

U. S. ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 N. 5<sup>th</sup> STREET

KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

In the Matter of

)

)

GARY OETH

)

Des Moines, Iowa

)

Docket No. TSCA-07-2008-0004

)

Respondent

)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7 and Gary Oeth (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 Revocation, 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, 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 Gary Oeth, an individual conducting business in the state of Iowa.

**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.

**Alleged Violations**

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

**Count 1**

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

8. Respondent is the "lessor", as that term is defined by 40 C.F.R. § 745.103, of 4141 Amherst, Des Moines, Iowa and 1105 Rittenhouse, Des Moines, Iowa.

9. The properties referenced above are "target housing" as that term is defined by 40 C.F.R. § 745.103.

10. Information collected shows that Respondent entered into oral contracts to lease 4141 Amhurst, Des Moines, Iowa and 1105 Rittenhouse, Des Moines, Iowa on or after January 12, 2005.

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

12. 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 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.

**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 attorneys' 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. Respondent understands that its failure to timely pay any portion of the mitigated 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. Interest shall accrue thereon at the rate determined by the Secretary of the Treasury (currently four percent (4%) per annum for the period January 1, 2007 through December 31, 2007) on the unpaid balance until such civil penalty and accrued interest are both paid in full. 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.

19. 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 at 4141 Amherst, Des Moines, Iowa 50313:

Respondent shall, by and through a certified lead abatement contractor, at the cost of 2,500.00 (Two Thousand and Five Hundred Dollars), perform removal and replacement of the items in accordance with Respondent's SEP Work Plan (attached hereto as Attachment A and incorporated by reference).

20. Within thirty (30) days of the effective date of the Final Order, Respondent will provide EPA with a copy of the letter sent to (State Agency) informing the state of its intent to perform a SEP and requesting procedural information pertaining to performance of the SEP.

21. The total expenditure for the SEP shall be not less than \$2922.50 (Two Thousand Nine Hundred Twenty Two Dollars and Fifty Cents) including the work completed, and the SEP shall be completed no later than 90 days. All work required to complete the SEP shall be performed in compliance with all Federal, State, and Local Laws and Regulations.

22. 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) The final abatement report, as required by state law; and
- (iv) The following certification signed by Gary Oeth:

**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.

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

As to EPA:

Stephven Richard, WWPD/TOPE  
U.S. Environmental Protection Agency, Region 7  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101.

As to the State:

Rita Gergely, Iowa Department Public Health  
Lucas State Office Building -321 East 12<sup>th</sup> Street  
Des Moines, IA 50319.

23. In the event that Respondent fails to complete the SEP in accordance with this Order or to the extent that actual expenditures for the SEP do not equal or exceed the amount

of money required to be expended on the SEP as set forth above, Respondent shall be liable for stipulated penalties as follows:

(i) If the SEP is not timely completed to the satisfaction of EPA in accordance with the terms of this Order, Respondent shall pay a stipulated penalty of \$200.00 (Two Hundred Dollars).

(ii) If the SEP is completed to the satisfaction of EPA but Respondent's actual expenditures are less than 90 percent of the amount of money required to be expended on the SEP, Respondent shall pay a stipulated penalty of \$500.00 (Five Hundred Dollars).

(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.

24. 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.

25. 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, in settlement of the allegations set forth in the Consent Agreement, shall pay by cashier's or certified check, a civil penalty, for the violations cited herein, in the amount of Six Thousand Six Hundred and Thirty Four Dollars (\$6634.00), plus interest of \$145.40 for a total payment of \$6779.40. An initial payment of \$564.95 shall be paid on or before thirty (30) days of the effective date this Final Order. Each succeeding payment of \$564.95 shall be due thirty (30) days after the previous payment. 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:

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

2. A copy of the check shall simultaneously be sent to the following:

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

Melissa A.C. Bagley, Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 7  
901 N. 5<sup>th</sup> 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  
GARY OETH**

Date: 12/14/07

By:

Gary Oeth  
Gary Oeth Owner  
Print Name Title

**COMPLAINANT**  
**U. S. ENVIRONMENTAL PROTECTION AGENCY**

Date: 12/18/07

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

Date: 12-17-2007

By: Melissa A.C. Bagley  
Melissa A.C. Bagley, Attorney  
Office of Regional Counsel

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

Date: December 26, 2007   
ROBERT L. PATRICK  
Regional Judicial Officer  
U.S. Environmental Protection Agency, Region 7

## **PROPOSED WORK PLAN FOR THE 4141 AMHERST, DES MOINES, IOWA SUPPLEMENTAL ENVIRONMENTAL PROJECT**

RESPONDENT, Gary Oeth, proposes to perform the following abatement projects in conformance with the Supplemental Environmental Project policies of EPA as a part of the settlement agreement between RESPONDENT and EPA. The abatement project will be completed by a certified lead abatement contractor and performed in conformance with applicable regulations.

### Projects Which Have Been Completed

On June 6, 2007, a Residential Inspection for Lead-based Paint was conducted consisting of a visual inspection for potential lead-based paint hazards, X-Ray Fluorescence analysis of deteriorated paint surfaces, and collection of dust and soil samples for laboratory analysis. The Residential Inspection for Lead-based Paint was performed by Alloy Specialty, at a cost of \$422.50. Pursuant to the visual assessment and dust and soil sampling conducted, substantial lead-based paint was present at Exterior-Doorframe side A, Door/Frame-Bedroom 1 and Bathroom, and Doorframe-Laundry room, side A.

### Projects To Be Completed

During the inspection of the property, Alloy Specialty identified areas which contained unacceptable levels of lead-based paint. Pursuant to the bid attached hereto as Exhibit "1", RESPONDENT has contacted an abatement contractor, BC Properties & Contracting, L.L.C., to obtain a preliminary bid on the project described at 4141 Amherst, which generally consists of the removal and replacement of doors and frames containing lead at a cost of \$2,500.00, as represented in the abatement proposal.

RESPONDENT anticipates entering into a binding contract with BC Properties & Contracting L.L.C. or other licensed abatement contractor within thirty (30) days of entry of the Consent Agreement and Final Order, and anticipates completing this abatement project within ninety (90) days of entry of the Consent Agreement and Final Order.

The cost of the prior and future abatements at 4141 Amherst, Des Moines, Iowa should be at least \$2922.50.

### Legal Guidelines For Sep Projects

The lead-based paint abatement and assessment projects set forth above all fall within the SEP policy guidance and legal guidelines for SEP projects. These projects are not inconsistent with any provision of the underlying statutes. These lead projects directly advance the goals of the Residential Lead Based paint Hazard Reduction Act of 1992 by detecting and eliminating lead paint from target housing and accordingly eliminating potential lead paint health hazards from such units. These projects have a strong nexus with that statute for the reason that the projects will reduce the likelihood that similar violations (alleged non-disclosure) will occur in

the future. In addition, the projects will reduce the potential for adverse impact to public health, and reduce other overall risks to public health addressed by the alleged violations at issue. The abatement projects are also within the immediate geographic area of the alleged violations.

The funding for these projects is in no way controlled by EPA nor will EPA gain any resources as a result of such projects. RESPONDENT will not use any federal funds or grants to perform these projects, and will not claim a tax deduction for monies expended on these projects.

#### Categories Of Supplemental Environmental Projects

Supplemental Environmental Projects are common settlement tools used in alleged violations of the Lead Based Paint Disclosure Rules. EPA has also expressed a preference for abatement SEP projects which eliminate the risk at a facility, as opposed to environmental assessment or audit SEP projects which may be interpreted as identifying but not eliminating the alleged risks.

Prior to initiating a lead-based paint abatement project, one might initiate an environmental quality assessment, which falls within the fifth type of SEP, the "Assessments and Audits" category. Such assessments include the investigation of the threats to human health, condition of the environment, and the environment impacted at the site.

Lead-based paint abatement projects fall within the third type of SEP described in the SEP guidance, the "Pollution Reduction" category of Supplemental Environmental Projects, for the reason that such projects result "in a decrease in the amount and/or toxicity of [a] hazardous substance" that has previously been generated or released into the environment. Elimination of the lead paint by abatement of the target housing units "employs recycling, treatment, containment or disposal techniques" which reduce the amount of lead in the environment and consequently, reduces the potential for lead paint based health related effects and other harmful consequences of lead in the environment.

To the extent that lead-based paint abatement projects do not fit within one of the seven specific categories of SEP projects, these projects would fit within the "catch-all" eighth category described in the SEP policy. This category includes "projects determined by the case team to have environmental merit which do not fit within at least one of the seven categories above, but are otherwise fully consistent with all other provisions of the SEP policy."

#### CONCLUSION

RESPONDENT has completed an environmental risk assessment in 2007. The cost of the 2007 assessment was \$422.50. RESPONDENT also proposes to perform the above referenced abatement project at 4141 Amherst, Des Moines, Iowa 50313. The abatement project should be complete on or before ninety (90) days from the entry of the Consent Agreement and Final Order. Total costs for the abatement projects combined with the total assessment cost, will equal approximately \$2922.00.

IN THE MATTER OF Gary Oeth, Respondent  
Docket No. TSCA-07-2008-0004

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:

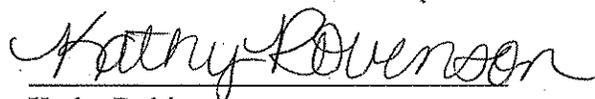
Copy hand delivered to  
Attorney for Complainant:

Melissa A.C. Bagley  
Assistant Regional Counsel  
Region VII  
United States Environmental Protection Agency  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Gary Oeth  
6501 Madison Avenue  
Urbandale, Iowa 50322-2735

Dated: 12/26/07



Kathy Robinson  
Hearing Clerk, Region 7