

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2008 JUN 12 PM 3:43
REGIONAL HEARING
CLERK

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In the Matter of :
 :
Niagara Ceramics Corporation, : **CONSENT AGREEMENT**
 : **AND FINAL ORDER**
 :
Respondent. :
 : Docket Number RCRA-02-2007-7114
Proceeding under Section 3008 of the :
Solid Waste Disposal Act, as amended. :
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This is an administrative proceeding instituted pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by various statutes including the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. § 6928 (such statutes here referred to collectively as the "Act" or "RCRA"). This action was commenced to assess a civil penalty against Respondent for alleged past violations of the requirements of Subchapter III of RCRA, 42 U.S.C. §§ 6921 - 6939e, and to require future compliance with said requirements. The United States Environmental Protection Agency ("EPA") has promulgated regulations governing the handling and management of hazardous waste at 40 C.F.R. Parts 260-279.

Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), "[a]ny State which seeks to administer and enforce a hazardous waste program pursuant to [Subchapter III, Hazardous Waste Management; 42 U.S.C. §§ 6921-6939e] may develop and...submit to the Administrator [of EPA] an application...for authorization of such program." If EPA then grants a State's request to operate such a hazardous waste program, Section 3006 further provides that "[s]uch State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste...."

Pursuant to Section 3006(b) of the Act, 42 U.S.C. § 6926(b), the State of New York received on May 29, 1986 final authorization from EPA to administer its base hazardous waste program. Since 1986, New York State has been authorized to enforce many other hazardous waste requirements promulgated by EPA pursuant to RCRA. See 67 Fed. Reg. 49864 (August 1, 2002) and 70 Fed. Reg. 1825 (January 11, 2005). This includes most EPA regulations issued as of July 1999. Section 3008(a) of the Act, 42 U.S.C. § 6928(a), authorizes EPA to enforce the regulations constituting the authorized State program.

Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA Region 2, issued a "Complaint, Compliance Order, and Notice of Opportunity for Hearing," bearing docket number RCRA-02-2007-7114, to Niagara Ceramics Corporation, on October 2, 2007, and Respondent served its Answer on or about October 26, 2007. The Complaint alleged that Respondents had violated requirements of RCRA and regulations concerning the handling and management of hazardous waste. The Answer admits many of the predicate allegations but denies the material allegations regarding liability; it also asserts several affirmative defenses and requests a hearing to contest all matters alleged in the Complaint. The parties served their prehearing exchanges in February 2008, with Respondent asserting in its papers an inability to pay.

Complainant and Respondent agree, by entering into this Consent Agreement and Final Order ("CA/FO"), that settlement of this matter upon the terms set forth in this CA/FO is an appropriate means of resolving the claims against Respondent without further litigation. This CA/FO is being issued pursuant to, and under authority of, 40 C.F.R. § 22.18(b). No admissions by Respondent and no adjudicated findings of fact or conclusions of law have been made. For the purposes of this CA/FO and for purposes of implementing the settlement set forth herein, Respondent neither admits nor denies the Findings of Fact or the Conclusions of Law that have been set forth below.

FINDINGS OF FACT

1. Respondent, Niagara Ceramics Corporation, a corporation organized under New York law since February 2004, has since March 2004 owned and operated a facility located at 75 Hayes Place, Buffalo, New York 14210 (the "Niagara facility").
2. On or about April 4, 2007, a duly designated EPA representative conducted an inspection of and at the Niagara facility in order to determine Respondent's compliance, in its operation of the Niagara facility, with RCRA regulatory requirements ("EPA inspection").
3. On or about April 25, 2007, EPA sent a Notice of Violation/Information Request Letter to the Respondent seeking, in part, information and documentation relating to its compliance with applicable RCRA statutory and regulatory requirements in its operations of the Niagara facility; Respondent submitted its responses thereto on or about May 31, 2007.
4. At the Niagara facility, Respondent has since March 2004 manufactured (and continues to manufacture) commercial grade ceramic dinnerware products and china, including mugs, cups, saucers, cookware, plates, bowls, platters and other accessory items, in the course of which it has conducted (and continues to conduct) various plastic forming, dry pressing, slip casting, glazing and decorating, and related operations.
5. In the course of the aforementioned (§ 4 of this section, above) activities, Respondent has generated (and continues to generate):

a. a filtercake waste, *i.e.* a waste generated by a filter press that processes wastewater from lead glazing operations (hereinafter referred to as the “lead/cadmium cake waste”); and

b. spent paint solvents (hereinafter referred to as the “paint solvent waste”).

6. For each calendar month between (and including each of) March 2004 and April 2007, Respondent generated at the Niagara facility an average of more than 1,000 kilograms (“kgs”) of the lead/cadmium cake waste and paint solvent waste (combined); Respondent continues to generate such waste at the Niagara facility in quantities greater than 1,000 kgs per calendar month.

7. From time to time subsequent to March 2004, Respondent accumulated and stored at the Niagara facility the lead/cadmium cake waste and the paint solvent waste.

8. Prior to the EPA inspection, Respondent last shipped off-site (*i.e.* away from the Niagara facility) the waste that it had generated at the Niagara facility, as follows:

a. on or about December 12, 2005, paint solvent waste; and

b. on or about August 16, 2006, lead/cadmium cake waste.

9. At the time of the EPA inspection, Respondent had been storing at the Niagara facility the following hazardous waste that it had generated at the Niagara facility:

a. approximately 40,000 pounds of lead/cadmium cake waste in 19 boxes; and

b. paint solvent waste in one 55-gallon container.

10. The aforementioned (§ 9 of this section, above) storage occurred as follows:

a. for more than 90 days for some waste; and

b. for 90 days or less for other waste.

11. From March 2004 onward, Respondent has periodically stored for greater than 90 days at the Niagara facility additional amounts of the lead/cadmium waste cake and the paint solvent waste.

12. Hazardous waste has been generated and periodically stored at the Niagara facility since before November 19, 1980.

13. At no time prior or subsequent to March 2004 did Respondent obtain pursuant to

Section 3005 of RCRA, 42 U.S.C. § 6925, and/or 6 NYCRR § 373-1, a RCRA permit or “interim status” (within the meaning of Section 3005(e) of RCRA, 42 U.S.C. § 6925(e); 6 NYCRR § 373-1.3) for the operations of the Niagara facility.

14. To the extent Respondent stored the aforementioned (sub- ¶ “b” of ¶ 10 of this section, above) hazardous waste for 90 days or less, Respondent failed, as of the date of the EPA inspection, to meet RCRA permitting exemption requirements cross-referenced in 6 NYCRR § 373-1.1(d)(1)(iii) for such waste.

15. On or about April 17, 2007, Respondent shipped off-site the waste that it had generated and accumulated at the Niagara facility, as follows:

- a. approximately 44,700 pounds of lead/cadmium cake waste; and
- b. 1,200 pounds (in three drums) of paint solvent waste.

16. In accordance with Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), EPA has given the State of New York notice of the administrative proceeding bearing docket number RCRA-02-2007-7114.

CONCLUSIONS OF LAW

1. Respondent is a “person” as that term is defined in Section 1004(15) of the Act, 42 U.S.C. § 6903(15), and in 6 NYCRR § 370.2(b).

2. Each of the lead/cadmium cake waste and the paint solvent waste constitutes a “solid waste” (as defined in 6 NYCRR § 371.1(c)) and a “hazardous waste” (as defined in 6 NYCRR § 371.1(d)).

3. Respondent, at the Niagara facility, has been since March 2004 (and continues to be), a “generator” (as defined in 6 NYCRR § 370.2(b)) of hazardous waste.

4. The Niagara facility constitutes a “facility,” a “hazardous waste management facility” and an “existing hazardous waste management facility” (as such word or phrase is respectively defined in 6 NYCRR § 370.2(b)).

5. Pursuant to Section 3005 of the Act, 42 U.S.C. § 6925, and 6 NYCRR § 373-1.2(a), no person shall operate an existing hazardous waste management facility without a permit issued pursuant to 6 NYCRR Subpart 373-1 (hereinafter such permit referred to as a “RCRA permit”) or without having “interim status” pursuant to 6 NYCRR Part 373.

6. As a consequence of Respondent’s aforementioned (sub-¶ “a” of ¶ 10 and ¶ 11 of the “Findings of Fact” section, above) storage of hazardous waste, the Niagara facility was subject to the RCRA permit or interim status requirement set forth in Section 3005 of RCRA, 42 U.S.C. §

6925, and in 6 NYCRR § 373-1.2.

7. In relevant part, 6 NYCRR § 373-1.1(d)(1)(iii) provides that the owner or operator of a hazardous waste management facility may store hazardous waste generated on-site in containers or tanks for a period not to exceed 90 days without having to obtain a RCRA permit under 6 NYCRR Part 373, provided said owners or operators comply with the requirements set forth in 6 NYCRR § 373-1.1(d)(1)(iii) for any such storage area.

8. As a consequence of Respondent's aforementioned (sub-¶ "b" of ¶ 10 of the "Findings of Fact" section, above) storage of hazardous waste and aforementioned (¶ 14 of the "Findings of Fact" section, above) failure to satisfy conditions for storage without a permit, the Niagara facility was:

- a. not exempt from the 6 NYCRR Part 373 RCRA permitting requirements; and
- b. subject to the permit requirements of Section 3005 of RCRA, 42 U.S.C. § 6925, and 6 NYCRR § 373-1.2 in its operation of the Niagara facility.

9. Respondent's aforementioned (¶s 10 and 11 of the "Findings of Fact" section, above) storage of hazardous waste – and thus its operation of an existing hazardous waste facility – without having obtained a RCRA permit or without interim status constitutes a violation of each of the following provisions:

- a. Section 3005 of RCRA, 42 U.S.C. § 6925; and
- b. 6 NYCRR § 373-1.2(a).

10. Pursuant to Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1), whenever any person has violated or is in violation of a requirement of Subchapter III of RCRA, 42 U.S.C. §§ 6921 - 6939e, the Administrator of EPA, *inter alia*, "may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both."

11. Each of the following provisions constitutes a requirement of Subchapter III of RCRA, 42 U.S.C. §§ 6921 - 6939e:

- a. Section 3005 of RCRA, 42 U.S.C. § 6925; and
- b. 6 NYCRR § 373-1.2(a).

AGREEMENT ON CONSENT

Based upon the foregoing, and pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, and 40 C.F.R. § 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, it is hereby agreed by and between Complainant and Respondent, and voluntarily accepted by Respondent, that, for purposes of this Consent Agreement and in the interest of settling this matter expeditiously without the time, expense or uncertainty of a formal adjudicatory hearing on the merits, Respondent: (a) admits the jurisdictional allegations of the Complaint; (b) neither admits nor denies the non-jurisdictional allegations of the Complaint; (c) neither admits nor denies the "Findings of Fact" or "Conclusions of Law" as set forth in this document; (d) consents to the assessment of the civil penalty as set forth below; (e) consents to the issuance of the Final Order accompanying this Consent Agreement; and (f) waives its right to seek judicial review of, or otherwise contest, said Final Order.

Pursuant to 40 C.F.R. § 22.31(b), the executed CA/FO shall become effective and binding when it is filed with the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2 (such date henceforth referred to as the "effective date").

It is further hereby agreed by and between Complainant and Respondent, and voluntarily accepted by Respondent, that there shall be compliance with the following terms and conditions:

1. Respondent shall pay a civil penalty to EPA in the amount of **SIX THOUSAND (\$6,000.00) DOLLARS**, to be paid within forty-five (45) calendar days of the effective date.¹ Payment in accordance with the terms and schedule set forth below shall be made by cashier's check, certified check or by electronic fund transfer (EFT). If payment is made by cashier's check or by certified check, such check shall be made payable to the "**Treasurer, United States of America,**" and shall be identified with a notation thereon listing the following: ***In the Matter of Niagara Ceramics Corporation, Docket Number RCRA-02-2007-7114.*** If payment is made by either form of check, such payment shall be mailed to the following address:

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

Alternatively, if Respondent chooses to make payment by EFT, Respondent shall then provide the following information to its remitter bank:

a. Amount of Payment

¹ For purposes of this CA/FO, days shall mean calendar days.

b. SWIFT address: **FRNYUS33, 33 Liberty Street, New York, New York 10045**

c. Account Code for Federal Reserve Bank of New York receiving payment: **68010727**

d. Federal Reserve Bank of New York ABA routing number: **021030004**

e. Field Tag 4200 of the Fedwire message should read: **D 68010727 Environmental Protection Agency**

f. Name of Respondent: **Niagara Ceramics Corporation**

g. Case docket number: **RCRA-02-2007-7114**

2. Payment instructions:

a. Payment shall be in accordance with the instructions set forth in paragraph 1 of this section, above. If Respondent makes payment by cashier's check or certified check, then such check shall be *received* at the above-listed address on or before the date specified. If Respondent makes payment by the EFT method, then the EFT shall be *received* on or before the date specified.

b. Whether Respondent makes payment by cashier's check, certified check or by the EFT method, Respondent shall promptly thereafter furnish reasonable proof that such payment has been made, and such proof shall be furnished to each of:

Lee A. Spielmann
Assistant Regional Counsel
Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Karen Maples, Regional Hearing Clerk
Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

c. Failure to pay the amount in full within the time periods set forth above may result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for collection.

d. Furthermore, if payment is not made on or before the date when it is made due under the terms of this document, interest therefor shall be assessed at the

annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, on the overdue amount from the date payment was to have been made through the date payment has been received. In addition, a late payment handling charge of \$15.00 will be assessed for each thirty (30) calendar day period or any portion thereof, following the date payment was to have been made, in which payment of the amount remains in arrears. In addition, a 6% per annum penalty will be applied to any principal amount that has not been received by the EPA within ninety (90) days of the date for which payment was required hereto to have been made.

3. The civil penalty provided for in this section constitutes a penalty within the meaning of 26 U.S.C. § 162(f).

4. Respondent shall comply with the following provisions:

a. Respondent shall either:

(1) submit an application to the New York State Department of Environmental Conservation for a hazardous waste permit for the Niagara facility, within 30 days of the effective date, and comply with all applicable rules and regulations, including sub-paragraphs “b” through “h” of this paragraph, below, until it obtains such permit; **or**,

(2) comply with all conditions necessary to be exempt from hazardous waste permitting requirements, including sub-paragraphs “b” through “h” of this paragraph, below.

b. Starting no later than 10 days of the effective date, Respondent, so long as it generates 1,000 kilograms or more of hazardous waste at the Niagara facility in a calendar month, shall not accumulate hazardous waste at said facility for a period of greater than 90 days before shipping these wastes off-site unless permitted to do so by an applicable RCRA hazardous waste storage permit. (If Respondent’s rate of generation of hazardous waste at the Niagara facility becomes less than 1,000 kilograms per calendar month [hereinafter one generating hazardous waste at such a rate referred to as a “small quantity generator”], Respondent shall comply with the then applicable time limits for storage of hazardous waste by a small quantity generator.)

c. Starting no later than 10 days of the effective date, Respondent shall only store hazardous waste in containers labeled “Hazardous Waste” and with other words that identify the contents of the containers, mark all hazardous waste containers with the date accumulation of hazardous waste starts for that container, and ensure that all containers accumulating hazardous waste are closed except when hazardous waste is being removed or put into the containers.

- d. Starting no later than 10 days of the effective date, Respondent shall maintain aisle space among rows of hazardous waste containers and, on a least a weekly basis, inspect its hazardous waste storage areas.
- e. Starting no later than 10 days of the effective date, Respondent shall, to the extent that it has not done so, undertake a program to maintain up-to-date arrangements or agreements with local hospitals, police, and emergency response teams to familiarize them with the layout of the Niagara facility, properties of hazardous waste handled at the said facility and associated hazards, places where the facility personnel would normally be working, entrances to and any roads inside the Niagara facility, possible evacuation routes, and the types of injuries or illnesses which could result from fires, explosions or releases at the Niagara facility.
- f. Starting no later than 30 days of the effective date, Respondent shall, to the extent that it has not done so, develop an up-to-date contingency plan designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water.
- g. Starting no later than 30 days of the effective date, Respondent shall, to the extent it has not done so, provide required training to hazardous waste management personnel employed by or at the Niagara facility, and shall maintain required training records for each position at said facility related to hazardous waste management.
- h. Starting no later than 30 days of the effective date, Respondent shall comply with any other applicable federal and state regulatory requirements for hazardous waste generators, including those provisions for the temporary on-site storage of hazardous waste by the generator of such waste.
- i. Regardless of Respondent's decision with regard to the options in sub-paragraph "a" of this paragraph, Respondent shall submit to EPA within 30 days of the effective date written notice of its compliance (accompanied by a copy of all appropriate supporting documentation) or noncompliance for each of the requirements cited in sub-paragraphs "b" through "g" of this paragraph (except to the extent Respondent has already provided such documentation). If Respondent is in noncompliance with a particular requirement, the notice shall state the reasons for noncompliance and shall provide a schedule for achieving prompt compliance with the requirement.
- j. Responses, documentation, and evidence submitted in response hereto shall be sent to:

Ronald Voelkel, Environmental Scientist
RCRA Compliance Branch
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency - Region 2
290 Broadway, 21st Floor
New York, New York 10007-1866

5. Complainant shall mail to Respondent (to the representative designated below) a copy of the fully executed CA/FO, and Respondent consents to service of the CA/FO upon it by an employee of EPA other than the Regional Hearing Clerk of EPA, Region 2:

Michael C. Murphy, Esq.
Phillips Lytle LLP
3400 HSBC Center
Buffalo, New York 14203-2887

6. Respondent has read this Consent Agreement, understands its terms, and consents to the issuance of the Final Order accompanying this Consent Agreement and consents to making full payment of the civil penalty in accordance with the terms and schedule set forth above.

7. This CA/FO is not intended, and shall not be construed, to waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable federal, state and local law and regulations governing the generation, handling, treatment, storage, transport and disposal of hazardous waste (hereinafter, "the management") at, in or from the Niagara facility.

8. This Consent Agreement is being voluntarily and knowingly entered into by the parties to resolve the administrative claims alleged in the Complaint bearing docket number RCRA-02-2007-7114 upon full payment of the penalty amount set forth above. Notwithstanding the above, nothing herein shall affect the right of the EPA or the United States to pursue appropriate injunctive relief or otherwise seek equitable relief or criminal sanctions for any violation(s) of law resulting from or pertaining to Respondent's operation of the Niagara facility.

9. Respondent hereby waives its right to seek or to obtain any hearing on the allegations made in the Complaint, and on the terms and conditions set forth in the Consent Agreement and its accompanying Final Order and/or on the Findings of Fact or Conclusions of Law, above.

10. This Consent Agreement and any provision herein shall not be construed as an admission of liability in any adjudicatory or administrative proceeding, except in an action, suit or proceeding to enforce this Consent Agreement or any of its terms and conditions.

11. Respondent voluntarily waives any right or remedy it might have pursuant to 40

C.F.R. § 22.8 to be present during discussions with, or to be served with and reply to any memorandum or other communication addressed to, the Regional Administrator of EPA, Region 2, or the Deputy Regional Administrator of EPA, Region 2, where the purpose of such discussion, memorandum or other communication is to recommend that such official accept this Consent Agreement and issue the accompanying Final Order.

12. Each party shall bear its own costs and fees in connection with this proceeding.

13. The undersigned signatory for Respondent hereto certifies that: a) he or she is duly and fully authorized to enter into and ratify this Consent Agreement and all the terms, conditions and requirements set forth in this Consent Agreement, and b) he or she is duly and fully authorized to bind Respondent (including any successors) to comply with and abide by all the terms and conditions of this Consent Agreement.

In re Niagara Ceramics Corporation
Docket Number RCRA-02-2007-7114

RESPONDENT:

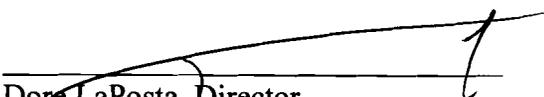
BY: 

NAME: Karl H Franz

TITLE: VP ENGINEERING

DATE: 5/28/08

COMPLAINANT:

BY: 
Dore LaPosta, Director
Division of Enforcement and Compliance
Assistance
U.S. Environmental Protection Agency -
Region 2

PATRICK DURRICE
for DL

DATE: JUNE 8, 2008

In re Niagara Ceramics Corporation,
Docket Number RCRA-02-2007-7114

FINAL ORDER

The Regional Administrator of EPA, Region 2 concurs in the foregoing Consent Agreement in the case of *In the Matter of Niagara Ceramics Corporation.*, bearing Docket Number RCRA-02-2007-7114. Said Consent Agreement, having been duly accepted and entered into by the parties, is hereby ratified and incorporated into this Final Order, which is hereby issued and shall take effect when filed with the Regional Hearing Clerk of EPA, Region 2. 40 C.F.R. § 22.31(b). This Final Order is being entered pursuant to the authority of 40 C.F.R. § 22.18(b) (3) and shall constitute an order issued under authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

DATED: June 11, 2008
New York, New York


ALAN J. STEINBERG
Regional Administrator
United States Environmental Protection Agency –
Region 2