



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

SEP 30 2019

REPLY TO THE ATTENTION OF:

VIA EMAIL @ LYNNLAW360@GMAIL.COM

Battelle Memorial Institute  
c/o Ms. Sarah E. Lynn, Esq.  
Lynn Law Group  
15882 McCown Road  
Newark, Ohio 43055-9174

Re: Consent Agreement and Final Order  
In the Matter of Battelle Memorial Institute, Columbus, Ohio  
Docket No. TSCA-05-2019-0015

Dear Ms. Lynn:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order in resolution of the above case. This document was filed on September 30, 2019 with the Regional Hearing Clerk.

The civil penalty in the amount of \$2,430 is to be paid in the manner described in paragraphs 20-26. Please be certain that the docket number is written on the transmittal letter. Payment is due within 30 calendar days of the filing date.

Thank you for your cooperation in resolving this matter.

Sincerely,

A handwritten signature in blue ink that reads "Kendall Moore".

Kendall Moore  
RCRA Compliance Section 2

Enclosure

cc: Robert Peachey, ORC (peachey.robert@epa.gov)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

In the Matter of:

Battelle Memorial Institute  
Columbus, Ohio,

Respondent.

Docket No. TSCA-05-2019-0015

Proceeding to Assess a Civil Penalty  
Under Section 16(a) of the Toxic  
Substances Control Act, 15 U.S.C.  
§ 2615(a)



Consent Agreement and Final Order

**I. Preliminary Statement**

1. This is an administrative action commenced and concluded under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), and Section 22.1(a)(5), 22.13(b), and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. § 22.1(a)(5), 22.13(b), and 22.18(b)(2) and (3).

2. The Complainant is, by lawful delegation, the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency (EPA), Region 5.

3. The Respondent is Battelle Memorial Institute (Respondent), an Ohio nonprofit corporation with its principal office at 505 King Avenue, Columbus, Ohio 43201.

4. Where the parties agree to settle one or more causes of action before the filing of an administrative complaint, the action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). *See* 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the

adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of this CAFO.

## **II. Jurisdiction and Waiver of Right to Hearing**

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO. Respondent does not admit any liability to EPA arising out of the transactions or occurrences alleged in the CAFO.

8. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CAFO, including its right to request a hearing or petition for judicial review under Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and under 40 C.F.R. § 22.15(c), its right to seek federal judicial review of the CAFO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, any right to contest the allegations in this CAFO, and its right to appeal this CAFO. Respondent also consents to the issuance of this CAFO without further adjudication.

## **III. Statutory and Regulatory Background**

9. The Polychlorinated Biphenyls (PCBs) Disposal and Marking regulations were lawfully promulgated pursuant to Section 6 of TSCA, 15 U.S.C. § 2605. *See* 43 Fed. Reg. 7,150 (Feb. 17, 1978). The PCBs Manufacturing, Processing, Distribution in Commerce and Use Prohibitions (PCB rule) incorporated previous disposal and marking regulations. *See* 44 Fed. Reg. 31,514 (May 31, 1979). The PCB rule was subsequently amended and partially re-codified at 40 C.F.R. Part 761.

10. Under 40 C.F.R. § 761.3, a person is defined, in pertinent part, as any natural or

judicial person including any individual, corporation, partnership, or association.

11. Under 40 C.F.R. § 761.3, PCB bulk product waste is defined as waste derived from manufactured products containing PCBs in a non-liquid state, at any concentration where the concentration at the time of designation for disposal was  $\geq 50$  ppm PCBs. PCB bulk product waste includes, but is not limited to, window caulking.

12. Under 40 C.F.R. § 761.3, disposal is defined as intentionally or accidentally discarding, throwing away, or otherwise completing or terminating the useful life of PCBs and PCB Items. Disposal includes actions related to transporting or destroying PCBs and PCB Items.

13. Any person disposing of PCB bulk product waste must do so in accordance with 40 C.F.R. § 761.62. *See* 40 C.F.R. § 761.50(b)(4)(i). 40 C.F.R. § 761.62 provides for several disposal options, depending on the type of PCB bulk product waste, including performance-based disposal, disposal in solid waste landfills, risk-based disposal, or disposal as daily landfill cover or roadbed.

14. Under 15 U.S.C. § 2614 and 40 C.F.R. § 761.1(d), it is unlawful for any person to fail or refuse to comply with any requirement of 40 C.F.R. Part 761. Any violation of 40 C.F.R. Part 761 may subject the violator to civil penalties under Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

15. The Administrator of EPA may assess a civil penalty of up to \$39,873 per day for each violation of TSCA that occurred after November 2, 2015, where penalties are assessed on or after January 15, 2019, pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, and 40 C.F.R. Part 19.

#### **IV. Alleged Improper Disposal of PCB Bulk Product Waste**

16. At all times relevant to this CAFO, Respondent was a “person” as defined at 40

C.F.R. § 761.3.

17. In July 2017, Respondent shipped 120 large window systems and 64 slot windows to a third party for recycling. The windows were later discovered to have caulking with PCB concentrations ranging from 0 ppm to as high as 15,100 ppm; Respondent estimates that there were 425 kilograms of caulking. According to information provided to Battelle, all Respondent's window materials, including the caulking, were shipped to aluminum smelters. Respondent's attempts to recover the windows and PCB caulking were unsuccessful.

18. Respondent's actions described in Paragraph 17 resulted in the disposal of PCB bulk product waste as those terms are defined in 40 C.F.R. § 761.3.

19. It is alleged that Respondent's disposal of PCB bulk product waste did not comply with 40 C.F.R. § 761.62 and that Respondent's improper disposal of PCB bulk product waste constitutes a violation of 40 C.F.R. § 761.50(b)(4)(i) and 761.62, as well as Section 15 of TSCA, 15 U.S.C. § 2614.

#### V. Civil Penalty

20. Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires the Administrator to take into account the nature, circumstances, extent, and gravity of the violations and, with respect to the violator, ability to pay, effect on ability to continue in business, any history of prior such violations, the degree of culpability, and such other matters as justice may require, when determining the amount of civil penalty for violations of TSCA.

21. Based on an evaluation of the facts alleged in this CAFO, the factors in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), and Respondent's voluntary disclosure, good faith and cooperation in resolving this matter, including steps that Respondent has agreed to take to complete a supplemental environmental project costing at least \$120,000.00 (described at

Paragraphs 27 to 46, below), Complainant has determined that an appropriate civil penalty to settle this action is \$2,430.00.

22. Within 30 days after the effective date of this CAFO, Respondent must pay a \$2,430.00 civil penalty for the TSCA violations alleged herein. Respondent must pay the penalty by sending by first class mail a cashier's or certified check, payable to the "Treasurer, United States of America," to:

U.S. EPA  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, Missouri 63197-9000

The check must note "In the Matter of Battelle Memorial Institute" and the docket number of this CAFO.

23. A transmittal letter stating Respondent's name, complete address, the case title, and the case docket number must accompany the payment. Respondent must send a copy of the transmittal letter to:

Regional Hearing Clerk (E-19J)  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, Illinois 60604

Kendall Moore (ECR-17J)  
RCRA Compliance Section 2  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, Illinois 60604

Robert M. Peachey (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, Illinois 60604

24. This civil penalty is not deductible for federal tax purposes.

25. If Respondent does not pay the civil penalty timely, EPA may refer the matter to the Attorney General, who will recover such amount by action in the appropriate United States district court under Section 16(a)(4) of TSCA, 15 U.S.C. § 2615(a)(4). The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

26. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a 6 percent per year penalty on any principal amount 90 days past due.

#### **VI. Supplemental Environmental Project**

27. Respondent shall implement a supplemental environmental project (SEP) at its Columbus, Ohio campus that consists of an assessment to identify and address the potential impact on indoor air quality that may be linked to the potential presence of PCB-containing building materials. The SEP shall be completed in accordance with the schedule set forth in Paragraph 30 after the effective date of this CAFO. For the SEP, Respondent shall survey the 16 buildings at the Columbus campus constructed between 1950 and 1979, conducting targeted air monitoring to identify and address the building occupants' risk of exposure to unsafe PCB levels in indoor air posed by the potential presence of in-place, undisturbed PCB-containing materials. *See* Att. A (List of Buildings (16) Included in SEP). The survey shall include all buildings fitting the identified profile, regardless of whether construction or renovation is planned.

28. Respondent must spend at least \$120,000.00 to fund the SEP described in this

Section.

29. Respondent is responsible for the satisfactory completion of the SEP in accordance with the requirements of this CAFO. Respondent has initiated a formal procurement process to select an industrial hygiene consultant to plan and implement the SEP.

30. The SEP shall be implemented according to the following schedule:

- a. Within 60 days of the effective date of this CAFO, Respondent, through its consultant, shall submit, for EPA review and approval, a proposal for implementing the SEP described in this Section. In the proposal, Respondent, through its consultant, shall demonstrate that its sampling and analytical methods can achieve a sample reporting limit of at least 200 ng/m<sup>3</sup> for each PCB Aroclor reported, consistent with EPA Method TO-10A.
- b. Within 120 days of the date that EPA approves the proposal described in Paragraph 30.a, Respondent, through its consultant, shall collect a total of at least 130 samples from the buildings described in Paragraph 27 (with the selection criteria for specific sampling locations based on number and location of windows and the HVAC configuration for each building; at least two air samples shall be collected from each floor of the targeted buildings) and analyze the samples for PCBs following EPA Method TO-10A.
- c. Within 60 days of the date that the sampling and analysis described in Paragraph 30.b is complete, Respondent, through its consultant, shall conduct follow-up sampling in: (i) 25% of the locations tested under Paragraph 30.a (focusing on office areas) in order to assure that seasonal changes do not materially impact potential indoor air exposure levels; and (ii) any location tested under Paragraph 30.a that exceeded 1,000 ng/m<sup>3</sup> total PCB Aroclors (unless such location has been addressed pursuant to Paragraph 32).
- d. SEP completion report to be completed within 30 days of the date that Respondent has received all sampling results from the second phase of testing described in Paragraph 30.c. *See* Paragraph 33.

31. For all sampling conducted under this Section, the samples shall be collected at a height of approximately 5 to 6 feet above the floor (the “breathing space”), and each building shall have its HVAC system in the normal operating mode during sampling with bay/dock doors closed.



32. For any sampling result that exceeds 1,000 ng/m<sup>3</sup> total PCB Aroclors, Respondent shall notify EPA using the contact information listed in Paragraph 35 within 7 days of receiving the sampling result. No later than 60 days after notifying EPA (or as otherwise directed by the official listed in Paragraph 35), Respondent shall submit a proposal to identify probable PCB sources in the building and to dispose of, or properly address, those PCBs or PCB Items in accordance with 40 C.F.R. § 761.62.

33. Within 30 days after the date that Respondent has received all sampling results from the second phase of testing described in Paragraph 30.c, Respondent shall submit a SEP completion report to EPA. This report must contain the following information:

- a. a detailed description of the SEP as implemented;
- b. a description of any problems encountered in completing the SEP and the solutions thereto;
- c. an itemized list of all eligible SEP costs expended;
- d. certification that the SEP has been fully implemented pursuant to the provisions of this CAFO; and
- e. a description of the environmental and public health benefits resulting from implementation of the SEP (with a quantification of the benefits and pollutant reductions, if feasible).

34. EPA may require information in addition to that described in the preceding Paragraph, in order to evaluate Respondent's completion report provided that any additional information requested by EPA shall not exceed the scope of this CAFO and the SEP outlined herein.

35. All notifications, submissions, or communications required by this Section shall be made by email to Kendall Moore of EPA Region 5's RCRA Compliance Section 2 (moore.kendall@epa.gov) and Peter Ramanauskas of EPA Region 5's Corrective Action Section

3 (ramanauskas.peter@epa.gov). (If email is not practicable, Respondent may use the addresses listed in Paragraph 23.)

36. In each report that Respondent submits in completing the SEP, it must certify that the report is true and complete by including the following statement signed by one of its officers:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

37. With regard to the SEP, Respondent certifies the truth and accuracy of each of the following:

- a. that all cost information provided to EPA in connection with EPA's approval of the SEP is complete and accurate and that Respondent in good faith estimates that the cost to implement the SEP is at least \$120,000.00.
- b. that, as of the date of executing this CAFO, Respondent is not required to perform or develop the SEP by any federal, state, or local law or regulation and is not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;
- c. that the SEP is not a project that Respondent was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this CAFO;
- d. that Respondent has not received and will not receive credit for the SEP in any other enforcement action;
- e. that Respondent will not receive any reimbursement for any portion of the SEP from any other person; and
- f. that Respondent is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in Paragraph 27; and (ii) Respondent has inquired of the SEP consultant whether it is a party to an open federal financial assistance transaction that is funding or could fund the same activity as the SEP and has been informed by the consultant that it is not a party to such a transaction. For purposes of these certifications, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-

guaranteed loan guarantee, or other mechanism for providing federal financial assistance whose performance period has not yet expired.

38. After receiving the SEP completion report described in Paragraph 33, EPA shall notify Respondent in writing that:

- a. Respondent has completed the SEP and the SEP completion report;
- b. There are deficiencies in the SEP as completed or in the SEP completion report, and EPA will give Respondent 30 days to correct the deficiencies; or
- c. Respondent has not satisfactorily completed the SEP and/or the SEP completion report, and EPA will seek stipulated penalties under Paragraph 40.

39. If EPA exercises option b in Paragraph 38, Respondent may object in writing to the deficiency notice within 10 days of receiving the notice. The parties will have 30 days from EPA's receipt of Respondent's objection to reach an agreement. If the parties cannot reach an agreement, EPA will give Respondent a written decision on its objection. Respondent will comply with any requirement that EPA imposes in its decision, so long as such requirement does not exceed the scope of this CAFO. If Respondent does not complete the SEP as required by EPA's decision, Respondent will pay stipulated penalties to the United States under Paragraph 40.

40. If Respondent violates any requirement of this CAFO relating to the SEP, Respondent must pay stipulated penalties to the United States as follows:

- a. Except as provided in subparagraph b. below, if Respondent does not complete the SEP satisfactorily according to the requirements of this CAFO, including the schedules in Paragraph 30, Respondent must pay a civil penalty of \$120,001.00 (in addition to the civil penalty at Paragraph 22).
- b. If Respondent does not complete the SEP satisfactorily according to the requirements of this CAFO, but EPA determines that Respondent made good faith and timely efforts to complete the SEP and certifies, with supporting documents, that it has spent at least 90 percent of the amount

set forth in Paragraph 28, Respondent will not be liable for any stipulated penalty under subparagraph a. above.

- c. If Respondent completes the SEP satisfactorily according to the requirements of this CAFO, but spends less than 90 percent of the amount set forth in Paragraph 28, Respondent must pay a civil penalty (in addition to the civil penalty at Paragraph 22) which is the difference between 90 percent of the amount set forth in Paragraph 28 (\$108,000) and the amount that Respondent spent in completing the SEP.
- d. If Respondent fails to comply with the schedules in Paragraph 30 for implementing the SEP, or fails to submit the SEP completion report on time as required by Paragraph 33, Respondent must pay stipulated penalties for each failure to meet an applicable milestone, as follows:

<u>Penalty per violation per day</u>	<u>Period of violation</u>
\$0	1 <sup>st</sup> through 14 <sup>th</sup> day
\$500	15 <sup>th</sup> through 30 <sup>th</sup> day
\$1,000	31 <sup>st</sup> day and beyond

These penalties will accrue from the date Respondent was required to meet each milestone until Respondent achieves compliance with the milestone.

41. EPA’s determinations of whether Respondent completed the SEP satisfactorily and whether Respondent made good faith and timely efforts to complete the SEP will bind Respondent.

42. Respondent must pay any stipulated penalties under Paragraph 40 within 15 days of receiving EPA’s written demand for the penalties. Respondent will use the method of payment specified in Paragraph 22 and will pay interest, handling charges, and nonpayment penalties on any overdue amounts as provided in Paragraph 26.

43. Any public statement that Respondent makes referring to the SEP must include the following language: “Battelle Memorial Institute undertook this project under the settlement of the United States Environmental Protection Agency’s enforcement action against Battelle Memorial Institute for alleged violations of the Toxic Substances Control Act.”

44. For federal income tax purposes, Respondent will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

45. If an event occurs which causes or may cause a delay in completing the SEP as required by this CAFO:

- a. Respondent must notify EPA in writing within 10 days after learning of the event which caused or may cause a delay in completing the SEP. The notice must describe the anticipated length of the delay, its cause(s), Respondent's past and proposed actions to prevent or minimize the delay and a schedule to carry out those actions. Respondent must take all reasonable actions to avoid or minimize any delay. If Respondent fails to notify EPA according to this paragraph, Respondent will not receive an extension of time to complete the SEP.
- b. If the parties agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, the parties will stipulate to an extension of time no longer than the period of delay.
- c. If EPA does not agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, EPA will notify Respondent in writing of its decision, and any delays in completing the SEP will not be excused.
- d. Respondent has the burden of proving that circumstances beyond its control caused or may cause a delay in completing the SEP. Increased costs for completing the SEP will not be a basis for an extension of time under subparagraph b. above. Delay in achieving an interim step will not necessarily justify or excuse delay in achieving subsequent steps.

46. Any requirement of the SEP may be modified in writing by mutual agreement of the parties.

#### **General Provisions**

47. Pursuant to 40 C.F.R. § 22.5(b)(2), the parties consent to service of this CAFO by email at the following addresses: peachey.robert@epa.gov (for Complainant) and lynnlaw360@gmail.com (for Respondent). See 40 C.F.R. § 22.5-6. The parties waive their right to service by the methods specified in 40 C.F.R. § 22.6.

48. Respondent's full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties for the violations alleged in this CAFO.

49. This CAFO does not affect the rights of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

50. This CAFO does not affect Respondent's responsibility to comply with TSCA and other applicable federal, state and local laws.

51. Compliance with this CAFO shall not be a defense to any action subsequently commenced pursuant to federal laws and regulations administered by the EPA.

52. Respondent certifies that, to the best of its knowledge, it is now in compliance with TSCA and its implementing regulations.

53. This CAFO is a "final order" for purposes of 40 C.F.R. § 22.31.

54. The CAFO shall be binding upon Respondent and Respondent's officers, directors, agents, servants, employees, and successors or assigns.

55. If Respondent fails to comply with this CAFO, Respondent waives any rights it may possess in law or equity to challenge the authority of EPA to bring a civil action in the appropriate United States District Court to compel compliance with this CAFO and/or seek an additional penalty for non-compliance with the CAFO.

56. Each party shall bear its own costs and attorney's fees in connection with this CAFO.

57. Each person signing this CAFO certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

58. The effective date of this CAFO is the date on which it is filed with the Regional Hearing Clerk, Region 5.

59. This CAFO shall terminate upon payment of the civil penalty in accordance with Paragraph 22 and receipt of notification from EPA that Respondent has completed the SEP and the SEP completion report pursuant to Paragraph 38.a.

**Consent Agreement and Final Order  
In the Matter of: Battelle Memorial Institute  
Docket No. TSCA-05-2019-0015**

**Battelle Memorial Institute, Respondent**

8/27/19

Date



Russell P. Austin  
Senior Vice President, General Counsel and  
Secretary  
Battelle Memorial Institute

**United States Environmental Protection Agency, Complainant**

9/20/2019

Date



Michael D. Harris  
Acting Director  
Enforcement and Compliance Assurance Division  
U.S. Environmental Protection Agency, Region 5

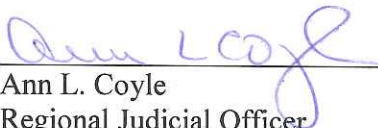


**Consent Agreement and Final Order**  
**In the Matter of: Battelle Memorial Institute**  
**Docket No. TSCA-05-2019-0015**

**Final Order**

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. § 22.18 and 22.31. IT IS SO ORDERED.

9/26/19  
Date

  
Ann L. Coyle  
Regional Judicial Officer  
U.S. Environmental Protection Agency  
Region 5

**Consent Agreement and Final Order  
In the Matter of: Battelle Memorial Institute  
Docket No. TSCA-05-2019-0015**

**Attachment A**

**List of Buildings (16) Included in SEP**

- Building A
- Building 1
- Building 2
- Building 3
- Building 5
- Building 6
- Building 6A
- Building 7
- Building 7A
- Building 7C
- Building 9
- Building 10
- Building 11N
- Building 11S
- Building 12
- Building 13

**Consent Agreement and Final Order**  
**In the Matter of: Battelle Memorial Institute**  
**Docket No. TSCA-05-2019-0015**

**CERTIFICATE OF SERVICE**

I certify that I served a true and correct copy of the foregoing Consent Agreement and Final Order, docket number TSCA 05 2019 0015, which was filed on 9/30/2019, in the following manner to the addresses:

Copy by email to Respondent: Sarah E. Lynn  
lynnlaw360@gmail.com

Copy by email to attorney for Complainant: Robert M. Peachey  
peachey.robert@epa.gov

Copy by email to enforcement officer, U.S. EPA, Region 5: Kendall Moore  
moore.kendall@epa.gov

Copy by email to Regional Judicial Officer, U.S. EPA, Region 5: Ann Coyle  
coyle.ann@epa.gov

  
LaDawn Whitehead  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 5