

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:)
)
)
E. I. du Pont de Nemours)
and Company)
)
Wilmington, DE)
)
)
Respondent)
)
Washington Works Facility)
Route 892 South DuPont Road)
Washington, Wood County, WV)
_____)

Docket No. TSCA-HQ-2004-0016
Docket No. RCRA-HQ-2004-0016
Docket No. TSCA-HQ-2005-5001

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ENVIR. APPEALS BOARD

JOINT MOTION TO AMEND THE SETTLEMENT

The United States Environmental Protection Agency (“EPA” or “Complainant”) and E.I. du Pont de Nemours and Company (“DuPont” or “Respondent”) (referred to jointly as “the Parties”) file this Joint Motion to Amend the Settlement (“Motion”) pursuant to 40 C.F.R. §§ 22.4(a) and 22.16 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Rules of Practice”). In this Motion, the Parties respectfully request to modify Appendix A (also referred to as the “Biodegradation SEP”, “SEP”, or “SEP A”) of the Consent Agreement and Final Order (“CAFO”) signed by the Environmental Appeals Board on December 21, 2005, as amended on January 8, 2009 and January 13, 2012, to allow the activities specified in Section VI (as amended) to be performed as an alternative to biodegradation

SCAS testing when characterization methods development is unsuccessful. Since the last extension, the work conducted under the SEP to develop analytical methods and to determine an effective way to remove residual analytes from the polymeric test substance for quantification has provided useful information for future research. The Parties, however, agree the remaining funds and timing are not sufficient to produce methods that could generate characterization data for the selected test substance. Further biodegradation testing in the absence of reliable characterization data will not be informative because characterization data is the reference point for all post-biodegradation chemical analysis. The Parties believe that the remaining DuPont obligation (as of October 30, 2013) of about \$1,320,827.00 (of the \$5 million required under the CAFO) would be best used on completion of the SEP through the activities specified in Section VI (as amended). A proposed amended SEP Section VI, dated November 5, 2013, is attached as Exhibit 1. For your convenience a copy of the full SEP as amended on December 22, 2011, (Appendix A without Attachments), is attached as Exhibit 2.

Objectives of the SEP

The original CAFO required that DuPont “will use its best efforts to satisfactorily complete this Biodegradation SEP.” (Section II.B. of SEP A of the CAFO.) According to the original CAFO, “Satisfactory Completion” of a SEP “means that Respondent shall expend not less than the amount indicated for that SEP . . . on SEP activities described in Appendix A or B respectively and performed in accordance with the applicable Appendix.” (Section IV.4. of the CAFO.) On January 13, 2012, the Environmental Appeals Board granted the Parties’ Motion and thereby inserted Section VI into the SEP. Section VI allows additional activities to be performed in lieu of further Semicontinuous

Activated Sludge (“SCAS”) testing if the level of residual test substance measured by the contracted characterization laboratory and the contracted biodegradation laboratory are not substantially equivalent. Section VI also allows the activities to be performed if, after completion of full SCAS testing of one or more Fluorotelomer Product, additional SCAS testing is not feasible with the remaining funds or no longer in the public interest to pursue. Neither of these conditions has been met because characterization methods development, a prerequisite process, has been unsuccessful to date. The Parties believe that further attempts to develop characterization methods are not in the public interest because it is uncertain whether any meaningful methods will be developed with the remaining SEP funds or within the remaining time. The Parties seek to amend Section VI to allow performance of the activities when the Parties agree that remaining funds and timing are not sufficient to produce methods that could produce reliable characterization data. The Parties believe this amendment is necessary to reconcile the goals of the SEP with the obligation of DuPont to spend the remaining funds within the remaining time.

Progress on the SEP

DuPont has made a good faith effort to perform many of the tasks required in the SEP since the second Motion to Amend was granted, but characterization methods development has remained an obstacle to substantial completion of the SEP. Under Appendix A, as amended in 2009 and 2012, SCAS testing is to be conducted in order to determine if certain fluorotelomer based polymer test substances can biodegrade to perfluorooctanoic acid (“PFOA”) or precursors of PFOA. Full and detailed characterization of the fluorotelomer based polymer test substances is necessary in order to distinguish

whether any PFOA found after SCAS testing is residual material that had been bound to the polymers prior to testing or if PFOA was formed as a result of biodegradation during SCAS testing.

The methods development for characterization testing has been challenging because these polymers were designed to repel other chemicals and not to react with them. Both the characterization laboratory and the biodegradation laboratory contracted by DuPont encountered problems while using gas chromatography/mass spectrometry (“GC/MS”) analysis. In both laboratories, signal enhancement of certain analytes on the instruments during GC/MS analysis resulted in unreliable data. To correct for the problem, the Parties agreed to use liquid chromatography/mass spectrometry (“LC/MS”) in lieu of the GC/MS method. The LC/MS analysis did not produce a method that could generate reliable characterization data for the selected test substance. DuPont consulted EPA on potential solutions to the dilemma and made unsuccessful attempts to obtain reliable characterization data.

Future SEP Activities

Section VI, as incorporated into Appendix A on January 13, 2012, provides that DuPont will purchase analytical instruments and reference standards for universities or state labs approved by EPA if full scale SCAS testing does not commence due to a lack of “substantial equivalence” between the residual levels of the polymer in the biodegradation laboratory results and the characterization laboratory results, or if additional SCAS testing is not feasible with the remaining funds and within the remaining time. The Parties agree purchasing analytical instruments or reference standards, or both, is in the interest of the public and consistent with the SEP policy because the remaining funds and time are not sufficient to develop characterization methods capable of producing the characterization data that is

necessary for determining substantial equivalence and interpreting SCAS testing results. The Parties request to amend Section VI of the SEP in order to reconcile the SEP requirements with the inability to develop characterization methods.

The items eligible for purchase are analytical instruments or reference standards used in laboratories for research that relates to the PFOA substance at issue in the initial action. Specifically, these items are intended to be used for research on the presence of perfluorinated compounds in people or the environment, or research on the fate of perfluorinated compounds in the environment. The cost of the items will not exceed one million five hundred thousand dollars (\$1,500,000). Any equipment purchase and donation will be made in accordance with the EPA's 1998 SEP Policy.¹

Analytical instrument purchase and donation will be carefully selected to promote a better understanding of fluorochemicals fate in the environment. The Parties have identified possible recipients of analytical instruments and reference standards to satisfy the remaining obligation of DuPont under the SEP. The Parties identified potential recipients due to their extensive knowledge of fluorochemicals and current ongoing research concerning perfluorinated compounds. The potential recipients have indicated that their research will benefit from the analytical instruments and research standards proposed in this SEP.

The Joint Motion to Amend is designed to facilitate further research of the perfluorinated compounds related to the substance at issue in the initial action by purchasing analytical instruments and reference standards for donation to eligible institutions. The Parties believe good cause exists to grant the Joint

¹ The EPA 1998 SEP Policy and related guidance is found at <http://www.epa.gov/enforcement/sep.html>

Motion to Amend because performance of Section VI activities, as amended, promotes the public interest and supports the goals of the SEP.

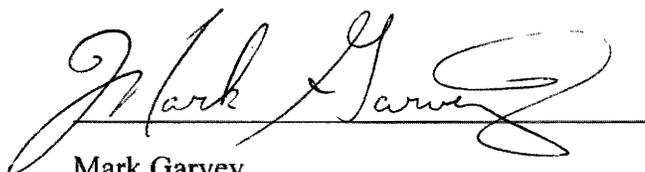
Conclusion

For the foregoing reasons, the parties request this **Joint Motion to Amend the Settlement** be
GRANTED

Respectfully submitted,

Nov. 26, 2013

Date



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9 November 2013

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CERTIFICATE OF SERVICE

I certify that the original of the above **Joint Motion to Amend the Settlement** Docket Nos. TSCA-HQ-2004-0016, RCRA-HQ-2004-0016, and TSCA-HQ-2005-5001 were filed with the Environmental Appeals Board Hearing Clerk and that copies were sent:

Hand carried to:

Eurika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
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Washington, D.C. 20005

By email and U.S. Mail to:

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