

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:) Docket No. **CAA-05- 2002 -0 00 3**
)
Poly-Carb, Inc.) Proceeding to Assess a
Cleveland, Ohio,) Civil Penalty under
Respondent.) Section 113(d) of the
) Clean Air Act, 02 APR -2 10:59
) 42 U.S.C. § 7413(d) REGION 5
)

Administrative Complaint

1. This is an administrative proceeding to assess a civil penalty under Section 113(d) of the Clean Air Act ("the CAA"), 42 U.S.C. § 7413(d).

2. The Complainant is, by lawful delegation, the Director of the Air and Radiation Division, United States Environmental Protection Agency ("U.S. EPA"), Region 5, Chicago, Illinois.

3. The Respondent is Poly-Carb, Inc. ("Respondent" or "Poly-Carb"), an Ohio corporation, doing business in Ohio, with a place of business located at 33095 Bainbridge Road, in Cleveland, Ohio.

4. Respondent is regulated by Section 183(e) of the CAA, 42 U.S.C. § 7511b and the implementing regulations set forth at 40 C.F.R. Part 59, Subpart D, "National Volatile Organic Compound Emission Standards for Architectural Coatings." These regulations became effective on September 13, 1999.

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Statutory and Regulatory Background

5. Section 183 of the CAA, 42 U.S.C. § 7511b, authorizes U.S. EPA to promulgate national volatile organic compound ("VOC") emissions standards for architectural coatings with the potential to contribute to ozone levels that violate the national ambient air quality standards ("NAAQS") for ozone.

6. Section 183(e)(6) of the CAA states, "[a]ny regulation established under this subsection shall be treated, for purposes of enforcement of this chapter, as a standard under section 7411 of this title and any violation of such regulation shall be treated as a violation of a requirement of section 7411(e) of this title."

7. On September 11, 1998, the Administrator of U.S. EPA promulgated national regulations under Section 183(e) of the Act, 42 U.S.C. § 7511b(e). 63 Fed. Reg. 48848. These regulations are codified at 40 C.F.R. Part 59, Subpart D (40 C.F.R. §§ 59.400 through 59.413, and Appendix A).

8. 40 C.F.R. § 59.402(a) require that, except as provided in 40 C.F.R. §§ 59.403 and 59.404, each manufacturer and importer of any architectural coating subject to Subpart D shall ensure that the VOC content of the coating does not exceed the applicable limit in table 1 of Subpart D.

9. 40 C.F.R. § 59.402(b) further provides that:

Except as provided in paragraph (c) of this section, if anywhere on the container of any architectural coating, or any label or sticker affixed to the container, or in any sales, advertising or technical literature supplied by the manufacturer or importer or anyone acting on their behalf, any representation is made that indicates that the coating meets the definition of more than one of the coating categories listed in table 1 of this subpart, then the most restrictive VOC content limit shall apply.

10. 40 C.F.R. § 59.401 defines "Architectural coating" as "a coating recommended for field application to stationary structures and their appurtenances, to portable buildings, to pavements, or to curbs. This definition excludes adhesives and coatings recommended by the manufacturer or importer solely for shop applications or solely for application to non-stationary structures, such as airplanes, ships, boats, and railcars."

11. 40 C.F.R. § 59.401 defines "Primer" as "a coating formulated and recommended for application to a substrate to provide a firm bond between the substrate and subsequent coatings."

12. 40 C.F.R. § 59.401 defines "Undercoater" as "a coating formulated and recommended to provide a smooth surface for subsequent coatings."

13. 40 C.F.R. § 59.401 defines "Waterproofing sealer and treatment" as a coating formulated and recommended for application to a porous substrate for the primary purpose of preventing the penetration of water.

14. The Administrator of U.S. EPA ("the Administrator") may assess a civil penalty of up to \$27,500 per day of violation up to a total of \$220,000 for violations of 40 C.F.R. Part 59 that occurred on or after January 31, 1997, under Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), and 40 C.F.R. Part 19.

15. Under Section 113(d)(1), the Administrator may pursue an action for matters where the first alleged date of violation occurred more than 12 months prior to initiating the administrative action, where the Administrator and the Attorney General of the United States jointly determine that a matter involving a longer

period of violation is appropriate for an administrative penalty action.

16. The Administrator and the Attorney General of the United States, each through their respective delegates, have determined jointly that an administrative penalty action is appropriate for the period of violations alleged in this complaint.

General Allegations

17. Poly-Carb is the owner and operator of Poly-Carb, Inc. located at 33095 Bainbridge Road, Cleveland, Ohio.

18. Poly-Carb manufactures and distributes Mark-124, for application to both stationary structures and pavements, qualifying it as an architectural coating subject to the provisions of 40 C.F.R. Part 59, Subpart D.

19. Poly-Carb manufactured 13,780 gallons of Mark-124 between September 13, 1999 and June 23, 2000.

20. The technical data sheets for Mark-124 show that this coating has a maximum VOC content of 468 grams per liter. Poly-Carb last manufactured Mark-124 with a VOC limit of 468 grams per liter on December 7, 2000.

21. Under Table 1 of 40 C.F.R. Part 59, Subpart D, the VOC limit for the "waterproofing sealer and treatment" category is 600 grams per liter set forth in 40 C.F.R. Part 59, Subpart D, table 1.

22. The VOC limit for the "primer and undercoaters" category is 350 grams per liter. See Table 1 of 40 C.F.R. Part 59, Subpart D.

Count I

23. Complainant incorporates paragraphs 1 through 22 of this Complaint, as if set forth in this paragraph.

24. Poly-Carb lists Mark-124 as being compliant with the "waterproofing sealer and treatment" category VOC limit of 600 grams per liter set forth in 40 C.F.R. Part 59, Subpart D, table 1.

25. The technical data sheet for another Poly-Carb product, Mark-73, states that "MARK-73 Ultrakote meets and exceeds all the requirements when tested per NCHRP-244 (Southern exposure) when used over MARK-124, an epoxy primer." (Emphasis added).

26. Because Poly-Carb represented in technical literature that Mark-124 meets the definition of more than one of the coating categories listed in Table 1 of 40 C.F.R. Part 59, Subpart D, it must comply with the most restrictive applicable VOC content limit, pursuant to 40 C.F.R. § 59.402(b).

27. Thus, under 40 C.F.R. § 59.402(b), Mark-124 must comply with the stricter VOC content limit for "Primers and Undercoaters" of 350 grams per liter, as set forth in 40 C.F.R. Part 59, Subpart D, table 1.

28. By manufacturing Mark-124 with a VOC content limit of 468 grams per liter, Mark-124 exceeded the applicable VOC limit of 350 grams per liter for primer, in violation of 40 C.F.R. §59.402(a), and Section 111 of the CAA, 42 U.S.C. § 7411, for the period between September 13, 1999 and December 7, 2000.

29. Poly-Carb did not pay an annual exceedance fee as permitted under 40 C.F.R. § 59.403 for the time period of September 13, 1999 through December 7, 2000, when it was manufacturing Mark-124 that exceeded the applicable VOC limit of 350 grams per liter.

30. The total amount of VOC contained in the coatings manufactured by Poly-Carb between September 13, 1999 and December 7, 2000 exceeded 25 tons.

31. On November 13, 2000, U.S. EPA issued a Notice of violation to Poly-Carb for violations of 40 C.F.R. Part 59, Subpart D.

32. On December 4, 2000, U.S. EPA and Poly-Carb held a conference to discuss the November 13, 2000 notice of violation.

Proposed Civil Penalty

33. The Administrator must consider the factors specified in Section 113(e) of the Act when assessing an administrative penalty under Section 113(d). 42 U.S.C. § 7413(e).

34. Based upon an evaluation of the facts alleged in this complaint and the factors in Section 113(e) of the Act, Complainant proposes that the Administrator assess a civil penalty against Respondent of \$89,486.00. Complainant evaluated the facts and circumstances of this case with specific reference to U.S. EPA's Clean Air Act Stationary Source Penalty Policy dated October 25, 1991 ("penalty policy"). Enclosed with this complaint is a copy of the penalty policy.

35. Complainant developed the proposed penalty based on the best information available to Complainant at this time. Complainant may adjust the proposed penalty if the Respondent establishes bona fide issues of ability to pay or other defenses relevant to the penalty's appropriateness.

Rules Governing This Proceeding

36. The "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" (the Consolidated Rules) at 40 C.F.R. Part 22 govern this proceeding to assess a civil penalty. Enclosed with the complaint served on Respondent is a copy of the Consolidated Rules.

Filing and Service of Documents

37. Respondent must file with the Regional Hearing Clerk the original and one copy of each document Respondent intends as part of the record in this proceeding. The Regional Hearing Clerk's address is:

Regional Hearing Clerk (R-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

38. Respondent must serve a copy of each document filed in this proceeding on each party pursuant to Section 22.5 of the Consolidated Rules. Complainant has authorized John Matson, Assistant Regional Counsel, to receive any answer and subsequent legal documents that Respondent serves in this proceeding. You may telephone Mr. Matson at (312)886-2243, and his address is:

John Matson (C-14J)
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Penalty Payment

39. Respondent may resolve this proceeding at any time by paying the proposed penalty by certified or cashier's check payable to "Treasurer, the United States of America", and by delivering the check to:

U.S. Environmental Protection Agency
Region 5
P.O. Box 70753
Chicago, Illinois 60673

Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondent simultaneously must send copies of the check and transmittal letter to John Matson, Assistant Regional Counsel, and to:

Attn: Compliance Tracker, (AE-17J)
Air Enforcement and Compliance Assurance Branch
Air and Radiation Division
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Opportunity to Request a Hearing

40. The Administrator must provide an opportunity to request a hearing to any person against whom the Administrator proposes to assess a penalty under Section 113(d)(2) of the Act, 42 U.S.C. § 7413(d)(2). Respondent has the right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of the proposed penalty, or both. To request a hearing, Respondent must specifically make the request in its answer, as discussed in paragraphs 41 through 46 below.

Answer

41. Respondent must file a written answer to this complaint if Respondent contests any material fact of the complaint; contends that the proposed penalty is inappropriate; or contends that it is entitled to judgment as a matter of law. To file an answer, Respondent must file the original written answer and one copy with the Regional Hearing Clerk at the address specified in paragraph 37, above, and must serve copies of the written answer on the other parties.

42. If Respondent chooses to file a written answer to the complaint, it must do so within 30 calendar days after receiving the complaint. In counting the 30-day time period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the 30-day time period expires on a Saturday, Sunday, or federal legal holiday, the time period extends to the next business day.

43. Respondent's written answer must clearly and directly admit, deny, or explain each of the factual allegations in the complaint; or must state clearly that Respondent has no knowledge of a particular factual allegation. Where Respondent states that it has no knowledge of a particular factual allegation, the allegation is deemed denied.

44. Respondent's failure to admit, deny, or explain any material factual allegation in the complaint constitutes an admission of the allegation.

45. Respondent's answer must also state:

- a. the circumstances or arguments which Respondent alleges constitute grounds of defense;
- b. the facts that Respondent disputes;
- c. the basis for opposing the proposed penalty; and
- d. whether Respondent requests a hearing as discussed in paragraph 39 above.

46. If Respondent does not file a written answer within 30 calendar days after receiving this complaint the Presiding Officer may issue a default order, after motion, under Section 22.17 of the Consolidated Rules. Default by Respondent constitutes an admission of all factual allegations in the complaint and a waiver of the right to contest the factual allegations. Respondent must pay any penalty assessed in a default order without further proceedings 30 days after the order becomes the final order of the Administrator of U.S. EPA under Section 22.27(c) of the Consolidated Rules.

Settlement Conference

47. Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this proceeding and to arrive at a settlement. To request an informal settlement conference, Respondent may contact John Matson, Assistant Regional Counsel, at the address or phone number specified in paragraph 38, above.

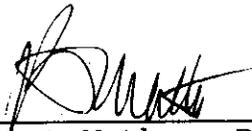
48. Respondent's request for an informal settlement conference does not extend the 30 calendar day period for filing a written answer to this complaint. Respondent may pursue simultaneously the informal settlement conference and the adjudicatory hearing process. U.S. EPA encourages all parties

facing civil penalties to pursue settlement through an informal conference. U.S. EPA, however, will not reduce the penalty simply because the parties hold an informal settlement conference.

Continuing Obligation to Comply

49., Neither the assessment nor payment of a civil penalty will affect Respondent's continuing obligation to comply with the Act and any other applicable federal, state, or local law.

4-1-02
Date



Bharat Mathur, Director
Air and Radiation Division
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

In the Matter of Poly-Carb, Inc.
Docket No:

CERTIFICATE OF FILING AND MAILING

I, Betty Williams, certify that I hand delivered the original and one copy of the Administrative Complaint, docket number CAA-05- 2002-0003 to the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, and that I mailed correct copies of the Administrative Complaint, copies of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits" at 40 C.F.R. Part 22, and copies of the penalty Policy described in the Administrative Complaint by first-class, postage prepaid, certified mail, return receipt requested, to the Respondent and Respondent's Counsel by placing it in the custody of the United States Postal Service addressed as follows:

Dr. Anil Goel
Poly-Carb, Inc.
33095 Bainbridge Road
Solon, Ohio 44139

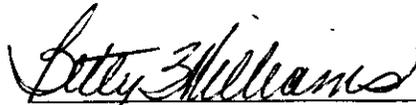
I also certify that a copy of the Administrative Complaint was sent by First Class Mail to:

Robert Hodanbosi, Chief
Division of Air Pollution Control
Ohio Environmental Protection Agency
Lazarus Government Center
P.O. Box 1049
Columbus, Ohio 43216-1049

REC'D
MAY 2 1995
MAY 2 1995

Mark Vilem, Project Coordinator
Department of Public Health and Welfare
Division of the Environment
1925 St. Clair Avenue
Cleveland, Ohio 44114

on the 1st Day of April 2002.



Betty Williams, Secretary
AECAS (IL/IN)

CERTIFIED MAIL RECEIPT NUMBER: 70993400 0000 95868769