$1548.00.

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

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

The Respondent shall reference the Docket Number on the check. A copy of the check shall also be mailed to:

Kathy Robinson  
Regional Hearing Clerk  
U.S. EPA Region VII  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

and

Deborah Finger  
ARTD/RESP  
U.S. EPA Region VII  
901 North 5th Street  
Kansas City, Kansas 66101.

48. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

### **B. Compliance Actions**

49. Respondent shall take the following actions within the specified time periods, and according to the terms and conditions, specified below.

- a. Beginning on the effective date of this CA/FO, and for the duration of three (3) months thereafter, Respondent shall maintain a solid waste inventory that documents the monthly and annual amounts of solid waste generated during this time frame. As part of this inventory, Respondent shall provide documentation that a complete and accurate hazardous waste determination has been performed on each solid waste stream generated, in accordance with the requirements of 40 C.F.R. § 262.11. This documentation shall include the following information:
  - i) a description of the waste stream, including a detailed description of the process or processes that generated the waste and the generation rate of the waste;
  - ii) a determination of whether or not the waste has been excluded from regulation under 40 C.F.R. § 261.4;
  - iii) a determination of whether or not the waste has been listed in Subpart D of 40 C.F.R. § 261; and
  - iv) a determination of whether or not the waste is identified in Subpart C of 40 C.F.R. Part 261. To determine whether the waste fails any of the characteristics of Subpart C, the waste may need to be analyzed using the procedures set forth in Subpart C, or by applying knowledge of the waste characteristics based upon the material processes used. Any laboratory analyses used to make this determination must be provided to EPA. If Respondent elects to apply knowledge of the process to make the waste determination, Respondent will provide a detailed explanation and the basis to support this determination.

This documentation shall be submitted to EPA no later than August 7, 2009.

- b. No later than thirty (30) days after the effective date of this CA/FO, Respondent shall provide EPA with a written description of its plans to store hazardous wastes as allowed by the regulations.
50. All documents required to be submitted by this CA/FO shall be sent to the attention of:

Ms. Deborah Finger  
AWMD/RESP  
U.S. EPA Region 7  
901 North 5th Street  
Kansas City, Kansas 66101

This information should be transmitted to EPA either electronically or in hard-copy. Documents submitted in hard-copy should be on unbound, 8.5" by 11" paper (i.e., no binders, notebooks, or covers).

### **C. Parties Bound**

51. This Final Order shall apply to and be binding upon Complainant and 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**

52. Notwithstanding any other provision of this CA/FO, EPA reserves the right to enforce the terms of the Final Order 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) of RCRA, for each day of non-compliance with the terms of the Final Order, or to seek any other remedy allowed by law.

53. 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.

54. 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.

55. 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.

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

57. 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.

**For the Respondent:**

Gardner, Berry Painting, Inc.

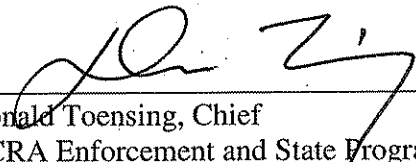
Edwin Gardner

6-1-09  
Date

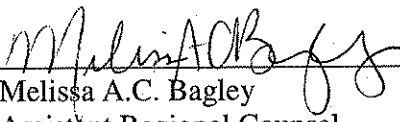
Printed Name: Edwin Gardner

Title: Sec.

**For the Complainant:**  
The United States Environmental Protection Agency

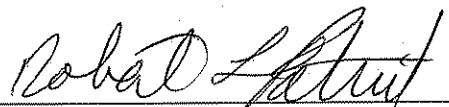
  
\_\_\_\_\_  
Donald Toensing, Chief  
RCRA Enforcement and State Programs Branch

6-3-09  
Date

  
\_\_\_\_\_  
Melissa A.C. Bagley  
Assistant Regional Counsel

6-3-09  
Date

IT IS SO ORDERED. This Final Order is effective upon its final entry by the Regional Judicial Officer.

  
\_\_\_\_\_  
Robert Patrick  
Regional Judicial Officer

June 11, 2009  
Date

IN THE MATTER OF Gardner, Berry Painting, Inc., Respondent  
Docket No. RCRA-07-2009-0002

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 addresses:

Copy hand delivered to

Attorney for Complainant:

Melissa Bagley  
Assistant Regional Counsel  
Region VII  
United States Environmental Protection Agency  
901 North 5th Street  
Kansas City, Kansas 66101

Original by Certified Mail, Return Receipt to:

Mr. Edwin Gardner  
Gardner, Berry Painting, Inc.  
2015 NE 58th Avenue  
Des Moines, Iowa 50313

Dated: 6/12/09



Kathy Robinson  
Hearing Clerk, Region 7