COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE
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Doug Domenech
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Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
KMX CHEMICAL CORP.
FOR
NEW CHURCH, VIRGINIA, FACILITY
Storm Water Registration No. VAR050491

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and KmX Chemical Corp., regarding the New Church, Virginia, Facility for the purpose of resolving certain violations of the State Water Control Law and the applicable regulation.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.

2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

3. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

4. "Facility" or "Plant" means the KmX Chemical Corp. facility located at 30474 Energy Drive in New Church, Accomack County, Virginia, where it receives liquid industrial chemical by-products from which it recovers ethanol and other organic solvents by distillation for resale.

5. "KmX" means KmX Chemical Corp., a corporation authorized to do business in Virginia and its affiliates, partners, subsidiaries, and parents. KmX is a "person" within the meaning of Va. Code § 62.1-44.3.

6. "Letter of Agreement" or "LOA" means an informal enforcement mechanism, which represents an agreement between a responsible party and the Department to correct violations of the State Water Control Law and applicable regulations.

7. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

8. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.

9. "Permit" means VPDES General Permit No. VAR05 for Storm Water Discharges Associated with Industrial Activity, which was effective July 1, 2009, and expires June 30, 2014. KmX is subject to the Permit through Stormwater Registration No. VAR050491.

10. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 9 VAC 25-31-10.

11. "Pollution" means such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) an alteration of the physical, chemical, or biological property of state waters or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution but which, in combination with such alteration of or discharge or deposit to state waters by other owners, is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution." Va. Code § 62.1-44.3.

12. "Registration statement" means a registration statement for storm water discharges under 9 VAC 25-151-60.

13. "Regulation" means the VPDES Permit Regulation, 9 VAC 25-31-10 *et seq.*

14. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.

15. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.

16. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia

17. "Va. Code" means the Code of Virginia (1950), as amended.

18. "VAC" means the Virginia Administrative Code.

19. "VPDES" means Virginia Pollutant Discharge Elimination System.

SECTION C: Findings of Fact and Conclusions of Law

1. KmX owns and operates the Facility. Storm water and surface-water runoff from the Facility flow into drainage ditches that lead to an unnamed tributary to Pitts Creek. The Facility is subject to the Permit. Storm water and surface-water runoff discharge from the Facility through six storm water outfalls identified by KmX as Outfalls 001, 002, 003, 004, 005 and 006.

2. On May 2, 2008, KmX had signed a Letter of Agreement ("LOA") following an NOV for inspection deficiencies that included an unpermitted discharge of cooling water condensate that overflowed the boiler room collection pit and the improper management of combined process waste water and storm water captured by the bermed secondary containment areas associated with the Facility's tank "farms." The secondary containment areas are concrete pads enclosed by low concrete walls (or "berms"). Among other things, the LOA required KmX to maintain a log for each containment area that reflects the date water is pumped from the area, the volume of water removed from each area, and the site of the water's ultimate disposal.

3. On January 16, 2010, at about 2:00 AM, a local emergency responder ("responder") received a citizen's complaint concerning red coloration and a strong chemical odor in the water in the unnamed tributary downstream of the Facility. The responder traced the source of the discoloration and odor upstream to the Facility. The Facility was unattended, but the responder gained access using an emergency gate-opener in his possession. The responder observed a 2-1/2 inch reinforced rubber hose connected to Tank 90, a 30,000-gallon enclosed steel tank. Tank 90 is part of a tank "farm" (Area Q) situated on a concrete pad that is surrounded by a concrete secondary containment berm. The hose was observed running from Tank 90 out of the bermed secondary containment area and under a fence to an area near Outfall 002. There was red liquid on the ground in

the vicinity of Tank 90 and a strong chemical odor throughout the Facility. The KmX Facility manager arrived to disconnect the hose.

4. KmX notified DEQ of the unpermitted discharge, which had occurred during the weekend. Due to a power outage at the DEQ office, it could not be determined if the notification had been made within 24 hours as required by Va. Code 62.1-44.5(b). DEQ compliance staff ("staff") conducted a site visit of the Facility on January 20, 2010, and observed that the access panel of Tank 90 was open. Apparent rust was seen on the bottom and sides of the tank and a strong chemical smell was present. Staff interviewed the Facility manager who stated that on January 15, 2010, at about 4:00 PM, an unsupervised KmX employee initially had followed KmX's standard procedure by emptying the process wastewater from Tank 90 into Tank 80, one of three large tanks where contaminated wastewater from throughout the Facility is stored temporarily awaiting pickup by a wastewater disposal contractor. Tank 80 is located in a different tank "farm" (Area W) near both Area Q and Outfall 002. After transferring its contents to Tank 80, the KmX employee reportedly rinsed out Tank 90, but deviated from the standard procedure by discharging the tank wash water to the ground near Outfall 002. Outfall 002 is approximately 200 feet from Tank 90. According to the Facility manager, KmX's standard procedure is to discharge tank wash water to within the bermed secondary containment area and then transfer it from the secondary containment to Tank 80 or one of the other wastewater disposal tanks.

5. KmX submitted to DEQ a written report dated January 20, 2010, within the five days required by the Permit, which confirmed the account of the unpermitted discharge given to staff by the KmX Facility manager, also on January 20, 2010. The report estimated the amount of tank wash water discharged from Tank 90 at 700 to 1000 gallons. It stated that after the discovery of the discharge, KmX had pumped about 300 gallons of apparently contaminated water from Outfall 002 into Tank 80. The report also indicated that the Facility operates only intermittently when there is enough feed to warrant the Facility opening; that Facility employees would be receiving training in handling and managing hazardous materials; that KmX will be installing new technology equipment at the Facility that will purportedly reduce the level of contaminants in its process waste water; and that KmX would be hiring a new Facility manager.

6. KmX collected water samples from the drainage ditches at all six Facility outfalls listed in the Permit ten to twelve hours after the unpermitted discharge. Contamination was found only in the sample taken from Outfall 002. The sample was found to be 98.2% water with low levels of various organic solvents. The red coloration was attributable to fine, suspended ferric oxide scale from the sides and bottom of Tank 90. There were no reports of water quality impacts other than the discoloration and chemical smell.

7. TRO issued NOV No. 2010-02-T-0002 dated February 22, 2010, for the unpermitted discharge to State waters of tank wash waters.

8. KmX responded to the NOV by telephone on March 9, 2010, and by electronic mail on March 15, 2010, affirming the information contained in its January 20, 2010, written

response. The information was confirmed during a site visit by DEQ compliance and enforcement staff on March 31, 2010. The new Facility manager was on site and the new technology equipment had been delivered but not yet installed.

9. Va. Code § 62.1-44.5 states that: "[E]xcept in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances."

10. The Regulation, at 9 VAC 25-31-50, also states that except in compliance with a VPDES permit, or another permit issued by the Board, it is unlawful to discharge into state waters sewage, industrial wastes or other wastes.

11. Va. Code § 62.1-44.15(5a) states that a VPDES permit is a "certificate" under the statute.

12. The Department has issued no permits or certificates to KmX that regulates discharges to Outfall 002 other than the Permit.

13. Tank wash water contaminated with organic solvents is considered a pollutant under 9 VAC 25-31-10 of the Regulation because it is a chemical waste. It is also considered an "other waste" under Va. Code § 62.1-44.3 because it is a chemical or substance that may cause pollution in State waters.

14. The unnamed tributary to Pitts Creek is located in the Chesapeake Bay Basin and is listed in DEQ's 305(b) as impaired due to excess levels of *e. coli* bacteria, low dissolved oxygen and low pH. The source of the impairments is unknown. The unnamed tributary to Pitts Creek is a surface water located wholly within the Commonwealth and is a "state water" under State Water Control Law.

15. Based on the results of the January 20, 2010, and March 31, 2010, inspections and the documentation submitted on January 20, 2010, and March 15, 2010, the Board concludes that KmX has violated Va. Code 62.1-44.5 and 9 VAC 25-31-50, by discharging tank wash water from the Facility as described in paragraphs C(3) through C(14), above.

16. KmX has submitted documentation that verifies and DEQ staff inspected the Facility on March 31, 2010, and verified that the violations as described in paragraphs C(3) through C(14), above, have been corrected.

17. In order for KmX to remain in compliance, DEQ staff and representatives of KmX have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders KmX, and KmX agrees to:

1. Perform the actions described in Appendix A of this Order; and

2. Pay a civil charge of $9,100 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

KmX shall include its Federal Employer Identification Number (FEIN) (32-0123702) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF).

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of KmX for good cause shown by KmX, or on its own motion pursuant to the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, after notice and opportunity to be heard.

2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the Facility; or (3) taking subsequent action to enforce the Order.

3. For purposes of this Order and subsequent actions with respect to this Order only, KmX admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. KmX consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. KmX declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.

6. Failure by KmX to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. KmX shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. KmX shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. KmX shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

   a. the reasons for the delay or noncompliance;

   b. the projected duration of any such delay or noncompliance;

   c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

   d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

   Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which KmX intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and KmX. Nevertheless, KmX agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until:

    a. KmX petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

b. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to KmX.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve KmX from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by KmX and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

13. The undersigned representative of KmX certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind KmX to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of KmX.

14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.

15. By its signature below, KmX voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, 2010.

_____
Francis L. Daniel, Regional Director
Department of Environmental Quality

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KmX Chemical Corp. voluntarily agrees to the issuance of this Order.

Date: 06-01-10 By: [signature], GENERAL MGR.
(Person) (Title)
KmX Chemical Corp.

Province/State/Commonwealth of Virginia
City/County of Accomack

The foregoing document was signed and acknowledged before me this 1st day of June, 2010, by ROBERT A. HALLOWELL JR who is GENERAL MGR. of KmX Chemical Corp., on behalf of the corporation.

[signature]
Notary Public

249760
Registration No.

My commission expires: 12-31-2013

Notary seal:

APPENDIX A
SCHEDULE OF COMPLIANCE

KmX Chemical Corp. shall:

1. Within 90 days of the effective date of this Order submit to DEQ Tidewater Regional Office, for review and approval, a corrective action plan ("plan") and schedule that fully examines the root cause of the release of tank wash water to State waters on January 15, 2010, and describes actions KmX has taken and plans to take to prevent future releases from the Facility's secondary containment berms and to mitigate environmental damage in the event a release does occur. The approved plan and schedule shall specifically include a component on training Facility employees in managing tank wash waters. Upon approval, the plan and schedule shall become a part of and enforceable under the terms of this Order.

2. Comply with all conditions of the VPDES Permit.

3. Mail all submittals and reports required by this Appendix A to:

   Regional Director
   DEQ, Tidewater Regional Office
   5636 Southern Boulevard
   Virginia Beach, VA 23462