



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2007 OCT -2 PM 2:52
REGIONAL HEARING
CLERK

SEP 28 2007

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

Robert L. Lupica, President and CEO
Niagara Ceramics Corporation
75 Hayes Place
Buffalo, New York 14210

Re: **In the Matter of Niagara Ceramics Corporation**
Docket No. RCRA-02-2007-7114

Dear Mr. Lupica:

Enclosed is the Complaint, Compliance Order and Opportunity for Hearing in the above-referenced proceeding. The Complaint alleges violations of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.*

You have the right to a formal hearing to contest any of the allegations in the Complaint and/or to contest the penalty proposed in the Complaint. If you wish to contest the allegations and/or the penalty proposed in the Complaint, you must file an Answer within **thirty (30)** days of your receipt of the enclosed Complaint with the Regional Hearing Clerk of the Environmental Protection Agency ("EPA"), Region 2, at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

If you do not file an Answer within thirty (30) days of receipt of this Complaint and have not obtained a formal extension for filing an Answer from the Regional Judicial Officer of Region 2, a default order may be entered against you and the entire proposed penalty may be assessed.

Whether or not you request a formal hearing, you may request an informal conference with EPA to discuss any issue relating to the alleged violations and the amount of the proposed penalty. EPA encourages all parties against whom it files a Complaint to pursue the possibility of settlement and to have an informal conference with EPA. However, a request for an informal conference **does not** substitute for a written Answer, affect what you may choose to say in an Answer, or extend the thirty (30) days by which you must file an Answer requesting a hearing.

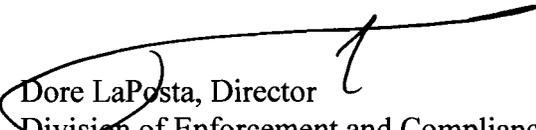
You will find enclosed a copy of the "Consolidated Rules of Practice," which govern this proceeding. (A brief discussion of some of these rules appears in the later part of the Complaint.)

For your general information and use, I also enclose both an "Information Sheet for U.S. EPA Small Business Resources" and a "Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings" which may apply to you depending on the size of the proposed penalty and the nature of your company.

EPA encourages the use of Supplemental Environmental Projects, where appropriate, as part of any settlement. I am enclosing a brochure on "EPA's Supplemental Environmental Projects Policy." Please note that these are only available as part of a negotiated settlement and are not available if this case has to be resolved by a formal adjudication.

If you have any questions or wish to schedule an informal conference, please contact the attorney whose name is listed in the Complaint.

Sincerely,



Dore LaPosta, Director
Division of Enforcement and Compliance Assistance

Enclosures

cc: Karen Maples, Regional Hearing Clerk (without enclosures)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2007 OCT -2 PM 2:52
REGIONAL HEARING
CLERK

In the Matter of Niagara Ceramics
Corporation,

Respondent.

Proceeding Under Section 3008 of the
Solid Waste Disposal Act, as amended .

**COMPLAINT, COMPLIANCE ORDER
AND NOTICE OF OPPORTUNITY
FOR HEARING**

Docket No. RCRA-02-2007-7114

COMPLAINT

This is an administrative proceeding instituted pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. §§ 6901 et seq. (referred to collectively as the "Act" or "RCRA"). 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.

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING ("complaint") serves notice of EPA's preliminary determination that Niagara Ceramics Corporation, at its Buffalo, New York, facility, has violated provisions of RCRA and requirements of the federally authorized New York regulations concerning the handling and management of hazardous waste.

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)(2) of the Act, 42 U.S.C. § 6928(a)(2), authorizes EPA to enforce the regulations constituting the authorized State program.

The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2, who has been duly delegated the authority to institute this action, hereby alleges as and for her complaint against Respondent:

Predicate Allegations

1. This is an administrative proceeding pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), to assess a civil penalty against Respondent for past violations of the requirements of Subchapter III of RCRA, 42 U.S.C. §§ 6921 - 6939e, and to require future compliance with said requirements.
2. This Tribunal has jurisdiction over the subject matter of this administrative proceeding pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and 40 C.F.R. § 22.1(a)(4).
3. 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.”
4. 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 this administrative proceeding.
5. Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), “[a]ny penalty assessed in the order [issued under authority of Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1)] shall not exceed \$25,000 per day of noncompliance for each violation of a requirement of [Subtitle C of RCRA].”
6. Under authority of the Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, Public Law 101-410 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, 110 Stat. 1321, Public Law 104-134 (codified at 31 U.S.C. § 3701 note), EPA has promulgated regulations, codified at 40 C.F.R. Part 19, that, *inter alia*, increase the maximum penalty EPA might obtain pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), to \$32,500 for any violation occurring after March 15, 2004.

Respondent's Background

7. Respondent is Niagara Ceramics Corporation ("Respondent").

8. Respondent is a for-profit corporation organized pursuant to, and since February 18, 2004, existing under, the laws of the State of New York.

9. Respondent is a "person" as that term is defined in Section 1004(15) of the Act, 42 U.S.C. § 6903(15), and in Title 6 of the New York Codes, Rules, and Regulations ("6 NYCRR") § 370.2(b).¹

10. In March 2004, Respondent purchased the manufacturing operations and assets of an entity known as Buffalo China from an entity known as Oneida Ltd.

11. Since March 2004, Respondent has been (and remains) the owner and operator of a facility the address of which is 75 Hayes Place, Buffalo, New York 14210 (hereinafter referred to as the "Niagara facility").

12. Since March 2004, Respondent has manufactured (and continues to manufacture) at the Niagara facility commercial grade ceramic dinnerware products and china, including mugs, cups, saucers, cookware, plates, bowls, platters and other accessory items.

13. The aforementioned (¶ 12, above) manufacturing activities at the Niagara facility have been occurring there since prior to November 19, 1980.

EPA Interactions with Respondent

14. Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, Respondent provided EPA, through a RCRA Subtitle C Site Identification Form dated March 30, 2004, a subsequent notification of regulated waste activity for the Niagara facility with EPA Identification Number NYD980653109, which number had previously been assigned to the Niagara facility under its prior ownership.

15. In response to the aforementioned (¶ 14, above) notification, EPA acknowledged on April 28, 2004, Respondent's filing of a Notification of Hazardous Waste Activity for EPA Identification Number NYD980653109.

16. On or about April 4, 2007, a duly designated representative of EPA conducted a RCRA Compliance Evaluation Inspection of the Niagara facility (the "2007 inspection").

¹ All words or phrases that have been defined with reference to statutory and/or regulatory provisions are used throughout the Complaint as so defined.

17. The purpose of the 2007 inspection was to determine Respondent's compliance with applicable RCRA statutory and regulatory requirements in its ownership and operation of the Niagara facility.

18. On or about April 25, 2007, EPA issued to Respondent a combined:

- a. Notice of Violation ("NOV"); and
- b. Information Request Letter ("IRL").

19. The NOV, issued pursuant to Section 3008 of the Act, 42 U.S.C. § 6928, *inter alia*, informed Respondent that EPA had identified at least nine RCRA violations at the Niagara facility.

20. The IRL, issued pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, sought information relating to Respondent's compliance with applicable RCRA statutory and regulatory requirements in its ownership and operation of the Niagara facility.

21. On or about May 31, 2007, Respondent submitted its response to the NOV and the IRL.

22. The aforementioned (¶ 21, above) response to the NOV and IRL was prepared by an official of Respondent in the course of carrying out his duties and responsibilities for Respondent.

Respondent's Generation of Waste

23. Since March 2004, Respondent, at the Niagara facility, in the course of conducting the aforementioned (¶ 12, above) manufacturing activities, has conducted (and continues to do so) various plastic forming, dry pressing, slip casting, glazing and decorating, and related operations.

24. Since March 2004, Respondent, at the Niagara facility, in the course of conducting the aforementioned (¶ 12, above) manufacturing activities, has generated (and continues to do so) "solid waste" (as defined in 6 NYCRR § 371.1(c)).

25. A portion of the aforementioned (¶ 24, above) solid waste Respondent has generated (and continues to generate) constitutes "hazardous waste" (as defined in 6 NYCRR § 371.1(d)).

26. Included among (but not necessarily limited to) the aforementioned (¶ 25, above) hazardous waste Respondent has generated (and continues to generate) are the following:

- a. a filtercake waste (a waste generated by a filter press that processes wastewater from lead glazing operations), which, as a solid waste exhibiting the characteristic

of toxicity for both lead and cadmium, is classified pursuant to 6 NYCRR 371.3(e) as a D008 and D006, respectively, hazardous waste (hereinafter referred to as the “lead/cadmium cake waste”); and

b. spent paint solvents, which, as a solid waste exhibiting the characteristic of ignitability, are thus classified pursuant to 6 NYCRR 371.3(b) as a D001 hazardous waste (hereinafter referred to as the “paint solvent waste”).

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

28. For each calendar month between (and including each of) March 2004 and March 2007, Respondent generated at the Niagara facility an average of more than 1,000 kilograms (“kgs”) of the aforementioned (§§ 25 and 26, above) hazardous waste.

29. For the month of April 2007, Respondent generated at the Niagara facility more than 1,000 kgs of the aforementioned (§§ 25 and 26, above) hazardous waste.

30. From time to time, Respondent accumulated and stored at the Niagara facility the following hazardous waste generated at said facility:

- a. the lead/cadmium cake waste; and
- b. the paint solvent waste.

31. The Niagara facility constitutes a “facility” (as that word is defined in 6 NYCRR § 370.2(b)).

32. The Niagara facility constitutes a “hazardous waste management facility” (as those words are defined in 6 NYCRR § 370.2(b)).

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

34. The Niagara facility constitutes an “existing hazardous waste management facility” (as those words are defined in 6 NYCRR § 370.2(b)).

35. Prior to the 2007 inspection, Respondent last shipped off-site (*i.e.* away from the Niagara facility) hazardous 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.

36. On or about April 17, 2007, Respondent shipped off-site hazardous waste that it had generated 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.

37. Respondent continues to generate at the Niagara facility an average of more than 1,000 kgs of the aforementioned (§s 25 and 26, above) hazardous waste during each calendar month.

COUNT 1 - Unpermitted Storage of Hazardous Waste for Greater than 90 Days

38. Complainant repeats and realleges each allegation set forth in paragraphs “1” through “37,” inclusive, as if fully set forth herein.

39. 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” (within the meaning of Section 3005(e) of RCRA, 42 U.S.C. § 6925(e); 6 NYCRR § 373-1.3) pursuant to 6 NYCRR Part 373.

40. At the time of the 2007 inspection, Respondent was 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.

41. As of the date of the 2007 inspection, Respondent had been storing at the Niagara facility the aforementioned (§ 40, above, sub-paragraphs “a” and “b”) hazardous waste for more than 90 days.

42. From March 2004 onward, Respondent has periodically also stored for greater than 90 days at the Niagara facility the aforementioned (§ 30, above, sub-paragraphs “a” and “b”) hazardous waste in addition to the hazardous waste referenced in paragraph 41, above.

43. As a consequence of Respondent’s aforementioned (§s 41 and 42, 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.

44. At no time prior to Respondent's aforementioned (§ 10, above) March 2004 purchase of manufacturing operations and assets was a RCRA permit or interim status obtained pursuant to Section 3005 of RCRA, 42 U.S.C. § 6925, and/or 6 NYCRR § 373-1 for the operations of the Niagara facility.

45. Since Respondent's aforementioned (§ 10, above) March 2004 purchase of manufacturing operations and assets, Respondent never obtained, pursuant to Section 3005 of RCRA, 42 U.S.C. § 6925, and/or 6 NYCRR § 373-1, a RCRA permit or interim status for its operations of the Niagara facility.

46. Respondent's aforementioned (§§ 41 and 42, 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).

47. 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).

**COUNT 2 - Unpermitted Storage of Hazardous Waste for
Under 90 Days (Alternative Pleading to Count 1)**

48. Complainant repeats and realleges each allegation set forth in paragraphs "1" through "37," inclusive, as if fully set forth herein.

49. 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 specified in said provision [6 NYCRR § 373-1.1(d)(1)(iii)] for any such storage area.

50. Pursuant to 6 NYCRR § 373-1.1(d)(1)(iii), in order to be exempt from the 6 NYCRR Part 373 RCRA permitting requirements, owners or operators must comply with, *inter alia*, the following requirements:

- a. 6 NYCRR § 373-3.9(d)(3), which requires that containers holding hazardous waste be marked with the words “Hazardous Waste” and other words that identify their contents;
- b. 6 NYCRR § 373-1.1(d)(1)(iii)(‘c’)(‘2’), which requires that the date upon which the period of accumulation begins be clearly marked and visible for inspection on all containers holding hazardous waste;
- c. 6 NYCRR § 373-3.9(d)(1), which requires that containers holding hazardous waste be closed during storage except when it is necessary to add or remove waste;
- d. 6 NYCRR § 373-3.3(f), which requires that aisle space be maintained to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency;
- e. 6 NYCRR § 373-3.9(e), which requires that areas where containers are stored be weekly inspected, with such inspections to look for leaking containers and for deterioration of containers and the containment system caused by corrosion and other factors;
- f. 6 NYCRR § 373-3.3(g)(1)(i), which requires that arrangements, where appropriate, be made to familiarize police, fire departments and emergency response teams with the layout of the facility, properties of hazardous waste handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to and roads inside the facility, and possible evacuation routes;
- g. 6 NYCRR § 373-3.3(g)(1)(iv), which requires that arrangements, where appropriate, be made to familiarize local hospitals with the properties of hazardous waste handled at the facility and the types of injuries or illnesses which could result from fires, explosions or releases at the facility;
- h. 6 NYCRR § 373-3.4(e), which requires that the prescribed (6 NYCRR § 373-3.4) contingency plan be reviewed and immediately amended whenever, *inter alia*, there are changes in facility operations, emergency coordinators, or emergency equipment;
- i. 6 NYCRR § 373-3.2(g)(1)(i), which requires that facility personnel successfully complete a program of classroom instruction or on-the-job training that teaches them how to perform their duties in a way that ensure the facility’s compliance with the requirement of 6 NYCRR Subpart 373-3; and

j. 6 NYCRR § 373-3.2(g)(4), which requires that the documents and records specified in sub-paragraphs (i) through (iv) of 6 NYCRR § 373-3.2(g)(4) be maintained at the facility (hereinafter, the requirements listed in sub-paragraphs “a” through “j” collectively referred to as the “RCRA permitting exemption requirements”).

51. As of the date of the 2007 inspection, and at various other times since March 2004, Respondent, at the Niagara facility, has stored in containers and tanks each of the following hazardous wastes generated at the Niagara facility for a period of 90 days or less:

- a. lead/cadmium cake waste in 19 boxes; and
- b. paint solvent waste in one 55-gallon container.

52. As of the date of the 2007 inspection, for the aforementioned (§ 51, above) storage of hazardous wastes, Respondent failed to meet the RCRA permitting exemption requirements, as follows:

- a. Respondent failed to label the 19 boxes holding the lead/cadmium cake waste and the 55-gallon container holding the paint solvent waste with the words “Hazardous Waste” or with other words that would have identified the respective contents;
- b. Respondent failed to mark the 19 boxes holding the lead/cadmium cake waste and the 55-gallon container holding the paint solvent waste with the respective accumulation start dates;
- c. Respondent failed to keep at least two boxes holding the lead/cadmium cake waste and one 55-gallon container holding the paint solvent waste closed (and hazardous waste was neither being added nor removed from said containers);
- d. Respondent failed to maintain adequate and sufficient aisle space among the 19 boxes holding the lead/cadmium cake waste;
- e. Respondent failed weekly to inspect areas where hazardous waste containers were being stored;
- f. Respondent failed to make arrangements to familiarize local emergency response teams with the properties of hazardous waste handled at the Niagara facility and the types of injuries or illnesses that could result in the event of fires, explosions or releases occurring at the Niagara facility;

g. Respondent failed to amend and update a contingency plan to reflect current operations at the Niagara facility; and

h. Respondent failed to assure that its personnel completed instruction in the management of hazardous waste and did not maintain documents regarding such training.

53. The aforementioned (¶s 51 and 52) 19 boxes constituted “containers” (as defined in 6 NYCRR § 370.2(b)) for purposes of 6 NYCRR § 373-1.1(d)(1)(iii).

54. As a consequence of Respondent’s aforementioned (¶ 52, above) failures, Respondent, with regard to its aforementioned (¶ 51, above) storage of hazardous wastes at the Niagara facility:

a. was not exempt from the 6 NYCRR Part 373 RCRA permitting requirements in its operation of the Niagara facility; and

b. was 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.

55. At no time prior to Respondent’s aforementioned (¶ 10, above) March 2004 purchase of manufacturing operations and assets was a RCRA permit or interim status obtained pursuant to Section 3005 of RCRA, 42 U.S.C. § 6925, and/or 6 NYCRR § 373-1 for the operations of the Niagara facility.

56. Since Respondent’s aforementioned (¶ 10, above) March 2004 purchase of manufacturing operations and assets, Respondent never obtained a RCRA permit or interim status pursuant to Section 3005 of RCRA, 42 U.S.C. § 6925, and/or 6 NYCRR § 373-1 for its operation of the Niagara facility.

57. As a consequence of its aforementioned (¶ 51, above) storage of hazardous waste for a period of less than 90 days – and thus its operation of an existing hazardous waste management facility — without having obtained a RCRA permit or interim status, Respondent has violated each of the following:

a. Section 3005 of RCRA, 42 U.S.C. § 6925; and

b. 6 NYCRR § 373-1.2(a).

58. 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).

II. PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 3008(a)(3) of the Act, 42 U.S.C. § 6928(a)(3). For purposes of determining the amount of any penalty assessed, Section 3008(a)(3) requires EPA to “take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.” To develop the proposed penalty in this complaint, the Complainant has taken into account the particular facts and circumstances of this case and used EPA's 2003 RCRA Civil Penalty Policy, a copy of which is available upon request or can be found on the Internet at the following address: <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf>. This policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors to particular cases.

Complainant proposes, subject to receipt and evaluation of further relevant information from Respondent, that Respondent be assessed the following civil penalty for the violations alleged in this Complaint. A penalty calculation worksheet and narrative explanation to support the penalty figure for each violation cited in this Complaint are included in Attachment I, below. Matrices employed in the determination of individual and multi-day penalties are included as Attachments II, and III, below.

In view of the above-cited violations, and pursuant to the authority of Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), and in light of the guidance provided by the RCRA Civil Penalty Policy, including consideration of the seriousness of the violations and any good faith efforts by Respondent to comply with applicable requirements, Complainant herewith proposes the assessment of a civil penalty in the total amount of **one hundred and thirty-one thousand and three hundred and fifty (131,350) dollars** as follows:

Counts 1 and 2 \$131,350

Total Proposed Penalty: \$131,350

III. COMPLIANCE ORDER

Based upon the foregoing, and pursuant to the authority of Section 3008 of the Act, Complainant herewith issues the following Compliance Order to Respondent:

1. Within ten (10) calendar days of the effective date of this Compliance Order, Respondent shall not accumulate hazardous waste for a period of greater than 90 days before shipping these wastes off site.
2. Respondent shall either:
 - a. submit an application to the New York State Department of Environmental Conservation for a hazardous waste permit for the Niagara facility, within thirty (30) calendar days of the effective date of this Compliance Order, comply with all applicable rules and regulations, including paragraphs "3" through "7" below, until it obtains such permit; **or**,
 - b. comply with all conditions necessary to be exempt from hazardous waste permitting requirements, including paragraphs "1", and "3" through "7" below.
3. Within ten (10) calendar days of the effective date of this Compliance Order, 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.
4. Within ten (10) calendar days of the effective date of this Compliance Order, Respondent shall maintain aisle space among rows of hazardous waste containers and, on a least a weekly basis, inspect its hazardous waste storage areas.
5. Within ten (10) calendar days of the effective date of this Compliance Order, 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 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.
6. Within thirty (30) calendar days of the effective date of this Compliance Order, 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.

7. Within thirty (30) calendar days of the effective date of this Compliance Order, Respondent shall, to the extent it has not done so, provide training to all personnel employed by or at the Niagara facility personnel related to hazardous waste management, and shall maintain training records for each position at said facility related to hazardous waste management.
8. Within thirty (30) calendar days of the effective date of this Compliance Order, Respondent shall comply with all other applicable federal and state regulatory requirements for hazardous waste generators, including those provisions for the on-site storage of hazardous waste by the generator of such waste.
9. Regardless of Respondent's decision with regard to the options in paragraph 2, above, Respondent shall submit to EPA within thirty (30) calendar days of the effective date of this Compliance Order written notice of its compliance (accompanied by a copy of all appropriate supporting documentation) or noncompliance for each of the requirements cited in paragraphs "1" through "8" of this Compliance Order, above. 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.
10. All responses, documentation, and evidence submitted in response to this Compliance Order should 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

This Compliance Order shall take effect thirty (30) days after service of this Order, unless by that date Respondent has requested a hearing pursuant to 40 C.F.R. § 22.15. *See* 42 U.S.C. § 6928(b) and 40 C.F.R. §§ 22.37(b) and 22.7(c).

Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all other applicable RCRA statutory or regulatory (federal and/or state) provisions, nor does such compliance release Respondent from liability for any violations at the Niagara facility. In addition, nothing herein waives, prejudices or otherwise affects EPA's right to enforce any applicable provision of law, and to seek and obtain any appropriate penalty or remedy under any such law, regarding Respondent's generation, handling and/or management of hazardous waste at said facility.

IV. NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

Pursuant to the terms of Section 3008(c) of RCRA and the Debt Collection Improvement Act of 1996, a violator failing to take corrective action within the time specified in a compliance order is liable for a civil penalty of up to \$32,500 for each day of continued noncompliance which occurs after March 14, 2004. Such continued noncompliance may also result in suspension or revocation of any permits issued to the violator whether issued by EPA or the State of New York.

V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 *Fed. Reg.* 40138 (July 23, 1999), entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS," and which are codified at 40 C.F.R. Part 22 (2003). A copy of these rules accompanies this "Complaint, Compliance Order and Notice of Opportunity for Hearing."

A. Answering The Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty and/or the Compliance Order is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within 30 days after service of the Complaint. 40 C.F.R. §§ 22.15(a) and 22.7(c). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866**

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b).

The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of their defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity To Request A Hearing

If requested by Respondent, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c). With regard to the Compliance Order in the Complaint, unless Respondent requests a hearing pursuant to 40 C.F.R. § 22.15 within thirty (30) days after the Compliance Order is served, the Compliance Order shall automatically become final. 40 C.F.R. § 22.37

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

C. Failure To Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefor shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court. Any

default order requiring compliance action shall be effective and enforceable against Respondent without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d).

D. Exhaustion Of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Agency's Environmental Appeals Board ("EAB"; see 40 C.F.R. § 1.25(e)) pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

To appeal an initial decision to the EAB, Respondent must do so "[w]ithin thirty (30) days after the initial decision is served." 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, "five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document." Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

VI. INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in the Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this complaint should be directed to:

Lee A. Spielmann
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, Room 1654
New York, New York 10007-1866
212-637-3222

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference will be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waive its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). To conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

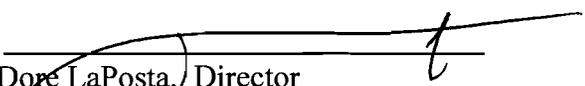
Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in the such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

**VII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR
CONFERENCE**

If, instead of filing an Answer, Respondent wishes not to contest the Compliance Order in the Complaint and wants to pay the total amount of the proposed penalty within thirty (30) days after receipt of the Complaint, Respondent should promptly contact the Assistant Regional Counsel identified on the previous page.

Dated: September 23, 2007
New York, New York

COMPLAINANT:



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

To: Robert L. Lupica, President and CEO
Niagara Ceramics Corporation
75 Hayes Place
Buffalo, New York 14210

cc: Thomas Killeen, Chief
Hazardous Waste Compliance Section
Bureau of Hazardous Waste Management
New York State Department of Environmental Conservation
625 Broadway, 5th Floor
Albany, New York 12233-7250

CERTIFICATE OF SERVICE

This is to certify that on the day of OCT - 2, 2007, I caused to be mailed a true and correct copy of the foregoing "COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING," bearing Docket Number RCRA-02-2007-7114, together with Attachments I, II, and III (collectively henceforth referred to as the "Complaint"), and with a copy of the "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS," 40 C.F.R. Part 22, by certified mail, return receipt requested, to **Robert L. Lupica, President and CEO, at Niagara Ceramics Corporation, 75 Hayes Place, Buffalo, New York 14210**. I hand carried the original and a copy of the Complaint to the office of the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2, 290 Broadway, 16th floor, New York, New York 10007-1866.

Dated: OCT - 2, 2007
New York, New York



ATTACHMENT I

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT Penalty Computation Worksheet (Counts 1 and 2)

Respondent: Niagara Ceramics Corp.
Facility Address: 75 Hayes Place, Buffalo, NY 14210

Requirements Violated:

42 U.S.C § 6925, 6 NYCRR §§ 373-1.2. Respondent's Unpermitted Storage of Hazardous Waste

Respondent stored hazardous waste for greater than 90 days and failed to comply with the requirement to obtain a RCRA permit to conduct such storage operations, as more specifically alleged in the body of the Complaint. To the extent Respondent stored hazardous waste for a period under 90 days, it too failed to obtain a RCRA permit (or, as an alternative to obtaining a RCRA permit, it failed to comply with the regulatorily-prescribed conditions that would have exempted it from the requirement to obtain a RCRA permit for the storage of hazardous waste for under 90 days). Such conditions include hazardous waste container management requirements, personnel training requirements, and contingency requirements; owners or operators of such a facility must also meet certain preparedness and prevention requirements to be exempt from permitting.

PENALTY AMOUNT FOR COMPLAINT

| | |
|-----------------------------------------------------------------|----------------|
| 1. Gravity based penalty from matrix | \$12,350 |
| (a) Potential for harm. | MODERATE |
| (b) Extent of Deviation. | MAJOR |
| 2. Select an amount from the appropriate multi-day matrix cell. | \$ 1,000 |
| 3. Multiply line 2 by number of days of violation minus (120-1) | \$ 119,000 |
| 4. Add line 1 and line 3 | \$ 131,350 |
| 5. Percent increase/decrease for good faith. | Not applicable |
| 6. Percent increase for willfulness/negligence. | Not applicable |
| 7. Percent increase for history of noncompliance. | Not applicable |
| 8. Total lines 5 through 7. | Not applicable |

- | | |
|---------------------------------------------------------------------------------|----------------|
| 9. Multiply line 4 by line 8. | Not applicable |
| 10. Calculate economic benefit. | Under \$5,000 |
| 11. Add lines 4, 9 and 10 for penalty amount to be inserted into the complaint. | \$131, 350 |

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT
Penalty Computation Worksheet (Counts 1 and 2)

1. Gravity Based Penalty

- a. Potential for Harm - The potential for harm present in these violations was determined to be MODERATE. Operation without a permit is a serious violation and has a substantial adverse effect on the RCRA program. Respondent stored hazardous waste for approximately 210 days, in unlabeled, undated, and open containers, did not provide for aisle space to inspect for possible releases of hazardous waste, and failed to conduct weekly inspections to look for leaks. In addition, Respondent did not make arrangements with emergency response teams and the local hospital to familiarize them with the facility and the properties of the hazardous waste managed by the facility, did not update its contingency plan to reflect current facility operations, and did not provide training to its personnel to ensure they are familiar with managing hazardous waste. However, most containers of lead (the Niagara facility's primary waste stream) were contained in boxes preprinted with the words "HazPack," the Niagara facility utilizes well systems that reduced the probability that any undetected releases of hazardous waste would not be contained, and the company did provide training in "Lead Awareness."
- b. Extent of Deviation - The extent of deviation present in this violation was determined to be MAJOR. The Niagara facility stored hazardous waste for considerably greater than 90 days; to the extent Respondent stored hazardous waste for less than 90 days, it also did not comply with a significant number of the required regulations that it must have met in order to qualify for exemption from the permitting requirement for such a shorter (*i.e.* less than 90 days) period of storage.

The applicable cell ranges from \$10,400 to \$14,299. The mid point for the cell matrix was selected.

- c. Multiple/Multi-day - EPA to date has amassed evidence that the unpermitted hazardous waste storage occurred for a period of 210 days (from August 16, 2006, the date of the last documented off-site shipment of hazardous waste) through April 17, 2007 (the date of the next documented off-site shipment of hazardous waste. Subtracting 90 (for the maximum number of days in which an owner/operator might store hazardous waste without having obtained a RCRA permit [provided that such owner/operator fully complied with the conditions exempting one from such requirement, a situation that did not obtain with regard to the operations at the Niagara facility]) from 210 yields 120 days, which, in accordance with RCRA Penalty Policy guidance, is the starting figure for the multi-day calculation.

The lower end of the Moderate Potential for Harm/Major Extent of Deviation cell was selected owing to the fact that the conditions under which the hazardous waste had been stored mitigated the potential deleterious effects of such storage. In addition, based on evidence EPA has to date accumulated, it appears that the nature of the hazardous wastes generated by Respondent was such that the chance of a fire, explosion, or release of hazardous waste occurring was lower than it would have been with other types of hazardous waste.

While the multi-day component was calculated based upon the available evidence of unpermitted storage for the 210-day period (well in excess of the 90 day limit), Count 2 is set forth as an alternative count; it represents an alternative theory as to how Respondent violated the RCRA storage requirements (*i.e.* to the extent Respondent stored hazardous waste for a period less than 90 days, it failed to meet the conditions to qualify for an exemption from the RCRA permitting requirement). While a separate penalty, however, is not being sought for this count, the amount sought represents an appropriate penalty as well for this alternative theory in light of Respondent having failed to comply with a significant number of the conditions an owner/operator must satisfy in order to store hazardous waste for less than 90 days without first having to obtain a RCRA permit.

2. Adjustment Factors

- a. Good Faith - Based upon facility specific factors and available information, that Respondent did not identify the violation and take corrective action prior to the EPA Inspection; no adjustment has been made at this time.
- b. Willfulness/Negligence - Not applicable
- c. History of Compliance - Not applicable
- d. Ability to Pay - Not applicable
- e. Environmental Project - Not applicable
- f. Other Unique Factors - Not applicable

3. Economic Benefit - Determined to be less than \$5,000.

ATTACHMENT II
GRAVITY BASED PENALTY

| | | EXTENT OF DEVIATION FROM REQUIREMENT | | |
|--------------------------------------------------------------------------------------|----------|--------------------------------------|--------------------------|--------------------------|
| | | MAJOR | MODERATE | MINOR |
| P O T E N T I A L f o r H A R M | MAJOR | \$32,500 to 26,000 | \$25,999 to 19,500 | \$19,499 to 14,300 |
| | MODERATE | \$14,299 to 10,400 | \$10,399 to 6,500 | \$6,499 to 3,900 |
| | MINOR | \$3,899 to 1,950 | \$1,949 to 650 | \$649 to 130 |

ATTACHMENT III
MULTI-DAY MATRIX

| | | EXTENT OF DEVIATION FROM REQUIREMENT | | |
|--------------------------------------------------------------------------------------|----------|--------------------------------------|----------------------|----------------------|
| | | MAJOR | MODERATE | MINOR |
| P O T E N T I A L f o r H A R M | MAJOR | \$6,500 to 1,300 | \$6,499 to 975 | \$3,900 to 715 |
| | MODERATE | \$2,860 to 520 | \$2,080 to 325 | \$1,000 to 195 |
| | MINOR | \$780 to 130 | \$390 to 130 | \$130 |