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27 August 2010

Regional Hearing Clerk (E-19J)
United States Environmental Protection Agency – Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

VIA FEDEX

Re: Docket No. TSCA-05-2010-0013

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Dear Madam or Sir:

Enclosed herein, please find one (1) original and one (1) copy of Respondent's Response to Complainant's Motion to File First Amended Complaint. Copies of such filing have been served on all parties pursuant to 40 CFR 22.16 and 40 CFR 22.5.

Respectfully,



Kevin M. Tierney, Esq.

cc: Hanson's Window and Construction, Inc.
Enclosure (2)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

COPY

In the Matter of:)
)
Hanson's Window and Construction, Inc.) Docket No. TSCA-05-2010-0013
_____)

Respondent's Response to Complainant's Motion to File First Amended Complaint

In accordance with 40 C.F.R. §22.16(b), Respondent files this, its Response to Complainant's Motion to File First Amended Complaint. Respondent, Hanson's Window and Construction, Inc., is asking the Presiding Officer to DENY Complainant's request to file a first amended complaint.

In its Motion to File First Amended Complaint, Complainant cites a number of cases to support the proposition that administrative pleadings are liberally construed and easily amended. Respondent does not generally disagree with this proposition.

Complainant then cites Foman v. Davis for the proposition that in the absence of any apparent or declared reason -- such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment - the leave sought should, as the rules require, be "freely given." Respondent does not generally disagree that this is the proper legal standard or that previous Environmental Appeals Board decisions have relied on the Federal Rules of Civil Procedure to decide such issues. As to the

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balance of Complainant's motion, however, and for the reasons set forth below, Respondent could not disagree more with Complainant.

1. Respondent Will Be Prejudiced by the Granting of Complainant's Motion to File First Amended Complaint

Complainant cites all the factors that must be considered before granting a motion to amend -- undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. While technically correct, in this case, as in the vast majority of such cases, the most significant consideration is prejudice to the Respondent. Respondent respectfully submits that this is what lead the Ninth Circuit Court of Appeals to state that "[t]he crucial factor in determining whether leave to amend should be granted [under Rule 15(b)] is the resulting prejudice to the opposing party." Jordan v. County of Los Angeles, 669 F.2d 1311, 1324 (1982) (in which plaintiff sought leave to amend its complaint to add another claim).

In the instant matter, Respondent will indeed be prejudiced by the granting of Complainant's Motion to File First Amended Complaint. Specifically, the D.C. Circuit Court of Appeals has held that the general five-year statute of limitations under 28 U.S.C. § 2462 should be applied to administrative cases such as the instant case. 3M v. Browner, 17 F.3d 1453 (1994). The text of 28 U.S.C. § 2462 is as follows:

§ 2462. Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

As Complainant explicitly states in its Response to Respondent's Motion to Dismiss Complaint and in its Motion to File First Amended Complaint, the allegations in the complaint stem from conduct in May 2005 through December 2005. Accordingly, given the applicability of 28 U.S.C. § 2462 the instant matter, Complainant was under significant time pressure to file its complaint -- otherwise Complainant would need to excise from its complaint many of the earliest allegations.

Respondent respectfully submits that no "sympathy" in this regard should be extended to Complainant as Complainant's own pleading notes that Complainant issued the original subpoena duces tecum in this matter to Respondent on December 23, 2005. After issuing the subpoena, meeting with and discussing this matter numerous times with Respondent, and rebuffing Respondent's efforts to amicably resolve this matter, Complainant did nothing.

In fact, in September 2009, Respondent received a letter from Complainant acknowledging that Complainant had not acted for more than two years. Specifically, Complainant's September 28, 2009, letter (a true and complete copy of which is attached herein as Exhibit A) stated the following:

As I mentioned in my voice message today, the U.S. Environmental Protection Agency is reviewing our open Section 406(b) of the Toxic Substances Control

Act (TSCA) cases. We would like to confer with you about Hansons' Windows and Siding, Co., Inc. (Hansons) since we have not spoken since 2007...

In essence, Complainant issued a subpoena duces tecum in 2005, "sat" on the matter for more than two years, and then when it realized that the five-year statutory period to file was rapidly approaching, filed an error-filled complaint that failed to follow the express requirements of 40 C.F.R. §22.14(a)(2) and, consequently, did not give the Respondent fair notice of the charges against it.

When Respondent "cried foul", Complainant offered a "mea culpa", advised Respondent and this Court (through little more than repeated conclusory statements in both its Response to Respondent's Motion to Dismiss Complaint and its Motion to File First Amended Complaint) that no harm was done to Respondent, and that Complainant should be permitted to "fix" its mistakes.

Such a request must be rejected. Respondent will unequivocally be prejudiced by the granting of the Motion to Amend. 28 U.S.C. § 2462 applies to the instant matter, many of the allegations stem from conduct in 2005, and Complainant is solely to blame for finding itself in this situation. Moreover, as noted by Respondent in its Reply to Complainant's Response to Respondent's Motion to Dismiss EPA's Administrative Complaint, Complainant is not some misguided plaintiff seeking to understand an intricate law and incorporate same into its pleading, which Respondent respectfully submits is the primary reason why the "Federal Rules [of Civil Procedure] reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive as to the outcome..." Foman v. Davis, 371 U.S. 178, 181-82 (1962) (quoting

Conley v. Gibson, 355 U.S. 41, 48 (1957)). Rather, Complainant is the *author* of, and the *chief enforcement arm* of the United States of America for, 40 C.F.R. Part 745, Subpart E!

2. Existing Case Law Does Not Support Complainant's Position

In its motion, Plaintiff cites In the Matter of City of West Chicago, 2000 WL 356387 (February 25, 2000), Docket No. CWA-5-99-013, In the Matter of Bug Bam Product, LLC, 2010 WL 149296 (January 7, 2010), Doceket No. FIFRA-09-2009-0013, and In the Matter of Asbestos Specialists, Inc., TSCA Appeal 92-3, 4 EAD 819 (EAB October 6, 1993) for the proposition that the Environmental Appeals Board has held that a complainant should be given leave to freely amend a complaint in an EPA proceeding in accord with the liberal policy of the Federal Rules of Civil Procedure (FRCP) 15(a).

In In the Matter of City of West Chicago ("City of West Chicago"), the Complainant sought to amend the complaint to reduce the number of alleged violations and to correspondingly reduce the proposed penalty. In In the Matter of Bug Bam Product, LLC ("Bug Bam Product"), the Complainant sought to amend the complaint to add a second respondent, increase the proposed penalty, and add additional allegations. Respondent respectfully submits that the amendments sought in City of West Chicago and Bug Bam Product are the kinds of liberal amendments that are contemplated by Federal Rules of Civil Procedure and administrative rules following same. However, the amendment sought by Complainant in the instant case bears no resemblance to City of West Chicago or Bug Bam Product; rather, Complainant seeks to change the rules and regulations under which Complainant is bringing this enforcement action.

Respondent respectfully submits that Complainant's attempted course of action has already been addressed in In the Matter of Asbestos Specialists, Inc.

In the Matter of Asbestos Specialists, Inc. ("Asbestos Specialists, Inc.") was an Environmental Appeals Board decision involving appeal of an order of the Presiding Officer dismissing *with prejudice* an EPA complaint against a respondent for an alleged violation of the Asbestos Hazard Emergency Response Act.

In Asbestos Specialists, Inc., the respondent ultimately filed a motion to dismiss *with prejudice*. In granting the respondent's motion to dismiss, the Presiding Officer expressly relied, in part, on 40 C.F.R. §22.14(a)(2), which states the following:

(a) Content of complaint. Each complaint shall include:

(2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;

The Presiding Officer stated that the EPA's complaint "failed miserably" in this respect. Specifically, the Presiding Officer noted the following:

"the citations to the regulations and statute, for example, were replete with errors: the complaint cites to a requirement contained in 40 CFR § 763.90(i)(5)(i), but § 763.90(i) does not have a subsection (5)(i); the complaint alleges that Respondent is in violation of TSCA section 15(3)(d), but TSCA section 15(3) does not have a subsection . . .

EPA subsequently appealed the Presiding Officer's ruling and in such appeal, EPA asked for one of the following alternative forms of relief: (i) a denial of Respondent's motion to dismiss, (ii) a dismissal of its complaint without prejudice to re-file it, or (iii) an opportunity to amend its complaint. In upholding the Presiding Officers decision to grant the respondent's

motion to dismiss (and implicitly rejecting the EPA's request to afford it an opportunity to amend its complaint), the Environmental Appeals Board stated the following:

“[W]e believe that adequate grounds existed for the presiding [officer](sic) to dismiss the complaint pursuant to § 22.20(a), which provides that the presiding officer, “upon motion of the respondent, may at any time dismiss an action on the basis of grounds which show no right to relief on the part of the complainant.” [EPA's] complaint is defective in that it does not give the Respondent fair notice of the charges against it... Therefore, no error *per se* resulted from the complaint's dismissal.¹

Respondent, Hanson's Window and Construction, Inc., readily acknowledges that while the Environmental Appeals Board in Asbestos Specialists, Inc., affirmed the dismissal of the complaint, it reversed the decision of the Presiding Officer insofar as the Presiding Officer dismissed the complaint *with prejudice*. Instead, the Environmental Appeals Board remanded the case so that EPA could file a new complaint.

Respondent notes that it is **not** seeking dismissal of Complainant's complaint *with prejudice*—a legal position that Respondent submits would be untenable and was deliberately not sought. Rather, if Respondent's Motion to Dismiss the EPA's Administrative Complaint is granted, Complainant will have every right to file a new complaint—the very same right afforded to Complainant by the Environmental Appeals Board in Asbestos Specialists, Inc.

For the reasons set forth above, Respondent respectfully submits that Asbestos Specialists, Inc., is a “road map” for deciding to grant Respondent's Motion to Dismiss EPA's

¹ Respondent forthrightly notes that the Presiding Officer's ruling was also predicated, in part, on what the Environmental Appeals Board ultimately decided was a faulty reading of § 22.16(b). However, despite this faulty reading, the Environmental Appeals Board upheld the Presiding Officer's Ruling and noted the following in advising that the faulty reading did not ultimately affect either the Presiding Officer or the Environmental Appeals Board's decisions: “[t]here is little doubt that the presiding officer saw scant merit to the complaint even though his reasons for dismissing it were built upon the faulty premise of § 22.16(b).”


Administrative Complaint and deny Complainant's Motion to File First Amended Complaint. As in Asbestos Specialists, Inc., the instant complaint fails to follow the express requirements of 40 C.F.R. §22.14(a)(2) in that the complaint does not include specific reference to each provision of the Act, implementing regulations, permit, or order which respondent is alleged to have violated. Rather, same as in Asbestos Specialists, Inc., the citations to the regulations and statute are replete with errors.

In failing to properly draft its complaint, Complainant failed to follow the express requirements of 40 C.F.R. §22.14(a)(2) and, consequently, did not give the Respondent fair notice of the charges against it. Complainant's quick "mea culpa" (as evidenced by its Response and its Motion to File the Amended Complaint) is admirable, but warrants nothing more than admiration given a fatally flawed complaint.

For the reasons stated herein, Respondent is asking the Presiding Officer to DENY Respondent's Complainant's Motion to File First Amended Complaint.

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Respectfully submitted for
Hanson's Window and Construction, Inc.

By: 
Johanson Berenson LLP
D.S. Berenson, Esq.
Kevin M. Tierney, Esq.
1146 Walker Road, Suite C
Great Falls, Virginia 22066
Telephone Number: (703) 759-1055
Facsimile Number: (703) 759-1051

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2010, the original and a true copy of the foregoing Respondent's Response to Complainant's Motion to File First Amended Complaint was filed with:


Regional Hearing Clerk (E-19J)
United States Environmental Protection Agency – Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

and mailed a true copy of the foregoing Respondent's Response to Complainant's Motion to File First Amended Complaint to:

Chief Judge Susan L. Biro
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington D.C. 20460-2001

Marcy A. Toney
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Chicago, Illinois 60604

Mary McAuliffe
Associate Regional Counsel
United States Environmental Protection Agency - Region 5
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Chicago, Illinois 60604-3590


Kevin M. Tierney, Esq.

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Exhibit A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

REPLY TO THE ATTENTION OF:

FOR PURPOSES OF SETTLEMENT ONLY
VIA ELECTRONIC AND U.S. MAIL

September 28, 2009

D.S. Berenson, Esquire
Johanson Berenson LLP
1146 Walker Road, Suite C
Falls, Virginia 22066
DSB@JohansonBerenson.com

Re: Hansons' Windows and Siding Co., Inc.

Dear Mr. Berenson:

As I mentioned in my voicemail message today, the U.S. Environmental Protection Agency is reviewing our open Section 406(b) of the Toxic Substances Control Act (TSCA) cases. We would like to confer with you about Hansons' Windows and Siding Co., Inc. (Hansons) since we have not spoken since 2007. Back in February 2007, Hansons submitted its position and offer to resolve violations of TSCA Section 406(b). At that time, EPA conferred with the State. We concluded that Hansons' offer at the time was not adequate, perhaps because the company was not convinced that EPA and the State were prepared to litigate the violations.

Around that same time, we began working on other cases, including another case in the State of Michigan involving violations of TSCA Section 406(b). That matter was recently resolved in the form of a federal consent decree recently entered in the Eastern District of Michigan. We are now turning to open cases to evaluate whether the companies wish to litigate or resolve the TSCA Section 406(b) violations.

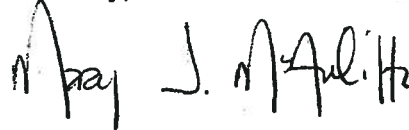
We wanted to confer with you to see if Hansons is interested in a prefiling resolution. If so, we would like to explore a potential federal/state settlement. For that, we would ask Hansons to execute a tolling agreement to toll the applicable statute of limitations while we discuss settlement.

If Hansons is not amenable to executing a tolling agreement, we will prepare this matter for litigation. While we will remain open to a settlement resolution, we will obviously be on the court's schedule at that time.

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If you wish to discuss this further, please feel free to call me at (312) 886-6237, or my co-counsel Mark Palermo at (312) 886-6082. Thank you for your attention to this matter.

Sincerely,



Mary T. McAuliffe
Associate Regional Counsel

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