

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

07 MAY 11 AM 11:36
ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
University of Kansas Medical Center,)
)
Respondent.)
)
Proceedings Under Section 3008(g) of the)
Resource Conservation and Recovery Act,)
as amended, 42 U.S.C. §6928 (a) and (g))

SECOND AMENDED ANSWER OF
UNIVERSITY OF KANSAS MEDICAL
CENTER TO EPA'S AMENDED
COMPLAINT, COMPLIANCE ORDER
AND NOTICE OF OPPORTUNITY FOR
HEARING

Docket No. RCRA-07-2006-0261

RECEIVED BY DALJ
07 MAY 10 4:38

University of Kansas Medical Center (“KUMC”) provides the following second amended response to the Environmental Protection Agency’s (“EPA”) Amended Complaint. KUMC denies all allegations in the EPA’s Amended Complaint, except those specifically admitted herein. KUMC provides the following specific responses to EPA’s First Amended Complaint.

ALLEGATIONS COMMON TO ALL COUNTS

1. KUMC admits that it is a state institution of the State of Kansas and is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).
2. KUMC admits that it operates a facility located at 3901 Rainbow Boulevard, Kansas City, Kansas. KUMC further admits that its basic functions include research, education, patient care, and community service in the medical field.
3. KUMC admits that it commenced operations in Kansas City, Kansas in 1905 and that it employs approximately 2,200 people. KUMC denies that it “includes” the University of Kansas Hospital Authority, which became a separate agency of the State of Kansas in 1998. KUMC further

admits that, until July 1, 2006, compliance with EPA regulations in the laboratories of both the Hospital and the University was the responsibility of KUMC, pursuant to a service agreement between the University of Kansas Hospital Authority and KUMC.

4. KUMC admits that, pursuant to Section 76-712 of the Kansas Statutes, Annotated (“K.S.A.”), it is a state institution, controlled by and operated and managed under the supervision of the Kansas Board of Regents.

5. KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5 of the Amended Complaint, and therefore, denies the same.

6. KUMC admits that it has been assigned the EPA Facility Identification Number KSD076274737.

7. KUMC admits that on or about March 15-17, 2006, an EPA representative conducted a Compliance Evaluation Inspection (“CEI”) at KUMC.

8. KUMC admits that at the time of the inspection, it was operating as an “EPA Generator.” To the extent that the rest of the allegations in Paragraph 8 purport to recite laws or regulations, no response is required. To the extent a response is required, KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore, denies the same.

COUNT I
FAILURE TO CONDUCT A HAZARDOUS WASTE DETERMINATION

9. KUMC repeats and incorporates, as if fully set forth herein, each and every response to the preceding paragraphs 1 through 8.

10. To the extent that Paragraph 10 of the Amended Complaint purports to recite laws or regulations, no response is required. To the extent a response is required, KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore, denies the same.

11. KUMC presents the following responses to the allegations in Paragraph 11 of the Amended Complaint:

- a. KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(a) of the Amended Complaint, and therefore, denies the same.
- b. KUMC admits the allegations in Paragraph 11(b) of the Amended Complaint that, on the relevant date, it stored three containers of waste in Lied G010 without conducting a waste determination.
- c. KUMC denies the allegations in Paragraph 11(c) of the Amended Complaint. Histoclear waste is and was known to KUMC to be a hazardous waste; although marked as “histoclear waste,” the word “hazardous” was not on the label.
- d. KUMC admits the allegations in Paragraph 11(d) of the Amended Complaint that, on the relevant date, it stored 4 containers of waste in Lied 1007 without conducting a waste determination.
- e. KUMC denies the allegations in Paragraph 11(e) of the Amended Complaint. Bouin’s waste is and was known to KUMC to be hazardous waste.

- f. KUMC denies the allegations in Paragraph 11(f) of the Amended Complaint. The materials identified were in use and available for use, and are not “solid waste.”
- g. KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(g) of the Amended Complaint, and therefore, denies the same.
- h. KUMC denies the allegations in Paragraph 11(h) of the Amended Complaint. Arsenic waste is and was known to KUMC to be a hazardous waste; although marked as “arsenic waste,” the word “hazardous” was not on the label.
- i. KUMC denies the allegations in Paragraph 11(i) of the Amended Complaint. The materials identified were in use and available for use, and are not “solid waste.”
- j. KUMC denies the allegations in Paragraph 11(j) of the Amended Complaint. Organic wastes are and are known to KUMC to be hazardous; although marked as “organic waste,” the word “hazardous” did not appear on the labels.
- k. KUMC is without knowledge or sufficient information to form a believe as to the truth of the allegations in Paragraph 11(k) of the Amended Compliant, and, therefore, denies the same.
- l. KUMC denies the allegations in Paragraph 11(l) of the Amended Complaint. The materials identified were in use and available for use, and are not “solid waste.”

- m. KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(m) of the Amended Complaint, and therefore, denies the same.
- n. KUMC admits the allegations in Paragraph 11(n) of the Amended Complaint that, on the relevant date, it stored four containers of waste in Breidenthal 2030 that were not properly labeled.

12. To the extent that Paragraph 12 of the Amended Complaint purports to recite laws or regulations, no response is required. To the extent a response is required, KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore, denies the same.

13. To the extent that Paragraph 13 of the Amended Complaint is a statement of EPA's position on a civil penalty, no response is required. To the extent a response is required, KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore, denies the same.

14. KUMC repeats and incorporates, as if fully set forth herein, each and every response to the preceding paragraphs 1 through 13.

STORING HAZARDOUS WASTE LONGER THAN 90 DAYS

15. To the extent that the allegations in Paragraph 15 of the Amended Complaint refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

16. To the extent that the allegations in Paragraph 16 of the Amended Complaint refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

17. KUMC admits that on or about March 15-17, there was a 55-gallon drum of F003 waste with an accumulation start date of October 27, 2005 located in Building #25. KUMC further admits that the container was located on-site until March 24, 2006.

18. KUMC admits that it did not have a permit to operate a “hazardous waste storage facility.” To the extent the remainder of the allegations contained in this paragraph purport to recite laws or regulations or constitute conclusions of law, no response is required.

19. This paragraph sets forth conclusions of law to which no response is required. To the extent that the allegations in this paragraph refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

FAILURE TO COMPLY WITH THE GENERATOR REQUIREMENTS

20. To the extent that the allegations in Paragraph 20 of the Amended Complaint refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

21. To the extent that the allegations in Paragraph 21 of the Amended Complaint refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

LABELING HAZARDOUS WASTE CONTAINERS

22. To the extent that the allegations in Paragraph 22 of the Amended Complaint refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

23. KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 23 of the Amended Complaint, and therefore, denies the same.

ACCUMULATION START DATE

24. To the extent that the allegations in Paragraph 24 of the Amended Complaint refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

25. KUMC admits that some containers of hazardous waste at the facility were not marked with an accumulation start date, but is without sufficient knowledge to admit or deny the remaining specific allegations in Paragraph 25 of the Amended Complaint.

26. To the extent that Paragraph 26 of the Amended Complaint purports to recite laws or regulations, no response is required. To the extent a response is required, KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore, denies the same.

27. KUMC admits that it did not have a permit to operate a “hazardous waste storage facility.” To the extent the remainder of the allegations contained in this paragraph purport to recite laws or regulations, no response is required.

28. This paragraph sets forth conclusions of law to which no response is required. To the extent that the allegations in this paragraph refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

FAILURE TO COMPLY WITH SATELLITE ACCUMULATION REQUIREMENTS

29. To the extent that the allegations in Paragraph 29 of the Amended Complaint refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

30. To the extent that the allegations in Paragraph 30 of the Amended Complaint refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

31. To the extent that the allegations in Paragraph 31 of the Amended Complaint refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

32. KUMC admits that on or about March 15-17, 2006, approximately 24 satellite accumulation containers were marked as “waste” or words to that effect, however not labeled as “HAZARDOUS WASTE.” KUMC further admits that these containers were located in the specific buildings set forth in the Amended Complaint. To the extent the remainder of the allegations contained in this paragraph purport to recite laws or regulations, no response is required.

33. This paragraph sets forth conclusions of law to which no response is required. To the extent that the allegations in this paragraph refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

34. KUMC admits that it did not have a permit to operate a “hazardous waste storage facility.” To the extent the remainder of the allegations contained in this paragraph purport to recite laws or regulations, no response is required.

35. This paragraph sets forth conclusions of law to which no response is required. To the extent that the allegations in this paragraph refer to statutes and regulations, those sources speak for themselves, and any characterizations thereof are denied.

36. To the extent that Paragraph 36 of the Amended Complaint is a statement of EPA’s position on a civil penalty, no response is required. To the extent a response is required, KUMC is without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore, denies the same.

AFFIRMATIVE DEFENSE

Lack of Fair Notice

KUMC should not be held liable nor required to pay the civil penalty sought by EPA because KUMC did not receive fair notice of EPA Region VII’s interpretation of 40 CFR Part 261 and KAR 28-31-4. Under constitutionally based principles of due process, the government is required to provide KUMC with clear and unambiguous notice of its interpretations of the regulations. In this case, EPA failed to notify KUMC of the agency’s interpretation of the regulations prior to commencing enforcement efforts. Though the EPA’s Notice of Violation listed a description of the alleged violations, and the Inspection Report provided further detail of the inspector’s observations, this does not qualify as the type of pre-enforcement warning that meets due process requirements.

Not only did Region VII of EPA fail to provide actual notice to KUMC of its regulatory interpretation prior to taking enforcement action, but Region VII’s analysis of the regulations differs from that of other EPA offices, thereby confusing KUMC. Since Region VII’s reading of the


regulations is not consistent with other official agency interpretations of the same regulations, KUMC lacked appropriate notice of what EPA considers to be hazardous waste and cannot now be held liable for any alleged violation of the regulations.

REQUEST FOR PUBLIC HEARING

KUMC requests a public hearing to resolve the above-mentioned issues.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP



Michael P. Comodeca Mo. Bar #52538, KS# 21185
9401 Indian Creek Parkway, Suite 700
Overland Park, KS 66210-2005
Telephone: (913) 345-8100
Facsimile: (913) 345-0736



Sara S. Hertz Mo. Bar #56863
1000 Walnut Street, Suite 1400
Kansas City, MO 64106
Telephone: (816) 474-8100
Facsimile: (913) 474-3216

**ATTORNEYS FOR RESPONDENT –
UNIVERSITY OF KANSAS MEDICAL
CENTER**

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2007, a copy of this document was served by U.S. Mail, postage prepaid and Federal Expressed upon:

Susan Biro (**via Federal Express**)
Administrative Law Judge
(202) 564-6281 or 564-6255
United States Environmental Protection Agency
Office of Administrative Law Judges
1099 14th Street, N.W.
Franklin Court, Suite 350
Washington, D.C. 20005

Kathy Robinson (**via Federal Express**)
Regional Hearing Clerk
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, KS 66101

Alex Chen, Esq. (**via U.S. Mail**)
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, KS 66101

Donald Toensing, Chief (**via U.S. Mail**)
RCRA Enforcement and State Programs Branch
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, KS 66101



**ATTORNEY FOR RESPONDENT -
UNIVERSITY OF KANSAS MEDICAL
CENTER**