



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

89 KINGS HIGHWAY
DOVER, DELAWARE 19901

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**AMENDED NOTICE OF ADMINISTRATIVE PENALTY ASSESSMENT
AND SECRETARY'S ORDER**

Issued Pursuant to 7 Del. C. §6005(b)(3)

Order No. 2012-WH-0035

*VIA SERVICE TO
RESPONDENT'S COUNSEL*

Issued To:

Mr. Jim Howard
Manager, Maintenance Programs
Merit Oil of Delaware, Inc.
Hess Plaza
Woodbridge, NJ 07095

Registered Agent:

The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, DE 19801

This is to notify Merit Oil of Delaware, Inc. ("the Respondent"), that the Secretary of the Department of Natural Resources and Environmental Control ("the Department") has found Respondent has violated 7 Del. C., Chapters 60 and 74, 7 DE Admin. Code 1351, the Delaware *Regulations Governing Underground Storage Tank Systems* ("the UST Regulations") and 7 DE Admin. Code 1124, Delaware *Regulations Governing the Control of Volatile Organic Compound Emissions* ("the VR Regulations"). Accordingly, the Department is issuing this Amended Notice of Administrative Penalty Assessment and Secretary's Order (the "Amended Order"), pursuant to 7 Del. C. §6005(b)(3). When this Amended Order becomes final (either upon signature of the Waiver portion of the Amended Order and payment of the penalty assessed herein or upon expiration of the time to request a hearing without one being requested), this Amended Order will supersede and withdraw the Notice of Administrative Penalty Assessment and Secretary's Order No. 2011-W-0025, dated April 11, 2011 ("Original Order").

BACKGROUND AND FINDINGS OF FACT

The Department - Tank Management Branch (the "TMB") conducted a compliance inspection of the underground storage tank (the "UST") systems at Respondent's Kirkwood Highway facility (Hess #8501) on April 8, 2009. A certified *request for information* (the "RFI") letter was issued on April 24, 2009 requesting proof of compliance for sixteen (16) deficiencies to be produced to TMB within thirty (30) days of receipt. To date, proof of compliance for all of the deficiencies has been received. However, the financial responsibility (the "FR") documentation had been requested on several occasions, including as part of separate follow-up activities for an indicated release at another Respondent owned facility. Due to

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the fact that the FR documentation was not received in the acceptable format outlined in the UST Regulations for a period of one (1) year following receipt of the RFI letter, Respondent is cited for failure to obtain FR.

On August 27, 2009, during a routine stop at the Kirkwood Highway facility, the Department observed that the permitted dispensers (Tokheim MaxVac) for the four (4) UST systems had been removed and replaced with unpermitted dispensers (Gilbarco). Due to the fact that the equipment brand (and, therefore, its *California Air Resources Board* (CARB) executive order) changed, the removal and replacement of the dispensers necessitated both a construction permit and a new operating permit. The TMB did not receive a permit application for the change in dispensers and had not issued a construction permit for this change. Also, no new operating permit had been issued for this facility. The dispensers were installed without the necessary construction permit and the facility was operating air contaminant control equipment without an operating permit.

The Department similarly identified that dispensers were installed without the necessary construction permit and operated without an operating permit at three other facilities of Respondent: 31 N. DuPont Highway, Dover, Delaware (Hess #8500), 506 DuPont Highway, New Castle, Delaware (Hess #8502) and 207 S. Market Street, Wilmington, Delaware (Hess #8503).

On January 20, 2010, the Department issued Notice of Violation (NOV) 10-UT-01 to the Respondents for:

1. Failure to produce financial responsibility documentation as described in the UST Regulations;
2. Failure to obtain necessary permits prior to construction of air contaminant control equipment; and
3. Failure to obtain and maintain operating permits prior to operation of air contaminant control equipment.

In an e-mail dated May 19, 2010, the Department notified the Respondent that it has come to the Department's attention that there was additional tank top work including replacing concrete that occurred at Respondent's Kirkwood Highway facility on Friday, May 7th 2010. Any time concrete is broken, the retrofit process is triggered and notification and plans must be submitted to and approved by the Department prior to commencement of any work. All retrofit work must also be completed by a Delaware Certified Contractor.

For its Kirkwood Highway facility, on November 23, 2010, Respondent received the necessary permit for construction of air contaminant control equipment, and the necessary permit for operation of air contaminant control equipment on January 25, 2011. For its other Delaware facilities, Respondent received the necessary permits for operation of air contaminant control equipment on February 9, 2012.

STATUTORY AND REGULATORY PROVISIONS

Respondent was in violation of the following provisions of 7 *Del. C.* Chapters 60 and 74, the UST Regulations, and the VR Regulations. Each day of violation is a separate violation for each UST System:

1. The UST Regulations: Part F, Section 1.3.1.1. and 1.3.2.1. Amount and Scope of Financial Responsibility

“Per-Occurrence Financial Responsibility Amounts

Owners and Operators of UST Systems shall demonstrate financial responsibility for taking corrective action and for compensating third parties for Bodily Injury and Property Damage caused by Accidental Releases from the operation of UST Systems in at least the following per-occurrence amounts:

For Owners or Operators of UST Systems that are located at Petroleum Marketing Facilities, or that handle an average of more than 10,000 gallons of Regulated Substance per month based on annual throughput for the previous calendar year, the demonstration of financial responsibility for corrective action and third-party liability shall be a minimum of one million dollars (\$1,000,000) per Occurrence.”

[...]”For Owners and Operators of UST Systems not described in §1.3.1.1.1. or §1.3.1.1.2. of this Part the demonstration of financial responsibility for corrective action and third-party liability shall be a minimum of five hundred thousand dollars (\$500,000) per Occurrence.”

“Annual Aggregate Financial Responsibility Amounts

“Owners and Operators of UST Systems shall demonstrate financial responsibility for taking corrective action and for compensating third parties for Bodily Injury and Property Damage caused by Accidental Releases from the operation of UST Systems in at least the following annual aggregate amounts:

For Owners and Operators of 1 to 100 UST Systems the demonstration of financial responsibility for corrective action and third-party liability shall be a minimum of one million dollars (\$1,000,000) annual aggregate.

For Owners and Operators of 101 or more UST Systems the demonstration of financial responsibility for corrective action and third-party liability shall be a minimum of two million dollars (\$2,000,000) annual aggregate.”

2. The UST Regulations: Part F, Section 1.1.8. Financial Responsibility Requirements for Underground Storage Tank Systems.

“Records documenting compliance with the Financial Responsibility Requirements of this part shall be made available upon the request of the Department.”

3. Regulation 1102, Permits, Section 2. Applicability

“Except as exempted in 2.2. of this regulation, no person shall initiate construction, install, alter, or initiate operation of any equipment or facility or air contaminant control device which will emit or prevent the emission of an air contaminant prior to receiving approval of his application from the Department or, if eligible, prior to submitting the Department a completed registration form.”

4. Regulation 1124, Section 36.5, Recordkeeping and Reporting

“The owner or operator of a gasoline dispensing facility subject to the requirements of 36.0 of this regulation shall keep on the facility premises and in a form acceptable to the Department, all of the following information. This information shall be retained for at least three years from the date of record and shall be made immediately available to the Department upon request.

Permits and Applications. Copies of the Stage I and Stage II System permit applications and the current Construction/Operation Permits shall be permanently maintained.

Installation and Testing Results. The test results shall be dated, and shall note the installing and test companies' names, addresses, and phone numbers. These records shall be kept on file until they are replaced with new test results verifying proper functioning of the Stage II system.

Maintenance Records. Any maintenance conducted on any part of the Stage II vapor recovery system shall be logged on a maintenance record. This maintenance record shall include a general part description, the date repaired or replaced, the replacement part manufacturer's information, and a description of the problem and solution.

Inspection Records. A file shall be maintained of all daily inspection reports including records of daily self-inspections, and any third party inspection records.

Compliance Records. A file shall be maintained of all compliance records. This record shall include:

Any warning letters and notices of violations issued by the Department to the facility.

Proof of attendance and completion of a training program for each person trained in accordance with 36.3.2.2 of this regulation. This does not apply to the records of an employee who is no longer in service for at least one year.”

CONCLUSION

Based on the foregoing findings and provisions, the Department has concluded that the Respondent has violated the UST Regulations and the VR Regulations, as follows:

1. The Respondent was not able to prove FR at the time of the inspection nor did Respondent timely produce proof of FR in the acceptable format for the UST systems. The Respondent was in violation of Part F, Sections 1.1.8., 1.3.1.1. and 1.3.2.1. of the UST Regulations.
2. The Respondent failed to obtain the Department's prior approval and the proper permits for dispenser change-out at its Delaware facilities. The Respondent was in violation of Regulation 1102, Permits, Section 2. Applicability.
3. The Respondent failed to obtain and permanently maintain the required Stage II construction and operating permits and applications at its Delaware facilities. The Respondent was in violation of Regulation 1124, Section 36.5, Recordkeeping and Reporting.

ASSESSMENT OF PENALTY

Pursuant to the provisions of 7 Del. C. §6005(b)(3), this is written notice to Respondent that on the basis of its findings, the Department is assessing Respondent an administrative penalty of \$12,000 for the violations identified in this Amended Order.

In addition to the penalty assessment, Respondent is hereby assessed estimated costs in the amount of \$1,800 pursuant to 7 Del. C. §6006(c). These costs were incurred by the Department in the investigation of the noted violations.

Respondent shall submit 2 checks to the Department in the amounts of \$12,000.00 and \$1,800.00 within thirty (30) days from the receipt of this Amended Order for the aforementioned penalties and costs. The checks shall be made payable to the "State of Delaware" and shall be directed to: Kevin P. Maloney, Deputy Attorney General, Department of Justice, Civil Division, 3rd Floor, 102 West Water Street, Dover, Delaware 19904. Payment of the administrative penalty by Respondent shall resolve all civil and administrative liability of Respondent for the violations set forth in this Amended Order or related to the Department's finding of facts.

PUBLIC HEARING

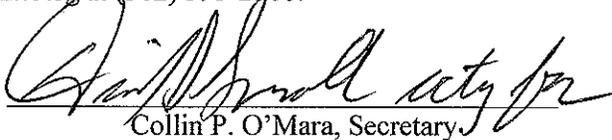
This Amended Order shall become effective and final unless the Department receives from Respondent, no later than thirty (30) days from the receipt of this Notice, a written request for a public hearing on these matters as provided in 7 Del. C. §6005(b)(3). In the event Respondent requests a hearing, the Department reserves the right to withdraw this Amended Order and take additional enforcement actions regarding these and other violations at Respondent's facilities, including, but not limited to, the imposition of civil penalties and recovery of the Department's costs and attorney's fees pursuant to 7 Del. C. §6005(c). The Department reserves the right to do so at its discretion.

PRE-PAYMENT

Respondent may pre-pay the administrative penalty of \$12,000 and the Department's estimated costs in the amount of \$1,800 in the manner described in the attached waiver. By doing so, Respondent waives its right to a hearing and the opportunity to appeal or contest the Amended Order, which shall become a final Order. It is agreed that pre-payment and submission of the attached waiver by Respondent does not constitute an admission of any fact or of the violation of any law, and does not constitute the admission of any liability to any person.

If you have any questions, please contact Alex Rittberg at (302) 395-2500.

Date: 8/24/12


Collin P. O'Mara, Secretary

cc: Marjorie A. Crofts, Director
Kevin P. Maloney, Deputy Attorney General
Alex Rittberg, EPM II
David Brixen, EPM I
Rebecca Keyser, Environmental Scientist
Jennifer Bothell, Enforcement Coordinator
Patricia Magee, Paralegal

WAIVER OF STATUTORY RIGHT TO A HEARING

Merit Oil of Delaware, Inc. hereby waives its right to a hearing and its opportunity to appeal or contest this Amended Order and agrees to the following:

Merit Oil of Delaware, Inc. will settle the alleged violations in the Amended Order as set forth below. In doing so, it does not admit any liability for the violations alleged in the Amended Order, and agrees to the entry of the Amended Order in order to resolve disputed claims, without admission of fact, violation, or liability.

Merit Oil of Delaware, Inc. will pay the administrative penalty in the amount of \$12,000 by sending a check payable to the "State of Delaware" within thirty (30) days of receipt of this Assessment and Order. The check shall be directed to Kevin P. Maloney, Deputy Attorney General, Department of Justice, 102 W. Water Street, 3rd floor, Dover, Delaware 19904; and

Merit Oil of Delaware, Inc. will reimburse the Department in the amount of \$1,800 which represents the Department's estimated costs. The reimbursement shall be paid within thirty (30) days of receipt of this Assessment and Order. The check shall be payable to the "State of Delaware" and be directed to Kevin P. Maloney, Deputy Attorney General, Department of Justice, 102 W. Water Street, 3rd floor, Dover, Delaware 19904.

Merit Oil of Delaware, Inc.

Date: _____

By: _____

Title: _____