

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

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)
In the Matter of:)
)
THE CITY OF NEW YORK,)
NEW YORK, and)
)
THE NEW YORK CITY SCHOOL)
CONSTRUCTION AUTHORITY,)
)
Respondents.)
)
Proceeding under Section 16(a) of)
the Toxic Substances Control Act)
)
-----X

CONSENT AGREEMENT
AND
FINAL ORDER

Docket Number
TSCA-02-2010-9201

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION 2
2010 JAN 19 PM 3:10
REGIONAL HEARING
CLERK

I. PRELIMINARY STATEMENT

1. This is a civil administrative proceeding for the assessment of a civil penalty pursuant to Section 16(a) of the Toxic Substances Control Act (“TSCA” or (the “Act”), 15 U.S.C. § 2615(a), for the resolution of violations of regulations promulgated under the Act concerning use of polychlorinated biphenyls (“PCBs”) in caulk (“PCB Caulk”), determined by the United States Environmental Protection Agency (“EPA”) potentially to exist in many buildings across the country, including schools, built between 1950 and 1978. EPA defines “PCB Caulk” as caulk that contains PCBs at concentrations of 50 parts per million (“ppm”) or greater. Caulk is defined for purposes of this CAFO and attached Work Plan as any semi-drying or slow drying plastic material used to seal joints or fill crevices around window frames or panes, doors, or other building components; caulk does not include coatings, glazing varnishes or sealants that are or were applied as liquids.
2. In September 2009, EPA published a series of guidance materials peftaining to the management of PCB Caulk throughout the nation’s buildings, including a document entitled “PCB Caulk – QA.” The guidance materials explained the current state of knowledge regarding PCB Caulk, as well as set forth best management practices for addressing PCB Caulk.
3. The EPA guidance materials “PCB Caulk-QA” provide that Best Management Practices (“BMPs”) can be implemented by schools without entering into a formal agreement. The City of New York (the “City”) and the New York City School Construction Authority (“SCA”), as part of their commitment to provide a safe school environment for students

and faculty, in accordance with the "PCB Caulk – QA", however, have agreed to formalize their commitment to implement a series of best management practices in New York City public schools, to implement a pilot study to further evaluate the risk and management of PCB Caulk in New York City School buildings, as well as to use best efforts to reach agreement with EPA on the development and implementation of a Citywide PCB Management Plan.

4. This Consent Agreement and Final Order ("CAFO") is issued under the authority vested in the Administrator of EPA by Section 16(a)(2) of TSCA, 15 U.S.C. § 2615(a)(2). The Administrator has delegated the authority to issue the Final Order in this matter to the EPA Regional Administrator, Region 2. The parties in this proceeding are the EPA Region 2 ("Complainant") and the City and SCA ("Respondents").
5. Complainant and Respondents have agreed that this proceeding is being simultaneously commenced and concluded pursuant to provisions of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation and Suspension of Permits, 40 C.F.R. Part 22 (July 1, 2009). Under 40 C.F.R. § 22.13(b), when parties agree to settle one or more causes of action before the filing of an Administrative Complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a CAFO pursuant to 40 C.F.R. §§ 22.18(b)(2) and (3).

II. STATUTORY AND REGULATORY AUTHORITY

6. Under 40 C.F.R. Part 761 (the "PCB Regulations"), 40 C.F.R. § 761.3 defines a "person" as "any natural or judicial person including any individual, corporation, partnership, or association; any State or political subdivision thereof; any interstate body; and any department, agency, or instrumentality of the Federal Government."
7. Section 6(e)(2) of TSCA, 15 U.S.C. § 2605(e)(2), prohibits the manufacture, processing, distribution in commerce, or use of "polychlorinated biphenyl in any manner other than in a totally enclosed manner," unless authorized by EPA.
8. The PCB Regulations establish "prohibitions of, and requirements for, the manufacture, processing, distribution in commerce, use, disposal, storage, and marking of PCBs and PCB Items." See 40 C.F.R. § 761.1(a).
9. The PCB Regulations define "PCB" as "any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contain such substance." See 40 C.F.R. § 761.3.
10. The PCB Regulations define "Non-liquid PCBs" to include "materials containing PCBs that by visual inspection do not flow at room temperature." See 40 C.F.R. § 761.3.
11. The PCB Regulations at 40 C.F.R. § 761.20(a) establish that "no persons may use any PCB, or any PCB Item regardless of concentration, in any manner other than in a totally enclosed manner within the United States unless authorized under §761.30, except that:

(1) An authorization is not required to use those PCBs or PCB Items which consist of excluded PCB products as defined in §761.3.”

12. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), provides for the assessment of civil penalties for violations of Section 15 of TSCA, 15 U.S.C. § 2614. Sections 15(1)(B) and (C) of TSCA, 15 U.S.C. §§ 2615(1)(B) and (C), make it unlawful for any person to fail to comply with any requirement prescribed by Section 6 of TSCA, 15 U.S.C. § 2605, or any rule promulgated under that section.

III. EPA FINDINGS OF FACT

13. Respondent the City is a municipal corporation under the laws of the State of New York. Respondent SCA is a public benefit corporation established under the laws of the State of New York.
14. Each Respondent is a "person" as defined in 40 C.F.R. § 761.3, and is subject to the provisions of TSCA and the PCB Regulations promulgated pursuant to Section 6(e) of TSCA, 15 U.S.C. § 2605(e).
15. New York City school buildings constructed between 1950 and 1978 may contain PCB Caulk that is used in a manner other than a totally enclosed manner. PCB Caulk was in general and legal use during that timeframe and thus was likely used in school structures, including but not necessarily limited to window frames, and around door frames, expansion joints, exterior masonry and other applications.
16. EPA has determined, based on data compiled by Respondents in conducting capital projects in accordance with New York State Department of Education guidelines, as well as the age of Respondents' schools, that PCB Caulk may be in continued use in a manner other than a totally enclosed manner, as described in paragraph 15, in many of Respondents' school buildings.

IV. EPA CONCLUSIONS OF LAW

17. Respondents are subject to the regulations and the prohibitions and requirements pertaining to PCBs, promulgated pursuant to Section 6(e) of TSCA, 15 U.S.C. § 2605(e), and set forth at 40 C.F.R. Part 761.
18. PCB Caulk that remains in use in school buildings constitutes a continued use of PCBs under Section 6(e) of TSCA and its implementing regulations at 40 C.F.R. Part 761.
19. The continued use of PCB Caulk in schools in any manner other than a totally enclosed manner, as described in paragraphs 15 & 16, is prohibited under the provisions of 40 C.F.R. §§ 761.20(a)(1)-(4).
20. Respondents' continued use of PCB Caulk in a manner other than a totally enclosed manner in many older schools, as described in paragraphs 15 & 16, where documented,

constitutes violations of 40 C.F.R. § 761.20(a), which are violations of Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C), and which are violations of Section 6(e) of TSCA, which are violations of Section 15(1)(B) of TSCA, 15 U.S.C. § 2614(1)(B).

21. In making these conclusions of law, EPA acknowledges that regulations promulgated pursuant to TSCA do not require sampling caulk for PCBs, unless such sampling is performed in order to characterize waste materials for disposal purposes. Thus, EPA acknowledges that any sampling of caulk that the Respondents perform under the terms of this CAFO, except that conducted in order to characterize waste materials for disposal purposes, is not required by TSCA regulatory provisions.

V. TERMS OF SETTLEMENT

22. Based on the foregoing, and pursuant to Section 16 of TSCA, 15 U.S.C. § 2615 and 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3), the parties have agreed to settlement terms as set forth herein.
23. Without admitting or denying the EPA Findings of Fact, nor concurring in or conceding EPA's Conclusions of Law, Respondents consent to the terms of this CAFO and its issuance.
24. This agreement may not be modified except by written agreement of the parties and signature by the EPA Regional Administrator, Region 2.
25. Each undersigned representative of a party to this CAFO certifies that she or he is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind such party to it.
26. The provisions of this CAFO shall apply to and be binding on Respondents, their officers, successors and assigns until Respondents have completed all of the obligations required by this CAFO.
27. Respondents stipulate that EPA has jurisdiction over the subject matter of this CAFO. For purposes of this CAFO, including any further action to enforce the terms of this CAFO, Respondents waive any defenses they might have as to jurisdiction.
28. Respondents acknowledge that they have been informed of their right to request a hearing in this proceeding, and hereby waive their rights to a judicial or administrative hearing or appeal on any issue of law or fact set forth in this CAFO.
29. Respondents hereby waive their rights to appeal the Final Order accompanying this Consent Agreement.
30. All parties shall bear their own costs and fees in this proceeding.

31. EPA and Respondents have a mutual interest in gaining further understanding regarding the presence of PCB Caulk in school buildings, as well as in developing methods, procedures and protocols for addressing such presence. EPA and Respondents have had meetings and communications regarding procedures for removing PCB waste during capital construction projects in Respondents' schools.
32. In furtherance of these cooperative efforts, Respondents agree to implement the NYC PCB Work Plan attached to this CAFO as Attachment A, and such Work Plan is hereby incorporated into, and enforceable through, this CAFO.
33. Respondents agree to properly dispose of any PCB Caulk and any associated PCB waste removed from use at the schools referenced in the NYC PCB Work Plan in accordance with PCB regulations and applicable local, state, and federal statutes, regulations, and policies, including but not necessarily limited to the 40 C.F.R. §§ 761.61 & 761.62 standards for PCB bulk and remediation wastes.
34. Upon adequate prior notice, Respondents shall provide access to the schools identified pursuant to the NYC PCB Work Plan at reasonable times to EPA officials and authorized representatives. Respondents shall also provide access at reasonable times to all records and documentation in Respondents' possession or control, including those records and documents in the possession or control of Respondents' contractors and employees, related to the actions conducted pursuant to this CAFO. Respondents shall use their best efforts to gain access to areas owned by or in the possession of someone other than Respondents, as necessary to implement this CAFO. Such access shall be provided to EPA and its authorized representatives, who shall be permitted to move freely about the school buildings and properties and appropriate off-site areas in order to conduct actions that EPA determines to be necessary. Respondents have a right to accompany EPA representatives at all times when such representatives are on school property or in school buildings pursuant to this paragraph.
35. Any denial of access at reasonable times to any portion of school buildings or properties shall be construed as a violation of the terms of this CAFO subject to the stipulated penalty provisions outlined herein.

VI. REPORTING AND RECORDKEEPING

36. Any reports required to be submitted by Respondents pursuant to the NYC PCB Work Plan or otherwise shall be transmitted to EPA by a responsible and authorized official of each Respondent, signed and certified as follows:

I certify under penalty of perjury that I have examined and am familiar with the information submitted in this document and all attachments, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information set forth in this document is true, accurate and complete. I am aware that there are significant penalties for

submitting materially false information, including the possibility of fines and imprisonment.

37. The responsible official(s) of the Respondents shall send all communications or required reports concerning this CAFO to EPA's Project Coordinator:

Chief, Pesticides and Toxic Substances Branch
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency, Region 2
2890 Woodbridge Avenue
Edison, New Jersey 08837

Respondents each shall name a Project Coordinator and supply his or her name and contact information to EPA within 10 days after the effective date of this CAFO.

38. Until at least ten years after all of Respondents' obligations under this CAFO have been met, Respondents shall retain, and shall instruct their contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in their possession or their contractors' or agents' possession or control, that relate in any manner to Respondents' performance of their obligations under this CAFO. This information-retention requirement shall apply regardless of any shorter retention period under institutional policies or procedures, or federal, state, or local law. At any time during this information-retention period, upon request by EPA, Respondents shall provide copies of any documents, records, or other information required to be maintained under this CAFO.

VII. PENALTY

39. Pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, and EPA's "Polychlorinated Biphenyls (PCB) Penalty Policy," dated April 9, 1990, EPA considered the nature, circumstances, extent, and gravity of the alleged violations; Respondents' ability to pay; the effect of the penalty on Respondents' ability to continue their operations; Respondents' history of prior violations; Respondents' degree of culpability; any economic benefit gained; and such other matters as justice requires. After consideration of the foregoing factors, EPA determined and Respondents agree that a civil penalty in the amount of one hundred fifty thousand dollars (\$150,000) is assessed against Respondents for the TSCA violations alleged herein.
40. Pursuant to 40 C.F.R. § 22.31(c), Respondents and EPA agree that payment of the civil penalty by Respondents is deferred until EPA issues a remittance or non-remittance Order.
41. EPA agrees to remit the entire penalty and issue a remittance Order upon Respondents' completion, to EPA's satisfaction, of the attached NYC PCB Work Plan and other obligations contained herein.

42. Prior to making a determination that Respondents have failed to implement the NYC PCB Work Plan, and/or Respondents' other obligations contained herein, EPA will give Respondents written notice or notices of deficiencies, and provide Respondents reasonable time(s) to cure such deficiencies.
43. If EPA in its sole discretion determines that Respondents have failed to implement their obligations under this CAFO fully and satisfactorily, EPA may issue a non-remittance Order requiring Respondents to pay the civil penalty plus interest accrued from the date of the issuance of the Final Order for this settlement. The non-remittance Order will set forth the details of the penalty payment procedures and calculations.

VIII. STIPULATED PENALTIES

44. If Respondents fail to comply with any term of this CAFO, Respondents shall be liable for stipulated penalties of: six hundred dollars (\$600) for each day that the violation occurs or continues for day one (1) through day thirty (30); one thousand seven hundred fifty dollars (\$1,750) for each day the violation continues for day thirty-one (31) through day sixty (60); two thousand two hundred fifty dollars (\$2,250) for each day the violation continues for day sixty-one (61) through day one hundred twenty (120); and three thousand five hundred dollars (\$3,500) for each day the violation continues beyond day one hundred twenty one (121). A separate stipulated penalty shall apply and accrue for each provision of this CAFO that is violated.
45. EPA acknowledges that the activities set forth in the Work Plan take place in public school buildings, which have special restrictions on when and how Respondents can perform testing, construction and other such work. Upon sufficient notice or cause provided by Respondents, EPA will suspend the stipulated penalties set forth in paragraph 44 if work cannot be performed timely because it will unreasonably interfere with normal school activities. In such notice, Respondents shall supply an alternate timeframe for completing such work, which EPA may accept or modify based on the circumstances.
46. Stipulated penalties shall begin to accrue on the day after performance is due and shall continue to accrue through the final day of completion of the activity.
47. Payment of stipulated penalties shall be made within thirty (30) days of receipt of written demand by EPA.
48. Payment of stipulated penalties shall be in addition to any other relief available under federal law. EPA may, in its sole discretion, decide not to seek stipulated penalties or to waive any portion of the stipulated penalties that accrue pursuant to this CAFO.
49. Pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, and 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States as well as a charge to cover the cost of processing and handling a delinquent claim. Interest will begin to accrue on stipulated penalties assessed that have not been paid within thirty (30)

days from written demand by EPA. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 31 C.F.R. § 901.9(b)(2). A charge will be assessed to cover the costs of debt collection, including processing and handling costs and attorneys' fees in accordance with 31 C.F.R. § 901.9(c). In addition, a penalty charge of six percent per year compounded annually will be assessed on any portion of the debt that remains delinquent more than ninety (90) days after payment is due in accordance with 31 C.F.R. § 901.9(d). Should assessment of the penalty charge on the debt be required, it will be assessed as of the first day that payment is due.

50. All penalties, stipulated penalties, interest, and other charges shall represent penalties assessed by EPA, and shall not be deductible for purposes of federal taxes.
51. Payment of any stipulated penalty, interest, or other charges does not waive, suspend, or modify the responsibility of Respondents to comply with the requirements of all of the federal laws and regulations administered by EPA and shall not be a defense to any actions subsequently commenced pursuant to said laws and regulations.
52. Payment of any civil penalty or stipulated penalty under this CAFO shall be made by check or by electronic fund transfer (EFT). If payment is made by check, the 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 The City of New York and The New York City School Construction Authority, Docket Number TSCA-02-2010-9201. If Respondents make payment by check then it shall be received at the address listed below in this paragraph on or before the date specified. The check making 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

53. Alternatively, if Respondents choose to make payment by EFT, then the EFT shall be received on or before the required date. Further, if payment is made by EFT, Respondents shall then provide the following information to the remitter bank:
 - a. Amount of Payment
 - 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. Names of Respondents: City of New York and New York City
School Construction Authority
- g. Case docket number: TSCA-02-2010-9201

54. Whether Respondents make payment by check or by the EFT method, Respondents shall promptly after payment has been made furnish reasonable proof that such payment has been made, and such proof shall be furnished to:

Robert G. Hazen, 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

55. Failure to pay the amount in full within the time period 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.

IX DISPUTE RESOLUTION

56. The parties shall use their best efforts informally and in good faith to resolve disputes and differences of opinion, which may arise concerning provisions of this Order. Notwithstanding the above, if Respondents disagree, in whole or in part, with any decision made by EPA pursuant to this Order with respect to the following: (1) rejection, modification or substitution of an alternative Pilot Preferred Remedy pursuant to Section II. F. of the Work Plan; or (2) an EPA determination to issue a non-remittance Order, pursuant to paragraph 43 of this CAFO, Respondents shall notify EPA in writing of such objections and the basis (bases) therefore within ten (10) calendar days of receipt of EPA's disapproval, modification, decision, or directive. The notice shall set forth the specific points of the dispute, the position Respondents maintain, the basis (bases) for Respondents' position, and any matters the Respondents consider necessary for EPA's determination. Following EPA's receipt of such written notice, EPA will provide Respondents its decision in writing on the pending dispute, which decision shall be binding. The parties may continue to confer and to use informal efforts to resolve the dispute during the period that EPA's final determination is pending.

X. FORCE MAJEURE

57. Respondents shall perform all the requirements of this Order within the time limits set forth, approved, or established herein, unless the performance is prevented or delayed solely by events which constitute a force majeure. A force majeure is defined as any event arising from causes not reasonably foreseeable and beyond the control of the Respondents which could not be overcome by due diligence and which delays or prevents performance by a date required by this Order. Such events do not include unanticipated or increased costs of performance, normal precipitation events, or failure to obtain federal, state, or local permits.
58. Respondents shall notify in writing the EPA Project Coordinator within ten (10) calendar days after becoming aware of any event, which they know or should know constitutes a force majeure. Such notice shall detail the estimated length of delay, including necessary demobilization and remobilization, its causes, measures taken or to be taken to minimize the delay, and an estimated timetable for implementation of these measures. Respondents shall adopt all reasonable measures to avoid and minimize the delay. Failure to comply with the notice provision of this section shall constitute a waiver of Respondents' right to assert a force majeure.
59. After receiving notice that Respondents are invoking the force majeure provisions of this Order, EPA will respond in writing indicating either EPA's agreement that the event constitutes a force majeure or its disagreement and the reasons therefore.
60. If the Parties agree that a force majeure has occurred, the time for performance may be extended, upon EPA approval, for a period equal to the delay resulting from such circumstances. This shall be accomplished through written amendment to this Order, or modifying the schedule for particular task(s) under the Order. Such an extension or modification will not alter the schedule for performance or completion of any other tasks required by this Order.

XI. EFFECT OF SETTLEMENT AND RESERVATION OF RIGHTS

61. Pursuant to 40 C.F.R. § 22.31(b), the effective date of this CAFO shall be the date when such document is filed with the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2. After such filing, EPA will notify Respondents' Project Coordinators of the effective date.
62. Respondents' obligations under this CAFO are severable. If a court of competent jurisdiction enters a final judgment holding invalid any material provision of this CAFO, the remainder of Respondents' obligations under the CAFO shall remain in force and shall be fully enforceable.
63. Nothing in this CAFO shall prevent EPA from taking any necessary action to address conditions at Respondents' schools, which may present an imminent hazard, nor shall this

CAFO be construed to, nor is it intended to operate in any way, to resolve any criminal liability or any other civil liability of Respondents.

64. EPA reserves all its rights to bring enforcement actions against Respondents for alleged PCB violations under TSCA and any other applicable laws or regulations.
65. This CAFO does not waive, extinguish or otherwise affect Respondents' obligation to comply with all applicable provisions of TSCA, the PCB regulations, and all other federal, state, and local laws, regulations, permits, or other requirements.

XII. TERMINATION

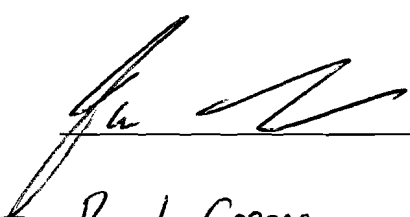
66. The obligations of the Respondents set forth in this Order shall terminate as follows:
 - a) The Respondents' obligations with respect to the Pilot Study set forth in the NYC PCB Work Plan shall terminate upon satisfactory completion of the activities set forth in Sections II and III. A. of the Work Plan, except as provided in (b) and (e) below.
 - b) The Respondents' obligations under this CAFO and Work Plan with respect to Best Management Practices shall terminate ten (10) years after the CAFO's effective date. A Citywide PCB Management Plan, if agreed to by Respondents and EPA, pursuant to Section III of the NYC PCB Work Plan, will supplant the provisions of this sub-paragraph.
 - c) The Respondents' obligations under a Citywide PCB Management Plan agreed to by EPA and Respondents shall terminate pursuant to the schedule contained in such Plan.
 - d) The Respondents' obligations to submit quarterly progress reports pursuant to Section IV. A. of the NYC PCB Work Plan shall terminate when the obligations set forth in a) – c), above, have terminated.
 - e) The Respondents' obligations with respect to retention of records set forth in Section II. I. of the Work Plan shall terminate pursuant to paragraph 38 of this CAFO.

In The Matter Of:
Administrative Order On Consent
Docket No: TSCA-02-2010-9201

RESPONDENT
CITY OF NEW YORK:

BY:

NAME:


Daniel Greene

(PLEASE PRINT)

TITLE:

Assistant Corporation Counsel

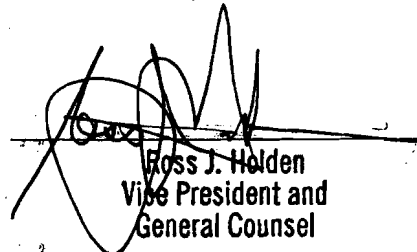
DATE:

1/13/10

In The Matter Of:
Administrative Order On Consent
Docket No: TSCA-02-2010-9201

RESPONDENT
NEW YORK CITY SCHOOL
CONSTRUCTION AUTHORITY:

BY:



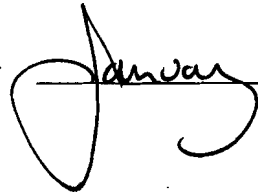
Ross J. Holden
Vice President and
General Counsel

NAME:

(PLEASE PRINT)

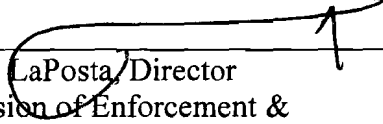
TITLE:

DATE:

 January 13, 2010

In The Matter Of:
Administrative Order On Consent
Docket No: TSCA-02-2010-9201

COMPLAINANT:



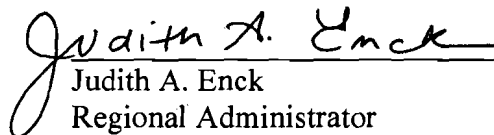
Dore LaPosta, Director
Division of Enforcement &
Compliance Assistance
U. S. Environmental Protection Agency
Region 2

DATE: JANUARY 15, 2010

In The Matter Of:
Administrative Order On Consent
Docket No: TSCA-02-2010-9201

FINAL ORDER

The Regional Administrator of EPA, Region 2, concurs in the foregoing Consent Agreement in the case of In the Matter of the City of New York and the New York City School Construction Authority, bearing Docket Number TSCA-02-2010-9201. The 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 to take effect when filed with the Regional Hearing Clerk of EPA, Region 2.



Judith A. Enck
Regional Administrator
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, New York 10007-1866

DATE: 1/19/10

Work Plan to Address PCB Caulk in New York City School Buildings (NYC PCB Work Plan)

This NYC PCB Work Plan ("Work Plan" or "Plan") is attached to and part of the Consent Agreement and Final Order ("CAFO") between EPA and Respondents the City of New York (the "City") and the New York City School Construction Authority (the "SCA").

This Work Plan contains tasks to identify, prioritize, and respond to the presence of PCBs in buildings housing public schools. PCB Caulk is considered by EPA to be a potential source of PCB exposures in schools. This Work Plan is primarily focused on addressing PCB Caulk located in classrooms, gymnasiums and cafeterias ("Primary Exposure Areas"). Primary Exposure Areas in the school buildings are areas where students are located for prolonged periods during the school day. PCB Caulk may be present around window and door frames and other interior joints and may be present around window and door panes. A secondary focus of the Work Plan is PCB Caulk located in transitory interior areas (stairways, hallways, bathrooms) (hereinafter "Transitory Areas"), and within a ten foot wide strip of any soil immediately adjacent to school buildings where there may be significant likelihood of human exposure ("Outside Exposure Areas"). This Work Plan does not address any PCB Caulk that may be located in other exterior areas of a school building (e.g. masonry), and in interior areas not readily accessible to students (ventilation shafts, mechanical areas, utility areas etc.).

I Identification of Relevant Schools

- A. Respondents shall identify the universe of public schools buildings built between 1950 and 1978 ("Relevant Schools"). Within thirty (30) days after the effective date of the CAFO, Respondents shall submit to EPA the name of each Relevant School Building, the school address, the year the school was built, and the educational levels served.

II Stage 1 Pilot Study/Implementation of Best Management Practices Citywide

- A. Within sixty (60) days after the effective date of the CAFO, Respondents, with EPA approval, shall select 5 Relevant Schools ("Pilot School Buildings") in which to conduct a Pilot Remedial Investigation and Feasibility Study ("Pilot RI/FS") of PCB Caulk located in the Primary and Transitory Exposure Areas. The Relevant Schools that are selected shall to the extent feasible be of varying types and ages. The purpose of the Pilot RI/FS is to determine the most effective strategies for assessing and reducing potential exposure to PCBs contained in PCB Caulk located in Primary, Transitory and Outside Exposure Areas with consideration of potential human health risks, disruption to educational activities and overall costs.
- B. Within ninety (90) days following the effective date of the CAFO, Respondents shall submit a remedial investigation work plan, including an implementation

schedule ("RI Plan") for the Pilot School Buildings for EPA's review and approval, which at a minimum shall include:

- a. a protocol to collect and analyze in a representative number of Primary and Transitory Exposure Areas:
 - (1) air samples and dust wipe samples; and
 - (2) to identify deteriorating caulk (caulk that is peeling, cracking, flaking or showing other visible signs of deterioration) in the representative Areas.
- b. a protocol to collect and analyze soil samples in a representative number of Outside Exposure Areas.
- c. provision for the collection and analyses of representative samples of suspected PCB Caulk where: (i) analytic results from air samples exceed the applicable thresholds set forth in the EPA guidance document entitled "Public Health Levels for PCBs in Indoor School Air"; or (ii) analytic results from dust wipe samples exceed ten micrograms per one hundred square centimeters ("10 ug/100 cm²"); or (iii) the caulk is identified as deteriorating.
- d. provision for the collection and analyses of representative samples of suspected exterior window PCB Caulk where analytic results from soil samples exceed 1 ppm.

During implementation of the RI Plan, Respondents may submit modifications to the protocols or procedures to address the tasks described in this paragraph to EPA for review and approval.

- C. Within ninety (90) days after the effective date of the CAFO, Respondents shall submit a Citizens Participation Plan to EPA outlining steps to inform and obtain input from the public concerning the Pilot Study and its progress. Comments received from the public shall be advisory in nature. The Citizens Participation Plan shall include a document repository, public information sessions, opportunities to comment on draft reports, fact sheets, and an implementation timetable.
- D. Within thirty (30) days following EPA's approval of the RI Plan and Citizens Participation Plan, Respondents shall commence work required under the RI Plan, in accordance with its implementation schedule. Within ninety (90) days after completing such work, Respondents shall submit a RI Report (the "Report") to EPA setting forth the findings of the investigation. Among other things, the Report shall set forth a protocol for identifying and ranking caulk from "most exposure risk" to "least exposure risk." Accompanying the Report shall be a Feasibility Study, evaluating potential remedial actions to address PCB Caulk. At a minimum, the Feasibility Study shall contain analysis of remedial alternatives in terms of reducing human exposure to PCB sources to reduce potential human health risks, short term and long term effectiveness, cost, length

of implementation, potential to disrupt normal school activities, and other relevant factors. Where appropriate, the analysis shall be supported by scientific data or technical information. The Feasibility Study shall contain:

- (a) An alternative that evaluates removal in Pilot Schools of all PCB Caulk identified in Primary Exposure Areas, Transitory Areas, and Outside Exposure Areas.
 - (b) One or more alternatives evaluating methods of managing and/or addressing PCB Caulk, other than removal of all PCB Caulk identified in Primary Exposure Areas, Transitory Areas and Outside Exposure Areas, including the encapsulation of existing caulking and PCB caulk.
 - (c) A preferred remedy, (which may include one or more approaches) for characterizing and addressing PCB Caulk in Primary Exposure Areas, Transitory Areas and Outside Exposure Areas in potentially impacted schools based on the results of the RI Plan and Feasibility Study ("Pilot Preferred Remedy"). The Pilot Preferred Remedy shall be accompanied by a proposed implementation schedule.
- E. EPA will determine whether to accept or reject Respondents' Pilot Preferred Remedy or accept the Pilot Preferred Remedy with specified modifications. EPA will place its determinations in writing and submit them to Respondents. If EPA rejects the Pilot Preferred Remedy, EPA may state its preference for one or more of the remedial alternatives contained in the Feasibility Study, or may propose a remedy not contained in the Feasibility Study.
- F. If EPA selects Respondents' Pilot Preferred Remedy, Respondents shall begin implementing the remedy immediately according to its implementation schedule. If EPA prefers an alternative preferred remedy, including an alternate implementation schedule, Respondents shall have forty-five (45) days to accept EPA's Pilot Preferred Remedy. If Respondents have objections to all or parts of EPA's Pilot Preferred Remedy, EPA and Respondents shall consult in an effort to agree on a Final Pilot Preferred Remedy. Respondents may invoke the Dispute Resolution process set forth in paragraph 56 of this CAFO if agreement is not reached. Following consultation by the parties, or at the conclusion of the dispute resolution process, if invoked, EPA will specify a Final Pilot Preferred Remedy. Respondents thereafter shall implement the Final Pilot Preferred Remedy according to its implementation schedule.
- G. In order to ensure that remediation strategies can be implemented in a manner that reduces potential exposure to PCBs and are appropriate for any Pilot School, Respondents, as part of the Feasibility Study, may conduct satellite pilot studies of remedial technologies or methodologies in non-school facilities before implementation in school building(s).

H. Following the implementation of the Preferred Remedy (or the Final Pilot Preferred Remedy), Respondents shall:

- a) evaluate the effectiveness of the remedy. In such evaluation, the following factors shall be considered: (i) pre- and post-remedy air and dust wipe sample analytic results in relation to the reference levels identified in II. B. c. (i) and (ii), above; (ii) whether post-remedy soil sample analytic results exceed 1 ppm; (iii) reduction of areas of potential dermal exposure through caulk removal and/or encapsulation; (iv) effectiveness of enhanced cleaning or other Best Management Practices in reducing potential risks of PCBs; (v) the feasibility, potential effectiveness and cost of implementation of additional measures to further reduce exposures to PCB Caulk; (vi) site specific factors; and (vii) any other factors determined in the course of the Pilot Study to be relevant to the purposes of evaluating the effectiveness of the Pilot Study.
- b) In the event the implementation of the Preferred Remedy (or the Final Pilot Preferred Remedy) is ineffective in one or more schools, Respondents, after consultation with EPA, shall prepare and implement for such school(s) a protocol for further investigation to identify sources contributing to still existing exceedances in air or dust and/or soil analytic sampling results above the reference levels identified in (i) and (ii), above. Such protocol may include measures to undertake one or more re-sampling events in any Primary or Transitory Area(s) where a still existing exceedance is identified. Such re-sampling would occur prior to undertaking any further source investigation. The re-sampling events may take place after enhanced cleaning, ventilation or other measure(s) in the affected Primary or Transitory Area(s). If the analytic sampling results of the re-sampling event(s) are below the reference levels identified in (i) and (ii), above, the Respondents shall not be required to implement any further investigation pursuant to the protocol to identify potential sources,
- c) If the re-sampling analytic results exceed the reference levels identified in (i) and (ii), above, the Respondents, after consultation with EPA, shall prepare a "Supplemental Remedy" to address the exceedances. After implementation of the Supplemental Remedy, its effectiveness shall be evaluated in the manner, as described above, in (a)(i) through (a)(vii) of this paragraph. In the event the implementation of the Supplemental Remedy is ineffective, EPA and Respondents shall consult as to appropriate further actions that Respondents will undertake.

I. Respondents shall maintain records of their investigations, including all laboratory reports and data, and make such records available to EPA representatives for review upon request.

J. Citywide Activities During the Pilot Study and Thereafter

- a. Best Management Practices: Within sixty (60) days following the effective date of the CAFO, Respondents shall submit to EPA for approval a Best Management Practices (“BMP”) protocol for reducing the potential for human exposure to PCBs in all Relevant Schools Buildings, and a timetable for the protocol’s implementation. The BMPs may include:
- i. Enhanced procedures for cleaning in all Relevant Schools;
 - ii. Protocol(s) for identifying and replacing caulking that is in poor condition in all Relevant Schools, or for encapsulating PCB Caulk with prior EPA approval;
 - iii. Fact sheets for teachers, parents and students to explain the risks of PCB Caulk and how to avoid exposure;
 - iv. Measures to optimize air circulation and ventilation;
 - v. A system for tracking implementation of BMPs to ensure that the BMPs are being effectively performed on a regular basis;
 - vi. Methods and procedures to be employed to convey key information and instructions to personnel charged with implementing the BMPs, and training information;
 - vii. Procedures for Respondents to undertake periodic inspections of schools to observe implementation of BMPs; inspection reports shall be submitted to EPA; and
 - viii. As part of its regular inspection for planning for future capital projects, Respondents shall inspect the condition of caulking in Relevant Schools, and if the caulking is in generally poor condition, Respondents shall include replacement or encapsulation in the scope of work for any capital project scheduled for that school.
- b. BMPs shall be developed and implemented in a manner that minimizes disruptions to normal school operations. Respondents intend to continue to implement BMPs after completion of their obligations under this Work Plan and termination of this CAFO and Work Plan.
- c. With adequate prior notice, EPA representatives may periodically visit Relevant Schools to observe the implementation of BMPs and will provide feedback to Respondents on the implementation activities.

- d. Respondents have informed EPA that they will continue to carry out school renovation projects, including window replacements, in certain Relevant Schools. Respondents have further informed EPA that they will continue to comply with applicable New York State and EPA protocols to minimize PCB releases during renovation work, and EPA PCB disposal regulations in all such projects. Respondents shall retain for six (6) years records of PCB testing and remedial activities carried out during such renovation projects, and make such records available to EPA upon request.

III Stage 2 Citywide PCB Management Plan

- A. Within one hundred thirty-five (135) days of completing the implementation of a Pilot Remedy pursuant to II. F., above, Respondents shall submit a summary report together with appropriate backup information and data on the remediation of the Pilot Schools. The Report shall include a recommended Preferred Citywide Remedy (which may include one or more approaches) that Respondents recommend be utilized in a Citywide PCB Management Plan. The Report shall include a narrative summary of the work performed during the Pilot Study, an analysis of practices used in the application of the investigatory protocols, and Respondents' conclusions on the effectiveness of the Pilot process. The Report should include key data summaries and relevant backup information.

B. EPA Review and Approval of Preferred Citywide Remedy

- a) EPA will convene an independent peer review panel to evaluate the effectiveness of the recommended Preferred Citywide Remedy, as well as supplements or modifications proposed for consideration by EPA, and to make recommendations for appropriate modifications.
- b) EPA will hold a public meeting to receive comments on the Preferred Citywide Remedy.
- c) Respondents may respond to any public comments and to the recommendations of the peer review panel. EPA will take Respondents' response(s) into account before incorporating any revisions to the Preferred Citywide Remedy.
- d) After receipt of recommendations and comments pursuant to (a)-(c), above, EPA may incorporate revisions to the Preferred Citywide Remedy.

C. Developing Citywide PCB Management Plan

- a) Respondents and EPA shall meet to discuss implementing the Preferred Citywide Remedy in all Relevant Schools. (C) ...

Plan” or “the Plan”). The negotiations shall last for a period of sixty days, unless otherwise agreed to in writing by both parties. If agreement is reached on a Citywide PCB Management Plan, Respondents shall commence implementation of the Citywide PCB Management Plan, pursuant to the schedule contained in the Plan.

- b) While the specific details of the Citywide PCB Management Plan will be addressed during the negotiations, pursuant to III. C. a., above, the parties agree to the following principles and requirements to guide the negotiations:
1. PCB Caulk is a national issue and EPA Region 2 will consider any national or regional policies in developing and accepting a plan for New York City;
 2. Given the large number of Relevant Schools, EPA agrees that any Citywide PCB Management Plan shall be structured in a phased manner, prioritizing work based on factors including, but not limited to: (i) the condition of caulking; (ii) the potential for exposure; (iii) the concentrations of PCBs contained in caulking; (iv) the ages of the children within a school building; or (v) any other such factors that the parties may agree are appropriate for prioritizing work related to PCB Caulk.
 3. The Citywide PCB Management Plan will not address exterior PCB Caulk, except in Outside Exposure Areas, unless otherwise agreed to by the parties in writing.
- c) The Citywide PCB Management Plan shall include:
1. Schedule for remedial action that maximizes health protection consistent with City resources and avoidance of disruption of school activities.
 2. Initial focus on schools with the highest potential exposure risks.
 3. Cost-effective strategies to reduce PCB exposures.
 4. Reasonable testing or other methods of evaluation to characterize PCBs in Relevant Schools to help set priorities for remediation.
 5. Reduce potential PCB exposures through BMPs, encapsulation or removal of caulk.
 6. Where necessary for risk reduction, investigation of potential significant non-caulk sources and appropriate remedial action.
 7. A Citizens Participation Plan containing steps to inform and obtain input from the public concerning the Citywide PCB Management Plan and its implementation. The Citizens Participation Plan shall include a document repository, public

information sessions, opportunities to comment on draft reports, fact sheets, and an implementation timetable.

- d. If agreement is reached on a Citywide PCB Management Plan, Respondents shall commence implementation of the Citywide PCB Management Plan, pursuant to the schedule contained in the Plan. If an agreement cannot be reached on a Citywide PCB Management Plan, Respondents shall have no obligation to implement a Citywide PCB Management Plan under this CAFO and Work Plan, and EPA may exercise its rights to bring enforcement actions under TSCA or other applicable law for PCB violations in New York City public schools.

IV Reporting

- A. Beginning one hundred thirty five (135) days after the effective date of the CAFO, Respondents shall submit quarterly progress reports to EPA ("Quarterly Reports") no later than the 15th day of the month immediately following the end of the quarter. The Quarterly Reports shall include narrative descriptions of activities and work performed during the reporting period, and projected future work. As appropriate, the Quarterly Reports shall include current information on the Pilot Study, BMPs and the Citywide PCB Management Plan.

V Scheduling Changes

- A. EPA acknowledges that scheduling certain events under this Work Plan may be impacted by normal school activities. EPA also acknowledges that there is the potential that some testing and remedial work in the Pilot School Buildings can only take place during the summer vacation period. Thus, EPA's and the Respondents' Project Coordinators may agree to changes in the scheduling of events under this Work Plan. Any such changes shall be approved in writing by EPA Region 2's Director, Division of Enforcement and Compliance Assistance. EPA shall not refuse any reasonable request for a modification of the Work Plan schedule if such request is demonstrably based on the interference with normal school activities.

In the Matter of The City of New York and the New York City School Construction Authority, Consent Agreement and Final Order, TSCA-02-2010-9209

CERTIFICATE OF SERVICE

I certify that I have this day sent the foregoing fully executed Consent Agreement and Final order ("CAFO"), bearing the above-referenced docket number, in the following manner to the respective addressees listed below.

Original and Copy
By Hand Delivery:

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

Two Fully Executed Copies
By Overnight Mail:

Daniel Greene, Esq.
Environmental Law Division
New York City Law Department
100 Church Street
Fourth Floor
New York, New York 10007

Dated:

1/19/2010

