



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAR 11 2010

REPLY TO THE ATTENTION OF:

LC-8J

CERTIFIED MAIL

Receipt No.7001 0320 0006 0189 9651

Berry-Gibson Properties, LLC
Johnson, Urban & Range Co., LPA
117 South Broadway-P.O. Box 1007
New Philadelphia, Ohio 44663

Berry-Gibson Properties, LLC

TSCA-05-2010-0008

Dear Mr. Gibson:

I have enclosed a copy of an original fully executed Consent Agreement and Final Order in resolution of the above case. This document was filed on March 11, 2010, with the Regional Hearing Clerk.

The civil penalty in the amount of \$1000.00 is to be paid in the manner described in paragraphs 30 and 31. Please be certain that the number **BD 2751047X008** and the docket number are written on both the transmittal letter and on the check. Payment is due by April 3, 2010 (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,

Pamela Grace
Pesticides and Toxic Compliance Section

Enclosures

cc: Eric Volck, Cincinnati Finance/MWD (w/Encl.)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:

**Berry-Gibson Properties, LLC
New Philadelphia, Ohio,**

Respondent.



Docket No. TSCA-05-2010-0008

**Proceeding to Assess a Civil
Penalty Under Section 16(a)
of the Toxic Substances
Control Act,
15 U.S.C. § 2615(a)**

Consent Agreement and Final Order Commencing and Concluding the Proceeding

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits* (Consolidated Rules) as codified at 40 C.F.R. Part 22.
2. The Complainant is the Director of the Land and Chemicals Division, U.S. Environmental Protection Agency (EPA), Region 5.
3. Respondent is Berry-Gibson Properties, LLC (Berry-Gibson), a corporation, doing business in the State of Ohio.
4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).
5. The parties agree that settling this action without the filing of a complaint or

the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO, and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

Statutory and Regulatory Background

9. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the Lead Act), 42 U.S.C. § 4852d, requires the Administrator of EPA to promulgate regulations for the disclosure of lead-based paint hazards in target housing that is offered for sale or lease.

10. On March 6, 1996, EPA promulgated regulations at 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 (Disclosure Rule) pursuant to 42 U.S.C. § 4852d.

11. 40 C.F.R. § 745.103 defines target housing as any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling.

12. 40 C.F.R. § 745.103 defines “agent” as any party who enters into a contract

with a seller or a lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing.

13. 40 C.F.R. § 745.103 defines “seller” as any entity that transfers legal title to target housing, in whole or in part, in return for consideration, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.

14. 40 C.F.R. § 745.103 defines “purchaser” as any entity that enters into an agreement to purchase an interest in target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.

15. 40 C.F.R. § 745.113(a) requires that each contract to sell target housing include an attachment containing the following elements: a lead warning statement; a statement by the seller disclosing the presence of any known lead-based paint and/or lead-based paint hazards or lack of knowledge of such presence; a list of any records or reports available to the seller that have been provided to the purchaser regarding lead-based paints and/or lead-based paint hazards in target housing or a statement that no such records are available; a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. § 745.113(a)(2) and (3) and the *Lead Hazard Information Pamphlet*; a statement by the purchaser that he or she has received or waived the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a); and, the signatures and dates of signatures of the seller, and purchaser certifying the accuracy of their statements.

16. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failure to

comply with the Disclosure Rule violates Section 409 of TSCA, 15 U.S.C. § 2689, which may subject the violator to administrative civil penalties under Section 16(a) of TSCA, 15 U.S.C. § 2615(a), 42 U.S.C. § 4852d(b)(5), and 40 C.F.R. § 745.118(f).

17. The Administrator of EPA may assess a civil penalty of up to \$11,000 for each violation of Section 409 of TSCA that occurred after July 28, 1997 through January 12, 2009, pursuant to 42 U.S.C. § 4852d (b)(5), 15 U.S.C. § 2615(a), and 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

18. Between June 1 and 10, 2005, Respondent owned a single family dwelling in New Philadelphia, Ohio at 916 Grant Avenue, NW (Respondent's property).

19. Respondent's property is "target housing" as defined in 40 C.F.R. § 745.103.

20. On the following date, Respondent, either directly or through Respondent's authorized agent, entered into the following written sales agreement (contract) with individuals for the sale of target housing:

Address	Date of Sale
916 Grant Avenue, NW, New Philadelphia, Ohio	June 10, 2005

21. Respondent is a "seller," as defined in 40 C.F.R. § 745.103, because it transferred legal title of the target housing referred to in paragraph 18, above, in return for consideration.

22. The individuals who signed the contract to purchase the target housing referred to in paragraph 18, above, became a "purchaser," as defined in 40 C.F.R. § 745.103, because they entered into an agreement to purchase an interest in target housing.

23. Respondent failed to include a lead warning statement, as an attachment to

the contract to sell the target housing at 916 Grant Avenue, NW, New Philadelphia, Ohio, in violation of 40 C.F.R. § 745.113(a)(1), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

24. Respondent failed to include a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or a lack of knowledge of such presence, as an attachment to the contract to sell target housing at 916 Grant Avenue, NW, New Philadelphia, Ohio, in violation of 40 C.F.R. § 745.113(a)(2), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

25. Respondent failed to include a list of records or reports available to the seller pertaining to lead-based paint and/or lead-based paint hazards in the target housing that have been provided to the purchaser or a statement that no such records or reports are available, as an attachment to the contract to sell target housing at 916 Grant Avenue, NW, New Philadelphia, Ohio, in violation of 40 C.F.R. § 745.113(a)(3), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

26. Respondent failed to include a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. § 745.113(a)(2) and (3) and the *Lead Hazard Information Pamphlet* required under 15 U.S.C. § 2696, as an attachment to the contract to sell target housing at 916 Grant Avenue, NW, New Philadelphia, Ohio, in violation of 40 C.F.R. § 745.113(a)(4), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

27. Respondent failed to include a statement by the purchaser that he or she has either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a) or waived the opportunity, as an attachment to the contract to sell target housing at 916 Grant Avenue, NW, New Philadelphia, Ohio, in violation of 40 C.F.R. § 745.113(a)(5), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

28. Respondent failed to include the signatures of the seller's agent, and purchasers, certifying to the accuracy of their statements to the best of their knowledge, along with the dates of signature, as an attachment to the contract to sell target housing at 916 Grant Avenue, NW, New Philadelphia, Ohio, in violation of 40 C.F.R. § 745.113(a)(7), 15 U.S.C. § 2689, and 42 U.S.C. § 4852d(b)(5).

Civil Penalty

29. Pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a), Complainant determined that an appropriate civil penalty to settle this action is \$1,000. In determining the penalty amount, Complainant considered the nature, circumstances, extent, and gravity of the violations, and, with respect to Respondent, ability to pay, effect on ability to continue to do business, any history of such prior violations, and the degree of culpability. Complainant also considered EPA's *Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy*, dated December 2007.

30. Within 30 days after the effective date of this CAFO, Respondent must pay a \$1,000.00 civil penalty for the TSCA violations by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

[for checks sent by regular mail]

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

or,

[for checks sent by express mail]

U.S. Bank
Government Lockbox 979077 U.S. EPA Fines and Penalties
Contact: Natalie Pearson
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, Missouri 63101

The check must state the case title 'In the Matter of United States EPA and Berry-Gibson Properties, LLC,' the docket number of this CAFO, and the billing document number.

31. A transmittal letter stating Respondent's name, the case title, Respondent's complete address, the case docket number and the billing document number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Pamela Grace (LC-8J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Tom Turner (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

32. This civil penalty is not deductible for federal tax purposes.

33. If Respondent does not pay the civil penalty timely, EPA may refer this matter to the Attorney General who will recover such amount, plus interest, in the appropriate district court of the United States under Section 16(a) of TSCA, 15 U.S.C. § 2615(a). The validity, amount and appropriateness of the civil penalty are

not reviewable in a collection action.

34. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date the payment was due at a rate established pursuant to 31 U.S.C. § 3717. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a six percent per year penalty on any principal amount 90 days past due.

General Provisions

35. This CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in the CAFO.

36. This CAFO does not affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

37. This CAFO does not affect Respondent's responsibility to comply with the Lead Act and the Disclosure Rule and other applicable federal, state, and local laws.

38. Respondent certifies that it is complying with the Lead Act and the Disclosure Rule.

39. The terms of this CAFO bind Respondent, and its successors and assigns.

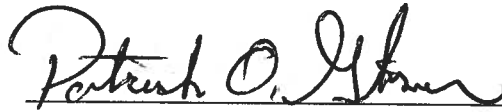
40. Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

41. Each party agrees to bear its own costs and attorney's fees in this action.

42. This CAFO constitutes the entire agreement between the parties.

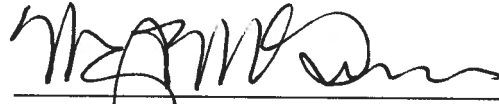
Berry-Gibson Properties, LLC, Respondent

2-18-10
Date


Patrick O. Gibson
Owner
Berry-Gibson Properties, LLC

U.S. Environmental Protection Agency, Complainant

March 5, 2010
Date


Margaret M. Guerriero
Director
Land and Chemicals Division

U.S. ENVIRONMENTAL
PROTECTION AGENCY
FEB 24 2010
OFFICE OF REGIONAL
COUNSEL

In the Matter of:
Berry-Gibson Properties, LLC
Docket No. TSCA-05-2010-0008

RECEIVED
MAR 11 2010

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

3/8/10

Date

Walter W. Karalich

for
Bharat Mathur
Acting Regional Administrator
U.S. Environmental Protection Agency,
Region 5

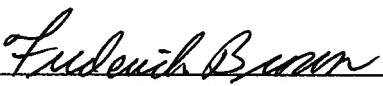
CERTIFICATE OF SERVICE

This is to certify that the original and one copy of this Consent Agreement and Final Order in the resolution of the civil administrative action involving Berry-Gibson Properties, LLC, was filed on March 11, 2010, with the Regional Hearing Clerk (E-19J), U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that a true correct copy was sent by Certified Mail, Receipt No.7001 0320 0006 0189 9651 to:

Berry-Gibson Properties, LLC
Johnson, Urban & Range Co., LPA
117 South Broadway-P.O. Box 1007
New Philadelphia, Ohio 44663

and forwarded intra-Agency copies to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J
Tom Turner, Counsel for Complainant/C-14J
Eric Volck, Cincinnati Finance/MWD


Frederick Brown, PTCS (LC-8J)
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Docket No. TSCA-05-2010-0008

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REGIONAL HEARING CLERK
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PROTECTION AGENCY