

U. S. ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 N. 5th STREET

KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

In the Matter of

R&S PARTNERSHIP

Omaha, Nebraska

Respondent

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Docket No. TSCA-07-2009-0003

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7 and R&S Partnership (Respondent) have agreed to a settlement of this action before filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Renovation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

FACTUAL ALLEGATIONS

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2615(a).

2. This Consent Agreement and Final Order serves as notice that EPA has reason to believe that Respondent has violated Section 409 of TSCA, 15 U.S.C. § 2689, by failing to comply with the regulatory requirements of 40 C.F.R. Part 745, Subpart F, *Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property*, promulgated pursuant to Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the "Act"), 42 U.S.C. § 4852d.

Parties

3. The Complainant, by delegation from the Administrator of the EPA, is the Chief, Toxics and Pesticides Branch, EPA, Region 7.

4. The Respondent is R&S Partnership.

Statutory and Regulatory Background

5. Congress passed the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the Act), 42 U.S.C. §§ 4851 to 4856, to address the need to control exposure to lead-based paint hazards. The Act amended TSCA by adding Sections 401 to 412, 15 U.S.C. §§ 2681 to 2692. Section 1018 of the Act required EPA and the Department of Housing and Urban Development (HUD) to jointly issue regulations requiring the disclosure of known lead-based paint and/or lead-based paint hazards by persons selling or leasing housing constructed before the phase-out of residential lead-based paint use in 1978. The regulations, issued March 6, 1996, and codified at 40 C.F.R. Part 745 Subpart F, require that sellers and lessor of most residential housing built before 1978: a) disclose the presence of known lead-based paint and/or lead-based paint hazards in the target housing; b) provide purchasers and lessees with any available records or reports pertaining to the presence of lead-based paint and/or lead-based paint hazards; c) provide purchasers and lessees with a federally approved lead hazard information pamphlet; d) provide purchasers with a IO-day opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards before the purchaser is obligated under any purchase contract; and e) include certain disclosure and acknowledgment language in the sales or leasing contract. The failure or refusal to comply with the regulations is a violation of Section 1018 of the Act and Section 409 of TSCA.

Alleged Violation

6. The Complainant hereby states and alleges that Respondent has violated TSCA and federal regulations promulgated there under, as follows:

Count 1

7. Respondent is, and at all times referred to herein was, a "person" within the meaning of TSCA.

8. The Properties leased by Respondent were constructed before 1978; therefore, they are "target housing" as that term is defined by 40 C.F.R. §745.103.

9. Respondent is the "lessor," as that term is defined by 40 C.F.R. § 745.103, of a residential housing unit located at 1137 Park Avenue #1 in Omaha, Nebraska ("the Property").

10. Information collected during an EPA review of Respondent's records on February 28, 2008, shows that Respondent entered into a contract to lease the Property on September 13, 2007.

11. Information collected shows that Respondent failed to provide the lessee of the Property owned by Respondent with an EPA-approved lead hazard information pamphlet before lessee was obligated under the contract to lease the target housing units managed by Respondent.

12. Respondent's failure to perform the acts indicated in Paragraph 11 above is a violation of 40 C.F.R. § 745.107(a)(1) and, in accordance with 40 C.F.R. § 745.118(e), a violation of Section 1018 of the Act, 42 U.S.C. § 4852d and Section 209 of TSCA, 15 U.S.C. § 2689, and thus Respondent is subject to civil penalties under Section 16 of TSCA, 15 U.S.C. § 2615.

CONSENT AGREEMENT

13. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above.

14. Respondent admits the factual allegations set forth above.

15. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

16. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

17. Respondent certifies by the signing of this Consent Agreement and Final Order that to the best of Respondent's knowledge, it is presently in compliance with all requirements of 40 C.F.R. Part 745, Subpart F.

18. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a mitigated civil penalty as specified in the Final Order to be paid within thirty (30) days of the effective date of the Final Order.

19. Payment of this Civil penalty in full shall resolve all civil and administrative claims alleged in and/or stated and/or referenced/ in this document for all violations of Section 1018 of the Act, 42 U.S.C. §485 2nd and Sections 209 and 409 of TSCA, 15 U.S.C. 2689 and 40 C.F.R. Part 745, Subpart F alleged in this document.

20. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order below, may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties, late payment handling charges, and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil penalty and any accrued interest are paid in full. A late payment handling charge of \$15 will be imposed after thirty (30) days and an additional \$15 will be charged for each subsequent thirty (30) day period. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

21. In settlement of this matter, Respondent has agreed to complete the following Supplemental Environmental Project (SEP), which the parties agree is intended to secure significant environmental and/or public health benefits:

A. "Lead-Based Paint Inspection" SEP: On July 14, 2008, the Respondent had a licensed lead-based paint inspector perform a lead-based paint inspection at the apartment building located at 1137 Park Avenue in Omaha, Nebraska. The building consists of 4 two bedroom units and 2 one bedroom units.

B. "Abatement and Interim Control" SEP: No later than six months after the effective date of this CAFO, Respondent will have a certified abatement contractor perform the "Abatement and Interim Control" SEP at the apartment building located at 1137 Park Avenue in Omaha, Nebraska. All work shall be performed in accordance with the Respondent's SEP Work Plan (attached hereto as Attachment A and incorporated by reference), the HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing and all applicable federal, state, and local laws and regulations. The following "Abatement and Interim Control" work is proposed and described in detail in Attachment A:

- 1) Window Trough: Enclosing this area by fastening an aluminum strip over the window seal;
- 2) Exterior Sliding Glass Door Casing; Scraping and painting;
- 3) Exterior Gutter: Removing and replacing the gutter;
- 4) Fascia: Scraping and painting the gutter;
- 5) Main Entrance Door Header: Scraping and painting;

- 6) Exterior Window Frame: Removing and replacing the window frame; and
- 7) Down Spouts: Removing and replacing the down spouts.

C. Within thirty (30) days of completion of the "Abatement and Interim Control" work described above in Paragraph 21.B., Respondent will have a certified inspector, other than the certified abatement contractor performing the "Abatement and Interim Control" SEP, conduct clearance sampling on the "Abatement and Interim Control" work described above in Paragraph 21.B. The Respondent agrees to correct any lead-based paint hazards indicated by the clearance sampling results. The clearance sampling and any necessary corrections shall be performed per HUD guidelines.

D. Respondent will perform Operation and Maintenance (O&M) on the areas receiving interim control work per the submitted O&M Plan (attached hereto as Attachment A and incorporated by reference.)

22. Within thirty (30) days of the effective date of the Final Order, Respondent will provide EPA with a copy of the letter sent to Doug Gillespie, Nebraska Department of Health and Human Services, 301 Centennial Mall, Lincoln, Nebraska, 68509 informing the state of its intent to perform the "Abatement and Interim Control" SEP and requesting procedural information pertaining to the performance of the SEP.

23. The Respondent has already expended one thousand five-hundred twenty-five dollars (\$1,525) on a lead-based paint inspection at the apartment building located at 1137 Park Avenue in Omaha, Nebraska. In addition, the total expenditure of the "Abatement and Interim Control" SEP, described in Paragraph 21.B. above, is estimated to be no less than four thousand three-hundred dollars (\$4,300) and Respondent shall spend no less than \$4,300.

24. Within thirty (30) days of completion of the clearance sampling described above in Paragraph 21.C., Respondent will submit a SEP Completion Report to EPA. The Report shall contain the following information:

- a. A detailed description of the "Lead-Based Paint Inspection" SEP and the "Abatement and Interim Control" SEP as implemented;
- b. Itemized costs for the "Lead-Based Paint Inspection" SEP and the "Abatement and Interim Control" SEP, documented by copies of purchase orders, receipts or cancelled checks;

- c. The clearance sampling results; and
- d. The following certification signed by a representative of R&S Partnership (the "Partnership"):

The Partnership certifies under penalty of law that it has examined and is familiar with the information submitted in this document and all attachments and that, based on its inquiry of those individuals immediately responsible for obtaining the information and performing the work required pursuant to Paragraph 21.B. as listed in the Consent Agreement and Final Order ("CAFO"), Docket No. TSCA-07-2009-0003, and Exhibit A attached to said CAFO, the information, to the best of its knowledge and belief, is true, accurate, and complete. The Partnership is aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

- e. The SEP Completion Report shall be sent to the following:

As to EPA:

Crystal McIntyre, WWPD/TOPE
U.S. Environmental Protection Agency, Region 7
901 N. 5th Street
Kansas City, KS 66101

As to the State:

Doug Gillespie
Nebraska Department of Health and Human Services
301 Centennial Mall
Lincoln, NE 68509

- 25. Respondent shall be liable for stipulated penalties in the following instances:
 - a. If the "Abatement and Interim Control" SEP is not timely completed to the reasonable and legally required satisfaction of the EPA in accordance with the terms of this Order, Respondent shall pay a stipulated penalty of four-thousand three-hundred dollars (\$4,300).
 - b. If the "Abatement and Interim Control" SEP is completed to the reasonable and legally required satisfaction of the EPA but Respondent's actual

expenditures are less than 90% of the amount of money required to be expended on the "Abatement and Interim Control" SEP, Respondent shall pay a stipulated penalty of one thousand dollars (\$1,000).

c. If Respondent fails to timely submit to EPA, any information required by this CAFO, Respondent shall pay a stipulated penalty of fifty dollars (\$50) a day until the information required has been submitted.

d. Any stipulated penalties for which Respondent is liable under this agreement shall be due and payable within ten (10) days of Respondent's receipt of a written demand from Complainant.

e. Timely submission of any above payments shall be defined by date of deposit of any means of payment whether by check or otherwise in the U.S. Postal System.

26. Respondent certifies that it is not required to perform the "Abatement and Interim Control" SEP by any federal, state or local law or regulation. Respondent has agreed to perform the Abatement and Interim Control SEP in a manner expressed in this Consent Agreement and Final Order. Respondent further certifies that it has not received, and is not presently in negotiation to receive, credit in any other enforcement action for the "Abatement and Interim Control" SEP.

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

28. Any public statement, oral or written, in print, film or other media, made by Respondent and/or EPA making reference to the "Abatement and Interim Control" SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency."

FINAL ORDER

Pursuant to the provisions of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692, and based upon the information set forth in the Consent Agreement accompanying this Final Order, **IT IS HEREBY ORDERED THAT:**

1. Respondent shall pay a mitigated civil penalty of three-hundred twenty-five dollars (\$325) within thirty (30) days of the effective date of this Final Order. Such payment shall identify the Respondent by name and docket number and shall be by Certified or Cashier's Check made payable to the "United States Treasury" and sent to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

2. A copy of the check or other information confirming payment shall simultaneously be sent to the following:

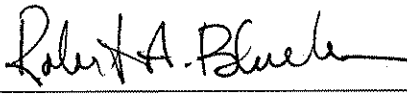
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, Kansas 66101; and

Jennifer Trotter, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, Kansas 66101

3. Respondent and Complainant shall each bear their own costs and attorneys' fees incurred as a result of this matter.

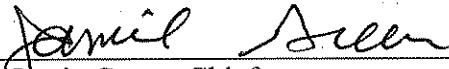
**RESPONDENT
R & S PARTNERSHIP**

Date: 5/18/09


By: 
Robert Bloechle, Partner

COMPLAINANT
U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 7/1/09


By: 
Jamie Green, Chief
Toxics and Pesticides Branch
Water, Wetlands and Pesticides Division

Date: 6/24/2009

By: 
Jennifer Trotter, Attorney
Office of Regional Counsel

IT IS SO ORDERED. This Order shall become effective immediately.

Date: July 13, 2009



ROBERT J. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency,
Region 7

Attachment A: SEP Work Plan/O&M Work Plan

SEP Work Plan: Abatement and Interim Control SEP

1. Address of ____ Target housing ____ child occupied facility:

1137 Park Avenue
Omaha, Nebraska 68105
2. Property Owner:

R & S Partnership
11118 N. 62nd Street
Omaha, NE 68152
3. Property is currently X occupied _____ unoccupied.
4. Scope of work (describe what work will be done, when it will be done, and who will be doing the work):

See attached proposal.
5. Licensed lead-based professionals/firm:

Coleman Construction Company
2505 N. 24th Street, Suite 536
Omaha NE 68110
1-877-877-8790
6. Cost Estimate: \$4,300.00
7. Planned work start date: After EPA approves plan. See CAFO requirements.
8. Date state notified (attach copy of notification): Within 30 days of the effective date of the CAFO, R&S Partnership (R&S) will notify Nebraska Department of Health and Human Services (NDHHS) of planned abatement activities. R&S will provide a copy of this notification to EPA as stated within the CAFO. R&S must receive a response from NDHHS before any work can begin.
9. Actual work start date: Please see CAFO for specific deadlines.
10. Work Completion date: The SEP will be complete no later than 180 days (six months) after the effective date of the CAFO.
Within 30 days of completion of the SEP, R&S will have a third party, separate from the contractor performing SEP work, perform Clearance Sampling. Refer to CAFO for requirements and submittal dates.

11. Report Completion date: Refer to CAFO requirements.

R & S Partnership

Property at 1137 Park Ave.

11/21/2008

Proposed SEP Workplan and O&M Plan
Abatement SEP and Interim Control SEP

Scope of Work:

ABATEMENT WORK:

a. enclose window troughs with prefinished aluminum panels:

apart. 3 east bedroom
apart 3 west bedroom
apart 1 living room
apart 1 west bedroom
apart 6 west bedroom
apart 6 east bedroom, east window
apart 6 east bedroom, west window

b. remove & replace gutters

c. remove & replace down spouts

d. remove & replace exterior window & frame, apartment 1 bathroom window

INTERIM CONTROL WORK:

a. apartment 3 deck, exterior sliding glass door casing – scrape & paint

b. roof overhang & fascia – scrape & paint

c. main entrance door, exterior header – scrape & paint

OPERATIONS AND MAINTENANCE PROTOCOL:

1. On two occasions annually, an inspection by R&S Partnership of the three interim control work items listed above shall be made. If any peeling, flaking, or cracking is observed, action shall be taken by R&S Partnership to maintain the integrity of the original interim control measures.

2. The necessary work taken to correct any peeling, flaking, or cracking observed, shall be equal to that provided in the original process and shall be accomplished by a licensed abatement contractor.

3. All information related to the semi annual inspection and any interim control work by the licensed abatement contractor shall be kept in the facility O & M Protocol follow up file.

IN THE MATTER OF R&S Partnership, Respondent
Docket No. TSCA-07-2009-0003

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

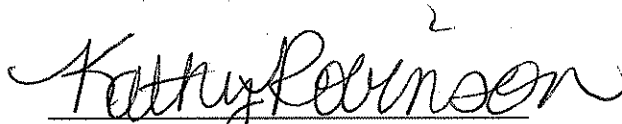
Copy hand delivered to
Attorney for Complainant:

Jennifer Trotter
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Elaine M. Martin
Smith, Gardner, Slusky, Lazar,
Pohren & Rogers, LLP
8712 West Dodge Rd., Suite 400
Omaha, Nebraska 68114

Dated: 7/13/09



Kathy Robinson
Hearing Clerk, Region 7