UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In The Matter of:	)	
	)	
Hanson's Window and Construction, Inc.,	)	**Docket No. TSCA-05-2010-0013**
	)	
Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION FOR INTERLOCUTORY APPEAL

I. Background

On June 10, 2010, the United States Environmental Protection Agency, Region 5 ("Complainant"), filed a Complaint pursuant to Section 16(1) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), requesting $784,380 in civil penalties be imposed against Hanson's Window and Construction, Inc., d/b/a "numerous assumed names," located in Madison Heights, Michigan ("Respondent"). The Complaint's 542 counts allege that, in regard to window replacements at 271 units of housing, Respondent violated the Residential Property Renovation Rule, 40 C.F.R. Part 745 Subpart E ("Pre-Renovation Rule"), promulgated under Section 406(b) of TSCA, requiring persons who renovate "target housing" (built prior to 1978) to provide a lead hazard information pamphlet to the owner and occupant prior to the renovation. On August 3, 2010, Respondent filed an Answer to the Complaint and a Motion to Dismiss EPA's Administrative Complaint.

In its Motion to Dismiss, Respondent pointed out that the Complaint alleges violations of sections of the Pre-Renovation Rule which were not in effect until after the time of the alleged violations. In response, Complainant argued that it "is enforcing the portion of the regulations that were promulgated and in effect since 1998." Complainant's Response to Respondent's Motion to Dismiss Complaint at 2. Acknowledging that the Complaint erroneously cited to the Rule as recodified in 2008 rather than to the Rule in effect in 2005, Complainant argued that the substantive requirements of the Pre-Renovation Rule "were not significantly changed" by the revised version cited in the Complaint, and that the Complaint provided a narrative description of the alleged violations and provided notice that the claims alleged violations under the Rule in effect in 2005. *Id.* at 2, 3. In reply, Respondent argued that the Complaint did not establish a *prima facie* case and, because of the incorrect citations, did not provide Respondent with fair notice of the allegations alleged against it.

Complainant filed a Motion to File the Amended Complaint and a memorandum in support ("Motion to Amend"), wherein it sought to amend the Complaint to: (1) clarify Respondent's assumed and trade names as set forth in Respondent's Answer, (2) cite to the provisions within Part 745 effective in 2005, (3) include reference to an additional section of TSCA, and (4) clarify when the window replacement contracts at issue were made. Respondent challenged the Motion to Amend on the grounds that if it was granted, Respondent would not be able to assert a statute of limitations defense, whereas if the Complaint were instead dismissed without prejudice and a new Complaint filed, the defense would be available. Further, Respondent reiterated its argument that the Complaint, filled with errors, did not give the Respondent fair notice of the charges against it. In reply, Complainant argued that "Respondent has not identified any prejudice that outweighs having the alleged violations decided on the merits," and cannot claim that it did not have notice of the Complainant's allegations.[1]

By order issued December 1, 2010, the undersigned granted Complainant's Motion to Amend and denied Respondent's Motion to Dismiss ("Order"). On December 13, 2010, Respondent filed a Motion for Interlocutory Appeal ("Motion"), wherein it seeks a recommendation from the undersigned for interlocutory review of the Order by the Environmental Appeals Board ("Board"). On December 21, 2010, Complainant's Response to Respondent's Motion for Interlocutory Appeal ("Response") was filed. On December 28, 2010, Respondent filed Respondent's Reply to Complainant's Response to Respondent's Motion for Interlocutory Appeal ("Reply"), and Respondent's Amended Answer to Amended Administrative Complaint ("Answer to Amended Complaint").

II. Standard for Approving Requests for Interlocutory Appeal

Section 22.29(b) of the rules applicable to this proceeding, 40 C.F.R. Part 22, provides that the presiding judge may recommend an order or ruling for review by the Environmental Appeals Board when:

> (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and
>
> (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

40 C.F.R. § 22.29(b).

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[1] *See* Complainant's Reply to Respondent's Response to Complainant's Motion to File the Amended Complaint.

III. The Parties' Arguments

As to the first prong of Section 22.29(b), Respondent submits that "the legal and policy implications of whether the [Complaint] . . . provided fair notice to the Respondent of the legal assertions against it . . . [are] substantial . . . and should be resolved by the [Board] itself." Motion at 2. Respondent argues that it is a matter not merely of an incorrect citation, but instead that the differences between the 2005 and 2008 versions of the Pre-Renovation Rule are "extraordinarily material" as to the charges in the Complaint. *Id.* at 4. The changes to the regulations, as to when and what lead hazard information was to be provided, and penalties for failing to provide it, are "operationally revolutionary, at least as to the business of installing replacement windows," according to Respondent. *Id.* at 5.

Specifically, Respondent points out that the Pre-Renovation Rule in effect in 2005 exempted "minor repair and maintenance activities" from disclosure requirements. Motion at 5; 40 C.F.R. § 745.82(b)(1) (1998). Respondent argues that "a person could be performing a renovation involving window replacement and have such renovation constitute a minor repair and maintenance activity" under the Rule in effect in 2005 where "minor repair and maintenance activities" were undefined, but not under the 2008 amendments which defined "minor repair and maintenance activities" to exclude window replacement work. Motion at 6 (emphasis added). Further, Respondent points out that the term "renovation" was revised in 2008 to exclude "minor repair and maintenance activities," which as defined, does not include window replacement work. Motion at 6. Respondent notes that, based on EPA's Interpretive Guidance issued May 28, 1999, EPA disagrees its interpretation of the 2005 Rule. [2] *Id.*

Respondent additionally argues that the lead paint informational pamphlet that Respondent allegedly failed to provide under the original Complaint *"did not even exist in 2005."* Motion at 7. Finally, Respondent states that only a "learned environmental attorney or an EPA official" could have read the Complaint and received fair notice of the allegations therein. Motion at 7-8.

As to the second prong of Section 22.29(b), Respondent asserts that after Complainant's Amended Complaint is filed, Respondent's contention that it should be dismissed will be irrelevant. Motion at 8. If review of the Order is conducted now, "much time, money, and judicial resources" may be saved "and the litigation . . . significantly advanced." *Id.*

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[2] The Interpretive Guidance states as follows::

> Finally, EPA wishes to clearly state that window replacements do not qualify for this exemption to the rule because (a) the definition of the term "renovation" specifically includes window replacement; and (b) replacement of a window(s) cannot reasonably be classified as "minor repair and maintenance activities."

The Lead-Based Paint Pre-Renovation Education Rule, Interpretive Guidance . . ., May 28, 1999; revised June 25, 1999, available online at http://www.epa.gov/lead/pubs/406ig-1rev.pdf.

In response, maintaining that Respondent did have fair notice of the allegations, Complainant argues that the Complaint contained several references to the applicable regulations, including a statement about how the Pre-Renovation Rule promulgated in 1998 was revised in 2008, and a narrative description of the violations involved in each transaction and each count. Response at 3, citing Complaint ¶¶ 5, 47, 321. Further, Complainant states, the Rule since 1998 has consistently defined "renovation" as explicitly including window replacement, and that there has never been an exemption from disclosure requirements for window replacement. Response at 4, citing 40 C.F.R. § 745.83 (1998). Complainant asserts that the substantial changes in 2008 were to the portions of the Rule dealing with lead-safe work practices and worker training, and that the revisions to the pamphlet at that time primarily reflected how work should be performed under those changes. Response at 5. Thus, Complainant asserts, Respondent's arguments to not amount to an important question of law or policy as to the rulings not to dismiss the Complaint and to allow its amendment. Regarding the second prong of Section 22.29(b), Complainant states that dismissal of the Complaint so that Complainant is precluded from filing a new complaint due to the statute of limitations, where there is no litigation whatsoever, is not the type of prejudice that warrants denying a motion to amend a complaint, and cannot properly be considered to "materially advance the termination of litigation" for purposes of ruling on a motion for interlocutory review. Response at 6-7.

In its Reply, Respondent asserts that some definitions written in the Complaint ("child occupied facility "and "firm") did not exist in 2005, and others ("minor repair and maintenance activities," "pamphlet," "renovation" and "renovator") had to be rewritten to reflect the 1998 Pre-Renovation Rule. Thus, such definitions are not citation errors, but are each a "red herring," and their inclusion "is the antithesis of fair notice." Reply at 3-5. Although the term "renovation" was defined since 1998 to include "window replacement," Respondent asserts, an activity defined as "renovation" cannot also be "minor repair" or "maintenance activity" under the Rule as amended in 2008, but can be under the 1998 Rule. *Id.* at 6-7. Indeed, a renovation activity is not subject to the 1998 version of the Rule if it disrupts two square feet or less of painted surface per component, Respondent emphasizes. *Id.* at 7, citing to 40 C.F.R. § 745.82(1998).

Further, the 1999 Interpretive Guidance on the Rule's coverage of window replacement work, Respondent argues, "is immediately contradicted by a reading of *40 C.F.R. 745* . . . and is not subject to deference." Reply at 8. Respondent submits that EPA corrected its mistake to make "renovation" mutually exclusive of "minor repair or maintenance activities," but crafted language in the Federal Register publication of the 2008 Pre-Renovation Rule to indicate that no significant changes were made. Such change in the Rule, combined with the citational errors, definitional errors, reference to a different pamphlet, and the changes in penalties for failing to provide the pamphlet, indicate that the 2008 Rule was an "entirely different law" from the 1998 Rule, Respondent argues. Reply at 9. Respondent asserts that many of the 542 allegations of violation "in fact, may not have been violations of law" under the 1998 Rule. *Id.* Finally, as to the second prong of Section 22.29(b), subsequent review of the issue would be inadequate, Respondent asserts, given time and money expended on each allegation, where out of the 271 jobs upon which the Complaint is based, "it appears that the vast majority will be outside of the applicable statute of limitations." Reply at 10-11.

IV. Discussion

The question as to the first prong of 40 C.F.R. § 22.29(b) is whether the rulings in the Order involve an "important question of law or policy about which there is substantial grounds for difference of opinion." 40 C.F.R. § 22.29(b)(1). The parties focus on the criterion of "substantial grounds for difference of opinion," reiterating and expanding on their arguments on the Motion to Dismiss and Motion to Amend. However, the rulings in the Order which would be presented on interlocutory appeal are the denial of a request to dismiss the Complaint and the granting of the Motion to Amend; that is, whether the original Complaint is properly salvageable through amendment, or whether instead it must be dismissed on the basis that the original Complaint did not provide fair notice of the alleged violations. Respondent acknowledges that it does not question the legal standards upon which the rulings on the Motion to Dismiss and Motion to Amend were based, namely the liberal standard for amending pleadings and the standard in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009) for dismissing a complaint for failure to state a claim upon which relief may be granted. Reply at 1. The question of whether a complaint should be amended or whether it should be dismissed and a new complaint filed is not an "important question of law or policy," as it is an issue merely involving a choice of two procedural options. *Compare*, *Request to Reduce Pre-Harvest Interval for EBDC Fungicides on Potatoes*, EPA Docket No. EPA-HQ-OPP-2007-0181, 2008 WL 4545096 (ALJ, Oct. 6, 2008) (Order on EPA's Motion for Interlocutory Appeal) (important question of law or policy was found where the issue in the contested orders "has been addressed in very few rulings in other cases and has not been addressed at all in circumstances" similar to those in that case).

Moreover, Respondent has not demonstrated substantial grounds for difference of opinion on the issue. In the case, Respondent cited in support of its Motion to Dismiss *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 1993 EPA App. LEXIS 7 (EAB 1993) wherein the Environmental Appeals Board found that the complaint did not provide fair notice of the charges, but stated, "[i]t is only where the defect in the complaint is not curable by amendment that leave to amend should be denied," citing 3 Moore's Federal Practice Para. 12.14. The Board quoted with approval the Eleventh Circuit Court of Appeals, "Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). In *Asbestos Specialists*, the respondent filed a motion to dismiss the complaint on grounds that it did not provide fair notice of the charges, and EPA did not file a timely or adequate response, so the presiding judge dismissed the complaint with prejudice. The Board, affirming the dismissal, nevertheless granted EPA leave to file an amended complaint.

In the present case, EPA had responded timely to the Motion to Dismiss and had moved to amend the Complaint, and the Complaint is curable by amendment. Applying the Board's reasoning to these circumstances, there is no substantial grounds for difference of opinion as to whether the Motion to Amend should have been granted and the Motion to Dismiss should have been denied. Respondent's disagreement with the ruling that the Complaint provided fair notice of the charges does not establish "substantial grounds for difference of opinion" to warrant interlocutory review. *See, Am. Soc'y for the Prevention of Cruelty Animals v. Ringling Bros.*

Barnum & Bailey Circus, 246 F.R.D. 39, 43 (D.D.C. 2007)(mere disagreement with a ruling does not warrant interlocutory review); *Isochem North America, LLC*, EPA Docket No. TSCA-02-2006-9143, 2008 WL 367767 (ALJ, Feb. 7, 2008)(Order Denying Motion for Interlocutory Appeal) ("*Isochem*").

ORDER

Respondent's Motion for Interlocutory Appeal is hereby **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Date: January 26, 2011
Washington, D.C.

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In the Matter of Hanson's Window and Construction, Inc., Respondent
Docket No.TSCA-05-2010-0013

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Respondent's Motion For Interlocutory Appeal**, dated January 26, 2011, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Staff Assistant

Dated: January 26, 2011

Original And One Copy By Pouch Mail To:

La Dawn Whitehead
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

Copy By Pouch Mail To:

Mary McAuliffe, Esquire
Associate Regional Counsel
U.S. EPA
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

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Copy By Regular Mail To:

D.S. Berenson, Esquire
Kevin M. Tierney, Esquire
Johanson Berenson LLP
1146 Walker Road, Suite C
Great Falls, VA 22066