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PROTECTION AGENCY

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

**BEFORE THE
UNITED STATES ENVIRONMENTAL 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 to Dismiss**
) **EPA's Administrative Complaint**
Respondent,)
_____)

Respondent Hanson's Window and Construction, Inc. ("Hanson's"), moves for a dismissal of the Complaint and would show the following:

1. In its June 9, 2010, Complaint against Hanson's, the U.S. Environmental Protection Agency ("EPA") alleges that Hanson's 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).

2. Specifically, in Paragraphs 47 through 319 of the Complaint, EPA alleges that Hanson's committed 271 violations of 40 C.F.R. 745.84(a)(1). Separately, in

Paragraphs 320 through 593 of the Complaint, EPA alleges that Hanson's also committed 271 violations of 40 C.F.R. 745.86(a).

3. EPA basis its allegations against Hanson's under 40 C.F.R. §745 as amended by EPA in 2010 (the "2010 Pre-Renovation Rule"). See, for example, Complaint at ¶6, ¶9, ¶10, ¶11, ¶12

4. However, each and every count listed in the Complaint relates to a job performed by Hanson's in 2005; nearly five years *before* 2010 Pre-Renovation Rule became effective.

5. Respondent asserts that such an approach by EPA is impermissible.

6. Respondent respectfully directs the parties to *Bowen, Otis R., Secretary of Health And Human Services v. Georgetown University Hospital, et al.* 488 U.S. 204; 109 S. Ct. 468; 102 L. Ed. 2d 493; 1988 U.S. LEXIS 5554; 57 U.S.L.W. 4057 (1998). In *Georgetown University Hospital*, the U.S. Supreme Court stated the following:

“[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. *E. g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162 -163 (1928). By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. See *Brimstone R. Co. v. United States*, 276 U.S. 104, 122 (1928) (“The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words”). Even where some substantial justification for retroactive rulemaking is presented, courts [488 U.S. 204, 209] should be reluctant to find such authority absent an express statutory grant.

7. Hanson's respectfully submits that nothing in the Toxic Substances Control Act encompasses the power to promulgate retroactive rules and that nothing in 40 C.F.R. §745 implies that such retroactivity is contemplated.

8. This error is fatal to the Complaint in that (i) the Complaint seeks to retroactively enforce EPA rules against Hanson's; and (ii) Hanson's legal rights would be severely prejudiced if it were required to defend against allegations based upon regulatory language that did not exist at the time such allegations are alleged to have occurred.

WHEREFORE, Hanson's requests this Court to enter an Order granting this Motion to Dismiss.

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

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2010, the original and a true copy of the foregoing Respondent's Motion to Dismiss EPA's Administrative Complaint was served on the following person(s) via overnight FedEx:

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

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