

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103

OVERNIGHT MAIL COURIER
DIRECT SIGNATURE CONFIRMATION REQUESTED

John V. Kane, IV
Route 3, Box 246B
Bridgeport, WV 26330

21 JUN 2010

Re: Toxic Substances Control Act
Administrative Complaint,
and Notice of Opportunity for Hearing
In the Matter of John V. Kane
Docket No. TSCA-03-2010-0323

Dear Mr. Kane:

Enclosed please find an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") concerning alleged violations of Section 409 of Toxic Substances Control Act, 15 U.S.C. § 2689, the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA"), 42 U.S.C. §§ 4851 *et seq.*, and the federal regulations promulgated thereunder, set forth in 40 C.F.R. Part 745, Subpart F (also known as the "Disclosure Rule"), in relation to a written residential lease agreement for the property located at 501 S. 5th Street, Clarksburg, West Virginia ("Target Housing").

The Complaint should be read and analyzed carefully to determine the alternatives available to you in responding to the alleged violations.

You must file an Answer to this Complaint within thirty (30) days of its receipt. The Answer must specifically respond to each of the allegations in the Complaint. Failure to respond to this Complaint by specific Answer within thirty (30) days of your receipt of this document will constitute an admission of the allegations made in the Complaint. Failure to answer may result in the filing of a Motion for a Default Order and the possible issuance of a Default Order imposing the penalty proposed in the Complaint without further proceedings.

In your Answer, you may choose to request a hearing to contest any matter set forth in the Complaint. Whether or not a hearing is requested, you may request an informal settlement conference to discuss resolution of this case in your Answer or you may contact the attorney assigned to this case.

EPA has determined that your company may be considered a "small business" under the Small Business Regulatory Enforcement and Fairness Act (SBREFA). Please see the "Information Sheet for Small Business Resources" enclosed with this letter. This enclosure provides information on contacting the SBREFA Ombudsman to comment on federal enforcement and compliance activities and also provides information on compliance assistance. As noted in the enclosure, any decision to participate in such program or to seek compliance assistance does not relieve you of your obligation to respond in a timely manner to an EPA request or other enforcement action, create any new rights or defenses under law, and will not affect EPA's decision to pursue this enforcement action. To preserve your legal rights, you must comply with all rules governing the administrative enforcement process. The Ombudsman and fairness boards do not participate in the resolution of EPA's enforcement action.

Should you have any questions or if you would like to request a settlement conference, please call Louis F. Ramalho, Senior Assistant Regional Counsel at (215) 814-2681.

Sincerely,



Abraham Ferdas, Director
Land and Chemicals Division

Enclosures

cc: Kyle Chelius (3LC61)

**UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION III**

In the Matter of: :

John V. Kane, IV :
Route 3, Box 246B :
Bridgeport, WV 26330 :

Respondent, :

501 S. 5th Street :
Clarksburg, WV 26301 :

Docket No. TSCA-03-2010-0323

Target Housing. :

**ADMINISTRATIVE COMPLAINT AND NOTICE OF OPPORTUNITY
 FOR A HEARING ISSUED PURSUANT TO SECTION 16(a) OF THE TOXIC
 SUBSTANCES CONTROL ACT (“TSCA”), 15 U.S.C. § 2615(a)**

This Administrative Complaint and Notice of Opportunity for a Hearing (“Complaint”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA” or the “Agency”) by Section 16(a) of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2615(a), the federal regulations set forth at 40 C.F.R. Part 745, Subpart F, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Consolidated Rules of Practice”), a copy of which is enclosed with this Complaint. The Administrator has delegated this authority, under TSCA, to the Regional Administrators and this authority has been further delegated in U.S. EPA Region III to, *inter alia*, the Director of the Land and Chemicals Division (“Complainant”), pursuant to EPA Region III Delegation No. 12-2-A.

The Respondent in this action is John V. Kane, IV, individually. By issuing this Complaint, Complainant alleges violations by the Respondent of Section 409 of TSCA, 15 U.S.C. § 2689, the Residential Lead-Based Paint Hazard Reduction Act of 1992 (“RLBPHRA”), 42 U.S.C. §§ 4851 *et seq.*, and the federal regulations promulgated thereunder, set forth in 40 C.F.R. Part 745, Subpart F (also known as the “Disclosure Rule”), in relation to one (1) written lease agreement associated with one (1) target housing unit as described more fully in this Complaint below.

Failure to comply with Section 1018 of the RLBPHRA, 42 U.S.C. § 4852d, or with any rule or regulation issued thereunder, including, but not limited to, 40 C.F.R. Part 745, Subpart F, constitutes a violation of Section 409 of TSCA, 15 U.S.C. § 2689. Pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, violations of Section 409 of TSCA, 15 U.S.C. § 2689, are subject to the assessment of civil and/or criminal penalties.

I In support of the Complaint, Complainant alleges the following:

I. JURISDICTION

1. EPA and the Office of Administrative Law Judges have jurisdiction over the above-captioned matter pursuant to Sections 16 and 409 of TSCA, 15 U.S.C. §§ 2615 and 2689; Section 1018 of the RLBPHRA, 42 U.S.C. § 4852d; 40 C.F.R. Part 745, Subpart F; and 40 C.F.R. §§ 22.1(a)(5) and 22.4.

II. DEFINITIONS AND REGULATORY REQUIREMENTS

2. Pursuant to 40 C.F.R. § 745.103, the term “agent” means, with certain exceptions, any party who enters into a contract with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing.

3. Pursuant to 40 C.F.R. § 745.103, the term “lead-based paint” means paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter [mg/cm²] or 0.5 percent by weight.
4. Pursuant to 40 C.F.R. § 745.103, the term “lead-based paint hazard” means any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the appropriate Federal agency.
5. Pursuant to 40 C.F.R. § 745.107(a)(1), the term “lead hazard information pamphlet” includes the EPA document entitled *Protect Your Family From Lead in Your Home* (EPA #747-K-94-001) or an equivalent pamphlet approved for use in a state by EPA.
6. Pursuant to 40 C.F.R. § 745.103, the term “Lessee” means any entity that enters into an agreement to lease, rent, or sublease target housing, including, but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.
7. Pursuant to 40 C.F.R. § 745.103, the term “Lessor” means any entity that offers target housing for lease, rent, or sublease, including, but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.
8. Pursuant to Section 1004(23) of the RLBPHRA, 42 U.S.C. § 4851b(23), Section 401(14) of TSCA, 15 U.S.C. § 2681(14), and 40 C.F.R. § 745.103, the term “residential dwelling” means: (1) A single-family dwelling, including attached structures such as porches and stoops; or (2) A single-family dwelling unit in a structure that contains more than one

separate residential dwelling unit, and in which each such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the residence of one or more persons.

9. Pursuant to Section 1004(24) of the RLBPHRA, 42 U.S.C. § 4851b(24), and Section 401(15) of TSCA, 15 U.S.C. § 2681(15), the term “residential real property” means real property on which there is situated one (1) or more residential dwellings used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one (1) or more persons.
10. Pursuant to Section 1004(27) of the RLBPHRA, 42 U.S.C. § 4851b(27), TSCA Section 401(17), 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.103, the term “target housing” means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling.
11. 40 C.F.R. § 745.113(b)(1) provides that each contract to lease target housing shall include, as an attachment or within the contract, a Lead Warning Statement with the following language: “Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.”
12. 40 C.F.R. § 745.113(b)(2) provides, in relevant part, that each contract to lease target housing shall include, as an attachment or within the contract, a statement by the lessor

disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards and the condition of the painted surfaces.

13. 40 C.F.R. § 745.113(b)(4) provides, in relevant part, that each contract to lease target housing shall include, as an attachment or within the contract, a statement by the lessee affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (b)(3) and the lead hazard information pamphlet required under 15 U.S.C. § 2686.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

14. John V. Kane, IV is an individual residing at Route 3, Box 246B in Clarksburg, West Virginia.
 15. At all times relevant to the violations in this Complaint, John V. Kane, IV (“Respondent”), was the “lessor”, as that term is defined in 40 C.F.R. § 745.103, of residential real property located at 501 S. 5th Street, Clarksburg, West Virginia.
 16. At all times relevant to the violations alleged herein, one building used as the home or residence for one or more persons was located on the property referred to in Paragraph 15, above, (hereinafter “Target Housing”).
 17. The Target Housing was constructed prior to 1978.
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18. At all times relevant to the violations alleged herein, the Target Housing was not housing for the elderly or persons with disabilities and was not a 0-bedroom dwelling as provided in 40 C.F.R. § 745.103.

19. At all times relevant to the violations alleged herein, the Target Housing contained a “residential dwelling” and was “target housing” within the meaning of Section 1004(23) and (27) of the RLBPHRA, 42 U.S.C. § 4851b(23) and (27), Section 401(14) and (17) of TSCA, 15 U.S.C. § 2681(14) and (17), and 40 C.F.R. § 745.103.

A. 501 S. 5th Street, Clarksburg, West Virginia (Lease Transaction #1)

20. Respondent entered into a written contract, dated June 29, 2007 (hereinafter referred to as the “Lease”) with a “lessee,” as that term is defined at 40 C.F.R. § 745.103, to rent and/or lease the Target Housing for a term of six months commencing on July 1, 2007 and terminating on December 31, 2007.

21. At all times relevant to the violation alleged herein, two children under the age of six resided at the Target Housing during the term of the Lease as described in Paragraph 20, above.

22. At all times relevant to the violation alleged herein, the Target Housing had not been found to be “lead-based paint free by a certified inspector” as provided at 40 C.F.R. § 745.101(b).

23. The Lease was not a “[s]hort-term lease of 100 days or less, where no lease renewal or extension can occur,” as provided at 40 C.F.R. § 745.101(c).

24. The Lease was not a “[r]enewal of [an] existing lease . . . in which the lessor has previously disclosed all information required under [40 C.F.R.] § 745.107 and where no

new information described in [40 C.F.R.] § 745.107 has come into the possession of the lessor,” as provided at 40 C.F.R. § 745.101(d).

IV. VIOLATIONS

Count 1

(Violations of 40 C.F.R. §§ 745.113(b)(1))

25. The allegations contained in Paragraphs 1 through 24, above, of this Complaint are incorporated by reference herein as though fully set forth at length.
26. Respondent failed to include a “Lead Warning Statement,” containing the language set forth in, and required by, 40 C.F.R. § 745.113(b)(1), either as an attachment to, or within, the Lease.
27. Pursuant to 40 C.F.R. § 745.118(e), Respondent’s failure to include a “Lead Warning Statement,” containing the language set forth in, and required by, 40 C.F.R. § 745.113(b)(1), either as an attachment to, or within, in the Lease constitutes a violation of Section 1018(b)(5) of RLBPHRA, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 2

(Violations of 40 C.F.R. §§ 745.113(b)(2))

28. The allegations contained in Paragraphs 1 through 27, above, of this Complaint are incorporated by reference herein as though fully set forth at length.
 29. Respondent failed to include a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards in the Target Housing being leased or a statement indicating no knowledge of the presence of lead-based paint and/or lead-based paint
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hazards, either as an attachment to, or within, the Lease, as required by 40 C.F.R.

§ 745.113(b)(2).

30. Pursuant to 40 C.F.R. § 745.118(c), Respondent's failure to include a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards in the Target Housing being leased or a statement indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards, either as an attachment to, or within, the Lease, constitutes a violation of Section 1018(b)(5) of RLBPHRA, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 3

(Violations of 40 C.F.R. §§ 745.113(b)(4))

31. The allegations contained in Paragraphs 1 through 30, above, of this Complaint are incorporated by reference herein as though fully set forth at length.
32. Respondent failed to include a statement by the lessee affirming receipt of the lead hazard information pamphlet required under 15 U.S.C. § 2686, either as an attachment to, or within, the Lease, as required by 40 C.F.R. § 745.113(b)(4).
33. Pursuant to 40 C.F.R. § 745.118(e), Respondent's failure to include a statement by the lessee affirming receipt of the lead hazard information pamphlet required under 15 U.S.C. § 2686, either as an attachment to, or within, the Lease, constitutes a violation of Section 1018(b)(5) of the RLBPHRA, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

IV. CIVIL PENALTY

Section 1018 of the RLBPHRA, 42 U.S.C. § 4852d, and 40 C.F.R. § 745.118(f) authorize the assessment of a civil penalty under Section 16 of TSCA, 15 U.S.C. § 2615, in the maximum

amount of \$10,000 for each violation of Section 409 of TSCA, 15 U.S.C. § 2689. This amount has been adjusted to \$11,000 per violation under the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, which increases the civil penalties which can be assessed by EPA under TSCA for violations occurring on or after January 31, 1997 and before March 15, 2004 by 10%. Violations occurring after March 15, 2004 and before January 12, 2009 are subject to a 17.23 increase for inflation, not to exceed \$11,000 per violation. For purposes of determining the amount of any civil penalty to be assessed, Section 16 of TSCA, 15 U.S.C. § 2615, requires EPA to take into account the nature, circumstances, extent, and gravity of the violation or violations alleged 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 (“statutory factors”). In developing a proposed penalty, Complainant takes into account the particular facts and circumstances of this case with specific reference to the statutory factors set forth in Section 16 of TSCA and EPA’s *Section 1018 Disclosure Rule Final Enforcement Response Policy (“Final ERP”)*, dated December 2007, a copy of which is enclosed with this Complaint. The *Final ERP* provides a rational, consistent, and equitable calculation methodology for applying the statutory factors enumerated above to particular cases.

Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant is not proposing a specific penalty at this time, but will do so at a later date after an exchange of information has occurred. See 40 C.F.R. § 22.19(a)(4).

This Complaint does not constitute a “demand” as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412. Pursuant to 40 C.F.R. § 22.14(a)(4)(i), an explanation of the number and severity of violations is as follows:

1. Explanation of Circumstance Level and Extent of Violation

A. Circumstance Levels:

- a) 40 C.F.R. § 745.113(b)(1) violations: Violations of the disclosure requirements set forth at 40 C.F.R. § 745.113(b)(1) are deemed to represent a “high” level of impairment to a lessee’s ability to assess the information required to be disclosed and have been characterized as Circumstance Level 2 violations in the ERP. As a result, the violation alleged in Count 1 of this Complaint may be characterized as Circumstance Level 2 violations for purposes of calculating an appropriate penalty.
- b) 40 C.F.R. § 745.113(b)(2) violations: Violations of the disclosure requirements set at 40 C.F.R. § 745.113(b)(2) are deemed to represent a “medium” level of impairment to a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 3 violations in the ERP. As a result, the violation alleged in Count 3 of this Complaint may be characterized as Circumstance Level 3 violations for purposes of calculating an appropriate penalty.
- c) 40 C.F.R. § 745.113(b)(4) violations: Violations of the requirements set forth at 40 C.F.R. § 745.113(b)(4) are deemed to represent a “medium” level of impairment to a lessee’s ability to assess the information required to be disclosed and are characterized as Circumstance Level 4 violations in the ERP. As a result, the violation alleged in Count 3 of this Complaint may be characterized as Circumstance Level 4 violations for purposes of calculating an appropriate penalty.

B. Extent Levels:

Failure to provide lead-based paint disclosures and/or certifications to lessees where no children or pregnant women live in the target housing is considered a “Minor Extent” violation under the ERP. However, failure to provide lead-based paint disclosures and/or certifications to lessees where children or pregnant women live in the target housing is considered a “Major Extent” violation under the ERP. EPA has determined that children under the age of six resided in the Target Housing during the term of the Lease. Accordingly, the Disclosure Rule violations associated with the Lease are all “Major Extent” violations.

2. Summary of Penalty Calculation

<u>Count</u>	<u>Violations</u>	<u>Circumstance/Extent</u>
1	113(b)(1)	Level 2, Major Extent
2	113(b)(2)	Level 3, Major Extent
3	113(b)(4)	Level 4, Major Extent

EPA will consider, among other factors, Respondent’s ability to pay the proposed civil penalty assessed in this Complaint. With respect to Respondent’s ability to pay the proposed penalty, it is Respondent’s responsibility to provide to Complainant financial information to support and establish a claim by Respondent of an inability to pay the proposed penalty. To the extent that facts or circumstances, including, but not limited to, additional information concerning Respondent’s ability to pay the proposed penalty that were unknown to Complainant at the time of the issuance of the Complaint become known to Complainant after issuance of the Complaint, such facts and circumstances may be considered as a basis for adjusting the civil penalty proposed in this Complaint.

NOTICE AND OPPORTUNITY TO REQUEST A HEARING

Respondent has the right to request a hearing to contest any matter of law or material fact set forth in this Complaint or the appropriateness of the proposed penalty. To request a hearing, Respondent must file a written Answer to the Complaint, within thirty (30) days of receipt of this Complaint, with:

Regional Hearing Clerk (3RC00)
EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029

The Answer should clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint of which Respondent has any knowledge. Where Respondent has no knowledge of the facts contained in an allegation, the Answer should so state. The Answer should contain: (1) the circumstances or arguments which are alleged to constitute the grounds of any defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) a statement of whether a hearing is requested. All material facts not denied in the Answer will be considered admitted.

If Respondent fails to file a written Answer within thirty (30) days of receipt of this Complaint, such failure shall constitute an admission of all facts alleged against Respondent in this Complaint and a waiver of Respondent's right to a hearing on factual allegations. Failure to file a written Answer may result in the filing of a Motion for a Default Order and the possible issuance of a Default Order imposing the penalties proposed herein without further proceedings. Any hearing requested by Respondent will be held at a location to be determined at a later date pursuant to the Consolidated Rules of Practice at 40 C.F.R. § 22.21(d). The hearing will be conducted in accordance with the provisions of the Consolidated Rules of Practice.

A copy of Respondent's Answer and all other documents that Respondent files in this action should be sent to the attorney assigned to represent Complainant in this case, Louis F. Ramalho, Senior Assistant Regional Counsel, at:

Office of Regional Counsel (3RC30)
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029.

SETTLEMENT CONFERENCE

Complainant encourages settlement of this proceeding at any time after issuance of the Complaint if such settlement is consistent with the provisions and objectives of TSCA and the RLBPHRA. Whether or not a hearing is requested, any Respondent may request a settlement conference with the Complainant to discuss the allegations of the Complaint, and the amount of the proposed civil penalty. However, a request for a settlement conference does not relieve Respondent of his responsibility to file a timely Answer to the Complaint. The procedures in the Consolidated Rules of Practice for quick resolution of a proceeding do not apply in this case because a specific penalty is not proposed. *See* 40 C.F.R. § 22.18(a)

In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties, and incorporated into a Final Order signed by the Regional Administrator or his designee. The execution of such a Consent Agreement shall constitute a waiver of each settling Respondent's right to contest the allegations of the Complaint or to appeal the Final Order accompanying the Consent Agreement.


If Respondent wishes to arrange a settlement conference, Respondent or Respondent's legal counsel should contact Mr. Ramalho at (215) 814-2681 prior to the expiration of the thirty (30) day period following the receipt of this Complaint. Once again, however, such a request for a

settlement conference does not relieve each Respondent of its/his responsibility to file an Answer within thirty (30) days following Respondent's receipt of this Complaint.

SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

The following Agency offices, and the staffs thereof, are designated as the trial staff to represent the Agency as a party in this case: the Region III Office of Regional Counsel; the Region III Land and Chemicals Division; the Office of the EPA Assistant Administrator for Pesticides and Toxic Substances; and the EPA Assistant Administrator for Enforcement and Compliance Assurance. Commencing from the date of the issuance of this Complaint until issuance of a final Agency decision in this case, neither the Administrator, members of the Environmental Appeals Board, Presiding Officer, Regional Administrator, nor the Regional Judicial Officer, may have an ex parte (unilateral) communication with the trial staff on the merits of any issue involved in this proceeding. Please be advised that the Consolidated Rules of Practice prohibit any ex parte discussion of the merits of a case between either party to this proceeding and the Administrator, members of the Environmental Appeals Board, Presiding Officer, Judicial Officer, Regional Administrator, Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case, after the Complaint is issued.

6/18/20
Date


Abraham Ferdas, Director
Land and Chemicals Division

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the date listed below, the original of the foregoing Administrative Complaint and Notice of Opportunity for Hearing, Docket No. TSCA-03-2010-0323 was filed with the Regional Hearing Clerk, U.S. EPA - Region III, 1650 Arch Street, Philadelphia, Pennsylvania, 19103-2029, and that a true and correct copy was sent to the following party:

John V. Kane, IV
Route 3, Box 246B
Bridgeport, WV 26330

6/21/10
Date



Louis F. Ranzalho
Sr. Assistant Regional Counsel
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103-2029