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13 December 2010

Regional Hearing Clerk (E-19J)
United States Environmental Protection Agency – Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

VIA FEDEX

Re: Docket No. TSCA-05-2010-0013

Dear Madam or Sir:

Enclosed herein, please find one (1) copy of Respondent's Motion for Interlocutory Appeal. One (1) original and one (1) copy of same was filed with the Presiding Officer.

Respectfully,

Kevin M. Tierney, Esq.

cc: Hanson's Window and Construction, Inc.
Enclosure (1)

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Attorneys for Respondent,
Hanson's Window and Construction, Inc.

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, ILLINOIS 60604

IN THE MATTER OF	)	
	)	**Docket No. TSCA-05-2010-0013**
Hanson's Window and Construction, Inc.	)	
Madison Heights, Michigan 48071	)	**Respondent's Motion for**
	)	**Interlocutory Appeal**
Respondent,	)	
	)	

Hanson's Window and Construction, Inc. ("Respondent"), by and through its counsel and pursuant to 40 CFR 22.29, hereby files its Motion for Interlocutory Appeal from the Administrative Law Judge's ruling denying its Motion to Dismiss EPA's Administrative Complaint and in support thereof states as follows:

I. Introduction

Respondent respectfully requests interlocutory review of the Administrative Law Judge's ("ALJ") December 1, 2010, Order ("Order") denying Respondent's Motion to Dismiss EPA's Administrative Complaint ("Motion"). Although recognizing that the ALJ has carefully reviewed the Motion and issued a reasoned determination, Respondent submits that the legal and policy implications of whether the Environmental Protection Agency's ("Complainant") Administrative Complaint, by alleging the Respondent failed to comply with legal requirements that did not exist in 2005, and could never have been complied with, provided fair notice to the Respondent of the

legal assertions against it that Complainant actually intended to bring is substantial, and should be resolved by the Environmental Appeals Board itself. Respondent further submits that an immediate appeal will materially advance the termination of the litigation and subsequent review of the ALJ's ruling will be an inadequate remedy.

The ALJ has ruled that although imperfect, the provisions cited in the Administrative Complaint do serve to adequately identify the legal deficiencies with which Respondent is charged. See, *Order, Page 5.* Accordingly, any citation errors can be cured through an amended complaint to be filed by the Complainant, which amended complaint can be filed as a result of the ALJ's concurrent ruling in its Order that the Complainant's Motion to File the Amended Complaint should be granted. See, *Order, Page 12.*

II. Background

On June 10, 2010, Complainant filed its Administrative Complaint alleging that Respondent has violated the Residential Property Renovation Rule codified at 40 Code of Federal Regulations ("C.F.R.") Part 745, Subpart E, implementing Section 406(b) of Title IV of the Toxic Substances Control Act ("TSCA"), *15 U.S.C. §2686(b).*

Specifically, in Paragraphs 47 through 319 of the Administrative Complaint, Complainant alleges that Respondent committed 271 violations of *40 C.F.R. 745.84(a)(1).* Separately, in Paragraphs 320 through 593 of the Administrative Complaint, Complainant alleges that Respondent also committed 271 violations of *40 C.F.R. 745.86(a).* All alleged violations relate to the Environmental Protection Agency's Pre-Renovation Rule.

On August 3, 2010, Respondent timely filed its Answer to the Complainant's Administrative Complaint ("Answer") and its Motion to Dismiss EPA's Administrative Complaint ("Motion")[1].

Complainant responded to the Motion on August 12, 2010 ("Complainant's Response").

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[1] Respondent notes that it timely filed its Motion and Answer to the Administrative Complaint by sending such via overnight FedEx on July 29, 2010, to the Complainant. Through FedEx confirmation, Complainant received such on July 30, 2010. Respondent cannot account for Complainant's internal mail policies that apparently led to Respondent's filings not being "received" by Complainant until August 3, 2010. A copy of the FedEx confirmation is attached herein.

Simultaneously with this filing, Complainant filed its Motion to File the Amended Complaint and memorandum in support thereof (collectively, "Motion to Amend"), which sought to correct the Complainant's incorrect citations and cite the correct section numbers.

On August 27, 2010, Respondent replied to Complainant's Response ("Respondent's Reply"), arguing, *inter alia*, that the Complainant's incorrect citations could not simply be cured via an amended complaint.

On August 30, 2010, Respondent filed a response to Complainant's Motion to Amend, arguing that the Administrative Complaint did not constitute fair notice of the charges against Respondent, and thus the Motion to Amend should not be granted.

On September 2, 2010, Complainant filed its Reply to Respondent's Response to Complainant's Motion to Amend, arguing, *inter alia*, that the Complaint did constitute fair notice of the charges against Respondent.

On December 1, 2010, the ALJ issued an Order denying Respondent's Motion to Dismiss EPA's Administrative Complaint and granting the Complainant's Motion to Amend. See, *Order, Page 12.*

III. Argument

40 CFR 22.29(b) of the Consolidated Rules of Practice specifies the circumstances under which the ALJ should refer a ruling to the Environmental Appeals Board for interlocutory review. Such review is warranted where (1) the ruling involves a controlling question of law or policy as to which there exists a substantial ground for a difference of opinion and (2) either (i) an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or (ii) subsequent review will be an inadequate remedy. These circumstances all weigh heavily in favor of granting Respondent's present application.

A. Respondent's Motion Involves an Important Question of Law or Policy Concerning Which There Is Substantial Grounds for Difference of Opinion

40 CFR 22.29(b) of the Consolidated Rules of Practice requires that the ALJ first determine whether its Order involves an important question of law or policy. The Consolidated

Rules of Practice do not define this phrase. Nevertheless, Respondent respectfully submits that the important question of law or policy in this case as to which there exists a substantial ground for a difference of opinion is whether or not the Administrative Complaint, by alleging the Respondent failed to comply with legal requirements that did not exist in 2005, and could never have been complied with, provided fair notice to the Respondent of the legal assertions against it that Complainant actually intended to bring.

The Complainant's actions in this case fall far short of what is required to provide Respondent with fair notice of the applicable law that it is alleging Respondent has violated. The Order holds that although imperfect, the provisions cited in the Administrative Complaint do serve to adequately identify the legal deficiencies with which Respondent is charged. See, *Order, Page 5.*

In support of the above, the Order states that "the differences between the 1998 and 2008 versions of the EPA's Pre-Renovation Rule are relatively minor. The *prima facie* case remains the same. EPA's preamble discussion of the amended version states: With respect to renovations in individual housing units, whether single family or multi-family, firms performing renovations for compensation in target housing must continue to distribute lead hazard information pamphlet to the owners and tenants of the housing no more than 60 days before beginning renovations." See, *Order, Page 5.*

Respondent respectfully suggests that this is not correct. Despite the Complainant's assertions to the contrary, this is not a matter of some "incorrect citation". Indeed, the differences between the 1998 version of the EPA's Pre-Renovation Rule (the "1998 Pre-Renovation Rule") and the 2008 Pre-Renovation Rule (the "2008 Pre-Renovation Rule") are <u>not</u> relatively minor, but are extraordinarily material, most importantly as to the very charges facing Respondent.

While Respondent agrees with the ALJ that the broad overarching requirement to distribute lead hazard information to the owners and tenants of housing no more than 60 days before beginning renovations has not changed between the 1998 Pre-Renovation Rule and the 2008 Pre-Renovation Rule the requirements as to when such lead hazard information was to be provided, when it was not to be provided, the penalties for failing to provide it, and the very content and form of *what* information was to be provided, was materially altered between the two

rules. The changes were legally complex and operationally revolutionary, at least as to the business of installing replacement windows—which is the basis for every allegation against Respondent in Complainant's Administrative Complaint.

Specifically, the 1998 Pre-Renovation Rule requires certain persons who perform "renovations" of "target housing" for compensation to provide the EPA lead hazard information pamphlet to owners and occupants of such housing prior to commencing the "renovation", unless exempted by Section *745.82*.

The Section *745.82* exemptions are, in part, as follows:

> (a) Except as provided in paragraph (b) of this section, this subpart applies to all renovations of target housing performed for compensation.
>
> (b) This subpart does not apply to renovation activities that are limited to the following:
>
> (1) Minor repair and maintenance activities (including minor electrical work and plumbing) that disrupt 2 square feet or less of painted surface per component.

Accordingly, under Section *745.82(b)(1)* of the 1998 Pre-Renovation Rule, renovation activities will not be subject to the EPA pamphlet disclosure requirement if the renovation activity is limited to "[m]inor repair and maintenance activities...that disrupt 2 square feet or less of painted surface per component."

The 2008 Pre-Renovation Rule made three significant changes that completely altered the above. First, as it noted in the April 22, 2008, Federal Register, EPA deleted *40 C.F.R. 745.82(a)(1)*. As noted *supra*, under Section *745.82(b)(1)* of the 1998 Pre-Renovation Rule, renovation activities will not be subject to the EPA pamphlet disclosure requirement if the renovation activity is limited to "[m]inor repair and maintenance activities...that disrupt 2 square feet or less of painted surface per component."

Second, in the 2008 Pre-Renovation Rule, EPA not only added a definition of "minor repair and maintenance activities", a term that was undefined under the 1998 Pre-Renovation Rule, but also expressly noted in this new definition that window replacement work did not

constitute a minor repair and maintenance activity. Under the 2008 Pre-Renovation Rule, minor repair and maintenance activities is defined as follows:

> Minor repair and maintenance activities are activities, including minor heating, ventilation or air conditioning work, electrical work, and plumbing, that disrupt 6 square feet or less of painted surface per room for interior activities or 20 square feet or less of painted surface for exterior activities where none of the work practices prohibited or restricted by § 745.85(a)(3) are used and where the work does not involve window replacement or demolition of painted surface areas. When removing painted components, or portions of painted components, the entire surface area removed is the amount of painted surface disturbed. Jobs, other than emergency renovations, performed in the same room within the same 30 days must be considered the same job for the purpose of determining whether the job is a minor repair and maintenance activity.

Third, EPA amended the definition of "renovation" in a number of ways, but for the purposes of this Motion, the most significant amendment was the addition of "[t]he term renovation does not include minor repair and maintenance activities" as the last sentence of the definition.

While discerning how the above changes revolutionized the actual application of the Pre-Renovation Rule may not be readily apparent at first blush, once the entire nature of the changes are appreciated, it becomes clear that these three changes, collectively, completely revolutionized the Pre-Renovation Rule.

Under the 1998 Pre-Renovation Rule, a person could be performing a renovation involving window replacement and have such renovation constitute a minor repair and maintenance activity.[2] Under the 2008 Pre-Renovation Rule, as a result of the above changes, this was no longer possible. Of course, a reader would not necessarily infer the scope of the changes from reading the April 22, 2008, Federal Register, as EPA only stated that "[a]s a result of these two definitional changes, the reference to minor maintenance in *40 CFR 745.82(a)(1)* is no longer necessary." Respondent anecdotally notes that this is hardly an apt description for such a revolutionary change.

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[2] Respondent notes that based on EPA's comments on the Section *745.82* exemption in EPA's Interpretive Guidance issued as of May 28, 1999 [revised June 25, 1999], Complainant disagrees with this assertion. Should the Administrative Complaint move forward, it is very likely that the parties will argue this issue.

As a result, the Complainant's definition of "minor repair and maintenance" under ¶9 and "renovation" under ¶11 in its original Administrative Complaint are entirely new legal definitions from the 2008 Pre-Renovation Rule, definitions which have absolutely no legal or operational relevance to Respondent's alleged activities in 2005 or the allegations within the original Administrative Complaint.[3] The allegations against the Respondent that Complaint now admits it intended to allege, utilize the dramatically different definitions discussed *supra*, with dramatically different legal implications and results.

Separately, illuminating the significant legal and operational differences between the 1998 Pre-Renovation Rule and the 2008 Pre-Renovation Rule in regard to the instant matter, Respondent also notes that the size limitations for determining whether a renovation constitutes a minor repair and maintenance activity are entirely different under the 1998 Pre-Renovation Rule versus the 2008 Pre-Renovation Rule – and it is this definition that gives rise to the delivery lead paint pamphlet requirements of which Respondent is accused of having violated. Indeed, the 1998 Pre-Renovation Rule states that minor repair and maintenance activities are those that disrupt 2 square feet or less of painted surface per component; whereas, the 2008 Pre-Renovation Rule states that minor repair and maintenance activities are those that disrupt 6 square feet or less of painted surface per room for interior activities or 20 square feet or less of painted surface for exterior activities.

Moreover, and of perhaps even greater concern to the rights of the Respondent, is that the lead paint informational pamphlet that Respondent is accused of having failed to provide under the original Administrative Complaint *did not even exist in 2005.*[4]

Respondent respectfully submits that a reading of the original Administrative Complaint, barring the Respondent being a learned environmental attorney or an EPA official, could not

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[3] As raised in Respondent's Motion to Dismiss, ¶6, ¶9, ¶10, ¶11, ¶12 of the Administrative Complaint use definitions that are incorrect and inapplicable as to the allegations against Respondent.

[4] The 1998 Pre-Renovation Rule references the pamphlet titled "Protect Your Family From Lead in Your Home"; whereas, the pamphlet required under the 2008 Pre-Renovation Rule – at time of the filing of the original Administrative Complaint - is titled "The Lead-Safe Certified Guide to Renovate Right". A cursory review will reveal the pamphlets are materially different technically, legally, and operationally.

possibly have provided fair notice to Respondent of the charges against it, and could not have informed the Respondent of the legal requirements at issue.

B. An Immediate Appeal Will Materially Advance the Termination of the Litigation Whereas Subsequent Review Is Inadequate

An immediate appeal will materially advance the termination of the litigation and subsequent review of the ALJ's decision will be an inadequate remedy. Respondent has submitted that the Administrative Complaint does not constitute fair notice of the charges against Respondent. Complainant contends that the flawed Administrative Complaint does constitute fair notice. The ALJ's Order agrees with Complainant.

If Complainant files its amended complaint as permitted and directed by the ALJ's Order, Respondent's contention that the original Administrative Complaint should be dismissed will be irrelevant. Even if somehow it could later be determined that the Order was incorrect, much time, money, and judicial resources will have been saved and the litigation will have been significantly advanced if such a determination were made at this time by the Environmental Appeals Board.

IV. Conclusion

Based on the foregoing, Respondent respectfully requests that the Administrative Law Judge grant Respondent's application for Environmental Appeals Board interlocutory appeal by certifying to the Environmental Appeals Board, in writing, that (i) its ruling involves an important question of law and policy as to which there exists a substantial ground for a difference of opinion and (ii) an immediate appeal will materially advance the termination of the litigation and subsequent review will be an inadequate remedy.

Respectfully submitted for
Hanson's Window and Construction, Inc.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2010, the original and a true copy of the foregoing Respondent's Motion for Interlocutory Appeal from the Administrative Law Judge's ruling denying its Motion to Dismiss EPA's Administrative Complaint was filed with:

Regional Hearing Clerk (E-19J)
United States Environmental Protection Agency – Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

a true copy of the foregoing was hand delivered via courier to:

Chief Judge Susan L. Biro
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington D.C. 20460-2001

a true copy of the foregoing was mailed via overnight courier to:

Marcy A. Toney
Regional Judicial Officer
United States Environmental Protection Agency - Region 5
77 West Jackson Boulevard
Mail Code C-14J
Chicago, Illinois 60604

Mary McAuliffe
Associate Regional Counsel
United States Environmental Protection Agency - Region 5
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Chicago, Illinois 60604-3590

Kevin M. Tierney, Esq.

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Weight:	0.50 lb.
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