



SEP 26 2012

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

290 BROADWAY

NEW YORK, NEW YORK 10007-1866

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.11  
2012 OCT -11 A 8:21  
REGIONAL HEARING  
CLERK

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Heiner Fernandez  
PZ Painting  
15 Salter Street  
Springfield, New Jersey 07081

Re: In the Matter of **PZ Painting**  
Docket No. TSCA-02-2012-9170

Dear Mr. Fernandez:

Enclosed is the Complaint and Notice of Opportunity for Hearing (the Complaint) and supporting documents in the above-referenced proceeding. This Complaint alleges violations of the Toxic Substances Control Act (TSCA), Section 409, and regulations promulgated pursuant to TSCA set forth at 40 C.F.R. Part 745 Subpart E.

You have the right to a formal hearing to contest any of the allegations in the Complaint and/or to contest the penalty proposed in the Complaint.

If you wish to contest the allegations or the penalty proposed in the Complaint, you must file an Answer within *thirty (30)* days of your receipt of the enclosed Complaint to the Environmental Protection Agency's (EPA) Regional Hearing Clerk at the following address:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16<sup>th</sup> Floor  
New York, New York 10007-1866

If you do not file an Answer within thirty (30) days of receipt of this Complaint and have not obtained a formal extension for filing an Answer from the Regional Judicial Officer, a default order may be entered against you and the entire proposed penalty may be assessed without further proceedings.

**bcc:** M. Tierney, 2-DECA-PTSB  
L. Hall, 2-DECA-PTSB  
B. McGarry, 2-DECA  
W. Sawyer, 2ORC-WTS  
S. Keith, 2ORC-WTSB  
E. Rodriguez, PAD

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Region 2**

----- X  
In the Matter of **PZ Painting**, :  
: :  
: :  
Respondent. :  
: :  
Proceeding under Section 16(a) of :  
the Toxic Substances Control Act. :  
----- X

**COMPLAINT AND NOTICE OF  
OPPORTUNITY FOR HEARING**

Docket No.  
TSCA-02-2012-9170

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2012 OCT -4 A 8:21  
REGIONAL HEARING  
CLERK

**COMPLAINT**

This is a civil administrative action instituted pursuant to § 16(a), 15 U.S.C. § 2615(a), of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 et seq. This Complaint serves notice of Complainant's preliminary determination 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 E, which were promulgated pursuant to § 402 of TSCA, codified at 15 U.S.C. § 2682 (hereinafter "§ 402").

Complainant in this proceeding, the Director, Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency ("EPA"), Region 2, has been duly delegated the authority to institute this action. Complainant, as and for her Complaint against Respondent, hereby alleges upon information and belief:

1. Respondent is PZ Painting. (hereinafter "Respondent").
2. Respondent's primary place of business is located at 15 Salter Street, Springfield, New Jersey 07081.
3. Respondent is subject to the regulations and requirements pertaining to Residential Property Renovation promulgated pursuant to Section 402, and set forth at 40 C.F.R. Part 745, Subpart E.
4. On or about June 7, 2012, duly designated representatives of EPA conducted an inspection of PZ Painting relating to renovation activities at 18 Church Mall Road, Springfield, New Jersey 07081 pursuant to § 11 of TSCA, 15 U.S.C. § 2610 (hereinafter "the Inspection").
5. The Inspection was conducted for the purpose of determining Respondent's compliance with the EPA regulations and requirements pertaining to Residential Property Renovation, 40 C.F.R. Part 745, Subpart E.

18 Church Mall Road Renovation Activities

6. The 18 Church Mall Road property, constructed in 1823, is “target housing” within the meaning of § 401 of TSCA, 15 U.S.C. § 2681, and 40 C.F.R. § 745.103.
7. Upon information and belief, Respondent is, and at all times relevant to this Complaint was, the “firm” contracted to conduct a “renovation,” as those terms are defined in 40 C.F.R § 745.83, of the property located at 18 Church Mall Road, Springfield, New Jersey 07081.
8. On or about June 7, 2012, the Respondent conducted a renovation of the 18 Church Mall Road property.

COUNT 1

**Failure of a Firm to Obtain Initial Certification from EPA**

9. Paragraphs 1 through 8 are realleged and incorporated as if fully set forth herein.
10. Under 40 C.F.R. § 745.89(a) pursuant to 40 C.F.R. § 745.81(a)(2)(ii), after April 22, 2010, firms that perform renovations for compensation must apply to EPA for certification.
11. For the renovation conducted at the property listed in paragraph 6 above on June 7, 2012 Respondent was not certified by EPA to conduct renovations.
12. Failure to obtain firm certification as specified in 40 C.F.R. § 745.89(a) is a violation of 40 C.F.R. § 745.89(a).
13. Respondent’s failure or refusal to comply with 40 C.F.R. § 745.89(a) constitutes a violation of § 409 of TSCA, 15 U.S.C. § 2689.

COUNT 2

**Failure of a Firm to Distribute Lead Hazard Information Pamphlet**

14. Paragraphs 1 through 8 are realleged and incorporated as if fully set forth herein.
15. Under 40 C.F.R. § 745.84(a)(1), beginning on December 22, 2008, no more than 60 days before beginning renovation activities in any residential dwelling unit of target housing, the firm performing a renovation must provide the owner of the unit with a pamphlet, as that term is defined in 40 C.F.R. § 745.83, which contains information regarding the hazards of lead and the firm must obtain a written acknowledgement of receipt from the owner of the unit.
16. For the renovation conducted at the property listed in paragraph 6 above on June 7, 2012 the Respondent did not provide the owner of the property with the lead hazard information pamphlet.

17. Failure to distribute the pamphlet as specified in 40 C.F.R. § 745.84(a)(1) is a violation of 40 C.F.R. § 745.84(a)(1).
18. Respondent's failure or refusal to comply with 40 C.F.R. § 745.84(a)(1) constitutes a violation of § 409 of TSCA, 15 U.S.C. § 2689.

PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with section 16 of TSCA, which authorizes the assessment of a civil penalty in the maximum amount of \$37,500 for each violation of TSCA § 409. (73 Fed. Reg. 75340-46, December 11, 2008, codified at 40 C.F.R. Part 19 increased the maximum penalty to \$37,500 per day.)

For purposes of determining the amount of any penalty to be assessed, § 16 requires EPA to take into account the nature, circumstances, extent and gravity of the violation or violations alleged. As to the violator, § 16 requires EPA to take into account its ability to pay, the effect of the penalty on its ability to continue to do business, its history of prior such violations, its degree of culpability, as well as such other matters as justice may require.

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case, to the extent known at the time, with specific reference to EPA's "Guidelines for Assessment of Civil Penalties Under § 16 of the Toxic Substances Control Act," which was published on September 10, 1980 in the Federal Register (45 Fed. Reg. 59,770), and EPA's August, 2010 "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair, and Painting Rule; and Lead-Based Paint Activities Rule Interim Final Policy." These policies provide rational, consistent and equitable calculation methodologies for applying the statutory penalty factors enumerated above to particular cases. Copies of these documents are available on request, or can be found on the web at the following link:

<http://www.epa.gov/compliance/enforcement/documents/policies/leadbasedpaint-consolidatederpp0810.pdf>

Given the facts alleged in this Complaint and the statutory factors enumerated above, as known to Complainant at this time, Complainant proposes, subject to receipt and evaluation of further relevant information that Respondent be assessed the following civil penalties for the violations alleged in the Complaint:

COUNT 1: Failure to obtain initial certification

Circumstance Level: 3a

Total number of violations: 1

Extent Category: Significant (age of youngest resident unknown)

Penalty Per Violation: Significant \$ 15,300

1 Significant violation X \$ 15,300= \$ 15,300

Total Proposed Assessment for this Count: \$ 15,300

COUNT 2: Failure to distribute lead hazard information pamphlet

Circumstance Level: 1b

Total number of violations: 1

Extent Category: Significant (age of youngest resident unknown)

Penalty Per Violation:	Significant	\$ 8,500
1 Significant violation X \$ 8,500=		\$ 8,500
Total Proposed Assessment for this Count:		\$ 8,500
<u>TOTAL PROPOSED PENALTY</u>		<u>\$ 23,800</u>

#### PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled, "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," and are codified at 40 C.F.R. Part 22. A copy of these rules accompanies this "Complaint and Notice of Opportunity for Hearing" (hereinafter referred to as the "Complaint").

##### A. Answering the Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within 30 days after service of the Complaint. 40 C.F.R. § 22.15(a). The address of the Regional Hearing Clerk of EPA, Region 2, is:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th floor  
New York, New York 10007-1866

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

##### B. Opportunity to Request a Hearing

If requested by Respondent in its Answer, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). See generally Section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c).

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22. See Section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A), which states, in part: "A civil penalty for a violation of section 2614 or 2689...of this title [15 U.S.C. § 2614, 2689] shall be assessed by the Administrator by an order made on the record after opportunity...for a hearing in accordance with section 554 of Title 5 [5 U.S.C. § 554]."

If Respondent fails to request a hearing, such failure may operate to preclude Respondent from obtaining judicial review of an adverse EPA order. See 15 U.S.C. § 2615(a)(3), which states, in part: "Any person who requested in accordance with paragraph (2)(A) [15 U.S.C. § 2615(a)(2)(A)] a hearing respecting the assessment of a civil penalty and who is aggrieved by an order assessing a civil penalty may file a petition for judicial review with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business."

#### C. Failure to Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely [*i.e.* in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). 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. 40 C.F.R. § 22.17(a). Following a default by Respondent for failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court.

#### D. Exhaustion of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

In order to appeal an initial decision to the Agency's Environmental Appeals Board [EAB; *see* 40 C.F.R. § 1.25(e)], Respondent must do so "within thirty (30) days after the initial decision is served." 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, "5 days shall be added to the time allowed by these [rules] for the filing of a responsive document." Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse

initial decision.

### INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent or any relevant information previously not known to Complainant, or to dismiss any or all of the charges if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to:

Stuart N. Keith  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway, 16<sup>th</sup> floor  
New York, NY 10007-1866  
(212) 637-3217

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the New York address noted above), a copy of the check or other instrument of payment. 40 C.F.R. § 22.18(a). Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America", in the full amount of the penalty assessed in this Complaint to the following addressee:

U. S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document. A copy of the check or other instrument of payment should be provided to the EPA Assistant Regional Counsel identified on the previous page.

Pursuant to 40 C.F.R. § 22.18(a)(3), if Respondent elects to pay the full amount of the penalty proposed in the Complaint within 30 days of receiving the Complaint, then, upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a final order. Issuance of this final order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Further, pursuant to 40 C.F.R. § 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said final order to federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable regulations and requirements, and to maintain such compliance.

Dated: SEPTEMBER 26, 2012

  
Dora LaPosta, Director  
Division of Enforcement and  
Compliance Assistance  
U.S. Environmental Protection  
Agency - Region 2

TO: Heiner Fernandez  
PZ Painting  
15 Salter Street  
Springfield, New Jersey 07081

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed a copy of the foregoing Complaint, bearing docket number TSCA-02-2012-9170, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22, by certified mail, return receipt requested, to:

Heiner Fernandez  
PZ Painting  
15 Salter Street  
Springfield, New Jersey 07081

I carried the original and a copy of the foregoing Complaint to the office of the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: 10/11/12

M. J. [Signature]