

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

11201 RENNER BOULEVARD
LENEXA, KS 66219

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

2018 MAY -1 PM 3: 27

IN THE MATTER OF)
)
SUPERIOR RESTORATION)
& CONSTRUCTION LLC,)
)
Respondent.)
_____)

Docket No. TSCA-07-2016-0017

ORDER TO SHOW CAUSE AND SUPPLEMENT THE RECORD

On August 16, 2016, Complainant, U.S. Environmental Protection Agency, Region 7 initiated this administrative action with the filing of a Complaint and Notice of Opportunity For Hearing ("Complaint") against Superior Restoration & Construction LLC ("Respondent"). The Complaint alleged in nine (9) counts that Respondent had violated Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, and the federal regulations set forth at 40 C.F.R. Part 745, Subpart E, in connection with a renovation it performed in September 2015 at a property located at 3415 Charlotte Street in Kansas City, Missouri. The Complaint proposed the assessment of a civil penalty in the amount of \$44,680 against Respondent for its violations. The record in this proceeding contains a signed returned receipt, as well as USPS tracking information, indicating that the complaint was delivered to Respondent on August 19, 2016.¹ On March 28, 2018, Complainant, moved for entry of a Default Order against Respondent, Superior Restoration & Construction LLC, for failure to file a timely answer in this matter.

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 ("Consolidated Rules"). Section 22.17 of the Consolidated Rules provides in part:

- (a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations . . .

¹ Included in the record are Articles of Organization filed with the Kansas Secretary of State which shows the registered agent for Superior Restoration & Construction LLC as Cory W. Poulsen and the address for both the registered office and mailing address as 23625 W. 92nd Terrace, Lenexa, KS 66227. Pre-filing letters addressed to Cory W. Poulsen at this address were returned to the Agency three times. After the third failed attempt to deliver the pre-filing letter to Mr. Poulsen at this address, an inspector in the Region 7 Toxics and Pesticide Branch attempted to deliver the pre-filing letter via personal service at the Respondent's registered Lenexa address, which appeared to be Respondent's home. After this attempt was also unsuccessful, an internet search revealed a second location in Overland Park, KS that was associated with Respondent's business. The EPA inspector personally visited this location at 7861 Mastin Street, Overland Park, KS 66204 where the inspector encountered a woman who identified herself as Heather Stuart, the office manager for Superior Restoration & Construction LLC. Ms. Stuart explained that the company was in the process of moving to the new location on Mastin Street. She provided the EPA inspector with assurances that she would give Mr. Poulsen the letter. The complaint was addressed to Mr. Poulsen at the Mastin Street address and EPA received and filed the signed return receipt, together with USPS tracking information which shows that the complaint was "delivered to an individual at the address at 9:37 am on September 1, 2016 in Overland Park, KS 66204."

- (b) *Motion for Default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.
- (c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

In addition, the Consolidated Rules provide in pertinent part that:

If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act . . . If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

As noted above, in addition to any civil penalty criteria in the Act, the Presiding Officer shall also consider any civil penalty guidelines issued under the Act. For purposes of calculating penalties in connection with cases involving violations of, *inter alia*, TSCA's Lead Renovation, Repair and Painting Rule, EPA issued guidelines entitled the "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule ("ERPP"). The ERPP sets forth EPA's analysis of the TSCA statutory factors as they apply to, *inter alia*, violations of the RRP Rule and provides a calculation methodology for applying the statutory factors to particular cases. ERPP at 8.

Paragraph 62 of the Complaint filed in this matter states as follows:

In order to assess a penalty for the violations alleged in this Complaint, Complainant has taken into account the particular facts and circumstances of this case with specific reference to the EPA's *August 2010* [emphasis added] Interim Final Policy entitled "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule" (the "LBP Consolidated ERPP"), a copy of which is enclosed with this Complaint. The LBP Consolidated ERPP provides a rational, consistent, and equitable calculation methodology for applying to particular cases the statutory penalty factors enumerated above.

In addition to the Complaint, Exhibit M of the Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order filed on March 28, 2018 is the LBP Consolidated ERPP Interim Final Policy, dated *August 2010* [emphasis added].

According to the Complaint, the alleged violations occurred in September 2015. *Complaint, ¶¶ 15 and 18*. The LBP Consolidated ERPP was revised on *April 4, 2013* [emphasis added]. As a result of the revision, it appears that Complainant should have utilized the revised April 4, 2013 LBP Consolidated ERPP instead of the August 2010 version for purposes of calculating the penalty for the alleged violations.

Therefore, based upon the record in this matter, and in light of the considerations set forth herein, the undersigned issues the following ORDER:

Complainant shall, no later than May 31, 2018, explain whether the revised April 4, 2013 LBP Consolidated ERPP applies in this matter and if it applies, Complainant shall explain if the penalty calculation differs in any way from the penalty calculation utilizing the August 2010 LBP Consolidated ERPP. Complainant shall provide a detailed discussion of the legal and factual basis for the requested penalty, including an analysis in light of the statutory factors and the 2013 LBP Consolidated ERPP. If the April 4, 2013 LBP Consolidated ERPP does not apply, Complainant shall explain why it does not apply. Complainant shall also supplement the record by submitting a declaration or affidavit by the Agency representative responsible for calculation of the penalty that demonstrates compliance with the statutory factors and any applicable Agency policies that were used, including either the 2010 or 2013 LBP Consolidated ERPP.

Complainant shall serve its response to this Order to Show Cause to Respondent. Respondent may file a reply to Complainant's response to this Order to Show Cause within 20 days of Respondent's receipt of Complainant's response.

SO ORDERED, this 1st day of May, 2018.



Karina Borromeo
Regional Judicial Officer/Presiding Officer

IN THE MATTER OF Superior Restoration & Construction, LLC, Respondent
Docket No. TSCA-07-2016-0017

CERTIFICATE OF SERVICE

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

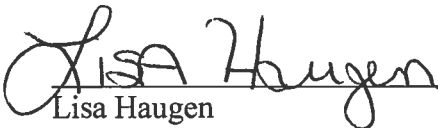
By Hand Delivery

Jared Pesseto
Assistant Regional Counsel
United States Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, KS 66219

By Certified Mail, Return Receipt Requested

Mr. Cory Poulsen
Superior Restoration & Construction LLC
23625 West 92nd Terrace
Lenexa, KS 66227

Mr. Cory Poulsen
Superior Restoration & Construction LLC
7861 Mastin Drive
Overland Park, KS 66204

 5/1/18

Lisa Haugen
Region 7 Hearing Clerk