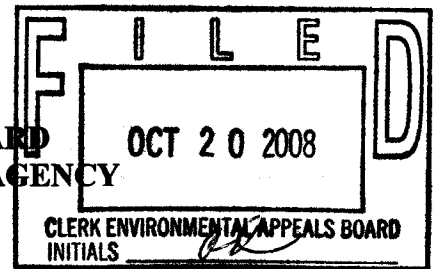


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



\_\_\_\_\_  
**In the Matter of:**  
  
**FUJIFILM Manufacturing**  
**U.S.A., Inc.**  
**Greenwood, South Carolina**  
  
**Respondent**  
\_\_\_\_\_

**Docket Number TSCA-HQ-2008-5029**

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**CONSENT AGREEMENT**

Complainant United States Environmental Protection Agency (EPA or Agency) and Respondent FUJIFILM Manufacturing U.S.A., Inc. (FUJIFILM 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 that 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 211 Pucketts Ferry Road, Greenwood, South Carolina 29649, 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" a "chemical substance," as defined by TSCA §§ 3(7) and 3(2) respectively, 15 U.S.C. § 2602(7) and (2), and 40 C.F.R. § 720.3(e) and (q). The term "manufacture" means to import into the United States, produce, or manufacture.
5. Any chemical substance which is not included in the chemical substance list (TSCA Inventory) compiled and published under TSCA § 8(b), 15 U.S.C. § 2607(b), is a "new chemical substance" pursuant to TSCA § 3(9), 15 U.S.C. § 2602(9) and 40 C.F.R. § 720.3(v).
6. Pursuant to TSCA § 5(a)(1), 15 U.S.C. § 2604(a)(1) and 40 C.F.R. § 720.22(a)(1) and § 720.40(b), no person may manufacture (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 § 5(h)(4), 15 U.S.C. § 2604(h)(4), provides that EPA may exempt the manufacturer of certain new chemicals from all or part of the full PMN requirements.

8. 40 C.F.R. Part 723, PREMANUFACTURE NOTIFICATION EXEMPTIONS, was promulgated under the authority of TSCA § 5, 15 U.S.C. § 2604 (“Manufacturing and processing notices”) and sets forth EPA’s regulations regarding TSCA § 5(h)(4), 15 U.S.C. § 2604(h)(4). Section 723.50 addresses chemical substances manufactured in quantities of 10,000 kilograms or less per year, and/or chemical substances with low environmental release and human exposures.
9. 40 C.F.R. § 723.50(e)(1) provides that a Low Volume Exemption (“LVE”) applicant must submit to EPA an exemption application on the standard PMN form at least thirty days (a mandatory EPA review period) before the manufacture (import) of the new chemical substance begins.
10. 40 C.F.R. § 723.50(e)(2) requires that the LVE application include: (1) the identity of the manufacturer or importer; (2) the identity of the chemical substances; (3) the identity of any unknown impurities; (4) any known synonyms; (5) any by-products; (6) the intended production volume; (7) a description of intended categories of use; (8) for manufacturer-controlled sites only, the identity of manufacturing sites, process descriptions, and worker exposure and environmental release information; (9) for sites not controlled by the manufacturer, processing and use operation descriptions, the estimated number of processing and use sites, and worker exposure/environmental release information; (10) an indication on the first page of the application that the submission is a “TSCA section 5(h)(4) exemption notice” and whether the application is submitted under 40 C.F.R. § 723.50(c)(1) (<10,000 kilograms) or (c)(2) (low environmental releases and human exposures); (11) any test data in the possession or control of the applicant regarding the

new chemical's effects on human health and the environment; and (12) required certifications.

11. TSCA § 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 section 5, 15 U.S.C. § 2604.
12. TSCA § 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 section 5, 15 U.S.C. § 2604.
13. TSCA § 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.
14. On November 16, 2007 and May 28, 2008 Respondent voluntarily informed EPA in writing that it had potentially violated TSCA § 5 by failing to submit a PMN or LVE application for a new chemical substance, subsequently identified by Respondent as TS-MT555F (Chemical A).
15. On May 28, 2008, Respondent informed EPA in writing that FUJIFILM imported Chemical A during the time period of July 22, 2003 through October 24, 2007, prior to submitting a PMN or LVE application for this chemical.
16. From July 22, 2003 to October 24, 2007, Chemical A did not appear in the TSCA Inventory.

17. EPA alleges that Respondent's failure to submit a PMN at least ninety (90) days before manufacturing (importing) Chemical A constitutes a failure to comply with TSCA § 5(a)(1), 15 U.S.C. § 2604(a)(1) and 40 C.F.R. § 720.22(a)(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).

## COUNT II

18. Paragraphs 3 through 13 are re-alleged and incorporated herein by reference.
- ⇒ 19. Upon examination of Respondent's submitted information EPA discovered that beginning on or about July 22, 2003, and continuing to and including October 24, 2007, Respondent imported Chemical A on thirty-eight (38) different days and failed to accurately submit a written statement to the U.S. Customs Service certifying that Respondent was not offering Chemical A for entry in violation of TSCA.
20. During the period stated in Paragraph 19, Chemical A was not on the TSCA Inventory of Existing Chemical Substances. Any chemical substance that does not appear on the TSCA Inventory of Existing Chemical Substances is defined as a new chemical substance pursuant to section 3(9) of TSCA, 15 U.S.C. § 2602(9).
21. Section 5(a)(1) of TSCA, 15 U.S.C. § 2604(a)(1), provides that no person may manufacture (import) a chemical substance which does not appear on the TSCA Inventory of Existing Chemical Substances without first submitting a PMN to the Administrator of EPA at least 90 days before manufacturing (importing) such substance.

22. Section 13(b) of TSCA, 15 U.S.C. § 2612(b), requires the Secretary of the Treasury, after consultation with the Administrator, to issue rules for the administration of section 13(a). As indicated in 40 C.F.R. § 707.20, the rule at 19 C.F.R. §§ 12.118 through 12.127, issued under the authority of Section 13 of TSCA, 15 U.S.C. § 2612, requires importers to certify that all chemical substances in each shipment comply with all applicable rules or orders issued under TSCA, and that the importer is not offering the chemical substance for entry in violation of TSCA or any applicable rule or order under TSCA.
23. Respondent incorrectly or failed to certify at the port of entry that Chemical A was not in violation of TSCA.
24. The certification submission described in Paragraph 19 above was in violation of TSCA § 13(b), 15 U.S.C. § 2612(b) and section 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B).

### **III. CIVIL PENALTY**

25. The proposed penalty in this matter is consistent with the *TSCA Section 5 Enforcement Response Policy*, issued August 5, 1988, as amended June 8, 1989 and July 1, 1993 and the *Recordkeeping and Reporting Rules TSCA Sections 8, 12, and 13 Enforcement Response Policy*, dated March 31, 1999 (TSCA ERPs). Both TSCA ERPs were 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. 59,770 (Sept. 10, 1980) (Penalty Policy). The TSCA ERPs establish 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).

26. The proposed civil penalty in this case reflects: (1) a determination of the Gravity-Based Penalty (GBP), in accordance with the statutory factors nature, circumstances, extent and gravity; and (2) adjustments to the GBP, 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.
  
27. The GBP is determined by evaluating the nature, circumstances, and extent of the violation. In accordance with the *TSCA Section 5 Enforcement Response Policy* (TSCA Section 5 ERP) the nature of the violation is Hazard Assessment because it involves the failure to submit a PMN or LVE application when the substance was manufactured (imported). The circumstances involved with this violation involved further processing or distributing the chemical and therefore the TSCA Section 5 ERP assigns this violation a Level 4 circumstance. The extent level of the violation is determined by the quantity involved. The quantity of the chemical imported on each occasion was under 340.2 kilograms (kg), thus the TSCA Section 5 ERP assigns the extent level as “Minor” for each of the thirty-eight (38) importations. The TSCA Section 5 ERP establishes a GBP Matrix using the “circumstance” factor (vertical axis) and the “extent” factor (horizontal axis). Under the Section 5 ERP as modified by the Civil Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (December 31, 1996) the penalty proposed is \$1,100 per violation occurring from January 31, 1997 through March 14, 2004 and \$1,290 per

violation occurring on and after March 15, 2004. The TSCA Section 5 ERP assigns a total GBP for the thirty-eight (38) violations identified in Count I at \$47,690.

28. Penalties for failure to accurately certify that all chemical substances being imported are in compliance with TSCA as required by section 13 of TSCA are proposed under EPA's Penalty Policy and the *Recordkeeping and Reporting Rules TSCA Sections 8, 12, and 13 Enforcement Response Policy* (TSCA Section 13 ERP). The TSCA Section 13 ERP describes the Nature of this type of violation as Hazard Assessment. Under the TSCA Section 13 ERP, failure to certify compliance correctly with TSCA is assessed the same circumstance level as the underlying TSCA section 5 violation. Since the underlying PMN or LVE application violation has a circumstance level of 4, this level applies for the TSCA Section 13 violation. Under the TSCA Section 13 ERP, the extent level is capped at level 3 "significant." The proposed GPB for each of the thirty-eight (38) violations of the TSCA section 13 certification requirements is Forty-Seven Thousand Six Hundred and Ninety Dollars (\$47,690). Thus Complainant proposes a total gravity-based civil penalty of Ninety-Two Thousand Three Hundred and Eighty Dollars (\$92,380) for Counts I and II.
29. For purposes of settlement, Complainant has agreed to reduce the total proposed penalty as set forth below, to \$26,230. Consistent with the TSCA ERPs, EPA has adjusted the penalty downward 50% (25% based on Respondent's voluntary disclosure of the violations and 25% based upon Respondent's immediate disclosure (within 30 days of discovery). EPA has further reduced the penalty 15% for both Counts I and II to reflect the good attitude shown by Respondent in expeditiously negotiating this Consent Agreement. Moreover, EPA has reduced Count I an additional 15% to reflect



Respondent's taking all steps reasonably expected/requested by EPA to mitigate the violation. Accordingly, a total of 80% downward adjustment has been applied to the total gravity-based penalty for Count I resulting in a penalty of \$9,538 and a total of 65% downward adjustment has been applied to Count II, resulting in a civil penalty of \$16,692. The result is a total adjusted civil penalty of \$26,230.

#### **IV. TERMS OF SETTLEMENT**

30. This settlement resolves only the civil administrative claims alleged in this Consent Agreement for Respondent's facility located at 211 Pucketts Ferry Road, Greenwood, South Carolina 29649.
31. Respondent is authorized to distribute and otherwise use all sixteen containers of Chemical A totaling 76.8 kilograms (240 kg of the chemical in solution) as described in its May 28, 2008 letter to EPA. The authorization to use the existing stocks of Chemical A shall automatically terminate one year after the date of execution of the Final Order.
32. Respondent waives its right to request an administrative hearing pursuant to section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A) and waives its right to file a petition for judicial review of the Final Order assessing the civil penalty pursuant to section 16(a)(3) of TSCA, 15 U.S.C. § 2615(a)(3).
33. For the sole purpose of establishing Respondent's compliance history in any future enforcement proceeding that EPA may bring against Respondent within five (5) years of the date of the execution of the Final Order, Respondent admits that it is liable for the violations alleged in this Consent Agreement. By executing this Consent Agreement,

Respondent certifies that regarding the violations alleged herein, Respondent is in compliance with sections 5, 13, and 15 of TSCA, 15 U.S.C. §§ 2604, 2612 and 2614.

34. The occurrence of any violation is in dispute and the entry of the Consent Agreement and Final Order shall not constitute an admission by Respondent of any violation alleged in this Consent Agreement of any statute or regulation; however, Respondent consents to the terms and conditions of this Consent Agreement and Final Order.
35. Respondent admits the facts referenced in this Consent Agreement and neither admits nor denies the truth and accuracy of the facts alleging that Chemical A was not on the TSCA Inventory during the relevant time period.
36. The effect of this settlement (provided in paragraph 30) is conditioned upon the accuracy of the certification referenced in paragraph 33.
37. Respondent agrees to pay a civil penalty in the sum of **Twenty-Six Thousand Two Hundred and Thirty Dollars (\$26,230)** 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 "FUJIFILM Manufacturing U.S.A., Inc., Civil Penalty Docket No. TSCA-HQ-2008-5029," payable to the order of the "Treasurer, United States of America," to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Docket No. TSCA-HQ-2008-5029  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

or pay by wire transfer with a notation of "FUJIFILM Manufacturing U.S.A., Inc., Civil Penalty Docket No. TSCA-HQ-2008-5029" by using the following instructions:

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York, NY 10045  
Field Tag 4200 of the Fedwire message should read:  
"D 68010727 Environmental Protection Agency"

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., NW (Room No. 5041-A)  
Washington, DC 20460  
(202) 564-4167  
Fax (202) 564-0035

C. If Respondent fails to make the payment in a timely manner as required by paragraph 37.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

38. 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.

39. This Consent Agreement shall take full effect upon the signing and filing of the Final Order by EPA's Environmental Appeals Board.
40. 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.
41. 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 EPA's Environmental Appeals Board.
42. The penalty, including any stipulated penalties, specified above represents civil penalties assessed by EPA, and shall not be deductible for purposes of federal taxes.
43. 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.

44. 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

9/23/08  
\_\_\_\_\_  
Date

For Respondent:

  
\_\_\_\_\_  
Allen F. Creighton  
General Counsel and Secretary  
FUJIFILM Manufacturing U.S.A., Inc.

9/3/08  
\_\_\_\_\_  
Date