

JOHN C. PIERSON
Attorney & Counselor at Law
Twin Oaks Estate
1221 W. Market Street
Akron, Ohio 44313-7107

Telephone and Fax (330) 836-8159

e-mail: jcp@piersonlaw.com

By UPS ground
October 20, 2010

Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

RE: In the Matter of: NORKA Manufacturing, Inc.
EPA Docket No. RCRA-03-2010-0398

Dear Madam or Sir:

Enclosed is Respondent's Answer to the Administrative Complaint and Notice of Opportunity for a Hearing for filing in the above matter. Also enclosed, and bound with the Answer, are the attachments referenced in the Answer.

By copy of this letter, I am mailing a copy of the Answer to Ms. Howell, counsel for U.S. EPA in this matter.

Please contact me if you have any question. Thank you.

Sincerely,



John C. Pierson

cc: Joyce A. Howell, Esq. (3RC30), U.S. EPA, Region III (w/o attachments)
Kevin Royer

norkaepa2.doc

RECEIVED
OCT 20 2010
U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION III
PHILADELPHIA, PA

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of:	:	
	:	
NORKA Manufacturing, Inc.,	:	Respondent's Answer to
	:	Administrative Complaint and
Respondent	:	Notice of Opportunity for a Hearing
	:	
	:	EPA Docket No. RCRA-03-2010-0398
	:	
NORKA Manufacturing, Inc.	:	
103 E. 5 th Street	:	
Watsonstown, PA 17777	:	
	:	
	:	Proceeding under Section 3008(a)
	:	of the Resource Conservation and
	:	Recovery Act, as amended, 42 U.S.C.
Facility	:	Section 6928(a)
	:	

Respondent, by and through its undersigned attorney, hereby answers the Administrative Complaint received on September 23, 2010.

Findings of Fact and Conclusions of Law

1. Respondent admits that EPA has jurisdiction over this matter.
2. Respondent admits that it has been an Ohio corporation and therefore a "person" as alleged in EPA's paragraph 2.
3. Respondent denies that it is or has been an "owner" of the manufacturing plant located at 103 E. 5th Street, Watsonstown, Pennsylvania, 17777 (hereinafter, the "premises"). In fact, Respondent has leased the premises from Moran Industries, principal place of business at 601 Liberty Street, Watsonstown, Pennsylvania 17777, at all times relevant to the within matter. Moran Industries ("Moran"), as the owner of the premises, therefore is an indispensable party to the within proceeding. Respondent admits the remainder of the allegations in EPA's paragraph 3.
4. Respondent admits that the premises is a manufacturing facility.
5. In response to EPA's paragraph 5, Respondent is without information or belief as to the truth of the allegation that Respondent generated, in each month, at least 100 kg/month of hazardous waste and therefore denies the allegation. Respondent admits, in relation to the remainder of said paragraph, that it generated and stored solid waste and hazardous waste during its manufacturing activities on the premises.

6. Respondent admits the truth of the allegations in EPA's paragraphs 6 through 8.
7. Further in response to paragraph 8, Respondent states that it was locked out of the premises by its lessor, Moran, from October 8 through October 15, 2009 and again from November 1, 2009 through the present except for several days in May, 2010, during which time Respondent's contractor marshaled and shipped waste containers from the premises. Respondent's manufacturing activities at the premises ceased on October 30, 2009.
8. Respondent admits the truth of the allegations in EPA's paragraphs 9 and 10.
9. In response to EPA's paragraph 11, Respondent states that its lessor, Moran, permanently locked Respondent out of the premises, as averred above. A copy of the notice posted by Moran is submitted with this Answer; see Attachment 1. Thus, Moran, as the owner of the premises, prevented Respondent from exercising control over the containers described in EPA's paragraph 11. In establishing its control over the containers, Moran, in fact as well as under law, should be subject to regulation as an owner or operator, or both owner and operator, of the facility averred in EPA's paragraphs 3 and 4, as well as to liability herein.
10. In response to Attachment A to EPA's Complaint, the inventory of materials found at the premises referenced in EPA's paragraph 11, Respondent states that the two 5-gallon "pails of Solycote 1013 coating," item 14 under "Area outside of the paint related raw material storage closet," were neither Respondent's property nor under the control of Respondent. Rather, the pails were left in the custody of Moran Industries, Respondent's landlord.
11. Respondent admits the truth of the allegations in EPA's paragraphs 12 and 13.
12. In response to EPA's paragraph 14, Respondent states that it has been assigned the EPA identification number of PAR000017608, as shown on the manifests by which the wastes referenced in EPA's paragraph 13 were shipped for disposal.

COUNT I

13. In response to EPA's paragraph 15, Respondent re-states the responses set forth in paragraphs 1 through 12 above.
14. Respondent admits that EPA's paragraphs 16 through 19 accurately describe the regulations referenced therein.
15. Respondent admits that EPA's paragraph 20 accurately describes the PADEP inspector's report.

16. Respondent admits that EPA's paragraph 21 accurately describes the waste shipments described in manifests signed by Respondent's officer. Copies of all manifests in Respondent's possession are submitted with this Answer; see Attachment 2.

17. Respondent is without information or belief as to the truth of the allegation in EPA's paragraph 22 and therefore denies the allegations that on May 25, 2010, nine containers lacked labels required by law and that the accumulation start date for each container was not marked on the container.

18. In response to EPA's paragraph 23, Respondent does not know the basis of the allegation that three containers were marked with an accumulation start date of October 27, 2009, as the DEP Inspection Report does not include such a comment. Therefore, Respondent denies the allegation.

19. In response to EPA's paragraph 24, Respondent admits that the report of DEP's 11-12-2009 inspection includes the comment that "the oldest accumulation start date observed" on seven 55-gallon containers in the hazardous waste storage closet was July 6, 2009.

20. Respondent is without information or belief as to the truth of, and therefore denies, the allegations in EPA's paragraphs 25 through 27, as the DEP's 11-12-2009 inspection report does not identify specific accumulation start dates other than the above-cited reference to "the oldest accumulation start date observed."

21. In response to EPA's paragraphs 28 through 33, Respondent admits only that waste was accumulated on the premises in containers for more than 180 days. The remainder of the cited paragraphs are conclusions of law to which Respondent takes exception.

COUNT II

22. In response to EPA's paragraph 34, Respondent re-states the responses set forth in paragraphs 1 through 21 above.

23. Respondent admits that a generator of solid waste is required to determine whether the waste must be managed as a hazardous waste, as stated in EPA's paragraph 35.

24. Regarding EPA's paragraphs 36 and 37, Respondent admits that the PADEP inspection reports state that ninety-two unlabeled and undated containers of solid waste were observed on November 12, 2009 and on March 4, 2010.

25. In response to EPA's paragraph 38, Respondent admits that the May 12, 2010 EPA NOV cited it for failure to perform waste characterizations.

26. In response to EPA's paragraphs 39 and 40, Respondent states that its knowledge of the waste streams, based on its knowledge of the material inputs, was sufficient to determine that certain of the waste was required to be managed as hazardous waste and that it had in fact made such determination before May, 2010, rather than for the first time in that month, as alleged in paragraph 39.

COUNT III

27. In response to EPA's paragraph 41, Respondent re-states its responses set forth in paragraphs 1 through 26 above.

28. Respondent admits that the regulations referenced in EPA's paragraph 42 are as described in that paragraph.

29. Respondent admits that it was storing seven containers of hazardous waste at the premises on the dates cited in EPA's paragraphs 43 and 44.

30. In response to EPA's paragraph 45, Respondent admits only that it had no on-site records of inspections of the hazardous waste storage area. Respondent denies the remainder of EPA's paragraph 45.

31. In response to EPA's paragraph 46, Respondent admits only that the May 12, 2010 N.O.V. stated that "NORKA does not appear to have conducted weekly inspections of the hazardous waste container storage area since abandoning the facility" and denies the remainder of paragraph 46.

32. In response to EPA's paragraph 47, Respondent admits only that it had no on-site records of inspections for the period referenced in that paragraph and denies the remainder of EPA's paragraph 47.

III. CIVIL PENALTY CALCULATION

33. In response to EPA's paragraphs 48 through 50 and EPA's description of its consideration of the potential for harm and extent of deviation for the alleged violations under Counts I through III, Respondent states as follows.

34. In response to EPA's calculation of penalty for Count I, Respondent states as follows:

Count I

a. Respondent submits that its failure properly to label hazardous waste containers did not present a major risk of harm to the environment or to human health because the containers were kept within the premises. Respondent's landlord, Moran Industries, had locked Respondent out of the premises for the periods described above and Respondent prior to that time had regularly complied with applicable rules regarding labeling. Because it had been locked out of the

premises, Respondent should be accountable only for a "moderate" potential for harm. A copy of Moran's October 8, 2009 notice ("Warrant of Distrainment") is submitted herewith as Attachment 1. In addition, the DEP in its November 25, 2009 N.O.V. (page 2) noted that

All of the containers were observed to be properly labeled, closed, and within secondary containment. ... Norka Manufacturing no longer has access to the building or the waste material.

b. Respondent had complied with applicable hazardous waste rules until its business began to sour. Specifically, DEP inspections from August 15, 1997 through June, 2009 uniformly concluded "no violations noted." It was only after Respondent's business experienced three consecutive years of losses (2007 through 2009, after which the business was liquidated) that compliance problems developed. See <http://www.ahs2.dep.state.pa.us/> for inspection results. Copies of the Agency's summary are submitted herewith; see Attachment 3.

In light of that compliance history, Respondent submits that the "extent of deviation" of its violation be re-classified to "minor" or "moderate." Submitted herewith are copies of documents showing Respondent's compliance, including manifests for waste shipments, waste characterizations and correspondence with Rineco, the licensed T/S/D facility used by Respondent for waste disposal.

c. In regard to operating without a permit or interim status as a "specifically listed" violation which increases the threat of harm (Admin. Complaint, at 8), Respondent responds that the Agency's RCRA Penalty Policy (at 22) cites failure "to obtain a permit or interim status" only as a circumstance which "may produce a total penalty which is disproportionately high," rather than a specific basis for increasing the threat of harm.

Count II

a. While the Agency alleges that Respondent had failed "to make waste determinations," in fact Respondent had knowledge of the characteristics of the waste through characterizations performed by Rineco. Respondent herewith submits copies of waste profiles and manifests for all shipments from June 1996 through September 2009. Included with the manifests are LDR notification forms for each shipment. All of the manifests and notification forms specify that the waste consisted of paint overspray and filters and waste paint, all classified as D001 hazardous waste. There were no changes in production processes which would have resulted in changes to the waste throughout the time that Respondent operated the plant.

b. Respondent reasonably relied on its T/S/D facility and on its knowledge of its production processes throughout the time period encompassed by the Complaint. Thus, the "potential for harm" related to waste characterization should be, at most, "moderate" rather than "major."

Count III

a. The Agency states that Respondent failed to inspect the hazardous waste storage area after "Respondent vacated the Facility and abandoned seven drums." (Admin. Complaint, at 9). In fact, Respondent was unable to inspect the waste storage area and drums because it had been locked out of the premises by its lessor, Moran Industries, as averred above. Respondent refers the Agency to DEP's November 25, 2009 Notice of Violation, in which it is stated that "Norka Manufacturing no longer has access to the building or the waste material." In addition, that N.O.V. states that "All of the containers were observed to be properly labeled, closed, and within secondary containment." [See p. 2, November 25, 2009 N.O.V.]

b. Therefore, Respondent requests that the "extent of deviation" for the allegations in Count III be changed from "major" to "moderate."

35. Respondent's Financial Condition

Submitted herewith as Attachment 4, are copies of Respondent's U.S. Income Tax Returns for 2004 through 2009 and, as Attachment 5, attested financial statements. Both the tax returns and the financial statements show that Respondent encountered serious financial difficulties beginning in 2004. Before the plant was closed in 2009, Respondent experienced three consecutive years of losses, ranging from a loss of \$148,041 in 2008 to a loss of \$4,009 in 2009. Manufacturing activity ceased at the end of October, 2009, as stated above (paragraph 7).

In addition, as shown by the tax returns, none of Respondent's officers was paid any salary during the entire period referenced above, 2004 through 2009.

Therefore, Respondent argues that it is unable to pay a sum even approaching the civil penalty which would result from the authorized amounts described in paragraph 48 of the Complaint.

IV. REQUEST FOR A HEARING

In conformance with 40 C.F.R. 22.15(c), Respondent requests a hearing.

Respectfully submitted,

John C. Pierson

John C. Pierson, Attorney at Law, for
Norka Manufacturing, Inc.
1221 W. Market Street
Akron, OH 44313-7107
Telephone & fax (330) 836-8159
jep@piersonlaw.com