

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 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)

) Docket No.: TSCA-07-2009-0022

FLOYD E. MITCHELL)

Baldwin City, Kansas)

Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7 and Floyd E. Mitchell (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).

Section I

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, 42 U.S.C. § 4852d.

Section II

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 Floyd E. Mitchell, 1929 North 500th Road, Baldwin City, Kansas 66006.

Section III

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 phaseout 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 lessors 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 10-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.

Section IV

General Alleged Violations

6. Respondent is, and at all times referred to herein, a “person” within the meaning of TSCA.

7. Respondent is the “lessor,” as that term is defined by 40 C.F.R. § 745.103, of a residential housing unit located at 627 Walnut Street, Wellsville, Kansas (“the Property”).

8. The Property leased by Respondent was constructed before 1978; therefore, it is “target housing” as that term is defined by 40 C.F.R. § 745.103.

Violations

9. The Complainant hereby states and alleges that Respondent has violated TSCA and federal regulations promulgated thereunder, as follows:

Count 1

10. The facts stated in Paragraphs 1 through 9 above are herein incorporated.

11. Information collected during an EPA review of Respondent’s records on June 16, 2009, shows that Respondent entered into a contract to lease the Property on December 9, 2006.

12. Information collected shows that Respondent failed to provide the lessee of the Property managed by Respondent with an EPA-approved lead hazard information pamphlet or to perform any other lead-based paint disclosure activities before lessee was obligated under the

contract to lease the target housing unit managed by Respondent.

13. Respondent's failure to provide an EPA-approved lead hazard information pamphlet 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.

Section V

Consent Agreement

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

15. Respondent admits the factual allegations set forth above.

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

17. 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.

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

19. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a mitigated civil penalty of Five Hundred Forty-One Dollars and Eighty Cents (\$541.80) as specified in the Final Order to be paid within thirty (30) days of the effective date of the Final Order.

20. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of Section 409 of TSCA, 15 U.S.C. § 2689 and 40 C.F.R. Subpart F alleged in this document.

21. The effect of settlement described in Paragraph 20 above is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 18 above.

22. Respondent understands that his 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.

23. In settlement of this matter, Respondent agrees to complete the following Supplemental Environmental Project (SEP), which the parties agree is intended to secure significant environmental and/or public health benefits: Respondent agrees to replace windows contaminated with lead paint at 624 Poplar Street, Ottawa, Kansas, with new, lead-free windows within six (6) months.

24. Within thirty (30) days of the effective date of the Final Order, Respondent shall provide EPA with a SEP Work Plan that describes the SEP in detail including a description of the number of windows being replaced, documentation of cost estimates from a certified lead abatement contractor showing the cost of materials, labor and clearance sampling, a schedule for

when the work will be performed, and a copy of the lead abatement contractor's certification.

25. EPA may approve, disapprove, require revisions to, or modify the SEP Work Plan in whole or in part. If EPA requires revisions, Respondent shall submit a revised SEP Work Plan within fifteen (15) days of receipt of EPA's notification of the required revision. Once approved, or approved with modifications, the SEP Work Plan shall be incorporated into and become fully enforceable under this Consent Agreement and Final Order.

26. Within thirty (30) days of EPA's approval of the SEP Work Plan, Respondent shall provide EPA with a copy of the letter sent to the Kansas Department of Health and Environment informing the state of his intent to perform a SEP and requesting procedural information pertaining to performance of the SEP.

27. The total expenditure for the SEP shall be not less than Four Thousand Eight Hundred Seventy-Six Dollars and Twenty Cents (\$4,876.20) and the SEP shall be completed no later than six (6) months after the effective date of the Final Order. All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations.

28. Respondent agrees that the construction work on the SEP referenced in Paragraph 23 above will be performed by entities licensed and/or certified to handle, inspect, and/or dispose of lead-based paint contaminated waste. Respondent is responsible for ensuring that the entity or entities performing the SEP project described in Paragraph 23 above receive a copy of this Consent Agreement and Final Order (CAFO), and all attachments pertaining to the SEP project including the EPA approved SEP Work Plan, if applicable. Respondent is responsible for any failure to complete the SEP in accordance with all applicable terms of this agreement.

29. Within thirty (30) days of completion of the SEP, Respondent shall submit a SEP

Completion Report to EPA, with a copy to the state agency identified below. The SEP

Completion Report shall contain the following:

- (i) A detailed description of the SEP as implemented;
- (ii) Itemized costs, documented by copies of purchase orders, receipts or canceled checks;
- (iii) Clearance testing results;
- (iv) The final abatement report, as required by state law; and
- (v) The following certification signed by Respondent:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

- (vi) The report shall be directed to the following:

As to EPA:

Stephven X. Richard, WWPD/TOPE
U.S. Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101.

As to the state:

Thomas Langer
Kansas Department of Health and Environment
1000 SW Jackson, Suite 330
Topeka, Kansas 66612.

30. If the SEP referenced in Paragraph 23 above is not timely completed to the satisfaction of EPA in accordance with the terms of this Final Order, Respondent shall pay a stipulated penalty in the amount of Four Thousand Eight Hundred Seventy-Six Dollars and Twenty Cents (\$4,876.20) minus any documented expenditures determined by EPA to be

acceptable for the SEP. This stipulated penalty is consistent with the EPA SEP Policy, effective May 1, 1998. For the SEP, the following instances constitute a failure to complete the project in accordance with the terms of this Final Order:

(i) Failure to expend the funds in a manner acceptable to EPA or otherwise to complete the project pursuant to the terms of this consent agreement.

(ii) Failure to ensure, through good faith and timely efforts, that the SEP project is completed by the anticipated completion date of within six (6) months of the effective date of the Final Order. In the event of circumstances beyond his control rendering the anticipated completion date unfeasible, Respondent may demonstrate good faith by promptly notifying the EPA Region 7 contact identified in Paragraph 28 above of the change in circumstances and proposing a new completion date acceptable to EPA for the SEP.

(iii) 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.

31. Respondent certifies that it is not required to perform or develop the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant or as injunctive relief in this or any other case or to comply with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

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

33. Any public statement, oral or written, in print, film or other media, made by Respondent making reference to the 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 Five Hundred Forty-One Dollars and Eighty Cents (\$541.80) 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, Missouri 63197-9000.

X *ff*

Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

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 North 5th Street
Kansas City, Kansas 66101; and

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✓

Kelley Catlin, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101.

3. Respondent shall complete the Supplemental Environmental Project in accordance with the provisions set forth in the Consent Agreement and shall be liable for any stipulated penalty for failure to complete such project as specified in the Consent Agreement.

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

RESPONDENT

FLOYD E. MITCHELL

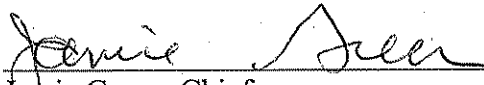
Date: 9-25-009

By: Floyd E. Mitchell
Floyd E Mitchell owner
Print Name Title

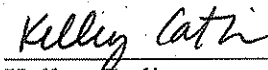
COMPLAINANT

U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 10/13/09

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

Date: 9/28/09

By: 
Kelley Catlin
Office of Regional Counsel

IN THE MATTER OF Floyd E. Mitchell
Docket No. TSCA-07-2009-0022

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

Date: Oct. 14, 2009

Karina Borrromeo
Karina Borrromeo
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 7

IN THE MATTER OF Floyd E. Mitchell, Respondent
Docket No. TSCA-07-2009-0022

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:

Kelley Catlin
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:

Floyd E. Mitchell
1929 North 500th Road
Baldwin City, Kansas 66006

Dated: 10/15/09



Kathy Robinson
Hearing Clerk, Region 7