

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

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

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

**ORIGINAL**

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IN THE MATTER OF: )

Clean Harbors Environmental Services, Inc. )  
2247 South Highway 71 )  
Kimball, Nebraska 69145 )

**RESPONDENT'S ANSWER**  
**AND**  
**REQUEST FOR HEARING**

EPA ID Number NED 981723513 )

Respondent )

) Docket No. RCRA-07-2009-0009

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

**RESPONDENT'S ANSWER AND REQUEST FOR HEARING**

NOW COMES Clean Harbors Environmental Services, Inc., made Respondent herein ("Clean Harbors"), by and through its undersigned counsel, filing and serving its Answer and Request for Hearing, in a timely manner, in accordance with the United States Environmental Protection Agency's ("EPA") Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 CFR Part 22, *et seq.*, and answers the Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint"), as follows:

**I. RESPONSE TO PRELIMINARY STATEMENT**

1. The averments in Paragraph 1 of the Complaint are conclusions of law and fact that require no response from Clean Harbors. To the extent any response is deemed to be required, the averments are denied.

2. The averments in Paragraph 2 are denied because of the lack of information sufficient to justify a belief therein, except to admit that Clean Harbors is a corporation incorporated under the laws of the Commonwealth of Massachusetts and that Clean Harbors is authorized to conduct business in Nebraska.

3. The averments in Paragraph 3 are denied because of the lack of information sufficient to justify a belief therein.

4. The averments in Paragraph 4 of the Complaint are conclusions of law and fact that require no response from Clean Harbors. To the extent any response is deemed to be required, the averments are denied.

5. The allegations in Paragraph 5 are admitted.

6. Clean Harbors admits that it operates a commercial hazardous waste incinerator located at 2247 South Highway 71 in Kimball, Nebraska ("Kimball Facility"). The allegation of the second sentence of Paragraph 6 is denied, because the statutory reference alleged therein does not establish which jurisdiction (if any) the cited reference comes from.

7. The allegations in Paragraph 7 of the Complaint are conclusions of law and fact that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

8. The allegation in Paragraph 8 of the Complaint is an averment that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegation is denied.

9. The allegation in Paragraph 9 is admitted.

10. The allegations in Paragraph 10 are admitted.

11. The allegations in Paragraph 11 are admitted.

## COUNT I

### RESPONSES TO ALLEGED INADEQUATE CONTAINER MANAGEMENT

12. Clean Harbors hereby incorporates its responses to the allegations and averments of Paragraphs 1 through 11 above, as if fully set forth herein *in verbatim*.

#### *Alleged Failure to Close Waste Containers*

13. The allegations in Paragraph 13 of the Complaint are conclusions of law and fact that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

14. The allegations in Paragraph 14 of the Complaint are conclusions of law and fact that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

15. The allegations of Paragraph 15 are denied, except to admit that the two roll-off boxes at issue, that were completely covered by tarps, each had a small tear in the tarp.

16. The allegations of Paragraph 16 are denied. The two "ash totes" are referred to as "cure bins" by the Kimball Facility, bearing cure bin numbers H876-046 and H976-033, were sampled at the time of the inspection, and the analytical results were furnished to EPA as attachments to correspondence from the Kimball Facility to EPA (*ref.* October 26, 2007 letter from William M. Glasgow, [former] Compliance Manager, Kimball Facility, to EPA, with attachments including analytical results of cure bin samples). The samples and analytical results provide documentary evidence of the fact that the material contained in the bins met delisting criteria (meaning that the bins did not contain hazardous waste). *A fortiori*, cure bin container usage documentation provided to EPA at the time of the inspection provides documentary evidence that these cure bins never contained hazardous waste, but instead only contained RCRA-delisted material (meaning that the bins never have contained hazardous waste).

17. The allegations of Paragraph 17 are denied. The alleged tear in the bag of ammonium persulfate was not discernible upon visual observation with unaided human eyes. The [former] Compliance Manager at the Kimball Facility was asked to don gloves by the EPA inspectors and to perform a tactile, potentially destructive, inspection to determine if any tears in the bag existed. The [former] Compliance Manager at the Kimball Facility "...was able to feel a slight tear in the bag and reported such to the inspectors." (*ref.* October 26, 2007 letter from William M. Glasgow, [former] Compliance Manager, Kimball Facility, to EPA).

18. The allegations in Paragraph 18 of the Complaint are conclusions of law and fact that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied, for the reasons set forth *supra*.

#### *Alleged Failure to Date Containers*

19. The allegations in Paragraph 19 of the Complaint are conclusions of law and fact that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

20. The allegations of Paragraph 20 are denied. At the time of the EPA inspection, the four roll-off containers in Area 25 were marked and labeled to identify the date the period of waste accumulation began; however, because the labels on these bins were subjected to weather conditions and ultraviolet sunlight rays, the markings and labels were faded at the time of the inspection.

21. The allegations of Paragraph 21 are denied. The Kimball Facility personnel had not failed to mark or label the four roll-off containers to identify the date the period of waste accumulation began, as set forth *supra* in Response Paragraph 20.

*Alleged Failure to Manage Leaking Containers*

22. The allegations in Paragraph 22 of the Complaint are conclusions of law and fact, or a summary of regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

23. The allegations in Paragraph 23 of the Complaint are based on an apparent summary or citation to a provision of the Kimball Facility's RCRA permit. To the extent any response is deemed to be required, the allegations are denied.

24. The allegations in Paragraph 24 of the Complaint are denied. The alleged leaking roll-off container is not identified by container number in this allegation.

25. The allegations of Paragraph 25 are admitted.

26. The allegations in Paragraph 26 of the Complaint are conclusions of law and fact, or a summary of regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied, except as noted *supra* in Response Paragraph 25.

*Alleged Open Universal Waste Lamp Container*

27. The allegations in Paragraph 27 of the Complaint are conclusions of law and fact, or a summary of statutory or regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

28. The allegations in Paragraph 28 of the Complaint are conclusions of law and fact, or a summary of statutory or regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

29. The allegations in Paragraph 29 of the Complaint are conclusions of law and fact, or a summary of statutory or regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

30. The allegations of Paragraph 30 are admitted.

31. The allegations of Paragraph 31 are admitted.

32. The allegations of Paragraph 32 are denied, except as admitted *supra* in Response Paragraphs 25, 30 and 31, and Clean Harbors hereby respectfully requests a hearing to allow Clean Harbors to contest and dispute the material facts upon which the allegations in the Complaint are based, and to contend that the proposed penalty and proposed compliance order are inappropriate, and unwarranted because of mitigating circumstances.

## COUNT II

### ALLEGED STORAGE OF INCOMPATIBLE WASTE

33. Clean Harbors hereby incorporates its responses to the allegations and averments of Paragraphs 1 through 32 above, as if fully set forth herein *in verbatim*.

34. The allegations in Paragraph 34 of the Complaint are conclusions of law and fact, or a summary of statutory or regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

35. The allegations in Paragraph 35 of the Complaint are based on an apparent summary or citation to provisions of the Kimball Facility's RCRA permit. To the extent any response is deemed to be required, the allegations are denied.

36. The allegations in Paragraph 36 of the Complaint are conclusions of law and fact, or a summary of statutory or regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

37. The allegations of Paragraph 37 are admitted.

38. The allegations of Paragraph 38 are admitted.

39. Clean Harbors hereby respectfully requests a hearing to allow Clean Harbors to contend that the proposed penalty and proposed compliance order are inappropriate, and unwarranted because of mitigating facts and circumstances.

## COUNT III

### ALLEGED FAILURE TO MINIMIZE THE POSSIBILITY OF RELEASE OF HAZARDOUS WASTE TO THE ENVIRONMENT

40. Clean Harbors hereby incorporates its responses to the allegations and averments of Paragraphs 1 through 39 above, as if fully set forth herein *in verbatim*.

41. The allegations in Paragraph 41 of the Complaint are conclusions of law and fact, or a summary of statutory or regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

42. The allegations in Paragraph 42 of the Complaint are based on an apparent summary of or citation to provisions of the Kimball Facility's RCRA permit. To the extent any response is deemed to be required, the allegations are denied.

43. The allegation in Paragraph 43 of the Complaint is a summary of a regulatory definition that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegation is denied.

44. The allegation in Paragraph 44 of the Complaint is a summary of regulatory requirements that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegation is denied.

*Alleged Failure to Minimize Possibility of Release of Hazardous Waste Incinerator Ash*

45. The allegations of Paragraph 45 are admitted.

46. The allegations of Paragraph 46 are admitted.

47. The allegations of Paragraph 47 are denied. The area where the K411 ash conveyor is located is within secondary containment, upon information and belief. As a result, any spillage or release of incinerator ash would have occurred within containment, and would not have reached soil, surface or subsurface water. Although ash could conceivably be released to the air if disturbed, any such release would be unlikely to threaten human health or the environment in such minute quantity and/or concentration.

48. The allegations of Paragraph 48 are denied, for the reasons set forth in the Response Paragraph 47, *supra*.

*Alleged Failure to Minimize the Possibility of Release of Hazardous Waste Constituents From Building 55*

49. The allegations of Paragraph 49 are admitted.

50. The allegations of Paragraph 50 are admitted.

51. The allegations of Paragraph 51 are admitted.

52. The allegations of Paragraph 52 are denied, because of the vagueness of the wording of the allegation, and the resulting lack of information sufficient to justify a belief therein.

53. The allegations of Paragraph 53 are denied. The split samples taken at the same time as the sampling events during the EPA inspection of areas around Building 55 that were collected by the Kimball Facility were damaged in transit to the analytical laboratory where the samples were being sent for independent third party analysis. Additionally, any sample results obtained from the concrete pads do not constitute evidence that any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface or subsurface water which could threaten human health or the environment had occurred.

54. The allegations of Paragraph 54 are denied. The split samples taken at the same time as the sampling events during the EPA inspection of areas around Building 55 that were collected by the Kimball Facility were damaged in transit to the analytical laboratory where the samples were being sent for independent third party analysis. Additionally, any sample results obtained from the concrete pads do not constitute evidence that any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface or subsurface water which could threaten human health or the environment had occurred.

55. The allegations of Paragraph 55 are admitted.

52. The allegations of (incorrectly numbered out of sequence) Paragraph 52 are denied. The split samples taken at the same time as the sampling events during the EPA inspection of areas around Building 55 that were collected by the Kimball Facility were damaged in transit to the analytical laboratory where the samples were being sent for independent third party analysis.

56. The allegations of Paragraph 56 are denied. Any sample results obtained from the soil area located near the northeast side of the north concrete pad do not constitute evidence that any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface or subsurface water which could threaten human health or the environment had occurred. The mere indication of the presence of hazardous waste constituents at such low concentrations does not establish a threat to human health, nor does it establish a threat to the environment, absent proof of an established exposure pathway for humans and absent an independent assessment of an actual threat to the environment. EPA has not established that any of the hazardous waste constituents alleged to be present, if any, meet or exceed the cleanup levels for hazardous waste constituents in soil set by EPA. Additionally, the presence of hazardous waste constituents, if any, can be fully and adequately addressed during RCRA closure activities of the area.

57. Clean Harbors again respectfully requests a hearing to allow Clean Harbors to contend that the proposed penalty and proposed compliance order are both inappropriate and unwarranted because of the mitigating facts and circumstances set forth *supra*.

## COUNT IV

### ALLEGED FAILURE TO MAKE HAZARDOUS WASTE DETERMINATION

58. Clean Harbors hereby incorporates its responses to the allegations and averments of Paragraphs 1 through 57 above, as if fully set forth herein *in verbatim*.

59. The allegations of Paragraph 59 are admitted, but only when applicable.

60. The allegations of Paragraph 60 are denied. One of the containers is alleged by EPA to be “approximately full”; it is Clean Harbors’ position that both of these containers were approximately half-full, and that the EPA allegation is a scrivener’s error or inadvertent typing oversight. Both of these containers were accumulation drums, and the volume of each of the two drums, combined, was below the regulatory threshold, pursuant to 40 CFR 264.32(c)(1). The [former] Compliance Manager at the time of the EPA inspection was not aware of what was contained in the drums, but the operations personnel in Area 50 (Drum Crushing Area) were aware of the process that generated the contents of the two containers, so a proper hazardous waste determination had actually been made. Therefore, there can be no violation, as alleged, for these two containers.

61. The allegation of Paragraph 61 is admitted.

62. The allegation of Paragraph 62 is denied.

63. Clean Harbors again respectfully requests a hearing to allow Clean Harbors to demonstrate that no violation has occurred, as explained above in the Response Paragraphs for Count IV, and to contend that the proposed penalty and proposed compliance order are inappropriate, and cannot withstand judicial scrutiny.

## COUNT V

### ALLEGED FAILURE TO MAINTAIN SECONDARY CONTAINMENT

64. Clean Harbors hereby incorporates its responses to the allegations and averments of Paragraphs 1 through 63 above, as if fully set forth herein *in verbatim*.

#### *Alleged Cracks and Gaps in Secondary Containment for Container Storage Areas*

65. The allegations in Paragraph 65 of the Complaint are conclusions of law and fact, or a summary of statutory or regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

66. The allegations in Paragraph 66 of the Complaint are based on an apparent summary of or citation to provisions of the Kimball Facility's RCRA permit. To the extent any response is deemed to be required, the allegations are denied.

67. The allegations of Paragraph 67 are denied, because of the vagueness of the wording of the allegation, and the resulting lack of information sufficient to justify a belief therein.

68. The allegations of Paragraph 68 are denied, because of the vagueness of the wording of the allegation, and the resulting lack of information sufficient to justify a belief therein.

69. The allegations in Paragraph 69 of the Complaint are conclusions of law and/or fact that are properly the province of the trier of fact herein, and/or a summary of statutory or regulatory requirements, and/or are based on an apparent summary of or citation to provisions of the Kimball Facility's RCRA permit, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

70. The allegations in Paragraph 70 of the Complaint are a summary of statutory or regulatory requirements, and/or are based on an apparent summary of or citation to provisions of the Kimball Facility's RCRA permit, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

71. The allegations in Paragraph 71 of the Complaint are based on an apparent summary of or citation to provisions of the Kimball Facility's RCRA Part B permit application, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

72. The allegation in Paragraph 72 of the Complaint is a summary of regulatory requirements that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

73. The allegation in Paragraph 73 of the Complaint is a summary of regulatory requirements that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

74. The allegations in Paragraph 74 of the Complaint are denied. Clean Harbors is prepared to present testimony and evidence to demonstrate that the application of sealants and coatings are only possible when certain ambient temperatures are available during the sealant or coating application process, and that any attempt to apply any such temperature dependent sealants or coatings during periods of time when the ambient temperature will not allow adequate curing of the material can result in cracking, peeling, separation at seals and seams, and other incomplete or impossible chemical adherence issues which are not the fault of Clean Harbors, and as a result, Clean Harbors cannot be held liable therefor.

75. The allegations in Paragraph 75 of the Complaint are denied. Clean Harbors is prepared to present testimony and evidence to demonstrate that the application of sealants and coatings are only possible when certain ambient temperatures are available during the sealant or coating application process, and that any attempt to apply any such temperature dependent sealants or coatings during periods of time when the ambient temperature will not allow adequate curing of the material can result in cracking, peeling, separation at seals and seams, and other incomplete or impossible chemical adherence issues which are not the fault of Clean Harbors, and as a result, Clean Harbors cannot be held liable therefor.

76. The allegations in Paragraph 76 of the Complaint are conclusions of law and/or fact that are properly the province of the trier of fact herein, and that are all hereby denied.

77. Clean Harbors again respectfully requests a hearing to allow Clean Harbors to contend that the proposed penalty and proposed compliance order are both inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*.

#### COUNT VI

#### ALLEGED FAILURE TO PROPERLY MANAGE RECEIVED HAZARDOUS WASTE

78. Clean Harbors hereby incorporates its responses to the allegations and averments of Paragraphs 1 through 77 above, as if fully set forth herein *in verbatim*.

#### *Alleged Failure to Resolve Manifest Discrepancy*

79. The allegations in Paragraph 79 of the Complaint are based on an apparent summary of or citation to provisions of the Kimball Facility's RCRA permit. To the extent any response is deemed to be required, the allegations are denied.

80. The allegation in Paragraph 80 of the Complaint is a summary of a regulatory definition that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegation is denied.

81. The allegation in Paragraph 81 of the Complaint is a summary of a regulatory definition that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegation is denied.

82. The allegations in Paragraph 82 of the Complaint are a summary of regulatory requirements that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

83. The allegations in Paragraph 83 of the Complaint are based on an apparent summary of or citation to provisions of the Kimball Facility's RCRA permit, and/or are a summary of statutory or regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

84. The allegations of Paragraph 84 are admitted.

85. The allegations of Paragraph 85 are denied. The unspent oxygen generator is and was at the time considered to be a product that was still suitable for its intended use, until such time as a decision is made to abandon, discard or dispose of the unspent oxygen generator, at which time it becomes a waste.

86. The allegations of Paragraph 86 are admitted.

87. The allegations of Paragraph 87 are denied. Undersigned counsel for Clean Harbors notified the generator/customer of the rejection of the unspent oxygen generator and put the generator/customer on notice that it had breached its contract with Clean Harbors by not disclosing the existence of the unspent oxygen generator in its original shipment to the Kimball Facility. At the time of rejection of the unspent oxygen generator, pursuant to the contract, which is the law between the parties to said contract, title to the unspent oxygen generator reverted [*viz.* reverted] back to the generator, and Clean Harbors had no further authority over the disposition of the unspent oxygen generator. The generator/customer took over responsibility for removal of the unspent oxygen generator and arranged for disposal of same at another facility designated by the generator/customer.

88. The allegations of Paragraph 88 are denied. The unspent oxygen generator was at the time of arrival at the Kimball Facility considered to be a product that was still suitable for its intended use, until such time as a decision is made to abandon, discard or dispose of the unspent oxygen generator, at which time it becomes a waste. The generator/customer did not provide written approval to amend the hazardous waste manifest by agreeing to add in the unspent oxygen generator until June 9, 2008, at which time the container became a waste pursuant to, and subject to, RCRA.

89. The allegations of Paragraph 89 are denied. There was not a significant discrepancy in type of hazardous waste received; at the time of receipt of the container that held the undisclosed and unspent oxygen generator, the unspent oxygen generator was considered to be a product that was still suitable for its intended use, until such time as a decision was made by the generator/customer to abandon, discard or dispose of the unspent oxygen generator, at which time it became a waste. There was also no manifest discrepancy to resolve, since the unspent oxygen generator had never been declared on the original manifest, since it was reportedly not known to exist within the shipment by and from the original generator/customer.

***Alleged Failure to Document Hazardous Waste Container Location***

90. The allegation in Paragraph 90 of the Complaint is based on an apparent summary of or citation to provisions of the Kimball Facility's RCRA permit. To the extent any response is deemed to be required, the allegations are denied.

91. The allegations in Paragraph 91 of the Complaint are based on an apparent summary of or citation to provisions of the Kimball Facility's RCRA permit. To the extent any response is deemed to be required, the allegations are denied.

92. The allegations in Paragraph 92 of the Complaint are a summary of regulatory requirements that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

93. The allegations in Paragraph 93 are admitted. At the time of receipt of the container that held the undisclosed and unspent oxygen generator, the unspent oxygen generator was considered to be a product that was still suitable for its intended use, until such time as a decision was made by the generator/customer to abandon, discard or dispose of the unspent oxygen generator, at which time it became a waste. As such, the unspent oxygen generator was not subject to regulation under RCRA. The unspent oxygen generator was stored [cordoned off would be more appropriate under the circumstances] outside of the Kimball Facility's north fence for safety reasons, because the unspent oxygen generator was a safety hazard that posed the risks of fire or explosion.

94. The allegations of Paragraph 94 are denied. At the time of receipt of the container that held the undisclosed and unspent oxygen generator, the unspent oxygen generator was considered to be a product that was still suitable for its intended use, until such time as a decision was made by the generator/customer to abandon, discard or dispose of the unspent oxygen generator, at which time it became a waste. As such, the unspent oxygen generator was not subject to regulation under RCRA; thus, none of the permit provisions or RCRA or state analogue provisions applied to the unspent oxygen generator. As a result, there was no violation of any of these regulatory provisions or permit conditions.

95. The allegations of Paragraph 95 are denied. There can be no civil penalty under RCRA unless violations under RCRA have occurred and can be proved legally; therefore, no civil penalty can be proposed, nor imposed, for the reasons set forth *supra*.

**COUNT VII**

**ALLEGED IMPROPER CONTROL OF AIR EMISSIONS FROM HAZARDOUS WASTE TANKS**

96. Clean Harbors hereby incorporates its responses to the allegations and averments of Paragraphs 1 through 95 above, as if fully set forth herein *in verbatim*.

97. The allegations in Paragraph 97 of the Complaint are based on an apparent summary of or citation to provisions of the Kimball Facility's RCRA permit, and/or are a summary of statutory or regulatory requirements, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

98. The allegations in Paragraph 98 of the Complaint are a summary of regulatory requirements that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

99. The allegations in Paragraph 99 of the Complaint are a summary of regulatory requirements, or are conclusions of law and/or fact that are properly the province of the trier of fact herein, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

100. The allegations in Paragraph 100 of the Complaint are a summary of regulatory requirements that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

101. The allegations in Paragraph 101 of the Complaint are a summary of regulatory requirements that requires no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

102. The allegations in Paragraph 102 of the Complaint are a summary of regulatory requirements, or are conclusions of law and/or fact that are properly the province of the trier of fact herein, that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

103. The allegations of Paragraph 103 are admitted. However, Clean Harbors asserts and pleads the affirmative defense of being in compliance with its permit as issued, and thus being in compliance with all applicable law, commonly referred to as raising the "permit as a shield" defense. In addition, Clean Harbors asserts and pleads the affirmative defense of mutual mistake, on a tripartite basis, since the permit as issued was reviewed by, and issued by, EPA and/or the Nebraska Department of Environmental Quality.

104. The allegations of Paragraph 104 are denied. Clean Harbors asserts and pleads the affirmative defense of being in compliance with its permit as issued, and thus being in compliance with all applicable law, commonly referred to as raising the "permit as a shield" defense. In addition, Clean Harbors asserts and pleads the affirmative defense of mutual mistake, on a tripartite basis, since the permit as issued was reviewed by, and issued by, EPA and/or the Nebraska Department of Environmental Quality.

105. The allegations of Paragraph 105 are denied. Clean Harbors asserts and pleads the affirmative defense of being in compliance with its permit as issued, and thus being in compliance with all applicable law, commonly referred to as raising the “permit as a shield” defense. In addition, Clean Harbors asserts and pleads the affirmative defense of mutual mistake, on a tripartite basis, since the permit as issued was reviewed by, and issued by, EPA and/or the Nebraska Department of Environmental Quality. Because the Kimball Facility was in compliance with its permit as issued, the permit serves as an absolute bar to the imposition of the proposed penalty.

### **III. RESPONSE TO PROPOSED PENALTY**

106. The allegations in Paragraph 106 of the Complaint are a summary of statutory and/or regulatory requirements that require no response from Clean Harbors. To the extent any response is deemed to be required, the allegations are denied.

107. The allegations in Paragraph 107 are denied. Clean Harbors again respectfully requests a hearing to allow Clean Harbors to contend that the proposed penalty and proposed compliance order are both inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*.

108. Clean Harbors is hereby filing its Answer and Request for Hearing to the Complaint in accordance with 40 CFR §22.15, contending that the proposed penalty and proposed compliance order are both inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*, thus payment is not applicable.

### **IV. RESPONSE TO COMPLIANCE ORDER**

109. The Compliance Order provisions set forth in Paragraph 109 are premature, because Clean Harbors again respectfully requests a hearing to allow Clean Harbors to contend that proposed compliance order is inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*.

110. The Compliance Order provisions set forth in Paragraph 110 are also premature, because Clean Harbors again respectfully requests a hearing to allow Clean Harbors to contend that proposed compliance order is inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*.

111. The Compliance Order provisions set forth in Paragraph 111 are also premature, because Clean Harbors again respectfully requests a hearing to allow Clean Harbors to contend that proposed compliance order is inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*.

112. The Compliance Order provisions set forth in Paragraph 112 are also premature, because Clean Harbors again respectfully requests a hearing to allow Clean Harbors to contend that proposed compliance order is inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*. To the extent that EPA is seeking to propose penalties for failure to comply with a compliance order that is subject to Clean Harbors' Request for Hearing, Clean Harbors hereby requests a stay of the requirements of Paragraphs 109 through 114, inclusively, until such time as a hearing can be held on the issues raised in this Answer and Request for Hearing.

113. The Compliance Order provisions set forth in Paragraph 113 are also premature, because Clean Harbors again respectfully requests a hearing to allow Clean Harbors to contend that proposed compliance order is inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*.

114. In accordance with the requirements of 40 CFR § 22.15, Clean Harbors requests a public hearing hereby in writing to contest the appropriateness of the Compliance Order, in a timely manner within the 30 days after service of the Complaint, thus the Compliance Order cannot become final. Clean Harbors again requests a stay of the requirements of Paragraphs 109 through 114, inclusively, until such time as a hearing can be held on the issues raised in this Answer and Request for Hearing.

#### **V. RESPONSE TO NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

115. Clean Harbors is hereby filing its Answer and Request for Hearing to the Complaint in accordance with 40 CFR §22.15, contending that the proposed penalty and proposed compliance order are both inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*.

116. Clean Harbors is hereby filing its Answer and Request for Hearing to the Complaint in accordance with 40 CFR §22.15, contending that the proposed penalty and proposed compliance order are both inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*.

117. Clean Harbors is hereby filing its Answer and Request for Hearing to the Complaint in accordance with 40 CFR §22.15, contending that the proposed penalty and proposed compliance order are both inappropriate and unwarranted because of the mitigating (if not exonerating) facts and circumstances set forth *supra*.

#### **VI. SETTLEMENT CONFERENCE**

118. Clean Harbors, by and through its undersigned counsel, will be requesting an informal settlement conference in order to discuss the facts and law of this case in an attempt to arrive at settlement.

119. Clean Harbors is hereby timely filing its Answer and Request for Hearing, and will be requesting an informal settlement conference.

120. Clean Harbors is prepared to enter into a Consent Agreement and Final Order if a settlement that is mutually acceptable between the parties can be reached.

121. Clean Harbors is hereby timely filing its Answer and Request for Hearing. Clean Harbors is hereby also requesting a Stay of the Compliance Order provisions of the Complaint until such time as a hearing can be held on the issues raised in this Answer and Request for Hearing.

RESPECTFULLY SUBMITTED BY:



Raeford Craig Lackey, Esquire  
Vice President and Chief Counsel  
Environmental Law and Litigation  
Clean Harbors Environmental Services, Inc.  
400 Arbor Lake Drive, Suite B-900  
Columbia, South Carolina 29223  
Telephone: (803) 691-3400

CERTIFICATE OF SERVICE

ORIGINAL

I certify that on the date noted below I shipped via Federal Express for overnight delivery the original and one true copy of the Respondent's Answer and Request for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North 5<sup>th</sup> Street, Kansas City, Kansas 66101.

I further certify that on the date below I shipped via Federal Express for overnight delivery a true and correct copy of the original Respondent's Answer and Request for Hearing to the following persons:

Mr. Jonathan W. Meyer, Esquire  
United States Environmental Protection Agency  
Region VII  
901 North 5<sup>th</sup> Street  
Kansas City, KS 66101

Mr. David Haldeman  
Administrator  
Waste Management Division  
Nebraska Department of Environmental Quality  
1200 "N" Street, Suite 400  
Lincoln, NE 68509-8922

Dated this 27<sup>th</sup> day of October, 2009.

R. Craig Lackey, Esq.  
R. Craig Lackey, Esquire