

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

_____)	
In the Matter of:)	
)	
Toray Marketing & Sales)	Docket Number TSCA-HQ-2007-5012
(America), Inc.)	
New York, NY)	
)	
Respondent)	
_____)	

CONSENT AGREEMENT

Complainant United States Environmental Protection Agency (EPA or Agency) and Respondent Toray Marketing & Sales (America), Inc. (Toray or Respondent), the parties herein, having consented to the entry of this Consent Agreement and proposed Final Order before the taking of any testimony and without adjudication of any issues of law or fact herein, hereby consent to the terms of this Consent Agreement and attached Final Order.

I. PRELIMINARY STATEMENT

1. This civil administrative proceeding for the assessment of penalties pursuant to section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a) is being simultaneously commenced and concluded pursuant to 40 C.F.R. § 22.13(b) and § 22.18(b)(2) and (3).

2. To avoid the disruption of orderly business activities and expense of protracted and costly litigation, Respondent, for purposes of this proceeding: (1) admits EPA has jurisdiction over the subject matter in this Consent Agreement; and (2) consents to the terms of this Consent Agreement and Final Order.

II. EPA'S FINDINGS OF FACT AND LAW

COUNT I

3. Respondent, a corporation located at 461 Fifth Avenue, 9th Floor, New York, New York 10017, is a "person" as defined in 40 C.F.R. § 720.3(x) and, as such, is subject to TSCA and the regulations promulgated thereunder.
4. Respondent "manufactures," (which is defined to include "import"), a "chemical substance," as defined by sections 3(2)(A) and 3(7) of TSCA, 15 U.S.C. § 2602(2)(A) and (7), and 40 C.F.R. § 720.3(q) and (e).
5. Any chemical substance which is not included in the chemical substance list (TSCA Inventory) compiled and published under TSCA section 8(b), 15 U.S.C. § 2607(b), is a "new chemical substance" pursuant to TSCA section 3(9), 15 U.S.C. § 2602(9) and 40 C.F.R. § 720.3(v).

6. Pursuant to TSCA section 5(a)(1), 15 U.S.C. § 2604(a)(1) and 40 C.F.R. § 720.22(b)(1) and § 720.40(b), no person may manufacture or import a new chemical substance unless such person submits a Premanufacture Notification (PMN) to EPA at least ninety (90) days before manufacturing that substance.
7. TSCA section 15(1)(B), 15 U.S.C. § 2614(1)(B), provides that it is unlawful for any person to fail or refuse to comply with any requirement prescribed by TSCA § 5, 15 U.S.C. § 2604.
8. TSCA section 15(1)(C), 15 U.S.C. § 2614(1)(C), provides that it is unlawful for any person to fail or refuse to comply with any rule promulgated under TSCA § 5, 15 U.S.C. § 2604.
9. TSCA section 15(3)(B), 15 U.S.C. § 2614(3)(B) provides that it is unlawful for any person to fail or refuse to submit reports, notices, or other information as required by TSCA.
10. On September 28, 2006 Respondent learned that a certain nylon polymer that it imported into the United States from Japan during the period of April 4, 2002 through September 4, 2006 was not on the TSCA Inventory.

11. Between April 4, 2002 and September 4, 2006, Respondent imported approximately 563,000 kilograms (kg) of the nylon polymer on 26 separate occasions and distributed all but 31,350 kg of the nylon polymer to its customers.
12. In an October 27, 2006 letter to the Agency, Respondent disclosed that it had violated TSCA section 5 by importing the nylon polymer into the United States without submitting a PMN to the Agency 90 days before the date of first import, thereby violating TSCA section 5(a)(1), 15 U.S.C. § 2604(a)(1) and 40 C.F.R. § 720.22(b)(1) and § 720.40(b).¹
13. Although the chemical substance did not appear on the TSCA Inventory at any time during the period of April 4, 2002 through September 4, 2006, the chemical substance did meet the definition of "polymer" under 40 C.F.R. § 723.250(b) and satisfied certain requirements of the polymer exemption as specified in 40 C.F.R. § 723.250(c), (d) and (e). However, Respondent failed to timely submit an exemption report as required by 40 C.F.R. § 723.250(f), did not timely satisfy the record keeping requirements of 40 C.F.R. § 723.250(g), and failed to timely make the certification statements as required by 40 C.F.R. § 723.250(h) so as to qualify its importation of the chemical substance under the polymer exemption.

¹ Respondent's violations were not eligible to be considered under "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 65 F.R. 19616 (April 11, 2000) (Audit Policy) because Respondent did not discover the violations through an environmental audit or compliance management program and Respondent did not disclose the violations to EPA within 21 calendar days after discovery.

14. Immediately upon disclosing the violation to EPA, Respondent ceased further importation of the nylon polymer and quarantined 31,350 kg of existing stocks of the nylon polymer at its Wood Dale, Illinois warehouse. On January 10, 2007, Respondent submitted the exemption report to EPA, satisfied the record keeping requirements and made the certifications statements required by 40 C.F.R. § 723.250(f), (g) and (h) so as to satisfy the polymer exemption.

15. Respondent's failure to submit a PMN at least ninety (90) days before importing the chemical substance into the United States, or to otherwise fulfill all of the requirements of the polymer exemption in a timely manner, constitutes a failure to comply with TSCA section 5(a)(1), 15 U.S.C. § 2604(a)(1) and 40 C.F.R. § 720.22(b)(1) and § 720.40(b), which is a violation of TSCA section 15(1)(B), (1)(C) and (3)(B), 15 U.S.C. § 2614(1)(B), (1)(C) and (3)(B).

III. CIVIL PENALTY

16. The proposed penalty in this matter is consistent with the *TSCA Section 5 Enforcement Response Policy*, issued August 5, 1988 and amended June 8, 1989 and July 1, 1993 (TSCA ERP). The *TSCA ERP* was developed in accordance with the *Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy*, which sets forth a general penalty assessment policy for TSCA violations. 45 Fed. Reg. 59770 (Sept. 10, 1980). The *TSCA ERP*, though not a regulation, establishes a framework for applying the statutory factors to be considered in assessing a civil penalty, *i.e.*: "the nature, circumstances, extent and gravity of the

violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B).

17. The proposed civil penalty in this case reflects: (1) a determination of the gravity-based penalty (GBP), in accordance with the statutory factors of nature, circumstances, extent and gravity; and (2) adjustments to the GBP, by taking into account the statutory factors ability to pay, effect on ability to continue business, prior violations, culpability, and such other matters as justice may require.

18. The GBP is determined by evaluating the nature, circumstances, and extent of the violation. In accordance with the *TSCA ERP*, the failure to submit a PMN or otherwise comply with the terms of any applicable exemption, when the substance was manufactured and distributed to others or further processed for commercial use by the company is a considered "Hazard Assessment," the circumstance level is "Level 4," and, when the quantity of the chemical imported on each separate occasion is between 340.2 kg and 3,402 kg, the extent level is "Significant." When the quantity of the chemical imported on each separate occasion is over 3,402 kg, the extent level is "Major."

19. By following the TSCA ERP GBP Matrix (on page 8) the gravity factor is determined by the value at which the "circumstances" factor (vertical axis) intersects the "extent" factor (horizontal axis). In this case, the chemical substance was imported on 26 separate

27. Respondent agrees to pay a civil penalty in the sum of **Sixty One Thousand Five Hundred and Four Dollars (\$61,504.00)** in accordance with the following terms:

- A. Not more than thirty (30) calendar days after the effective date of the Final Order, Respondent shall either submit a cashier's or certified check with a notation of "Toray Marketing & Sales (America), Inc., Civil Penalty Docket No. TSCA-HQ-2007-5012," payable to the order of the "Treasurer, United States of America," to:

EPA-Washington
(Hearing Clerk)
Docket No. TSCA-HQ-2007-5012
P.O. Box 360277
Pittsburgh, PA 15251-6277

or pay by wire transfer with a notation of "Toray Marketing & Sales (America), Inc., Civil Penalty Docket No. TSCA-HQ-2007-5012" by using the following instructions:

Name of Beneficiary:	EPA
Number of Account for deposit:	68010099
The Bank Holding Acct:	Treas_NYC
The ABA routing Number:	021030004

- B. Respondent shall forward a copy of the check or documentation of a wire transfer

to: Tony R. Ellis, Case Development Officer
Waste and Chemical Enforcement Division (2249A)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W. (Room No. 5041-A)
Washington, D.C. 20460
(202) 564-4167
Fax (202) 564-0035

- C. If Respondent fails to make the payment in a timely manner as required by paragraph 27.A., then Respondent shall pay a stipulated penalty of **One Thousand**

Dollars (\$1,000.00) per calendar day for every day the penalty payment is late, unless EPA in writing excuses or mitigates the stipulated penalty. EPA may excuse or mitigate the stipulated penalty if EPA determines that the failure to comply occurred despite Respondent's exercise of good faith and due diligence.

V. OTHER MATTERS

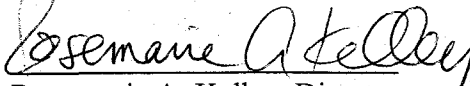
28. This Consent Agreement shall be binding upon the Parties, and their respective officers, directors, employees, successors and assigns. The undersigned representative of each Party certifies that he or she is duly authorized by his or her respective Party to enter into this binding Consent Agreement.
29. This Consent Agreement shall take full effect upon the signing and filing of the Final Order by EPA's Environmental Appeals Board.
30. Respondent's obligations under this Consent Agreement shall end when it has paid in full the scheduled civil penalty, paid any stipulated penalties, and submitted the documentation required by the Consent Agreement and Final Order.
31. All of the terms and conditions of this Consent Agreement together comprise one settlement agreement, and each of the terms and conditions is in consideration for all of the other terms and conditions. This Consent Agreement shall be null and void if any term or condition of this Consent Agreement is held invalid or is not executed by all of the

signatory parties in identical form, or is not approved in such identical form by the EPA Environmental Appeals Board.

32. The penalty, including any stipulated penalties, specified above represents civil penalties assessed by EPA, and shall not be deductible for purposes of federal taxes.
33. Failure of Respondent to remit the civil penalties provided herein will result in this matter being forwarded to the United States Department of Justice for collection of the amount due, plus stipulated penalties and interest at the statutory judgment rate provided in 28 U.S.C. § 1961.
34. The Parties agree to bear their own costs.

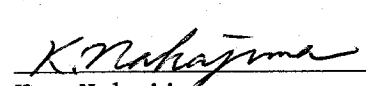
WE HEREBY AGREE TO THIS:

For Complainant:


Rosemarie A. Kelley, Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

5/22/07
Date

For Respondent:


Ken Nakajima
Corporate Secretary
Toray Marketing & Sales (America), Inc.

4/23/2007
Date

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

In the Matter of:)
)
Toray Marketing & Sales)
(America), Inc.)
)
Respondent.)

Docket Number TSCA-HQ-2007-5012

FINAL ORDER

The United States Environmental Protection Agency as Complainant, and Toray Marketing & Sales (America), Inc. as Respondent, the parties herein, having signed and consented to entry of the attached Consent Agreement incorporated by reference into this Final Order,

NOW, THEREFORE, IT IS ORDERED THAT:

1. Respondent, Toray Marketing & Sales (America), Inc., shall comply with all terms of the Consent Agreement;
2. Respondent is assessed a civil penalty of Sixty One Thousand Five Hundred and Four Dollars (\$61,504.00); and
3. Respondent shall, in accordance with the payment provisions set forth in the Consent Agreement, make payment via a certified or cashier's check or through a wire transfer as described in the Consent Agreement.

IT IS SO ORDERED.

By: _____
Environmental Appeals Board

Dated: _____

CERTIFICATE OF SERVICE

I certify that the foregoing "Consent Agreement and Final Order," *Toray Marketing & Sales (America), Inc.*, Docket No. TSCA-HQ-2007-5012, was filed and copies of the same were mailed to the parties as indicated below:

(Interoffice)

James J. Vinch, Esq.
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W. (Mail Code 2249A)
Washington, D.C. 20460
(202) 564-1256
Fax: (202) 564-0035

(U.S. Mail)

John V. Massingale
Greenwich Chemical Consulting, Inc.
Two Sound View Drive, Suite 100
Greenwich, Connecticut 06830

Annette Duncan
Secretary
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Dated: _____