UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Waterway Realty, LLC,	)	**Docket No. TSCA-01-2014-0066**
	)	
Respondent.	)	

DEFAULT ORDER AND INITIAL DECISION

On September 30, 2014, the Legal Enforcement Manager of the Office of Environmental Stewardship, United States Environmental Protection Agency, Region 1 ("Complainant") filed a Complaint seeking the imposition of civil penalties against Waterway Realty, LLC ("Respondent") for alleged violations of Sections 15 and 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2614, 2689, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851 *et seq.*, and the regulations promulgated thereunder, 40 C.F.R. Part 745, Subparts E & L (the "RRP Rule"). Specifically, the Complaint alleges in seven counts that Respondent purchased and performed renovations on a single family residence at 6 Mitchell Street, Nashua, New Hampshire, without obtaining the necessary certification, following mandatory procedures for containing dust and debris, assigning certified renovators, or posting the required signage required by TSCA and the RRP Rule. For the seven violations, the Complainant proposes imposition of penalties totaling $49,654.

On November 17, 2014, Respondent, through counsel, filed an Answer and Request for Hearing. On December 23, 2014, Respondent further filed an "[Assented-to] Motion for Leave to File Amended Answer and Request for Hearing," including therewith its signed proposed Amended Answer ("Answer" or "Ans."). On April 2, 2015, this matter was transferred to the Office of Administrative Law Judges for litigation. The parties then voluntarily engaged in an alternative dispute resolution process until July 2, 2015. At the conclusion of the unsuccessful alternative dispute resolution process, the undersigned was designated as the Presiding Officer for hearing.

On July 8, 2015, in addition to an Order granting Respondent's Motion, this Tribunal issued a Prehearing Order directing Complainant to submit its initial prehearing exchange by August 14, 2015, and directing Respondent to file its prehearing exchange by September 4, 2015. The Prehearing Order advised Respondent that it was "hereby notified that [its] failure to comply with the prehearing exchange requirements set forth herein may result in the entry of a default judgment against [it]." Prehearing Order at 4. Complainant timely filed its prehearing exchange

(PHE) on August 14, 2015 ("EPA PHE"). Respondent did not file a prehearing exchange by the deadline assigned in the Prehearing Order.[1]

On September 15, 2015, the undersigned issued an Order directing Respondent to show good cause, on or before September 29, 2015, why it had failed to submit its prehearing exchange, and why it should not be declared in default.[2] To date, Respondent has neither filed any response thereto, nor filed its prehearing exchange. Further, the record indicates that the Respondent has engaged in no other formal or informal communications with this Tribunal.

Accordingly, as discussed below, Respondent's failure to comply with this Court's July 8, 2015 Prehearing Exchange Order and Show Cause Order of September 15, 2015 results in a finding of default, the admission by Respondent of all facts alleged in the Complaint, and the assessment of a $49,654 civil penalty against it.

FINDS OF FACT AND CONCLUSIONS OF LAW

1. The Complainant is the the Legal Enforcement Manager of the Office of Environmental Stewardship, United States Environmental Protection Agency (EPA), Region 1. Complaint ("Compl.") ¶ 1.

2. The Respondent is Waterway Realty, LLC, a limited liability company registered in New Hampshire, which buys, sells, leases and renovates properties. Compl. ¶ 9; Ans. ¶ 9; EPA PHE Exs. 1, 2.

3. Respondent failed to comply with the Prehearing Exchange Order of July 8, 2015, as well as the related Show Cause Order dated September 15, 2015, and is therefore found in default. 40 C.F.R. § 22.17(a).[3]

4. "Default by respondent constitutes, for purpose 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." 40 C.F.R. § 22.17(a).

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[1] In the interim, by separate Notices dated July 30, 2014, counsel for Respondent withdrew its appearance and Respondent entered its appearance *pro se*, identifying its manager, Brian W. Colsia, and a post office box address as points of contact.

[2] The Order was served on the Respondent via Brian Colsia at the post office address provided in its Notice of Appearance. This is the same address Respondent identified for Mr. Colsia on its 2015 Annual Report filed with the state of New Hampshire. EPA PHE Ex. 2.

[3] Section 22.17(a) of the Consolidated Rules applicable to this proceeding, 40 C.F.R. Part 22, provides in pertinent part that: "A party may be found to be in default: . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer." 40 C.F.R. § 22.17(a).

5. The record does not show good cause why a Default Order should not be issued against the Respondent. 40 C.F.R. § 22.17(c).[4]

6. On May 25, 2012, Respondent purchased a single family home (the "Property") located at 6 Mitchell Street in Nashua, New Hampshire, with the intent to renovate the Property for an eventual sale or lease. Compl. ¶ 10; Ans. ¶ 10, 12; EPA PHE Exs. 3, 4 at 2, and Attachment ("Att.") 2 at 1.

7. The Property was constructed in 1900, and is "target housing" as defined in 15 U.S.C. § 2681(17) and 40 C.F.R. § 745.103.[5] EPA PHE Ex. 3.

8. Mr. Brian Colsia is a member and a manager of Waterway Realty, LLC, which functioned as the general contractor for the renovation activities at the Property. EPA PHE Exs. 2, 4 at 2, and Att. 2-4.

9. Respondent undertook the following renovation activities at the Property: power-washed the exterior; repainted the exterior; replaced window casements; replaced drywall; remodeled the first- and second-story bathrooms; remodeled the kitchen; installed new flooring; and performed plumbing and electrical work. EPA PHE Ex. 4 at 2, Att. 2 at 5, Att. 6.

10. The activities at the Property constituted a "renovation," as defined in 40 C.F.R. § 745.83. ("Renovation means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, . . . include[ing] (but is not limited to): 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)".)

11. The activities at the Property constituted a "renovation for compensation" under 40 C.F.R. § 745.82, and did not satisfy the requirements for any exemption contained therein. EPA PHE Ex. 4 at 2. (Mr. Colsia advised the inspector that he did not reside in the property or personally perform the renovations. Rather, it was being renovated for the purpose of resale, and he "had multiple employees perform the work.")

12. At all times relevant to the Complaint, Respondent was a "firm," as defined in 40 C.F.R. § 745.83. ("Firm means a company, partnership, [or] corporation. . . .")

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[4] 40 C.F.R. § 22.17(c) provides in pertinent part: "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."

[5] "The term 'target housing' means any housing constructed prior to 1978." 15 U.S.C. § 2681(17).

13. At all times relevant to the Complaint, Respondent was a "renovator," as defined in 40 C.F.R. § 745.83. ("Renovator means an individual who either performs or directs workers who perform renovations. A certified renovator is a renovator who has successfully completed a renovator course accredited by EPA or an EPA-authorized State or Tribal program.")[6] *See also* EPA PHE Ex. 4 at 2, and Att. 2 at 5.

14. On October 3, 2012, EPA conducted an inspection of the Property and discovered that Respondent was unaware of, and had failed to comply with, numerous RRP Rule requirements during the renovations. EPA PHE Ex. 4 at 1-2, and Atts. 3, 4.

15. As alleged in Count 1 of the Complaint, Respondent's failure to apply for and obtain firm certification from EPA prior to beginning renovation activities at the Property, EPA PHE Ex. 4 at 2 and Att. 5 at 3, violated 40 C.F.R. § 745.89(a)(1) ("Firms that perform renovations for compensation must apply to EPA for certification to perform renovations") and 40 C.F.R. § 745.81(a)(2)(ii) ("On or after April 22, 2010, no firm may perform, offer, or claim to perform renovations without certification from EPA under § 745.89 in target housing").

16. As alleged in Count 2 of the Complaint, Respondent's failure to "[c]over the [interior] floor surface, including installed carpet, with taped-down plastic sheeting or other impermeable material in the work area 6 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to contain the dust, whichever is greater" at the Property during renovation (EPA PHE Ex. 4, Att. 2 at 6, Att. 5 at 2, Att. 6), violated 40 C.F.R. §§ 745.89(d)(3) ("All renovations [must be] performed . . . in accordance with the work practice standards in § 745.85"), and § 745.85(a)(2)(i)(D).

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[6] In reaching this conclusion, I considered Respondent's claim and defense raised in its Answer that it was not a "renovator" and that "it did not conduct the renovation activities at the Property," but rather "[w]hile it held titled to the Property, it hired a third-party, non-employee general contractor (Kevin Pinet ("Pinet")) to perform work on the Property, including the renovations at issue in this case." Ans. ¶ 44, 66, *etc.* I also considered the documents it attached to its Amended Answer and original answer in support thereof: a 2012 Certificate of Liability Insurance for "Kevin Pinet DBA Waterway Building and Construction Management LLC" with Respondent identified as the Certificate Holder; an undated IRS Form 1099-Misc issued by Respondent to Kevin Pinet for over $50,00 in "Non-Employee Compensation;" and a 2013 Insurance Declaration for Pinet Construction LLC for "Carpentry – Residential – Three Stories or Less" work, which identified Respondent as an "Additional Insured." Neither of Respondent's Answers is certified or sworn, and its claims regarding hiring an independent contractor to perform the renovations is inconsistent with the representations made by Respondent at the time of the inspection. EPA PHE Ex. 4 at 2 (noting that Respondent explained that it had "multiple 'employees' perform the work"). Further, none of these documents appear to reference the Property at issue, and Respondent is engaged in the business of renovating properties generally. In addition, Respondent acknowledged in its Answer that it and Mr. Pinet "did not memorialize their agreement concerning the Property in an integrated, formal written contract." Ans. ¶ 68. As such, there is no evidence of any representations made by Mr. Pinet regarding (1) his status as a "Certified Renovator" (as required by law); (2) his assumption of general responsibility for regulatory compliance; or (3) his direction of the workers performing the renovations at the Property. As such, I find that Complainant has met its burden of proof on this issue despite the claim and/or defense raised by Respondent.

17. As alleged in Count 3 of the Complaint, Respondent's failure to "[c]over the [exterior] 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" during renovation of the Property (EPA PHE Ex. 4, Att. 2 at 6-7, Att. 5 at 2, Att 6), violated 40 C.F.R. §§ 745.89(d)(3) and 745.85(a)(2)(ii)(C).

18. As alleged in Count 4 of the Complaint, Respondent's failure to contain the waste from the renovation activities at the Property to "prevent releases of dust and debris before the waste was removed from the work area for storage or disposal" (EPA PHE Ex. 4, Att. 2 at 6, 8, Att. 5 at 2-3, Att. 6), violated 40 C.F.R. §§ 745.89(d)(3) and 745.85(a)(4)(i).

19. As alleged in Count 5 of the Complaint, Respondent's failure to ensure that at the Property "[a]ll individuals performing renovation activities on behalf of the firm are either certified renovators or have been trained by a certified renovator" (EPA PHE Ex. 4, Att. 2 at 4), violated 40 C.F.R § 745.89(d)(l).

20. As alleged in Count 6 of the Complaint, Respondent's failure to assign a certified renovator to the project at issue at the Property (EPA PHE Ex. 4, Att. 2 at 4, Att. 5 at 3), violated 40 C.F.R. § 745.89(d)(2) ("A certified renovator [must be] assigned to each renovation performed by the firm and discharge[] all of the certified renovator responsibilities identified in § 745.90.").

21. As alleged in Count 7 of the Complaint, Respondent's failure to "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" during the renovation at issue at the Property (EPA PHE Ex. 4, Att. 5 at 2, Att. 6), violated 40 C.F.R. §§ 745.89(d)(3) and 745.85(a)(l).

DETERMINATION OF CIVIL PENALTY AMOUNT

22. Section 22.17(c) of the Consolidated Rules provides, in pertinent part, that upon issuing a default order, "the relief proposed in the complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c).

23. Section 16(a) of TSCA, 15 U.S.C. § 2615(a) and 40 C.F.R. § 745, Subpart E, authorize the assessment of a civil penalty of up to $25,000 for each violation, which is increased to $37,500 per violation occurring between January 13, 2009 and September 7, 2013 under the Civil Monetary Penalty Inflation Adjustment Rule of 2008. 73 Fed. Reg. 75340 (December 11, 2008).

24. Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires that the following factors be considered in determining the amount of any penalty assessed under Section 16: "the nature, circumstances, extent, and gravity of the violation or violations

and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and other such matters as justice may require."

25. Having found that Respondent violated TSCA in seven instances, I have determined that $49,654, the aggregate penalty proposed in the Complaint, is the appropriate civil penalty to be assessed against Respondent, and that it is neither clearly inconsistent with the record of the proceeding nor clearly inconsistent with the Act.

26. In doing so, I have taken into account the nature, circumstances, extent, and gravity of the violations and, with respect to Respondent, its ability to pay, the effect on its ability to continue to do business, any history of prior such violations, its degree of culpability, and other such matters as justice may require, which are all of the factors identified by 15 U.S.C. § 2615(a)(2).

27. I have reviewed and considered the Agency's proposed penalty analysis, which calculated a $15,300 penalty for Count 1 (Failure to Obtain a Firm Certification); $6,000 penalties for Count 2 (Failure to Cover Interior), Count 3 (Failure to Cover Exterior), and Count 4 (Failure to Contain Waste); $4,500 penalties for Count 5 (Failure to Certify or Train Workers) and Count 6 (Failure to Assign Certified Renovator); a $2,840 penalty for Count 7 (Failure to Post Signs); and adjusted the penalty upward by 10% for culpability. Compl. ¶ 53 and Att. 1 thereto (Proposed Penalty Summary).

28. Further, I took into consideration the fact that Respondent has asserted that it was unaware of the RRP Rule at the time the renovations were undertaken at the Property (EPA PHE Ex. 4 at 2). However, I find that ignorance of the law does not excuse Respondent's violations, particularly as it is in the business of, *inter alia*, renovating real property, and has been in such business since 2010. Compl. ¶ 9; Ans. ¶ 9; EPA PHE Exs. 1, 2; *In the Matter of F.C. Haab Co.*, 1998 EPA ALJ LEXIS 46, *34 (ALJ June 30, 1998). Rather, it was Respondent's responsibility to become aware of its legal obligations, and to ensure that it had complied with all federal statutes and regulations that applied to its activities. *See* 44 U.S.C. § 1507; *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947) (Respondent is charged with the knowledge of the statutes of the United States and of the Federal regulations promulgated thereunder).

29. In addition, in determining the penalty, I considered Respondent's claim and defense raised in its Answer that "it did not conduct the renovation activities at the Property," and that "[w]hile it held titled to the Property, it hired a third-party, non-employee general contractor (Kevin Pinet ("Pinet")) to perform work on the Property, including the renovations at issue in this case," as well as the documents it submitted in support thereof. *See* note 6, *supra*. The documentary evidence Respondent submitted does not clearly prove, or even strongly suggest, that Mr. Pinet was responsible for independently directing the workers performing the relevant renovations, or that he assumed

responsibility for regulatory compliance at the Property.[7] There is certainly no evidence that Mr. Pinet was a Certified Renovator, or that he held himself out to Respondent as such.

30. Finally, I noted that there is no evidence of record that Respondent has any prior history of violations, has claimed an inability to pay the proposed penalty, or that doing so will negatively impact its ability to continue to do business.

ORDER

1. For failing to comply with the Prehearing Order and Order to Show Cause of the Presiding Officer, as enumerated above, Respondent is hereby found in **DEFAULT**.

2. Respondent **Waterway Realty, LLC** is assessed a civil administrative penalty in the amount of $49,654.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $49,654, payable to "Treasurer, United States of America," and mailed to:

   Regional Hearing Clerk (RAA)
   U.S. Environmental Protection Agency, Region 1
   5 Post Office Square, Suite 100 (ORA 18-1)
   Boston, MA 02109-3912

4. A transmittal letter identifying the subject case and EPA docket number, as well as Respondent's name and address, must accompany the check.

5. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

6. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon

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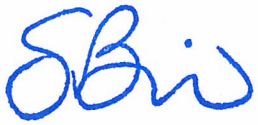
[7] As noted in the footnote above, none of the documents Respondent submitted with his Answers reference the specific renovations performed on the Property at issue in this case. Further, I note that at the top left of the $50,000 1099-Misc Form, the date "2012" is handwritten while the form appears to have been stamped by the Internal Revenue Service Taxpayer Assistance Center with the date of "Nov 25, 2014." Thus, it is unclear whether the document relates to the renovations at issue, performed on the property in 2012, as to which Respondent claims it paid Mr. Pinet $30-$35,000. Ans. ¶ 68.

the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: November 4, 2015
Washington, D.C.

In the Matter of Waterway Realty, LLC, Respondent
Docket No.TSCA-01-2014-0066

CERTIFICATE OF SERVICE

I certify that the foregoing **Default Order and Initial Decision**, dated November 4, 2015, was sent this day in the following manner to the addressees listed below.

Danielle Pope
Paralegal

Original And One Copy To:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA
Mail Code 1900R
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001

Copy By Regular Mail And Electronic Mail To:

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Dated: November 4, 2015
Washington, DC