



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1
5 POST OFFICE SQUARE, SUITE 100
BOSTON, MA 02109-3912

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July 3, 2013

Wanda Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 1 (ORA 18-1)
5 Post Office Square
Boston, Massachusetts 02140

Re: James J. Welch & Co., Inc.
Docket No. TSCA-01-2013-0036

Dear Ms. Santiago:

Enclosed for filing in the above-referenced matter, please find the original and one copy of the Complaint. Thank you for your assistance in this matter.

Very truly yours,

Andrea Simpson
Senior Enforcement Counsel

cc: Constance Welch

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

RECEIVED

JUL 03 2013

EPA ORC WJS
Office of Regional Hearing Clerk

In the Matter of:)
)
James J. Welch & Co., Inc.)
27 Congress Street, Suite 513)
Salem, Massachusetts 01970-5523)
)
Respondent.)
)
Proceeding under Section 16(a) of the)
Toxic Substances Control Act,)
15 U.S.C. § 2615(a))
)

Docket No.
TSCA-01-2013-0036

COMPLAINT AND
NOTICE OF
OPPORTUNITY FOR
HEARING

COMPLAINT

I. STATUTORY AND REGULATORY BACKGROUND

1. This Administrative Complaint and Notice of Opportunity for Hearing (“Complaint”) is issued pursuant to Section 16(a) of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2615(a), 40 C.F.R. § 745.118, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules of Practice”), 40 C.F.R. § 22.1(a)(5). Complainant is the Legal Enforcement Manager of the Office of Environmental Stewardship, U.S. Environmental Protection Agency (“EPA”), Region 1. Respondent, James J. Welch & Co., Inc. (“JJ Welch” or “Respondent”), is hereby notified of Complainant’s determination that Respondent has violated Sections 15 and 409 of TSCA, 15 U.S.C. § 2689, 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, entitled “Residential Property Renovation,” as set forth at 40 C.F.R. Part 745, Subpart E.

Complainant seeks civil penalties pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, which provides that violations of Section 409 of TSCA are subject to the assessment by Complainant of civil and/or criminal penalties.

2. 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. 42 U.S.C. § 4851(1)-(4). 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. *Id.* § 4851a(2). 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. Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, § 1021, 106 Stat. 3672, 3912 (1992).

3. 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 “Renovation, Repair and Painting Rule” or the “RRP Rule”). *See* Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692, 21758 (issued Mar. 31, 2008) (codified at 40 C.F.R. Part 745, Subpart E).

4. 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” and “child-occupied facilities.” “Renovation” is defined as “the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces” “Renovation includes (but is not limited to): . . . removal of building components (e.g., . . . windows).” 40 C.F.R. § 745.83. “Target housing” is defined as any housing constructed prior to 1978, except housing for the elderly or disabled (unless any child who is less than six years old resides or is expected to reside in such housing), or any 0-bedroom dwelling. “Child-occupied facility” is defined as “a building or portion of a building, constructed prior to 1978, visited regularly by the same child, under [six] years of age, on at least two different days with in any week . . . provided that each day’s visit lasts at least 3 hours and the combined weekly visit lasts at least six hours, and the combined annual visits last at least 60 hours.” Id. “Child-occupied facilities may include, but are not limited to, day care centers, preschools and kindergarten classrooms.” Id. They may be located in target housing or in public or commercial buildings. Id.

5. 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.

6. Pursuant to 40 C.F.R. § 745.85 and 40 C.F.R. § 745.89(d)(1), “renovations” must be performed by certified “firms” using certified “renovators.” Certified “firms” must ensure that all renovations performed by the firm are performed in accordance with

the work practice standards in 40 C.F.R. § 745.85. 40 C.F.R. § 745.89(d)(3). A “firm” includes a corporation. Id. § 745.83.

7. A “renovator” is defined as “an individual who either performs or directs workers to perform renovations.” Id. Pursuant to 40 C.F.R. § 745.90(b)(1), renovators must perform or direct workers who perform all work practice standards in 40 C.F.R. § 745.85.

8. Pursuant to Section 409 of TSCA, it is unlawful for any person to fail to comply with any rule issued under Subchapter IV of TSCA (such as the RRP Rule). 15 U.S.C. § 2689. Pursuant to 40 C.F.R. § 745.87(a), the failure to comply with a requirement of the RRP Rule is a violation of Section 409 of TSCA. Pursuant to 40 C.F.R. § 745.87(b), the failure to establish and maintain the records required by the RRP Rule is a violation of Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689.

9. Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), provides that any person who violates a provision of Section 15 or 409 of TSCA shall be liable to the United States for a civil penalty.

10. Section 16(a) of TSCA and 40 C.F.R. § 745.87(d) authorize the assessment of a civil penalty of up to \$25,000 per day per violation of the RRP Rule. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. Part 19, violations that occurred after March 15, 2004 through January 12, 2009, are subject to penalties up to \$32,000 per day per violation. Violations that occur on or after January 13, 2009, are subject to penalties up to \$37,500 per day per violation. See Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75340, 75345 (Issued Dec. 11, 2008) (codified at 40 C.F.R. § 19.4).

II. GENERAL ALLEGATIONS

11. Respondent is a corporation registered in Massachusetts with its principal place of business located at 27 Congress Street, Suite 513, Salem, Massachusetts. Respondent provides general contracting services, including residential and commercial construction and renovation. Therefore, Respondent was a “firm” as defined in 40 C.F.R. § 745.83.

12. On August 11, 2011, the Town of Kittery, Maine entered into a contract with JJ Welch to serve as general contractor to renovate the former Frisbee School as part of the Frisbee School Revitalization Project. The project involved converting the former Frisbee School into a community center.

13. On or about August 18, 2011, JJ Welch entered into a contract with New Hampshire Plate Glass Corporation (“NH Glass”) to conduct window replacement as part of the Frisbee School Revitalization Project.

14. At all times relevant to this Complaint, the Frisbee School Revitalization project was a “renovation,” as defined in 40 C.F.R. § 745.83.

15. At all times relevant to this Complaint, the Frisbee School Revitalization Project was a “renovation for compensation” subject to the RRP Rule. See 40 C.F.R. § 745.82. Furthermore, the window replacement project at the former Frisbee School did not satisfy the requirements for an exemption to the provisions of TSCA or the RRP Rule.

16. At the time of the renovation, there were two connected buildings that comprised the school—the original building, where the renovation occurred, and the

annex (collectively referred to as the “Facility”). The original building was built in 1941 and the annex was built in 1951.

17. At the time of the renovation, a Head Start Program and the Kittery Recreation Department Childcare Programs were located in the annex building. Upon completion of the renovation project, the Kittery Recreation Department Childcare Programs were moved into the newly renovated portion of the Facility.

18. At all times relevant to this Complaint, the Facility was a “child-occupied facility,” as defined in 40 C.F.R. § 745.83. Furthermore, the Facility did not satisfy the requirements for an exemption to the provisions of TSCA or the RRP Rule.

19. Respondent successfully completed an accredited course regarding the RRP Rule on September 1, 2010, and at all times relevant to this Complaint, Respondent was a certified “firm” pursuant to 40 C.F.R. § 745.89.

20. Between September 2011 and February 2012, NH Glass removed approximately 70 storm windows with wood trim at the Facility.

21. At all times relevant to this Complaint, NH Glass was a “renovator,” as defined in 40 C.F.R. § 745.83.

22. In a report dated April 18, 2011, Ransom Environmental Consultants, Inc. documented that painted surfaces in the former Frisbee School building, including windows, contained lead-based paint above 1.0 milligrams per square centimeter and that the renovation contractors should be trained in accordance with the RRP rule.

23. On February 14, 2012, an inspector from the Maine Department of Environmental Protection (“ME DEP”) visited the Facility after receiving a complaint indicating that lead paint may be present at the Facility posing a risk to children attending

day care programs there. The inspector conducted a lead test and determined that lead-based paint existed at the Facility.

24. On February 23, 2012, inspectors from EPA Region 1 and the ME DEP conducted an inspection of the Facility to evaluate Respondent's compliance with the RRP Rule. During the inspection, the EPA and ME DEP inspectors interviewed the JJ Welch Project Manager, David Crook, and Nick Raitt, the foreman for NH Glass. Mr. Crook stated that he had received a copy of the report prepared by Ransom Environmental Consultants, Inc. and had sent a copy to NH Glass. However, Mr. Raitt stated he had been told by an employee of JJ Welch that no lead was present in the building. Mr. Raitt also stated that he did not follow any of the RRP Rule requirements during the window replacement project.

25. Mr. Crook stated that around the beginning of February 2012, he observed NH Glass removing window trim without containment and immediately halted the window renovations. NH Glass had replaced approximately 70 windows prior to the work stoppage. Mr. Raitt confirmed that this information was true.

26. During the window replacement project, Nick Raitt and Roy Palmer acted as foremen for NH Glass. Neither Mr. Raitt nor Mr. Palmer were certified renovators, as required by 40 C.F.R. § 745.90, at the time of the window replacement project.

27. After NH Glass stopped work on the project, JJ Welch completed the project and conducted clean up of paint chips in the soil.

28. As a result of the inspection and additional information obtained by EPA, Complainant has identified the following violation of Section 409 of TSCA, the

Residential Lead-Based Paint Hazard Reduction Act of 1992, and the RRP Rule, as set forth at 40 C.F.R. Part 745, Subpart E.

III. VIOLATION

Count 1 - Failure to Ensure a Certified Renovator is assigned to each Renovation and Discharges All Renovator Responsibilities

29. Complainant incorporates by reference paragraphs 1 through 28.

30. Pursuant to 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure that all renovations performed by the firm are performed in accordance with the work practice standards in § 745.85.

31. Pursuant to 40 C.F.R. § 745.85(a)(2)(ii)(C), for exterior renovations, “renovators must cover the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to collect falling paint debris, whichever is greater.”

32. Pursuant to 40 C.F.R. § 745.85(a)(4)(i), “waste from renovation activities must be contained to prevent releases of dust and debris before the waste is removed from the work area for storage or disposal.”

33. JJ Welch did not ensure that during window renovations at the Facility, the ground was covered with plastic sheeting or other impermeable material to collect falling paint debris.

34. JJ Welch did not ensure that during window renovations at the Facility, waste from renovation activities was contained to prevent releases of dust and debris before the waste was removed from the work area for storage or disposal.

35. Respondent’s failure to ensure that (a) the ground was covered with plastic sheeting or other disposable impermeable material extending 10 feet beyond the

perimeter of surfaces undergoing renovation or a sufficient distance to collect falling paint debris, whichever is greater, for the renovation project at the Facility and (b) waste from the renovation project was contained at the Facility to prevent releases of dust and debris before the waste was removed from the work area for storage or disposal, constitutes a violation of 40 C.F.R. § 745.89(d)(3). JJ Welch, therefore, violated section 409 of TSCA.

IV. PROPOSED PENALTY

36. In determining the amount of any penalty to be assessed, 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 such other matters as justice may require.

15 U.S.C. § 2615(a)(2)(B).

37. To assess a penalty for the alleged violations in this Complaint, 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”), a copy of which is enclosed with this Complaint. The LBP Consolidated ERPP provides a rational, consistent, and equitable calculation methodology for applying the statutory penalty factors enumerated above to particular cases. Complainant proposes that Respondent be assessed a civil penalty in the amount of twenty-eight thousand one hundred twenty-five dollars (\$28,125) for the TSCA

violation alleged in this Complaint. (See Attachment I to this Complaint explaining the reasoning for this penalty.) The provisions violated and the corresponding penalties are as follows:

PROVISION	REQUIREMENT	PENALTY
Failure to Ensure Renovations Are Performed in Accordance with § 745.85	40 C.F.R. § 745.89(d)(3)	\$22,500
Culpability 25%		\$5,625
Total Penalty		\$28,125

V. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

38. As provided by Section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A), and in accordance with 40 C.F.R. § 22.14, Respondent has a right to request a hearing on any material fact alleged in this Complaint. Any such hearing would be conducted in accordance with EPA’s Consolidated Rules of Practice, 40 C.F.R. Part 22, a copy of which is enclosed with this Complaint. Any request for a hearing must be included in Respondent’s written Answer to this Complaint (“Answer”) and filed with the Regional Hearing Clerk at the address listed below within thirty (30) days of receipt of this Complaint.

39. The Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint. 40 C.F.R. § 22.15(b). Where Respondent has no knowledge as to a particular factual allegation and so states, the allegation is deemed denied. Id. The failure of Respondent to deny an allegation contained in the Complaint constitutes an admission of that allegation. Id. § 22.15(d). The Answer must also state the circumstances or arguments alleged to constitute the grounds of any

defense; the facts that Respondent disputes; the basis for opposing any proposed penalty; and whether a hearing is requested. See 40 C.F.R. § 22.15 of the Consolidated Rules of Practice for the required contents of an Answer.

40. Respondent shall send the original and one copy of the Answer, as well as a copy of all other documents that Respondent files in this action, to the Regional Hearing Clerk at the following address:

Wanda A. Santiago
Regional Hearing Clerk
U.S. EPA, Region 1
5 Post Office Square – Suite 100
Mail Code: ORA18-1
Boston, Massachusetts 02109-3912

41. Respondent shall also serve a copy of the Answer, as well as a copy of all other documents that Respondent files in this action, to Andrea Simpson, the attorney assigned to represent Complainant in this matter, and the person who is designated to receive service in this matter under 40 C.F.R. § 22.5(c)(4), at the following address:

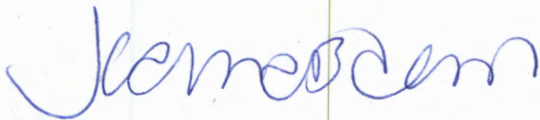
Andrea Simpson
Senior Enforcement Counsel
U.S. EPA, Region 1
5 Post Office Square – Suite 100
Mail Code: OES04-2
Boston, Massachusetts 02109-3912

42. If Respondent fails to file a timely Answer to the Complaint, Respondent may be found to be in default, pursuant to 40 C.F.R. § 22.17 of the Consolidated Rules of Practice. For purposes of this action only, default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations under Section 16(a)(2)(A) of TSCA. *Id.* § 22.17(a). Pursuant to 40 C.F.R. § 22.17(d), the penalty assessed in the default order shall become due and payable

by Respondent, without further proceedings, thirty (30) days after the default order becomes final.

VI. SETTLEMENT CONFERENCE

43. Whether or not a hearing is requested upon filing an Answer, Respondent may confer informally with Complainant or his designee concerning the violations alleged in this Complaint. Such conference provides Respondent with an opportunity to respond informally to the allegations, and to provide whatever additional information may be relevant to the disposition of this matter. To explore the possibility of settlement, Respondent or Respondent's counsel should contact Andrea Simpson, Senior Enforcement Counsel, at the address cited above or by calling (617) 918-1738. Please note that a request for an informal settlement conference by Respondent does not automatically extend the 30-day time period within which a written Answer must be submitted in order to avoid becoming subject to default.



Joanna Jerison
Legal Enforcement Manager
Office of Environmental Stewardship
U.S. EPA, Region 1

7 / 3 / 13
Date

ATTACHMENT 1 TO COMPLAINT

In the Matter of James J. Welch & Company, Inc.
Docket Number TSCA-01-2013-0036

PROPOSED PENALTY SUMMARY

Pursuant to EPA's August 2010 *Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule* ("LBP Consolidated ERPP"), EPA proposes a civil penalty in the amount of \$28,125 to be assessed against James J. Welch & Company, Inc. as follows¹:

COUNT 1. Failure to Assign Certified Renovators

Provision Violated: 40 C.F.R. § 745.89(d)(3) requires that all firms performing applicable renovations must ensure that such work is performed in accordance with the work practice standards in § 745.85.

Circumstance Level: The failure to ensure that a renovation is performed in accordance with the work practice standards results in a high probability of a renovation firm failing to comply with the work practice standards of 40 C.F.R. § 745.85. As a result, under the LBP Consolidated ERPP Appendix A, a violation of 40 C.F.R. § 745.89(d)(3) is a *Level 3a* violation.

Extent of Harm: The LBP Consolidated ERPP takes into consideration the risk factors for exposure to lead-based paint and lead-based paint hazards. The potential for harm is measured by the age of children living in the target housing and the presence of pregnant women living in the target housing. Children under the age of six are most likely to be adversely affected by the presence of lead-based paint and lead-based paint hazards, because of how they play and ingest materials from their environment, and because of their vulnerability due to their physical development. The harmful effects that lead can have on children under the age of six warrants a *major* extent factor. Children between the ages of six and eighteen may be adversely affected by the presence of lead-based paint and lead-based paint hazards because of their vulnerability due to their physical development. The harmful effects that lead can have on children between the ages of six and eighteen warrant a *significant* extent factor. The absence of children or pregnant women warrants a *minor* extent factor.

Respondent failed to ensure that such work was performed in accordance with the work practice standards in § 745.85.

A 25% upward adjustment was added to the penalty for culpability because, as a certified firm, JJ Welch should have known of its obligations under the RRP Rule.

¹ Section 16(a) of TSCA and 40 C.F.R. § 745.87(d) authorize the assessment of a civil penalty of up to \$25,000 per day per violation of the RRP Rule. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. Part 19, violations that occurred after March 15, 2004 through January 12, 2009, are subject to penalties up to \$32,000 per day per violation. Violations that occur on or after January 13, 2009, are subject to penalties up to \$37,500 per day per violation. See 73 Fed. Reg. 75340 (December 11, 2008).

Docket No. TSCA-01-2013-0036

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2013, the original and one copy of the Complaint in the Matter of James J. Welch & Co., Inc., Docket No. TSCA-01-2013-0036, were hand-delivered to the Regional Hearing Clerk and a copy was sent to Respondent, as set forth below:

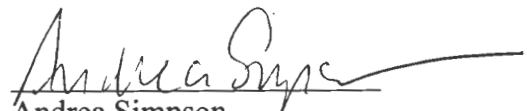
Original and one copy
by hand delivery to:

Wanda Santiago
Regional Hearing Clerk
U.S. EPA, Region I (ORA18-1)
5 Post Office Square, Suite 100
Boston, MA 02109

Copies by certified mail to:

Constance Welch, President
James J. Welch & Co., Inc.
27 Congress Street, Suite 513
Salem, Massachusetts 01970

Dated: 7/3/13


Andrea Simpson
Senior Enforcement Counsel
U.S. Environmental Protection Agency
Region 1
5 Post Office Square, Suite 100
Boston, MA 02109