

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2020-0142
)	
CARMAX AUTO SUPERSTORES, INC.)	
Independence, Missouri)	
)	
Respondent,)	COMPLAINT AND
)	CONSENT AGREEMENT/
Proceedings under Sections)	FINAL ORDER
309(g) and 311(b)(6) of the)	
Clean Water Act,)	
33 U.S.C. §§ 1319(g) and 1321(b)(6))	
_____)	

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 311(b)(6) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1321(b)(6), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency Region 7 (“EPA”) and Respondent, CarMax Auto Superstores, 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) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order serves as notice that EPA has reason to believe that Respondent has violated Sections 311(b)(3) and 311(j) of the CWA, 33 U.S.C. §§ 1321(b)(3) and 1321(j), and regulations promulgated thereunder.

Parties

4. The Respondent is CarMax Auto Superstores, Inc., a Richmond, Virginia-based used car dealer and vehicle service business registered and authorized to conduct business in the state of Missouri.

5. The authority to take action under Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

Statutory and Regulatory Framework

6. Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), prohibits the discharge of oil or hazardous substances into or upon the navigable waters of the United States or adjoining shorelines in such quantities that have been determined may be harmful to the public health or welfare or environment of the United States.

7. Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1), and 40 C.F.R. § 112.2 define "oil" as "oil of any kind or in any form, including, but not limited to, petroleum [or] fuel oil... "

8. Section 311(b)(4) of the CWA, 33 U.S.C. § 1321(b)(4), authorizes EPA to promulgate a regulation to define what discharges of oil may be harmful to the public health or welfare or environment of the United States. 40 C.F.R. § 110.3 defines such discharges to include discharges of oil that violate applicable water quality standards or cause a film or a sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines.

9. Section 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), provides in part that the President shall issue regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges.”

10. To implement Section 311(j)(1)(C), EPA promulgated regulations to prevent oil pollution at 40 C.F.R. Part 112 that set forth the requirements for the preparation and implementation of Spill Prevention, Control and Countermeasure Plans (“SPCC Plans”).

11. The requirements of 40 C.F.R. Part 112 apply to owners and operators of non-transportation-related onshore facilities with an aboveground storage capacity of 1,320 gallons or greater, engaged in gathering, storing, transferring, distributing, using or consuming oil or oil products, which due to their locations, could reasonably be expected to discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining

shorelines. In pertinent part, 40 C.F.R. § 112.8(c)(2) requires that secondary containment for oil storage be sufficiently impervious to contain a spill.

12. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States.”

13. 40 C.F.R. § 112.2 defines “waters of the United States” to include, *inter alia*: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all interstate waters; (iii) tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

General Allegations

14. As a corporation, Respondent is a “person” within the meaning of Sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.

15. Respondent is the owner and/or operator within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of a used car and vehicle service facility (“Facility”) located at 19010 East Valley View Parkway, Independence, Missouri 64055.

16. The Facility includes an above-ground petroleum storage tank with an estimated storage capacity of 3,500 gallons.

17. A storm drain located near the center of the Facility parking lot discharges directly to Camp Creek, a United States Geological Service-listed perennial stream. Camp Creek flows approximately .73 miles into the Little Blue River. The Little Blue River is a “navigable water” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7). Camp Creek is a “water of the United States” within the meaning of 40 C.F.R. § 112.2.

18. Respondent is engaged in storing, processing, using or consuming oil or oil products located at the Facility.

19. Respondent’s Facility is a non-transportation-related facility within the meaning of 40 C.F.R. § 112 Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.

20. Respondent’s Facility is an onshore facility within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

21. Respondent’s Facility is a non-transportation-related onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States in a harmful quantity and is, therefore, an “SPCC-regulated facility.”

22. Pursuant to Section 311(j)(1)(C) of the Act, Executive Order 12777, and 40 C.F.R. § 112.1, Respondent, as the owner and/or operator of an SPCC-regulated facility, is subject to the SPCC regulations.

23. On or about July 19, 2019, the Missouri Department of Natural Resources (“MDNR”) received a report from Mansfield Oil Company, the servicer of Respondent’s above-ground petroleum storage tank, that a release of approximately 2,000 gallons of petroleum at Respondent’s Facility discharged into Camp Creek. According to the report, “(t)he release was a result from a broken elbow in the line that runs to the dispenser,” and that “(f)ree product was observed” in the tributary.”

24. On July 20, 2020, staff from MDNR’s Environmental Emergency Response Section inspected the discharge site. MDNR reported that “a few hundred gallons of fuel” were vacuumed out of the creek and the rate of release “appeared to be several gallons/minute while fuel was being dispensed” from the Facility, and that the discharges from the Facility “may have started as early as April 2019.”

25. Based on ullage logs and vehicle sales information provided by Respondent, the rate and duration of release identified by MDNR, and the size of the storage tank, it is estimated that approximately 19,000 gallons of petroleum discharged from the Facility into Camp Creek.

26. On November 12, 2019, EPA conducted an inspection at Respondent’s Facility in order to determine compliance with the SPCC regulations of 40 C.F.R. Part 112 (“EPA Inspection”). A copy of EPA’s inspection report was transmitted to Respondent on or about February 18, 2020.

Alleged Violations

Count 1: Prohibited Discharge

27. The discharge of petroleum from the Facility as reported on July 20, 2019 caused a film or sheen upon the surface of Camp Creek and/or adjoining shorelines, and, therefore, was in a quantity that has been determined may be harmful under 40 C.F.R § 110.3, which implements Section 311(b)(3) and (b)(4) of the Act, 33 U.S.C. § 1321(b)(3) and (b)(4).

28. The discharge of petroleum from the Facility into Camp Creek and/or adjoining shorelines violated Section 311 (b)(3) of the Act, 33 U.S.C. § 1321(b)(3).

29. The discharge was caused by Respondent’s failure to properly implement the SPCC program, as outlined in Count 2.

Count 2: Violations of SPCC Program

30. Based on information gathered during EPA’s Inspection and EPA’s review of other available information, Respondent failed to fully prepare, implement, and/or update its SPCC Plan at the Facility as required by 40 C.F.R. Part 112 as follows:

- a. Respondent failed to review the SPCC Plan every five years in violation of 40 C.F.R. §112.5(b).

- b. Respondent failed to have a professional engineer certify amendments to the SPCC Plan in violation of 40 C.F.R. § 112.5(c).
 - c. Respondent's SPCC Plan was insufficient to meet the regulatory standards of 40 C.F.R § 112.7(a)(3), including but not limited to, the fact that the SPCC Plan did not adequately describe the above-ground piping and secondary containment provided for it.
 - d. Respondent failed to "provide appropriate containment and/or diversionary structures or equipment to prevent a discharge" in violation of 40 C.F.R. § 112.7(c). Specifically, Respondent failed to provide appropriate containment for the above-ground metal piping which resulted in the discharge as described in Paragraph 23.
 - e. Respondent failed to maintain inspection and test procedures and results as required by its SPCC Plan for at least three years in violation of 40 C.F.R. § 112.7(e).
 - f. Respondent failed to conduct integrity testing of its aboveground storage container and maintain records of integrity testing in violation of 40 C.F.R. § 112.8(c)(6).
 - g. Respondent failed to inspect valves, piping, and appurtenances, including but not limited to, the general condition of the above-ground piping in violation of 40 C.F.R. § 112.8(d)(4).
31. Respondent's failures to fully prepare, implement, and/or update its SPCC Plan are violations of 40 C.F.R. Part 112, which are violations of Section 311 of the CWA, 33 U.S.C. § 1321.

Count 3: Failure to Notify Regional Administrator

32. Respondent failed to notify the EPA Region 7 Regional Administrator of the unauthorized discharge to Camp Creek within 60 days of the discharge in violation of 40 C.F.R. § 112.4(a).
33. Respondent's failure to comply with 40 C.F.R. § 112.4(a) is a violation of Section 311 of the CWA, 33 U.S.C. § 1321.

CONSENT AGREEMENT

34. Respondent and the EPA agree to the terms of this Consent Agreement/Final Order.

35. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.

36. Respondent neither admits nor denies the factual allegations and legal conclusions asserted by the EPA in this Complaint and Consent Agreement/Final Order.

37. Respondent waives its right to contest any issue of fact or law set forth above, and its right to appeal this Consent Agreement/Final Order.

38. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorneys' fees incurred as a result of this action.

39. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

40. Respondent understands and agrees that this Consent Agreement/Final Order 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 Consent Agreement/Final Order.

41. Respondent certifies by the signing of this Consent Agreement/Final Order that it has properly closed the fuel tank and that the SPCC requirements no longer apply to the Facility due to the Facility no longer having oil storage capacity exceeding 1,320 gallons. Respondent further certifies that it is in current compliance with the CWA and all regulations promulgated thereunder at its Facility.

Penalty Payment

42. In accordance with Section 311(b)(6)(A)(ii) of CWA, 33 U.S.C. § 1321(b)(6)(A)(ii), EPA may assess a civil penalty to any owner or operator in charge of any onshore facility who fails to comply with any regulation issued under Section 311(j) of CWA, 33 U.S.C. § 1321(j).

43. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **One Hundred Nineteen Thousand Four Hundred Forty Dollars (\$119,440)** to be paid in full no later than 30 days after the Effective Date of this Consent Agreement/Final Order as set forth below.

44. Respondent shall pay the penalty identified above by a check made payable to "Environmental Protection Agency – OSLTF-311" with a reference to the case name and docket number CWA-07-2020-0142, and remitted to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

45. Respondent shall simultaneously send copies of the transmittal letter and the check, as directed above, by email to the following:

Lisa Haugen
Regional Hearing Clerk
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219
haugen.lisa@epa.gov

and

Chris Muehlberger
Office of Regional Counsel
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219
muehlberger.christopher@epa.gov

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

47. Interest on any late payment will be assessed at the annual interest rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs or interest.

Effect of Settlement and Reservation of Rights

48. Respondent's payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims for violations of the CWA alleged in this Complaint and Consent Agreement/Final Order or known by the EPA as of the Effective Date of this Complaint and Consent Agreement/Final Order. Complainant reserves the

right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

49. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in this Consent Agreement/Final Order.

50. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

51. Notwithstanding any other provision of this Consent Agreement/Final Order, the EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a judicial or administrative action pursuant to Section 311 of the CWA, 33 U.S.C. § 1321, and to seek penalties against Respondent or to seek any other remedy allowed by law, if Respondent fails to comply with its obligations under the Consent Agreement/Final Order.

52. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages, to the extent such violations were not known to EPA as of the Effective Date of this Complaint and Consent Agreement/Final Order.

General Provisions

53. The Parties acknowledge that this Consent Agreement/Final Order is subject to the public notice and comment required pursuant to Section 311(b)(6)(C) of the CWA, 33 U.S.C. § 1321(b)(6)(C), and 40 C.F.R. § 22.45.

54. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219 ("Effective Date"). All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

55. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

56. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

57. Respondent consents to receive the filed Consent Agreement/Final Order at the following email addresses: johanna_griscik@carmax.com and/or joy_chenault@carmax.com.

For the Complainant, United States Environmental Protection Agency Region 7:

Date

David Cozad
Director
Enforcement and Compliance Assurance Division

Date

Chris Muehlberger
Office of Regional Counsel

For the Respondent, CarMax Auto Superstores, Inc.:

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Signature



Daniel T. Bickett

Name

Vice President, SDSS

Title

TM

Date

September 3, 2020

FINAL ORDER

Pursuant to Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Karina Borromeo
Regional Judicial Officer

CERTIFICATE OF SERVICE

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

Copy by email to Respondent:

CarMax Auto Superstores, Inc.
CSC-Lawyers Incorporating Service Company, Registered Agent
221 Bolivar Street
Jefferson City, Missouri 65101
johanna_griscik@carmax.com
joy_chenault@carmax.com

Copy emailed to Attorney for Complainant:

Chris Muehlberger
U.S. Environmental Protection Agency Region 7
muehlberger.christopher@epa.gov

Date