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25 August 2010

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

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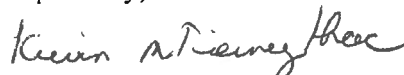
VIA FEDEX

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

Dear Madam or Sir:

Enclosed herein, please find one (1) original and one (1) copy of Respondent's Reply to Complainant's Response to Respondent's Motion to Dismiss EPA's Administrative Complaint. Copies of such filing has 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

RECEIVED
AUG 26 2010

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of:

Hanson's Window and Construction, Inc.

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Docket No. TSCA-05-2010-0013

**Respondent's Reply to Complainant's Response to
Respondent's Motion to Dismiss EPA's Administrative Complaint**

In accordance with 40 C.F.R. §22.16(b), Respondent files this, its Reply to Complainant's Response to Respondent's Motion to Dismiss EPA's Administrative Complaint. Respondent, Hanson's Window and Construction, Inc., asks the Presiding Officer to GRANT Respondent's Motion to Dismiss EPA's Administrative Complaint.

In its Response to Respondent's Motion to Dismiss EPA's Administrative Complaint, Complainant, the U.S. Environmental Protection Agency, states that while the Complainant erred in drafting its complaint against Respondent, the Complainant has established a prima facie case or on other grounds shown a right to relief on the part of Complainant.

In its Response, Complainant cites In the Matter of Asbestos Specialists, Inc., TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB, Oct. 6, 1993) for the proposition that motions to dismiss under §22.20(a) are analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Respondent does not disagree with this proposition, but Respondent does strongly disagree that Complainant has established a prima facie case or on other grounds has shown a right to relief on the part of Complainant.

In the Matter of Asbestos Specialists, Inc. (hereinafter “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 Officer’s 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.”

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 even Respondent submits is untenable. 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 Administrative Complaint. Same as in Asbestos Specialists, Inc., Complainant’s complaint fails miserably to follow the express requirements of 40 C.F.R. §22.14(a)(2) in that the complaint did not include specific reference to each provision of the Act, implementing regulations, permit, or order which respondent is alleged to have violated. Rather, exactly as in Asbestos Specialists, Inc., the citations to the regulations and statute are replete with errors.

Respondent additionally notes that 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!

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 its fatally flawed complaint.

For the reasons stated herein and stated in Respondent’s Motion to Dismiss EPA’s Administrative Complaint, Respondent is asking the Presiding Officer to GRANT Respondent’s Motion to Dismiss EPA’s Administrative Complaint.

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

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2010, the original and a true copy of the foregoing Respondent's Reply to Complainant's Response to Respondent's Motion to Dismiss EPA's Administrative Complaint was filed with:

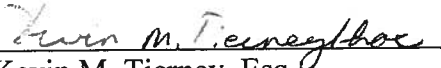
Regional Hearing Clerk (E-19J)
United States Environmental Protection Agency – Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

and mailed a true copy of the foregoing Respondent's Reply to Complainant's Response to Respondent's Motion to Dismiss EPA's Administrative Complaint to:

Chief Judge Susan L. Biro
Office of Administrative Law Judges
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