

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

_____)	
In the Matter of:)	
)	
Stephen Pearson d/b/a)	
Pearson Custom Homes)	Docket No.
30 Wayside Avenue)	TSCA-01-2018-0015
Byfield, MA 01922)	
)	
Respondent.)	
)	
Proceeding under Section 16(a) of the)	
Toxic Substances Control Act,)	
15 U.S.C. § 2615(a))	
_____)	

MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT ORDER

The Complainant, the United States Environmental Protection Agency (“EPA”), has moved for the issuance of an order finding that Respondent, Stephen Pearson d/b/a Pearson Custom Homes, is in default in this matter, finding that Respondent violated Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689 (“TSCA”), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (“the Act”), 42 U.S.C. § 4851 *et seq.*, and the federal regulations promulgated thereunder, set forth at 40 C.F.R. Part 745, Subpart E (the “Renovation, Repair and Painting Rule” or “RRP Rule”, and assessing a penalty of \$4,667.

I. Respondent Should Be Found In Default

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Part 22”) provides that a party may be found to be in default after motion, upon failure to file a timely

answer to the complaint. 40 C.F.R. § 22.17.

The Complaint in this action was filed on September 28, 2018. In the Complaint, EPA alleged that Respondent violated federally enforceable provisions of TSCA Section 409, the Act, and the RRP Rule, and that Respondent is therefore subject to penalties under TSCA Section 16, 15 U.S.C. § 2689. A copy of the Complaint is attached as Exhibit 1. A copy of the Complaint and 40 C.F.R. Part 22 rules were served on Respondent by certified mail, return receipt requested. See 40 C.F.R. § 22.5(b)(1) & (b)(1)(ii)(A). EPA received a signed return receipt from Respondent, which was postmarked on October 4, 2018. EPA also checked the United States Postal Service's tracking information on its internet site and verified that the certified package containing the Complaint was delivered on October 4, 2018. Accordingly, service was complete on October 4, 2018. A copy of proof of service, filed with the Regional Hearing Clerk on October 16, 2018, is attached as Exhibit 2. See 40 C.F.R. § 22.7(c).

Respondent has not filed an answer, and the 30-day period for filing an answer has lapsed. See 40 C.F.R. § 22.15(a). Because Respondent has not filed a timely answer to the Complaint, Respondent should be found in default. Such default constitutes an admission of all facts alleged in the Complaint and a waiver of any rights to contest the factual allegations of the Complaint. 40 C.F.R. § 22.17(a).

II. Respondent's Action Violated TSCA and the Act

The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), support a finding that the Complaint establishes a prima facie case that Respondent violated TSCA Section 409, the Act, and the RRP Rule.

In 1992, Congress passed the Act in response to findings that low-level lead poisoning is widespread among American children, that pre-1980 American housing stock contains more than

three million tons of lead in the form of lead-based paint, and that the ingestion of lead from deteriorated or abraded lead-based paint is the most common cause of lead poisoning in children. One of the stated purposes of the Act is to ensure that the existence of lead-based paint hazards is taken into account during the renovation of homes and apartments. To carry out this purpose, the Act added a new title to TSCA entitled “Title IV-Lead Exposure Reduction,” which currently includes Sections 401-411 of TSCA, 15 U.S.C. §§ 2681-2692.

In 1996, EPA promulgated regulations to implement Section 402(a) of TSCA, 15 U.S.C. § 2682(a). These regulations are set forth at 40 C.F.R. Part 745, Subpart L. In 1998, EPA promulgated regulations to implement Section 406(b) of the Act. These regulations are set forth at 40 C.F.R. Part 745, Subpart E. In 2008, EPA promulgated regulations to implement Section 402(c)(3) of TSCA, 15 U.S.C. § 2682(c)(3) by amending 40 C.F.R. Part 745, Subparts E and L (the “RRP Rule” and the “Lead-Based Paint Activities Rule,” respectively).

Pursuant to 40 C.F.R. § 745.82, the regulations in 40 C.F.R. Part 745, Subpart E apply to all renovations performed for compensation in “target housing.” As provided 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, unless that activity is performed as part of an abatement.” “Renovation” includes the removal of building components (e.g. walls, ceilings, plumbing, windows), and includes the renovation of a building for the purpose of converting a building or portion of a building into target housing. Pursuant to Section 401(17) of TSCA, as amended, 15 U.S.C. § 2681(17), the housing stock addressed by the Act and the RRP Rule is “target housing,” defined as any housing constructed prior to 1978, except housing for the elderly or persons with disabilities or any 0-bedroom dwelling (unless any child who is less than 6 years of age resides or is expected to reside in such housing). See 40 C.F.R. § 745.103.

The RRP Rule sets forth procedures and requirements for, among other things, the accreditation of training programs, the certification of renovation firms and individual renovators, the work practice standards for renovation, repair and painting activities in target housing and child-occupied facilities, and the establishment and maintenance of records.

Respondent is a sole proprietorship with a business address located at 30 Wayside Avenue, Byfield, Massachusetts, 01922, which is also the address of its principal owner and operator, Stephen Pearson. (Complaint, paragraph 9). In 2016, Respondent was hired to renovate the residential building at 217 Bartlett Street in Portsmouth, New Hampshire (“217 Bartlett St.”) which was constructed in 1900, to convert the building into condominiums. (Complaint, paragraph 10). At all times relevant to the Complaint, the building located at 217 Bartlett St. was “target housing,” as defined in Section 401(17) of TSCA and 40 C.F.R. § 745.103. (Complaint, paragraph 11). Furthermore, the building does not satisfy the requirements for an exemption to the provisions of the Act, TSCA (including 15 U.S.C. § 2681(17)), or the RRP Rule (including 40 C.F.R. § 745.82) Id.

The work done by Respondent at 217 Bartlett St. came to the attention of EPA via a referral from the New Hampshire Department of Health and Human Services (“NHDHHS”). NHDHHS learned of Respondent’s work through a complaint by a neighbor of the building whose property was being affected by dust from Respondent’s demolition activities. (Complaint, paragraph 12)

On December 9, 2016, EPA representatives conducted an inspection at the 217 Bartlett St. building while Respondent was performing work at the property. (Complaint, paragraph 13). The inspectors found that the interior of the vacant building had been stripped down to the studs with all walls and painted surfaces heavily disturbed by demolition work. Id. During the EPA

Inspection, Mr. Stephen Pearson admitted to the EPA representatives that Respondent was not a certified firm as required by the RRP Rule. (Complaint, paragraph 14).

On March 16, 2018, EPA Region 1 issued to Respondent by Certified Mail - Return Receipt Requested, a “Notice of Investigation Results – Federal Lead-based Paint Requirements” and an “Expedited Settlement Agreement,” (“Notice and ESA Package”) that addressed a single RRP Rule violation, consistent with the EPA Office of Enforcement and Compliance Assurance’s August 19, 2015 Lead-Based Paint Expedited Settlement Agreement Policy. (Complaint, paragraph 15). According to a signed receipt, Respondent received the Notice and ESA Package on April 2, 2018. Id. Despite additional attempts by EPA by telephone and email to request a response from Respondent, EPA received no response to its offer of expedited settlement. Id.

On September 21, 2018, EPA received a copy of a report written by American Environmental Testing Services of New England regarding lead testing on dust and soil samples taken from the interior and exterior of 217 Bartlett St. on December 6, 2016. (Complaint, paragraph 16). The report indicates the presence of lead in the dust and soil samples. Id.

Based on the above-described inspection and information, Complainant has identified the following violation of TSCA, the Act and the RRP Rule. (Complaint, paragraph 21).

A. Count 1 – Failure to Obtain Firm Certification under RRP Rule

Firms that perform renovations for compensation in target housing must apply to EPA for certification to perform renovations or dust sampling under 40 C.F.R. § 745.89(a), pursuant to 40 C.F.R. § 745.81(a)(2)(ii), which provides that no firm may perform, offer, or claim to perform renovations in target housing or child-occupied facilities without certification from EPA under § 745.89. (Complaint, paragraph 23). The building at 217 Bartlett St. is target housing because it

is housing built in 1900. (Complaint, paragraph 24). At the time of the EPA Inspection, Pearson Custom Homes had not applied for or received RRP firm certification from the EPA.

(Complaint, paragraph 25). Respondent's failure to deny the factual allegations contained in Count I of the Complaint constitutes an admission of these allegations. 40 C.F.R. § 22.15(d). Respondent's failure to obtain RRP firm certification prior to performing renovation work at 217 Bartlett St. constitutes a violation of 40 C.F.R. §§ 745.89(a) and 745.81(a)(2)(ii). (Complaint, paragraph 26). The above-listed violation alleged in this count is a prohibited act under TSCA Section 409 and 40 C.F.R. § 745.87(a), and a violation for which penalties may be assessed pursuant to Section 16 of TSCA. (Complaint, paragraph 27).

III. A Penalty of \$4,667 Should Be Assessed

Complainant recommends the imposition of a \$4,667 civil penalty, as proposed in the Complaint. The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), support a finding that the proposed penalty amount is appropriate in light of the penalty assessment criteria of TSCA Section 16, 15 U.S.C. § 2615, as applied to the circumstances of this case. Section 16 of TSCA requires Complainant to consider the nature, circumstances, extent and gravity of the violations and, with respect to Respondent, its ability to pay, the effect of the proposed penalty on the ability to continue to do business, any history of prior such violations, the degree of culpability, and other such matters as just may require. Complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's August 2010 Interim Final Policy entitled, "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule" (the "LBP Consolidated ERPP"). The LBP Consolidated ERPP provides a rational, consistent, and equitable calculation methodology for applying the

statutory factors enumerated above to particular cases. (See Attachment I to the Complaint explaining the reasoning for this penalty.)

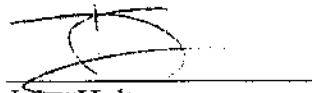
In addition, EPA performed a search of Respondent on websites for Nexis/Lexis and the Southern Essex Registry of Deeds, Massachusetts. See Exhibits 3(a), 3(b), 3(c), 3(d), 3(e), 3(f), and 3(g) for the results of this search. This information was examined by EPA Financial Analyst, Mary Medeiros, who has concluded that nothing in the information found on the websites indicates that Respondent does not have the ability to pay the assessed penalty of \$4,667. See Affidavit of Mary Medeiros, dated March 12, 2019, attached as Exhibit 4.

As noted above, Respondent has not filed an Answer, and EPA has not found any information indicating that Respondent cannot pay the proposed penalty. Absent any documentation from Respondent regarding his ability to pay, EPA continues to believe, in light of all applicable penalty assessment factors, that the amount of the proposed penalty is appropriate. If the Regional Judicial Officer is able to obtain additional information regarding Respondent's ability to pay, however, EPA would support a downward adjustment of the penalty, in accordance with the criteria outlined in TSCA Section 16, 15 U.S.C. § 2615 and EPA's LBP Consolidated ERPP guidance.

IV. Conclusion

The Complainant requests that the Regional Judicial Officer issue an order finding that Respondent is in default, that Respondent violated TSCA, the Act, and the RRP Rule, and that an appropriate penalty be assessed in the amount of \$4,667.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'John Hultgren', written over a horizontal line.

John Hultgren
Senior Enforcement Counsel

Date: March 12, 2019