

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219
BEFORE THE ADMINISTRATOR

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
2014 JUN -9 PM 12:47

In the Matter of

Douglas Thoman Construction

Respondent

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Docket No. TSCA-07-2014-0026

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7 and Douglas Thoman Construction (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 E, *Lead-Based Paint Renovation, Repair and Painting Rule*, (RRP Rule) promulgated pursuant to 15 U.S.C. §§ 2682, 2686 and 2687.

Section II

Parties

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

4. The Respondent is Douglas Thoman Construction, a business located in the State of Nebraska.

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.

6. On June 1, 1998, EPA promulgated information distribution and record keeping requirements codified at 40 C.F.R. Part 745, Subpart E, *Requirements for Hazard Education Before Renovation of Target Housing* (Pre-Renovation Education Rule or PRE Rule) pursuant to 15 U.S.C. § 2686. On April 22, 2008, EPA amended and re-codified the PRE Rule information distribution and recordkeeping requirements and promulgated additional regulations at 40 C.F.R. Part 745, Subpart E, *Lead-Based Paint Renovation, Repair and Painting Rule* (RRP Rule) pursuant to 15 U.S.C. §§ 2682, 2686 and 2687. The regulations aimed to protect the public from

lead-based paint hazards associated with renovation, repair and painting activities. Under the RRP Rule each person or firm who performs for compensation a renovation of target housing or a child-occupied facility must be trained and certified by an EPA accredited training provider to conduct renovation, remodeling and/or painting activities. Firms and individuals performing renovation, repair and painting projects for compensation that disturb lead-based paint must use certified renovators who follow specific work practices to prevent lead contamination. Prior to the start of renovation, the firm or individual performing the renovation must provide the owners and occupants of the target housing units subject to regulated renovation, repair, and/or painting a copy of the U.S. Environmental Protection Agency-approved *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools* pamphlet, and maintain written acknowledgment that the pamphlet has been provided.

7. Section 402 of TSCA, 15 U.S.C. § 2682, requires that the Administrator of EPA promulgate regulations regarding the activities of individuals and contractors engaged in lead-based paint activities, including renovation of residences built prior to 1978, and regulations for the certification of such individuals and contractors.

8. EPA promulgated regulations regarding lead-based paint activities, including renovation of residences built prior to 1978, and regulations for the certification of individuals and firms who are involved in these activities. These regulations are found within 40 C.F.R. Part 745, Subpart E.

9. Section 406 of TSCA, 15 U.S.C. § 2686, requires that the Administrator of EPA promulgate regulations to require each person who performs for compensation a renovation of target housing to provide a lead hazard information pamphlet to the owner and occupant of such housing prior to commencing the renovation.

10. 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 six (6) years of age resides or is expected to reside in such housing) or any zero-bedroom dwelling. 15 U.S.C. § 2681(17).

11. The term *renovation* means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined by this part (40 C.F.R. § 745.223). The term renovation includes but is not limited to the following: the removal, modification or repair of painted surfaces or painted components (e.g., modification of painted doors, surface restoration, window repair, surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust)); the removal of building components (e.g., walls, ceilings, plumbing, windows); weatherization projects (e.g., cutting holes in painted surfaces to install blown-in insulation or to gain access to attics, planning thresholds to install weather stripping), and interim controls that disturb painted surfaces. 40 C.F.R. § 745.83.

12. The term *firm* means a company, partnership, corporation, sole proprietorship or individual doing business, association, or other business entity; a Federal, State Tribal, or local government agency; or a nonprofit organization. 40 C.F.R. § 745.83

13. 40 C.F.R. §§ 745.81(a)(2)(ii) and 745.89(a)(1) state that firms that perform renovations for compensation must apply to EPA for certification to perform renovations.

14. The “Work Practice Standards” that must be followed by firms performing renovations on target housing are set forth at 40 C.F.R. § 745.85. The Work Practice Standards include, but are not limited to:

a. Occupant Protection. Firms must post signs clearly defining the work area and warning occupants and other persons not involved in renovation activities to remain outside of the work area. To the extent practicable, these signs must be in the primary language of the occupants. These signs must be posted before beginning the renovation and must remain in place and readable until the renovation and the post-renovation cleaning verification have been completed. 40 C.F.R. § 745.85(a)(1).

b. Exterior Renovations. The firm must cover the ground with plastic sheeting or other disposal impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to collect falling paint debris, whichever is greater, unless the property line prevents 10 feet of such ground covering. 40 C.F.R. § 745.85(a)(2)(ii)(C).

c. Exterior Renovations. Waste from renovation activities must be contained to prevent releases of dust and debris before the waste is removed from the work area for storage or disposal. 40 C.F.R. § 745.85(a)(4)(i).

15. Failure to comply with any provision of 40 C.F.R. Part 745, Subpart E (RRP Rule) violates Section 409 of TSCA, 15 U.S.C. § 2689, which may subject the violator to administrative penalties under Section 16(a) of TSCA, 15 U.S.C. § 2615(a) and 40 C.F.R. § 745.87(d).

16. Section 16(a) of TSCA, 42 U.S.C. § 2615, and 40 C.F.R. § 745.87(d), authorize the EPA Administrator to assess a civil penalty of up to \$25,000 for each violation of Section 409 of TSCA. Each day that such a violation continues constitutes a separate violation of Section 15 of TSCA, 15 U.S.C. § 2614. The Debt Collection Improvement Act of 1996, 31 U.S.C. §

3701, and its implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to \$37,500 for violations that occurred after January 12, 2009.

Section IV

General Factual Allegations

17. Respondent is, and at all times referred to herein was, a “firm” and a “person” within the meaning of TSCA.
18. Respondent is a builder and general contractor.
19. On April 3, 2013, pursuant to its authority under Section 11 of TSCA, 15 U.S.C. § 2610, a representative of the United States Environmental Protection Agency, Region 7 conducted an inspection of 6067 Ellison Avenue, Omaha, Nebraska (hereinafter, “the Property”), where Respondent was in the process of conducting “renovations”, as defined by C.F.R. § 745.83, for compensation. Specifically, Respondent performed renovation work that included removing and replacing the front entry door and accompanying side light window.
20. The Property was constructed before 1978.
21. The Property is “target housing” as defined by 40 C.F.R. § 745.103.
22. At the time of the EPA inspection, the Respondent had not applied to become a certified renovator.
23. At the time of the EP inspection, the EPA representative observed that, in the course of its renovation of the Property, the Respondent failed to comply with the work practice requirements.

Violations

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

Count 1

25. The facts stated in Paragraphs 17 through 23 above are herein incorporated.

26. At the time of the EPA inspection it was discovered that Respondent failed to apply for and obtain EPA certification prior to commencing the renovation for compensation on the Property, which is a violation of 40 C.F.R. §§ 745.81(a)(2)(ii) and 745.89(a)(1).

27. Respondent's failure to perform the act described above is a violation of Section 409 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.

Count 2

28. The facts stated in Paragraphs 17 through 23 above are herein incorporated.

29. At the time of the EPA inspection it was discovered that Respondent failed to comply with the following exterior renovation work practice standard – to post signs clearly defining the work area and warning occupants and other persons not involved in renovation activities to remain outside the work area – in violation of 40 C.F.R. 745.85(a)(1).

30. Respondent's failure to perform the act described above is a violation of Section 409 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.

Count 3

31. The facts stated in Paragraphs 17 through 23 above are herein incorporated.

32. At the time of the EPA inspection it was discovered that Respondent failed to comply with the following exterior renovation work practice standard – to cover the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to collect falling paint debris,

whichever is greater, unless the property line prevents 10 feet of such ground covering – in violation of 40 C.F.R. 745.85(a)(2)(ii)(C).

33. Respondent's failure to perform the act described above is a violation of Section 409 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.

Count 4

34. The facts stated in Paragraphs 17 through 23 above are herein incorporated.

35. At the time of the EPA inspection it was discovered that Respondent failed to comply with the following exterior renovation work practice standard – to contain waste from renovation activities to prevent releases of dust and debris before the waste is removed from the work area for storage or disposal – in violation of 40 C.F.R. § 745.85(a)(4)(i).

36. Respondent's failure to perform the act described above is a violation of Section 409 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

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

38. Respondent neither admits nor denies the factual allegations set forth above.

39. Respondent waives its right to contest any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

40. 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.

41. Respondent certifies by the signing of this Consent Agreement and Final Order that it is presently in compliance with all requirements of 40 C.F.R. Part 745, Subpart E.

42. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in the Final Order.

43. The effect of settlement described in Paragraph 45 below is conditioned upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraphs 44 and 41 of this Consent Agreement and Final Order.

44. Respondent has provided financial information to EPA to support the mitigation of the civil penalty and certifies by the signing of this Consent Agreement and Final Order to the truth and accuracy of that information.

45. Respondent agrees that, in settlement of the claims alleged in this CAFO, and based on its ability to pay, Respondent shall pay a mitigated penalty of zero dollars (\$0.00).

Section VI

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. Based on an ability to pay analysis, Respondent shall pay a civil penalty of zero dollars (\$0.00).

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

3. This CAFO shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

RESPONDENT
Douglas Thoman Construction


Date: 5-16-14

By: *Douglas Thoman*

Douglas THOMAN
Print Name


COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 5/21/2014



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

Date: 5/21/2014



Kelley Catlin
Assistant Regional Counsel
Office of Regional Counsel

IT IS SO ORDERED.

Date: 6-9-14

Karina Borromeo
Karina Borromeo
Regional Judicial Officer
U.S. Environmental Protection Agency

IN THE MATTER Of Douglas Thoman Construction, Respondent
Docket No. TSCA-07-2014-0026

CERTIFICATE OF SERVICE

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

Copy emailed to Attorney for Complainant:

catlin.kelley@epa.gov

johnson.kent@epa.gov

Copy emailed to Respondent:

dpthoman@hotmail.com

Dated: 6/10/14



Kathy Robinson
Hearing Clerk, Region 7