

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
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U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Otto Brothers, A Partnership) Docket No. TSCA-07-2014-0002
)
Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA or Complainant), Region 7 and Otto Brothers, A Partnership (Respondent) has agreed to a settlement of this action before filing of a Complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Renovation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Section I

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a).
2. This Consent Agreement and Final Order serves as notice that the EPA has reason to believe that Respondent has violated Section 409 of the TSCA, 15 U.S.C. § 2689, by failing to comply with the regulatory requirements of 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, promulgated pursuant to Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d.

Section II

Parties

3. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region 7, is the Chief, Toxics and Pesticides Branch, EPA, Region 7.

4. The Respondent is Otto Brothers, A Partnership, a business authorized to conduct business in the State of Nebraska.

Section III

Statutory and Regulatory Background

5. Congress passed the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the Act), 42 U.S.C. §§ 4851 to 4856, to address the need to control exposure to lead-based paint hazards. The Act amended the TSCA by adding Sections 401 to 412, 15 U.S.C. §§ 2681 to 2692. Section 1018 of the Act required the EPA and the Department of Housing and Urban Development (HUD) to jointly issue regulations requiring the disclosure of known lead-based paint and/or lead-based paint hazards by persons selling or leasing housing constructed before the phaseout of residential lead-based paint use in 1978. The regulations, issued March 6, 1996, and codified at 40 C.F.R. Part 745 Subpart F, require that sellers and lessors of most residential housing built before 1978: a) disclose the presence of known lead-based paint and/or lead-based paint hazards in the target housing; b) provide purchasers and lessees with any available records or reports pertaining to the presence of lead-based paint and/or lead-based paint hazards; c) provide purchasers and lessees with a federally approved lead hazard information pamphlet;

d) provide purchasers with a 10-day opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards before the purchaser is obligated under any purchase contract; and e) include certain disclosure and acknowledgment language in the sales or leasing contract. The failure or refusal to comply with the regulations is a violation of Section 1018 of the Act and Section 409 of the TSCA.

Section IV

General Factual Allegations

6. Respondent is, and at all times referred to herein was, a “person” within the meaning of the TSCA.

7. Respondent is the “lessor” as defined by 40 C.F.R. § 745.103, for the lease of 1533 Euclid Street, Ashland, Nebraska and 1841 Clay Street, Ashland, Nebraska (the Properties).

8. The Properties were constructed before 1978.

9. The Properties are “target housing” as defined by 40 C.F.R. § 745.103.

Violations

10. The Complainant hereby states and alleges that Respondent has violated the TSCA and federal regulations promulgated thereunder, as follows:

Count 1

11. The facts stated in Paragraphs 6 through 9 above are herein incorporated.

12. Respondent entered into a contract to lease the target housing unit located at 1533 Euclid Street, Ashland, Nebraska on or about September 19, 2011.

13. Respondent failed to provide the lessees of 1533 Euclid Street, Ashland, Nebraska with an EPA-approved lead hazard information pamphlet or to perform any other lead-based

paint disclosure activities before lessees were obligated under contract to lease the target housing unit.

14. Respondent's failure to perform the acts indicated in Paragraph 13 above are violations of 40 C.F.R. §§ 745.107, 745.113, and in accordance with 40 C.F.R. § 745.118(e), violations of Section 1018 of the Act, 42 U.S.C. § 4852d, and Section 409 of the TSCA, 15 U.S.C. § 2689, and thus Respondent is subject to civil penalties under Section 16 of the TSCA, 15 U.S.C. § 2615.

Count 2

15. The facts stated in Paragraphs 6 through 9 above are herein incorporated.

16. Respondent entered into a contract to lease the target housing unit located at 1841 Clay Street, Ashland, Nebraska on or about October 15, 2010.

17. Respondent failed to provide the lessees of 1841 Clay Street, Ashland, Nebraska with an EPA-approved lead hazard information pamphlet or to perform any other lead-based paint disclosure activities before lessees were obligated under contract to lease the target housing unit.

18. Respondent's failure to perform the acts indicated in Paragraph 17 above are violations of 40 C.F.R. §§ 745.107, 745.113, and in accordance with 40 C.F.R. § 745.118(e), violations of Section 1018 of the Act, 42 U.S.C. § 4852d, and Section 409 of the TSCA, 15 U.S.C. § 2689, and thus Respondent is subject to civil penalties under Section 16 of the TSCA, 15 U.S.C. § 2615.

Section V

Consent Agreement

19. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above.

20. Respondent neither admits nor denies the factual allegations set forth above.

21. Respondent waives its right to contest any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

22. Respondent and the EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

23. The undersigned representative of Respondent certifies that he is fully authorized to enter into the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondent to it.

24. Respondent certifies by the signing of this Consent Agreement and Final Order that it is presently in compliance with all requirements of 40 C.F.R. Part 745, Subpart F.

25. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement and Final Order, Respondent shall pay a mitigated penalty of One Thousand One Hundred Ninety Dollars (\$1,190) as set forth in Paragraph 1 of the Final Order. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of TSCA alleged in this document. Complainant reserves the right to take any enforcement action with respect to any other violations of the TSCA or any other applicable law and/or regulation administered by the EPA.

26. The effect of settlement described in Paragraph 25 above is conditioned upon the accuracy of Respondent's representations to the EPA, as memorialized in Paragraph 24 of this Consent Agreement and Final Order.

27. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in the Final Order.

28. In settlement of this matter, Respondent agrees to complete the following Supplemental Environmental Project (SEP), which the parties agree is intended to secure significant environmental and/or public health benefits: Abatement of lead-based paint at target housing by and through a certified lead abatement contractor at the cost of not less than Eleven Thousand Two Hundred Fifteen Dollars (\$11,215) for the replacement of lead-free windows in accordance with the federal lead-based paint abatement regulations. The abatement work shall be performed at the following target housing units: 404 North 14th Street, Ashland, Nebraska and 1842 Silver Street, Ashland, Nebraska. In accordance with Nebraska state regulations, following the completion of the abatement work, Respondent must have lead clearance testing performed by a certified risk assessor. The abatement work and the lead clearance testing may not be performed by the same individual or entity.

29. Within thirty (30) days of the effective date of the Final Order, Respondent will provide the EPA with a copy of the letter sent to Nebraska Department of Health and Human Services informing the state of Respondent's intent to perform a SEP and requesting procedural information pertaining to performance of the SEP.

30. The total expenditure for the SEP shall be not less than Eleven Thousand Two Hundred Fifteen Dollars (\$11,215) and the SEP shall be completed no later than six (6) months

from the effective date of the final order. All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations.

31. Respondent agrees that the abatement work on all SEPs referenced in Paragraph 28 above will be performed by entities licensed and/or certified by the state of Nebraska to perform lead-based paint abatement activities.

32. Within thirty (30) days of completion of the SEP, Respondent shall submit a SEP Completion Report to the EPA, with a copy to the state agency identified below. The SEP Completion Report shall contain the following:

- (i) A detailed description of the SEP as implemented;
- (ii) Itemized costs, documented by copies of purchase orders, receipts or canceled checks;
- (iii) The final abatement report, as required by state law; and
- (iv) The following certification signed by Respondent or, if Respondent is a corporation, an officer of the corporation:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

The report shall be directed to the following:

As to the EPA:

Cassandra Mance
WWPD/TOPE
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

As to the state:

Doug Gillespie
Nebraska Health and Human Services
P.O. Box 95026
301 Centennial Mall
Lincoln, Nebraska 68509-5026.

33. If the SEP referenced in Paragraph 28 above is not timely completed to the satisfaction of EPA in accordance with the terms of this Final Order, Respondent shall pay the following stipulated penalties:

(i) In the event Respondent fails to comply with any of the terms or provisions of this Agreement relating to the performance of the SEP, above, and/or to the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP described in this CAFO, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

a) If the SEP is not completed satisfactorily and timely pursuant to the requirements set forth in this CAFO, Respondent shall be liable for and shall pay a stipulated penalty to the United States in the amount of Eleven Thousand Two Hundred Fifteen Dollars (\$11,215).

b) If the SEP is satisfactorily completed, but the Respondent spends less than Ten Thousand Seven Hundred Ten Dollars (\$10,710) on the SEP, Respondent shall

pay as a stipulated penalty to the United States the amount of Ten Thousand Seven Hundred Ten Dollars (\$10,710) minus the amount that Respondent can demonstrate it spent upon the satisfactorily completed SEP.

(ii) If Respondent fails to timely and completely submit the SEP Completion Report required by this CAFO, Respondent shall be liable for and shall pay a stipulated penalty in the amount of One Hundred Dollars (\$100.00) for each day after the due date until a complete report is submitted.

(iii) EPA shall determine whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP.

(iv) Stipulated penalties shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the SEP or other resolution under this CAFO.

(v) Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions set forth in Paragraph 1 the Final Order portion of this Consent Agreement and Final Order.

34. Respondent certifies that it is not required to perform or develop the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant or as injunctive relief in this or any other case or to comply with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

35. Respondent further certifies that, to the best of its knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be

used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to the EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For the purposes of this certification, the term “open federal financial assistance transaction” refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not yet expired.

36. For federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

37. Any public statement, oral or written, in print, film or other media, made by Respondent making reference to the SEP shall include the following language: “This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency.”

38. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order below or any portion of a stipulated penalty as stated in Paragraph 33 above may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full. A late payment handling charge of \$15 will be imposed after thirty (30) days and an additional \$15 will be charge for each subsequent thirty (30) day period. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

Section VI

Final Order

Pursuant to the provisions of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692, and based upon the information set forth in the Consent Agreement accompanying this Final Order, **IT IS HEREBY ORDERED THAT:**

1. Respondent shall pay a civil penalty of One Thousand One Hundred Ninety (\$1,190) within thirty (30) days of the effective date of this Final Order. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

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

Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

2. A copy of the check or other information confirming payment shall simultaneously be sent to the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219; and

Kelley Catlin, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

3. Respondent shall complete the Supplemental Environmental Project in accordance with the provisions set forth in the Consent Agreement and shall be liable for any stipulated penalty for failure to complete such project as specified in the Consent Agreement.

4. Respondent and Complainant shall each bear their own costs and attorneys' fees incurred as a result of this matter.

5. This Consent Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for the EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

RESPONDENT

Otto Brothers, A Partnership

Date: 12-3-13 By: *Jerry W. Otto* *General Partner*
Jerry W. Otto *General Partner*
Print Name Title

Date: _____ By: _____

Print Name Title

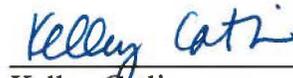
COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 12/9/13



Jamie Green
Chief
Toxics and Pesticides Branch
Water, Wetlands and Pesticides Division

Date: 12/9/13



Kelley Catlin
Office of Regional Counsel

IT IS SO ORDERED.

Date: 12-12-13



KARINA BORROMEO
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 7

IN THE MATTER OF Otto Brothers, A Partnership, Respondent
Docket No. TSCA-07-2014-0002

CERTIFICATE OF SERVICE

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

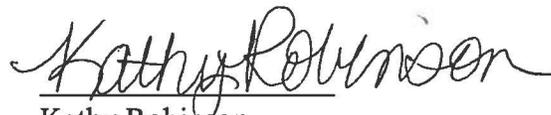
Copy by email to Attorney for Complainant:

Catlin.kelley@epa.gov

Copy by email to Attorney for Respondent:

DLutton@luttonlaw.com

Dated: 12/12/13

A handwritten signature in cursive script that reads "Kathy Robinson". The signature is written in black ink and is positioned above the printed name and title.

Kathy Robinson
Hearing Clerk, Region 7