

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS

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BEFORE THE ADMINISTRATOR

In the matter of)
)
SUPERIOR RESTORATION)
& CONSTRUCTION LLC,)
)
Respondent.)
_____)

Docket. No. TSCA-07-2016-0017

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,
DEFAULT ORDER, AND INITIAL DECISION**

In support of its Motion for Default Order, Complainant, the Chief of the Toxics and Pesticides Branch, EPA Region 7, respectfully proposes the following Findings of Fact, Conclusions of Law, Default Order, and Initial Decision:

I. PROPOSED FINDINGS OF FACT

1. Pursuant to Sections 402(a), 402(c)(3), 406(b), and 407 of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2682(a), 2682(c)(3), 2686(b) and 2687, the EPA promulgated regulations at 40 C.F.R. Part 745, Subparts E and L, establishing requirements for the training and certification of individuals and contractors engaged in lead-based paint activities, including renovation of residences built prior to 1978, and for performance of renovations on pre-1978 housing (“Renovation, Repair, and Painting Rule”).

2. The regulations at 40 C.F.R. §§ 745.80 and 745.82(a) provide that the Renovation, Repair, and Painting Rule is applicable to “all renovations performed for compensation in target housing and child-occupied facilities.”

3. The regulation at 40 C.F.R. § 745.83 defines “renovation” as 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 as defined by 40 C.F.R. § 745.223. The term renovation includes, but is not limited to, the removal, modification, or repair of painted surfaces or painted components (*e.g.*, modification of painted doors, surface restoration, window repair, surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust)); the removal of building components (*e.g.*, walls, ceilings, plumbing, windows); weatherization projects (*e.g.*, cutting holes in painted surfaces to install blown-in insulation or to gain access to attics, planing thresholds to install weather stripping); and interim controls that disturb painted surfaces.

4. The preamble to the Renovation, Repair, and Painting Rule states that “compensation includes pay for work performed, such as that paid to contractors and subcontractors.” *Lead; Renovation, Repair, and Painting Program*, 73 Fed. Reg. 21692, 21707 (Mar. 31, 2008).

5. With exceptions not relevant to this initial decision, Section 401(17) of TSCA, 15 U.S.C. § 2681(17), defines “target housing” as any housing constructed prior to 1978.

6. The regulation at 40 C.F.R. § 745.83 defines “firm” as a company, partnership, corporation, sole proprietorship or individual doing business, association, or other business entity; a Federal, State, Tribal, or local government agency; or a nonprofit organization.

7. Pursuant to 40 C.F.R. § 745.81(a)(2)(ii), firms performing renovations for compensation on or after April 22, 2010, must be certified by the EPA and have obtained initial certification prior to performance of renovations, unless the renovation qualifies for one of the exceptions identified in 40 C.F.R. § 745.82. The regulation at 40 C.F.R. § 745.89(a)(1) requires

firms that perform renovations for compensation to apply to EPA for certification to perform renovations or dust sampling.

8. Pursuant to 40 C.F.R. § 745.84(a)(1), firms performing renovation activities in any residential dwelling unit of target housing must provide the owner of the unit with the EPA pamphlet entitled *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools* (“EPA Pamphlet”) no more than 60 days before beginning the renovation.

9. Pursuant to 40 C.F.R. § 745.89(d)(2), firms performing renovations must ensure that a certified renovator is assigned to each renovation performed by the firm and discharges all of the certified renovator responsibilities identified in 40 C.F.R. § 745.90.

10. Pursuant to 40 C.F.R. § 745.81(a)(4)(ii), all renovations must be performed in accordance with the work practice standards in 40 C.F.R. § 745.85, including:

- a. 40 C.F.R. § 745.85(a)(1), which requires firms to post signs clearly defining the work area and warning occupants and other persons not involved in renovation activities to remain outside of the work area;
- b. 40 C.F.R. § 745.85(a)(2)(i)(A), which requires firms to remove all objects from the work area, including furniture, rugs, and window coverings, or cover them with plastic sheeting or other impermeable material with all seams and edges taped or otherwise sealed;
- c. 40 C.F.R. § 745.85(a)(2)(i)(C), which requires firms to close windows and doors in the work area and cover doors with plastic sheeting or other impermeable material. Doors used as an entrance to the work area must be covered with plastic sheeting or other impermeable material in a manner that allows workers to pass through while confining dust and debris to the work area;

- d. 40 C.F.R. § 745.85(a)(2)(i)(D), which requires firms to cover the floor surface, including installed carpet, with taped-down plastic sheeting or other impermeable material in the work area six feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to contain the dust, whichever is greater;
- e. The regulation at 40 C.F.R. § 745.85(a)(4)(i), which requires firms to contain waste from renovation activities to prevent releases of dust and debris before the waste is removed from the work area for storage or disposal; and
- f. 40 C.F.R. § 745.85(a)(4)(ii), which requires firms, at the conclusion of each work day and at the conclusion of the renovation, to ensure that waste that has been collected from renovation activities is stored under containment, in an enclosure, or behind a barrier that prevents release of dust and debris out of the work area and prevents access to dust and debris.

11. The regulation at 40 C.F.R. § 745.87(a) provides that failure or refusal to comply with any provision of 40 C.F.R. Part 745, Subpart E, is a violation of Section 409 of TSCA, 15 U.S.C. § 2689. Section 409 of TSCA, 15 U.S.C. § 2689, provides that it shall be unlawful for any person to fail to comply with, *inter alia*, any provision of 40 C.F.R. Part 745, Subpart E.

12. The regulation at 40 C.F.R. § 745.87(d) provides that violators may be subject to civil sanctions pursuant to Section 16 of TSCA, 15 U.S.C. § 2615. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), provides that any person who violates Section 409 of TSCA, 15 U.S.C. § 2689, shall be liable to the United States for a civil penalty of up to \$37,500 for each such violation. Each day that such a violation continues constitutes a separate violation of Section 409 of TSCA, 15 U.S.C. § 2689. The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996,

31 U.S.C. § 3701, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19 increased these statutory maximum penalties to \$38,114 for violations that occur after January 12, 2009.

13. The regulation at 40 C.F.R. § 745.83 defines “person,” in pertinent part, as any natural or judicial person including any individual, corporation, partnership, or association.

14. The regulation at 40 C.F.R. § 22.5(b)(1)(i), provides, in relevant part, that “Complainant shall serve on respondent, or a representative authorized to receive service on respondent’s behalf, a copy of the signed original of the complaint, together with a copy of [the Consolidated Rules of Practice] . . . by certified mail with return receipt requested . . .” When the respondent is “a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name,” the regulation at 40 C.F.R. § 22.5(b)(1)(ii)(A) states that the “complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.” “Service of the complaint is complete when the return receipt is signed.” 40 C.F.R. § 22.7(c). “Proof of service of the complaint shall be made by . . . properly executed receipt . . . filed with the Regional Hearing Clerk immediately upon completion of service.” 40 C.F.R. § 22.5(b)(1)(iii).

15. The regulation at 40 C.F.R. § 22.17(a) provides that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint. Pursuant to 40 C.F.R. § 22.15(a), any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint. “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). Accordingly, pursuant

to 40 C.F.R. § 22.17(c), the Presiding Officer must order the relief proposed in the complaint or the motion for default “unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.” Where such default order resolves all outstanding issues and claims in the proceeding, it constitutes an initial decision under the Consolidated Rules of Practice. *Id.*

16. Respondent is Superior Restoration & Construction LLC, a limited liability company operating under the laws of the state of Kansas. Respondent’s articles of organization name Cory W. Poulsen as the company’s resident agent, and the address provided for Respondent’s registered office is 23625 West 92nd Terrace, Lenexa, Kansas 66227. The same individual is listed as the sole member and owner of the LLC in annual reports filed with the Kansas Secretary of State.

17. Beginning on or about September 10, 2015, and continuing at least until September 17, 2017, Respondent was engaged in a renovation of the property located at 3415 Charlotte Street in Kansas City, Missouri (“the Property”), that included the removal of an 8-by-7 foot wall and the replacement of 13 windows.

18. The Property was built in 1904.

19. The Property was unoccupied at the time of the renovation, and children less than six years of age neither occupied nor were present at the Property at the time of Respondent’s renovation.

20. Respondent received compensation for the renovation activities it performed on the Property.

21. On September 17, 2015, and pursuant to Section 11 of TSCA, 15 U.S.C. § 2610, representatives of the EPA conducted an inspection at the Property to evaluate Respondent’s compliance with TSCA and the requirements of the Renovation, Repair, and Painting Rule (“EPA inspection”).

22. The EPA inspection revealed that Respondent had not applied for or obtained certification from the EPA to perform renovations or dust sampling prior to performing the renovation on the Property. Furthermore, the renovation did not qualify for one of the exceptions identified in 40 C.F.R. § 745.82.

23. The EPA inspection revealed that Respondent did not provide the owner of the Property with the EPA Pamphlet before beginning renovation activities on the Property.

24. The EPA inspection revealed that Respondent did not assign a certified renovator to the renovation performed on the Property.

25. The EPA inspection revealed that Respondent failed to post protective signs as required by 40 C.F.R. §745.85(a)(1). Photographs obtained by the EPA inspector show that neither caution tape nor warning signs were posted around the yard, front porch, or interior living spaces of the Property where renovation and waste-collection activities were occurring.

26. The EPA inspection revealed that Respondent did not remove objects from the work area. Photographs obtained by the EPA inspector show drinking glasses, pots and pans, a microwave, window blinds, and other household items present and uncovered in the kitchen where renovation activities were ongoing. Additionally, the EPA inspection revealed that where Respondent had covered with plastic sheeting certain objects left on kitchen cabinets and countertops, the edges of such plastic sheeting were not sealed to the floor.

27. The EPA inspection revealed that Respondent did not cover doors with plastic sheeting or other impermeable material. Photographs obtained by the EPA inspector show building supplies and renovation waste on and around the front porch of the Property. Such photographs also show that the front porch entry door to the Property is not covered with plastic sheeting or other impermeable material.

28. The EPA inspection revealed that Respondent did not cover the floor surface in the work area with taped-down plastic sheeting or other impermeable material. Photographs obtained by the EPA inspector show that the kitchen and adjoining dining room floors were not covered where renovation activities were ongoing.

29. The EPA inspection revealed that Respondent did not contain waste from renovation activities at the Property before the waste was removed from the work area for storage or disposal. Photographs obtained by the EPA inspector show a large pile of construction and renovation waste on the front lawn of the Property. Additionally, windows removed from the Property were lined up against a tree in the yard. The inspection photographs show dust and debris on the lawn and sidewalk leading to the front porch of the Property.

30. The EPA inspection revealed that Respondent did not ensure that waste collected from renovation activities was stored under containment at the conclusion of each work day. Photographs obtained by the EPA inspector show a large pile of construction and renovation waste on the front lawn of the Property, as well as old windows lined up against a tree. The EPA inspection revealed that the renovations commenced on September 10, 2015, and at the time of the EPA inspection on September 17, 2015, Respondent was engaged in finishing work on the interior of the Property.

31. Complainant attempted to transmit three letters to Respondent via certified mail, return receipt requested, inviting Respondent to engage in negotiations with the EPA prior to the filing of a complaint for alleged TSCA violations. Two letters were transmitted to Respondent's registered agent at the address of record provided to the Kansas Secretary of State; the third letter was transmitted to a publicly available business address listed for Respondent. Delivery of all letters through certified mail was unsuccessful.

32. After two failed attempts to hand-deliver the Agency's pre-filing negotiations letter to Respondent's address of record and a publicly available business address, a representative of the EPA successfully delivered a copy of the letter Agency's pre-filing negotiations letter to Respondent's office manager at 7861 Mastin Street in Overland Park, Kansas, on June 13, 2016.

33. Respondent did not contact the EPA within 30 days of its receipt of the Agency's pre-filing negotiations letter.

34. The Complaint in this matter was filed by Complainant and transmitted to Respondent on August 16, 2016, via certified mail, return receipt requested. The Complaint was addressed to Cory Poulsen, Respondent's registered agent and sole owner, and sent to 7861 Mastin Street in Overland Park, Kansas. The Complaint was received by Respondent at this address on August 19, 2016.

35. As proof of service, Complainant filed a copy of the return receipt with the Regional Hearing Clerk on August 29, 2016. A copy of Complainant's proof of service filing was transmitted to Respondent on the same date and received on September 1, 2016.

36. After 30 days elapsed from Respondent's receipt of the Complaint, the EPA sent Respondent a Notice of Intent to Institute Default Proceedings by certified letter dated September 22, 2016. This letter warned Respondent of Complainant's intention to move for a default order if Respondent did not file a written answer to the Complaint within 20 days of Respondent's receipt of the Notice. Respondent received this default notice letter on September 26, 2016, at its place of business on Mastin Drive.

37. To date, Respondent has failed to file an answer or submit any response or correspondence concerning this matter to the Regional Hearing Clerk or any other representative of EPA Region 7.

II. PROPOSED CONCLUSIONS OF LAW

19. Respondent is a “firm” and “person” as defined by 40 C.F.R. § 745.83.
20. Respondent’s renovation activities at the Property constituted a “renovation” as defined by 40 C.F.R. § 745.83.
21. Respondent’s renovation of the Property was performed for compensation per 40 C.F.R. § 745.82(a).
22. The Property is “target housing” as defined by Section 401(17) of TSCA, 15 U.S.C. § 2681(17).
23. The Renovation, Repair, and Painting Rule is applicable to the renovation that Respondent performed on the Property.
24. Respondent’s failure to apply to the EPA for certification pursuant to 40 C.F.R. § 745.89(a)(1) prior to performance of the renovation on the Property is a violation of 40 C.F.R. § 745.81(a)(2)(ii).
25. Respondent’s failure to provide the owner of the Property with the EPA Pamphlet before beginning renovation activities is a violation of 40 C.F.R. § 745.84(a)(1).
26. Respondent’s failure to ensure that a certified renovator was assigned to the renovation that the firm performed on the Property is a violation of 40 C.F.R. § 745.89(d)(2).
27. Respondent’s failure to post signs clearly defining the work area and warning occupants and other persons not involved in renovation to remain outside of the work area is a violation of 40 C.F.R. § 745.85(a)(1) pursuant to 40 C.F.R. § 745.81(a)(4)(ii).
28. Respondent’s failure to remove all objects from the work area or cover them with sealed plastic sheeting or other impermeable material is a violation of 40 C.F.R. § 745.85(a)(2)(i)(A) pursuant to 40 C.F.R. § 745.81(a)(4)(ii).

29. Respondent's failure to cover all doors in the work area with plastic sheeting or other impermeable material is a violation of 40 C.F.R. § 745.85(a)(2)(i)(C) pursuant to 40 C.F.R. § 745.81(a)(4)(ii).

30. Respondent's failure to cover the floor surface in the work area with taped-down plastic sheeting or other impermeable material is a violation of 40 C.F.R. § 745.85(a)(2)(i)(D) pursuant to 40 C.F.R. § 745.81(a)(4)(ii).

31. Respondent's failure to contain waste from renovation activities in order to prevent releases of dust and debris before the waste was removed from the work area for storage or disposal is a violation of 40 C.F.R. § 745.85(a)(4)(i) pursuant to 40 C.F.R. § 745.81(a)(4)(ii).

32. Respondent's failure to ensure that waste collected from renovation activities was stored under containment at the conclusion of each work day is a violation of 40 C.F.R. § 745.85(a)(4)(ii) pursuant to 40 C.F.R. § 745.81(a)(4)(ii).

33. Pursuant to 40 C.F.R. § 745.87(a), Respondent's violations of the Renovation, Repair, and Painting Rule are violations of Section 409 of TSCA, 15 U.S.C. § 2689.

34. As a Kansas limited liability company, Respondent is "an unincorporated association which is subject to suit under a common name" for purposes of service of the complaint under 40 C.F.R. § 22.5(b)(1)(ii)(A).

35. The Complaint in this matter was lawfully and properly served by Complainant on Respondent in accordance with the Consolidated Rules of Practice.

36. Pursuant to 40 C.F.R. § 22.15(a), Respondent was required to file an answer to the Complaint within 30 days of service of the Complaint.

37. Complainant's Motion for Default Order was lawfully and properly served on Respondent via certified mail, return receipt requested, on January 10, 2018, in accordance with 40 C.F.R. § 22.7(c).

38. Pursuant to 40 C.F.R. §§ 22.7(c) & 22.16(b), Respondent was required to file a response to Complainant's Motion for Default Order within 20 days of service. Pursuant to 40 C.F.R. § 22.16(b), Respondent's failure to respond to the motion within the designated period is deemed to be a waiver of any objection to the granting of the motion.

39. Upon Complainant's present motion, Respondent may be found in default for failure to file a timely answer to the Complaint.

40. Respondent's default constitutes an admission by Respondent of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations.

41. The Complaint establishes a prima facie case of liability for violations of Section 409 of TSCA, 15 U.S.C. § 2689, that are alleged as Counts 1 through 9 therein.

42. Pursuant to Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), Respondent is liable to the United States for a civil penalty of up to \$38,114 for each such violation, as adjusted for inflation by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and implemented by the 2017 Civil Monetary Penalty Inflation Adjustment Rule, 82 Fed. Reg. 3633 (Jan. 12, 2017).

43. The relief requested in the Complaint is consistent with the record of the proceeding, TSCA, and the EPA's civil penalty guidelines.

III. PROPOSED DEFAULT ORDER & INITIAL DECISION

44. Complainant's Motion for a Default Order is hereby GRANTED.

45. Respondent is hereby found in DEFAULT.

46. Respondent is hereby ORDERED to pay a civil penalty in the amount of Forty-Four Thousand Six-Hundred and Eighty Dollars (\$44,680) for the TSCA violations alleged in the Complaint.

47. This Default Order resolves all outstanding issues and claims in the proceeding and, in accordance with 40 C.F.R. § 22.17(c), constitutes the Initial Decision under the Consolidated Rules of Practice. Pursuant to 40 C.F.R. § 22.27(c), this Default Order and Initial Decision shall become a Final Order 45 days after its service upon the parties unless Respondent moves to reopen the hearing; Respondent appeals the Initial Decision to the Environmental Appeals Board within 30 days after the Initial Decision is served; Respondent moves to set aside the Default Order that constitutes the Initial Decision; or the Environmental Appeals Board elects to review the initial decision on its own initiative.

48. Within 30 days of this Initial Decision becoming a Final Order pursuant to 40 C.F.R. § 22.27(c), Respondent shall pay the full amount of the civil penalty assessment by sending a cashier's check or certified check to the payee specified in the Complaint, unless otherwise instructed by Complainant. The check shall note the case title and docket number, and Respondent shall serve copies of the check or other instrument of payment on Complainant and the Regional Hearing Clerk as instructed in the Complaint.

RESPECTFULLY SUBMITTED,
this 28th day of March, 2018,



Jared Pessetto
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7

CERTIFICATE OF SERVICE

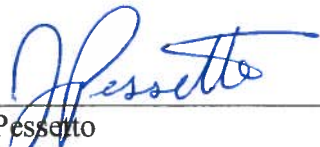
I hereby certify that the original and one true and correct copy of the foregoing Proposed Findings of Fact, Conclusions of Law, Default Order, and Initial Decision were hand-delivered to the Regional Hearing Clerk of the U.S. Environmental Protection Agency, Region 7, at 11201 Renner Boulevard, Lenexa, Kansas, on March 28, 2018.

A true and correct copy of the foregoing document was also sent by certified mail, return receipt requested, on March 28, 2018, to:

Mr. Cory Poulsen
Superior Restoration & Construction LLC
23625 West 92nd Terrace
Lenexa, Kansas 66227

and to:

Mr. Cory Poulsen
Superior Restoration & Construction LLC
7861 Mastin Drive
Overland Park, Kansas 66204.



Jared Pessetto
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7