



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

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REPLY TO THE ATTENTION OF:

December 21, 2010

La Dawn Whitehead
Regional Hearing Clerk
Records Management Specialist
U.S. EPA - Region 5 (E-19J)
Office of Enforcement and Compliance Assurance
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

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

Dear Ms. Whitehead:

Enclosed please find the original and one copy of Complainant's Response to Respondent's Motion for Interlocutory Appeal in the above-captioned matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mary T. McAuliffe".

Mary T. McAuliffe
Associate Regional Counsel

Enclosures

cc: Chief Judge Susan L. Biro
Office of the Administrative Law Judges
U.S. Environmental Protection Agency

D.S. Berenson, Esquire
Kevin M. Tierney, Esquire

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

Complainant's Response to Respondent's Motion for Interlocutory Appeal

Under 40 C.F.R. § 22.16(b), Complainant, the United States Environmental Protection Agency, Region 5, files this Response to Respondent's Motion for Interlocutory Appeal ("Motion for Appeal"). Complainant is asking the Presiding Office to DENY Respondent's request that this Court recommend interlocutory review of the December 1, 2010 Order Denying Respondent's Motion to Dismiss and Granting Complainant's Motion to File Amended Complaint ("Order").

I. Standard for Interlocutory Review

Respondent Hanson's Window and Construction, Inc., d/b/a numerous assumed and trade names, has requested interlocutory review under 40 C.F.R. § 22.29. 40 C.F.R. § 22.29(b) states:

The Presiding Officer may recommend any 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.

II. The Court's December 1, 2010 Order

In the December 1, 2010 Order, this Court denied Respondent's Motion to Dismiss, and allowed Complainant to file an Amended Complaint that comports with the Court's Order.

In reaching its decision to deny Respondent's Motion to Dismiss, the Court references 40 C.F.R. § 22.14(a)(2) for the requirements pertaining to the content of a complaint, and then 40 C.F.R. § 22.20(a), Federal Rule of Civil Procedure ("FRCP") 12(b)(6), and the United States Supreme Court's findings in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 150 (2009), for the standard to be used in identifying a failure to state a claim upon which relief may be granted. The Court's Order examined the regulations and case law, and the facts in this case, and found that the original Complaint complied with the standard in *Iqbal* and established a *prima facie* case as required by 40 C.F.R. § 22.20(a), and thus withstood Respondent's request for dismissal.

Next, the Court considered Complainant's request to amend the Complaint. The Court references FRCP 15(a)(2), which provides that amendment should be freely given when justice so requires, and cites to the Supreme Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962). In this matter, the Court did not find that Complainant's conduct in citing to the amended version of the original regulations provided a basis for denying Complainant's request to amend the Complaint to correct the citations.

III. Respondent's Motion for Appeal Lacks Any Basis for Granting Interlocutory Review of the Court's December 1, 2010 Order

a. Respondent Has Not Identified a Controlling Question of Law or Policy Related to the Court's December 1, 2010 Order

In its Motion for Appeal, with respect to the first prong of the regulatory criteria requiring that Respondent identify a controlling question of law or policy related to the Court's analysis to not dismiss the original Complaint, and to allow Complainant to amend the Complaint, Respondent reviews two fair notice arguments. First, Respondent argues that it did not have fair notice of the regulations it violated in 2005 since Complainant originally pled violations using

citations to the 2008 amended regulations rather than to the original 1998 regulations (see top of unnumbered page 4 of Respondent's Motion for Appeal). Respondent amends this fair notice argument to state that the 1998 regulations did not provide Respondent with fair notice that its window replacement work was renovation and thus subject to the regulations at 40 C.F.R. Section 745, Subpart E.

First, with respect to Respondent's argument that the original Complaint deprived Respondent of fair notice of violations that occurred in 2005, the original Complaint does provide information about the Residential Property Renovation Rule from 1998 to the present. Among other things, the original Complaint states that the regulations at 40 C.F.R. Section 745, Subpart E, entitled "Residential Property Renovation," were originally promulgated in 1998, and were amended in 2008 (see paragraph 5 of the original Complaint). In addition, Complainant provided a narrative description of the violations pertaining to each transaction (see paragraphs 47 and 321 of the original Complaint). The original Complaint states in each Count that Respondent failed to provide required information (Counts 1-271) and failed to retain the required documentation demonstrating that it provided the required information (Counts 272-542). Although the original Complaint cites to the recodified Residential Property Renovation Rule rather than to the original regulatory citations, the Complaint did provide notice to Respondent of its alleged violations under the Residential Property Renovation Rule in effect in 2005.

Complainant agrees that it should have cited Respondent under the 1998 version of the Residential Property Renovation Rule in effect at the time of the violations alleged in the Complaint. Therefore, Complainant immediately attempted to make this correction in the form

of seeking to amend the Complaint. Respondent vigorously opposed and continues to oppose this request because Respondent wishes to have the Complaint tossed out on statute of limitations grounds rather than have the case decided on the merits. However, neither Respondent's arguments nor its desires amount to an important question of law or policy that is appropriate for interlocutory review of this Court's underlying decision.

Next, Respondent argues that the 1998 Residential Property Renovation regulations did not provide fair notice that its window replacement work was renovation subject to federal law. However, since 1998, in the regulations at 40 C.F.R. Part 745, Subpart E, "renovation" has been consistently defined to include window replacement." See 40 C.F.R. § 745.83 (1998).

Respondent raises the differences between the Residential Property Renovation Rule, as originally promulgated in 1998, versus the Residential Property Renovation Rule, as amended in 2008. Respondent notes that the exemption available under the 1998 regulations versus the exemption in the 2008 amended regulations is "extraordinarily material," and that the Residential Property Renovation Rule dramatically changed in 2008. However, since 1998, the Residential Property Renovation rule had consistently defined "renovation" to specifically include window replacement. Respondent points to the fact that the exemption from applicability was amended in 2008 to specifically state that window replacement is not exempt, but fails to state that the definition of renovation has specifically included window replacement activities since 1998. There has never been an exemption allowing window replacement work to be performed out of compliance with the Residential Property Renovation regulations.

Respondent states that the 2008 changes to the Residential Property Renovation Rule were legally complex and operationally revolutionary. This is correct with respect to new

lead-safe work practices added by the amendments. Portions of the Residential Property Renovation Rule (Renovation Rule) did change substantially from 1998 to 2008. Specifically the Renovation Rule amendments added regulations required by TSCA Section 402 pertaining to the use of lead-safe work practices and to the training of workers. However, the Complaint in this matter does not include TSCA Section 402-related violations.

Respondent notes that the pamphlet it was required to provide to its customers beginning in 1998, and required at the time of the alleged violations, changed to a new version in 2008, as further evidence of the dramatic change in the regulations in 2008. Complainant agrees that the pamphlet was substantially revised, but this was done primarily so that it could be used to advise homeowners and tenants of how work should be performed under the newly-added lead safe work practice requirements. Further, in the original Complaint, Complainant acknowledged that the pamphlet requirement changed in 2008. See paragraph 10 of the original Complaint.

The requirement to provide the required lead-information pamphlet and to retain documentation of compliance for renovation work performed by companies like Respondent was substantially unchanged by the 2008 amendments to the Renovation Rule. In any case, none of the 2008 amendments to the regulations affect or excuse Respondent's 2005 renovation activities from being performed in compliance with regulations in effect since 1998.

For purposes of Respondent's Motion for Appeal, the issue is whether it was appropriate for the Court to give permission, that should be freely given, absent conduct warranting denial, to amend the Complaint. While Complainant understands that Respondent would like to see the original Complaint dismissed and amendment denied, its arguments in defense to the violations alleged in the Amended Complaint do not amount to an important question of law or policy with

respect to the Court's decision not to dismiss the original Complaint and to allow Complainant to amend the original Complaint. As determined by this Court, Complainant's original complaint did provide Respondent adequate notice of Complainant's allegations and established a *prima facie* case. Any argument about whether Respondent knew or should have known that it was required to comply with the 1998 regulations for renovation work it conducted in 2005 is not the type of fair notice argument relevant to analyzing Respondent's Motion to Dismiss as set forth in 40 C.F.R. § 22.20(a).

b. Respondent's Use of Motion of Appeal to Materially Advance the Termination of Litigation is Unwarranted

As stated at the outset, interlocutory review is available only when both prongs of 40 C.F.R. § 22.29(b) are met. With respect to the first prong of 40 C.F.R. § 22.29(b), Respondent has not identified an important issue of law or policy that is offended by the December 1, 2010 Order. Under the second prong for reviewing a motion for interlocutory review, Respondent must demonstrate that an immediate appeal will materially advance the termination of the litigation and subsequent review is inadequate. Respondent's argument is that if the original Complaint is amended, and subsequently, a court determines that it should not have been amended, time, money and judicial resources will have been wasted. However, Respondent's argument is premised on having the original Complaint dismissed in a manner in which Complainant is precluded from filing any complaint alleging violations from 2005 due to a statute of limitations argument. However, dismissing a complaint so that there is no need for litigation is not the type of prejudice that warrants denying a motion to amend a complaint, particularly where Complainant's citation errors did not deprive Respondent of notice of the

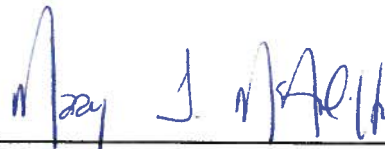
allegations asserted in the original Complaint.

IV. Conclusion.

In the original Complaint, Complainant alleged violations that constitute violations of the regulations in effect since 1998, and that were in effect at the time of the alleged violations, approximately seven years later. Complainant included the substantive regulatory violations in the original Complaint, but referred to the newly codified version of these regulations in effect in 2008, rather than to the original regulatory citations in effect at the time of Respondent's alleged violations, in 2005. Complainant maintains that Respondent violated the requirements pertaining to the regulations in effect in 2005. Complainant promptly sought permission to correct the citations in the pleadings, so that the original regulations, rather than the recodified regulations, are now cited in the Amended Complaint. Complainant filed the Amended Complaint as ordered by this Court. Accordingly, Complainant respectfully requests that Respondent's Motion for Appeal be denied.

Respectfully submitted,

U.S. Environmental Protection Agency



Mary T. McAuliffe

Mark Palermo

Associate Regional Counsel

U.S. Environmental Protection Agency

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Docket No. TSCA-05-2010-0013

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2010, I filed the original and one copy of this Complainant's Response to Respondent's Motion for Interlocutory Appeal with LaDawn Whitehead, Regional Hearing Clerk, EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois 60604, and placed a copy of Complainant's Response to Respondent's Motion for Interlocutory Appeal, to be mailed by Pouch Mail to:

Chief Judge Susan L. Biro
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

and placed for pickup to be mailed a copy of Complainant's Response to Respondent's Motion for Interlocutory Appeal, by certified mail number 7001 0320 0006 0188 4633, return receipt requested, to:

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



Leanne Fountas
Office Automation Assistant