

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

In the Matter of:)
)
John Fogg Jr. Enterprises, LLC.)
247 Haley Road)
Ledyard, CT 06339)
)
Respondent)
)
)
Proceeding under Section 16(a) of)
The Toxic Substances Control Act,)
15 U.S.C. § 2615(a).)
)

Docket No. TSCA-01-2014-0034

**ADMINISTRATIVE COMPLAINT AND
NOTICE OF OPPORTUNITY FOR HEARING**

I. STATEMENT OF AUTHORITY

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 and the Revocation/Termination or Suspension of Permits* (“Consolidated Rules of Practice”), 40 C.F.R. Part 22. Complainant is the Legal Enforcement Manager of the Office of Environmental Stewardship, U.S. Environmental Protection Agency (“EPA”), Region 1. Respondent is John Fogg Jr. Enterprises, LLC (“Respondent”).

II. NATURE OF THE ACTION

2. This Complaint alleges that Respondent performed a renovation for compensation on a pre-1978 multi-family residential structure located in Madison, Connecticut in August 2013.
3. Respondent is hereby notified of Complainant's determination that Respondent has violated the "Renovation, Repair and Painting" ("RRP") Rule, set forth at 40 C.F.R. Part 745, Subparts E and L, promulgated under Sections 402(a) and (c) and 406(b) of the Toxic Substances Control Act ("TSCA"), §§ 2682(c) and 2686(b), during a "renovation," as defined at Section 401(17) of TSCA, 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.83, of "target housing," as defined at 40 C.F.R. § 745.223. 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.

III. STATUTORY AND REGULATORY BACKGROUND

4. In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act ("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.
5. 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, comprehensively referred to as the RRP Rule.

6. Pursuant to Section 401(17) of TSCA, 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.103, the housing stock addressed by the Act is termed “target housing.”

7. Pursuant to TSCA Section 406(b), 15 U.S.C. § 2686(b) and the federal regulations promulgated thereunder, set forth in 40 C.F.R. § 745.84, the RRP Rule sets forth procedures and requirements for the distribution of EPA’s lead hazard information pamphlet to the owner or an adult occupant of pre-1978 housing units at least 60 days prior to beginning renovation activities at their properties.

8. Pursuant to TSCA Section 402, 15 U.S.C. § 2682 and the federal regulations promulgated thereunder, set forth at 40 C.F.R. § 745, Subpart E, 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 the establishment and maintenance of records.

9. 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). 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.

10. 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.

11. 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 between January 14, 2009 and December 6, 2013, are subject to penalties of up to \$37,500 per day per violation. See 73 Fed. Reg. 75340 (December 11, 2008); 78 Fed. Reg. 66643 (Nov. 6, 2013).

IV. APPLICABLE DEFINITIONS

12. Pursuant to 40 C.F.R. § 745.83, the term “*EPA pamphlet*” means the EPA pamphlets developed under Section 406(a) of TSCA for use in complying with 406(b) of TSCA and the RRP Rule. At all times relevant to the violations alleged herein, such pamphlets were entitled either *Protect Your Family From Lead in Your Home* or *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools*. The term “*EPA pamphlet*” may also include any State or Tribal pamphlet approved by EPA pursuant to 40 C.F.R. § 745.326 that is developed for the same purpose. This includes reproductions of the pamphlet when copied in full and without revision or deletion of material from the pamphlet (except for the addition or revision of State or local sources of information).

13. Pursuant to 40 C.F.R. § 745.83, the term “*firm*” means 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.

14. Pursuant to 40 C.F.R. § 745.83, the term “*minor repair and maintenance activities*” means activities, including minor heating, ventilation or air conditioning work, electrical work,

and plumbing, that disrupt 6 square feet or less of painted surface per room for interior activities or 20 square feet or less of painted surface for exterior activities where none of the work practices prohibited or restricted by 40 C.F.R. § 745.85(a)(3) are used and where the work does not involve window replacement or demolition of painted surface areas.

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

16. Pursuant to 40 C.F.R. § 745.83, the term “*renovator*” means an individual who either performs or directs workers who perform renovations. A certified renovator is a renovator who has successfully completed a renovator course accredited by EPA or an EPA-authorized State or Tribal program.

17. Pursuant to 40 C.F.R. § 745.103 and Section 401(17) of TSCA, 15 U.S.C. § 2681(17), the term “*target housing*” means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling.

18. Pursuant to Section 401(14) of TSCA, 15 U.S.C. § 2681(14), and 40 C.F.R. § 745.103, the term “*residential dwelling*” means either a single-family dwelling, including attached structures such as porches and stoops, or a single-family dwelling unit in a structure that contains more than one separate residential dwelling unit, and in which each such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the residence of one or more persons.

19. Pursuant to 40 C.F.R. § 745.103, the term “*owner*” means any entity that has legal title to target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes and nonprofit organizations, except where a mortgagee holds legal title to property serving as collateral for a mortgage loan, in which case the owner would be the mortgagor.

V. GENERAL ALLEGATIONS

20. Respondent is a Connecticut limited-liability corporation with its principal place of business located at 247 Haley Road, Ledyard, Connecticut.

21. Respondent is a “person” within the meaning of 40 C.F.R. § 745.83.

22. At all times relevant to this Complaint, Respondent was a “firm” within the meaning of 40 C.F.R. § 745.83.

23. Respondent is a company that provides interior and exterior house painting services in Connecticut.

24. Respondent is a “renovator” as that term is defined at 40 C.F.R. § 745.83. During all times relevant to this Complaint, Respondent was not an EPA certified firm.

25. During July 2013, Respondent performed exterior painting services work at a property located at 24-26 Wall Street, Madison, Connecticut (“Property”).

26. The painting services that Respondent performed at the Property were “renovation” activities as that term is defined in 40 C.F.R. § 745.83.
27. The Property is “target housing” within the meaning of Section 401(17) of TSCA, 15 U.S.C. § 2681(17) and 40 C.F.R. § 745.103.
28. The Property is “residential housing” within the meaning of Section 401(14) of TSCA, 15 U.S.C. § 2681(14), and 40 C.F.R. § 745.103.
29. The E.C. Scranton Memorial Library (“Owner”) owns the Property.
30. The Property consists of two floors. At all times relevant to this Complaint, the bottom-floor of the Property was used for storage by the Owner. The upper floor contained two residential rental apartments. At all times relevant to this Complaint, there were no children residing at the Property.
31. John Bowers, the Director of Health for Madison, Connecticut, stopped work at the Property on July 30, 2013, due to concerns about Respondent’s possible violations of the RRP Rule. Mr. Bowers notified EPA of his concerns.
32. Tina McCarthy, an employee of the Connecticut Department of Public Health (“CT DPH”), also notified EPA that CT DPH had provided Respondent with RRP Rule compliance assistance in response to a complaint about RRP Rule work practice violations in Stonington, Connecticut in 2012. These violations included failure to contain waste from renovation activities.
33. On August 1, 2013, an EPA inspector (“inspector”), conducted an on-site inspection (“inspection”) at the Property to document and determine Respondent’s compliance with Section 402 of TSCA. The inspector met with Respondent’s foreman, Dewitt Sizer, and John Fogg, Respondent’s owner/president. Mr. Bowers was also present during the inspection.

34. Mr. Sizer told the inspector that Respondent had been hired by the Owner to perform surface preparation and painting of the exterior of the building. Mr. Sizer also told the inspector that the surface preparation included power sanding without high-efficiency particulate air filter (“HEPA”) attachments, hand-scraping of painted surfaces and caulking of damaged clapboards.
35. When the inspector asked if Respondent was aware of the RRP Rule and its requirements, Mr. Fogg stated that he was aware of the RRP Rule and that he and Mr. Sizer were both certified renovators. When asked if Respondent was an EPA certified firm, Mr. Fogg stated that it was not a certified firm and that he did not know about firm certification requirements.
36. Additionally, during the inspection, the inspector learned, through observation at the Property and statements made by Mr. Fogg and Mr. Sizer, that Respondent failed to:
- a. provide written notification of the planned renovation, or ensure written notification of, each affected residential unit at the Property. Respondent also failed to post informational signs at the Property;
 - b. obtain written acknowledgement that it had notified the Owner using either the EPA Pamphlet or posted informational signs;
 - c. cover the ground with plastic sheeting (or other disposable impermeable material) extending 10 feet beyond the perimeter of surfaces undergoing renovation to collect falling lead-paint debris;
 - d. contain renovation wastes to prevent releases of dusts and debris;

VI. VIOLATIONS

Count 1 - Failure to Obtain Initial Certification from EPA

37. Complainant incorporates by reference Paragraphs 1 through 36.
38. Pursuant to 40 C.F.R. §§ 745.81(a)(2)(ii) and 745.89(a), a firm that performs, offers, or claims to perform renovations or dust sampling for compensation must obtain initial certification from EPA unless the renovation qualifies for one of the exceptions identified in 40 C.F.R.

§ 745.82(a) or (b).

39. Respondent did not obtain initial firm certification from EPA prior to performing the renovation activities at the Property. Moreover, the renovation at the Property did not qualify for an exception identified in 40 C.F.R. § 745.82(a) or (b).

40. Respondent's failure to obtain initial firm certification from EPA violates 40 C.F.R. §§ 745.81(a)(2)(ii) and 745.89(a) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 2 – Failure to Use HEPA Shrouds or Containment Systems and HEPA Vacuum Attachments on High Speed Machines Used to Remove Paint

41. Complainant incorporates by reference Paragraphs 1 through 40.

42. Pursuant to 40 C.F.R. § 745.85(a)(3)(ii), firms performing renovations must prohibit the use of machines that remove paint or other surface coatings through high-speed operation such as sanding and grinding unless such machines have shrouds or containment systems and are equipped with a HEPA vacuum attachment to collect dust and debris at the point of generation.

43. During the EPA inspection, Mr. Sizer told the inspector that Respondent had been using power sanders as surface preparation for the renovation activity at the Property, and that the sanding machines were not equipped with shrouds or containment systems or equipped with HEPA vacuum attachments.

44. Respondent's failure to use shrouds or containment systems and HEPA vacuum attachments on high speed machinery used to remove paint or other surface coatings constitutes a violation of 40 C.F.R. § 745.85(a)(3)(ii) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 3 – Failure to Provide Notification of Renovation Activities to Residents of Target Housing

45. Complainant incorporates by reference Paragraphs 1 through 44.

46. Pursuant to 40 C.F.R. § 745.84(b)(2)(i) and (ii), firms performing renovations in common areas of target housing must, within 60 days before beginning renovation activities, notify in writing, or ensure written notification of, each affected unit. In addition, the firm must make the EPA Pamphlet available upon request prior to the start of renovation. The written notice shall describe general nature and locations of the planned renovation activities; the expected starting and ending dates; and a statement of how the occupant can obtain the EPA Pamphlet and a copy of the records required by 40 C.F.R. §§ 745.86(c) and (d), at no cost to the occupants. In the alternative, while the renovation is ongoing, the firm may post informational signs describing the general nature and locations of the renovation and the anticipated completion dates.

47. At all times relevant to this Complaint, Respondent failed to provide written notification to each affected unit or to post informational signs notifying residents about renovation activities in common areas of the Property.

48. Respondent's failure to provide written notification or to post information signs notifying residents about renovation activities in common areas of the Property constitutes a violation of 40 C.F.R. §§ 745.84(b)(2) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 4 – Failure to Obtain Written Acknowledgement of Notification to Owner

49. Complainant incorporates by reference Paragraphs 1 through 48.

50. Pursuant to 40 C.F.R. § 745.84(b)(1)(i), firms performing renovations must obtain from the owner a written acknowledgement that the owner received the EPA Pamphlet. In the alternative, 40 C.F.R. §745.84(b)(1)(i) requires a firm to obtain a certificate of mailing at least 7 days prior to beginning a renovation.

51. At all times relevant to this Complaint, Respondent failed to obtain from the owner a written acknowledgement that the owner received the EPA Pamphlet, or to obtain a certificate of mailing the EPA Pamphlet at least 7 days prior to beginning its renovation at the Property.

52. Respondent's failure to obtain a written acknowledgement that the owner received the EPA Pamphlet, or to obtain a certificate of mailing of the EPA pamphlet at least 7 days prior to beginning its renovation at the Property constitutes violation of 40 C.F.R. § 745.84(b)(1)(i).

Count 5 – Failure to Adequately Cover Ground With Plastic Sheeting

53. Complainant incorporates by reference Paragraphs 1 through 52.

54. Pursuant to 40 C.F.R. § 745.85(a)(2)(ii)(c), prior to renovations, firms 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.

55. At the time of the EPA inspection, Respondent did not cover the ground with plastic sheeting that extending 10 feet beyond the perimeters of surfaces or a sufficient distance to collect falling paint debris.

56. When questioned by the inspector, Mr. Sizer stated that the plastic used by Respondent did not extend 10 feet from the surfaces undergoing renovation.

57. Respondent's failure to 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, constitutes a violation of 40 C.F.R. § 745.85(a)(2)(ii)(c) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 6 – Failure to Contain Waste From Renovation Activities

58. Complainant incorporates by reference Paragraphs 1 through 57.

59. Pursuant to 40 C.F.R. § 745.85(a)(4)(i), firms must 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. If a chute is used to remove waste from the work area, it must be covered.
60. At the time of the EPA inspection, Respondent did not contain the waste from its renovation activities.
61. The inspector observed paint chips, dust, and debris from Respondent's renovation activities around the entire perimeter of the Property.
62. Respondent's failure to contain waste from its renovation activities to prevent releases of dust and debris before the waste is removed from the work area for storage or disposal constitutes a violation of 40 C.F.R. § 745.85(a)(4)(i).

VII. NOTICE OF PROPOSED ASSESSMENT OF CIVIL PENALTY

63. In determining the amount of any penalty to be assessed, Section 16 of TSCA requires that Complainant 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.
64. 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 and revised April 2013 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 penalty factors enumerated above to particular cases.

65. Based on the nature, circumstances, extent and gravity of the above-cited violations, Complainant proposes that Respondent be assessed a civil penalty in the amount of thirty-four thousand two hundred seventy-five dollars (\$34,275) for the violations 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 (\$)
1. 40 C.F.R. §§ 745.81(a)(2)(ii) and 745.89(a)	Failure to Obtain Initial Certification from EPA	\$4,500
2. 40 C.F.R. § 745.85(a)(3)(ii)	Failure to Use a HEPA Shroud or Containment Systems and HEPA Vacuum Attachments on High Speed Machines Used to Remove Paint	\$7,500
3. 40 C.F.R. § 745.84(b)(2)(i) and (ii)	Failure to Provide Notification of Renovation Activities to Residents of Target Housing	\$2,840
4. 40 C.F.R. § 745.84(b)(1)(i)	Failure to Obtain Written Acknowledgement of Notification to Owner	\$ 580
5. 40 C.F.R. § 745.85(a)(2)(ii)(c)	Failure to Cover Ground With Plastic Sheeting	\$6,000
6. 40 C.F.R. § 745.85(a)(4)(i)	Failure to Contain Waste	\$6,000
PENALTY SUBTOTAL		\$27,420
DEGREE OF CULPABILITY ADJUSTMENT (25% Increase)		\$6,855
TOTAL PENALTY AMOUNT		\$34,275

66. **Ability to Pay:** Any proposed penalty in this matter will be developed based upon the best information available to Complainant. However, any such penalty may also be adjusted if Respondent is able to establish a bona fide claim of its ability to pay a penalty by providing Complainant with adequate financial documentation of its claim.

VIII. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

67. 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. 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 twenty (20) days of receipt of this Complaint.
68. The Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint. Where Respondent has no knowledge as to a particular factual allegation and so states, the allegation is deemed denied. The failure of Respondent to deny an allegation contained in the Complaint constitutes an admission of that allegation. 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.
69. 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

70. 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 Steven Schlang, 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:

Steven Schlang
Enforcement Counsel
U.S. EPA, Region 1
5 Post Office Square – Suite 100
Mail Code: OES04-4
Boston, Massachusetts 02109-3912

71. 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. 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.

IX. INFORMAL SETTLEMENT CONFERENCE

72. Whether or not a hearing is requested upon filing an Answer, Respondent may confer informally with Complainant or her 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 Steven Schlang, Enforcement Counsel, at the address cited above or by calling 617-918-1773.

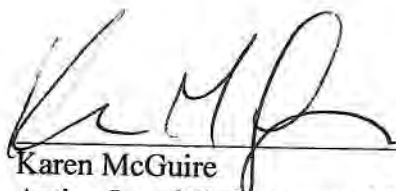
73. Please note that a request for an informal settlement conference by Respondent does not automatically extend the 20-day time period within which a written Answer must be submitted in order to avoid becoming subject to default.

74. Quick Resolution: Respondent may also resolve the proceeding at any time by paying the specific penalty proposed in the Complaint, as more fully explained in 40 C.F.R.

§ 22.18. If Respondent pays the proposed penalty in full within 30 days of receiving the Complaint then no Answer need be filed.

X. CONTINUED COMPLIANCE OBLIGATION

Neither assessment nor payment of an administrative penalty shall affect Respondent's continuing obligation to comply with 40 C.F.R. Part 745, Subparts E and L, and Section 409 of TSCA, 15 U.S.C. § 2689.



Karen McGuire
Acting Legal Enforcement Manager
Office of Environmental Stewardship
U.S. EPA, Region 1

8-21-14

Date

ATTACHMENT 1 TO COMPLAINT

In the Matter of John Fogg Jr. Enterprises, LLC
Docket Number TSCA-01-2014-0034

PROPOSED PENALTY SUMMARY

Pursuant to Section 16 of TSCA and 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 \$34,275 to be assessed against John Fogg Jr. Enterprises, LLC, as follows¹:

COUNT 1 - Failure to Obtain Initial Firm Certification from EPA

Provision Violated: 40 C.F.R. §§ 745.81(a)(2)(ii) and 745.89(a) require that a firm performing, offering, or claiming to perform renovations or dust sampling for compensation must obtain initial certification from EPA unless the renovation qualifies for one of the exceptions identified in 40 C.F.R. § 745.82(a) or (b).

Circumstance Level: The failure to obtain firm certification prior to performing renovations or dust sampling 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. § 745.107(a)(1) 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, if any, living in the target housing and/or the presence of pregnant women living in the target housing. The absence of children or pregnant women in this matter warrants a *minor* extent factor.

Respondent failed to obtain certification from EPA before beginning the renovation cited in the Complaint.

COUNT 2 – Failure to Use HEPA Shrouds or Containment systems and HEPA Vacuum Attachments on High Speed Machines Used to Remove Paint

Provision Violated: 40 C.F.R. § 745.85(a)(3)(ii), requires that firms performing renovations prohibit the use of machines that remove paint or other surface coatings through high-speed operation such as sanding and grinding unless painted surfaces unless such machines have

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 between January 14, 2009, and December 6, 2013, are subject to penalties up to \$37,500 per day per violation. See 73 Fed. Reg. 75340 (December 11, 2008); 78 Fed. Reg. 66643 (Nov. 6, 2013)..

shrouds or containment systems and are equipped with a HEPA vacuum attachment to collect dust and debris at the point of generation.

Circumstance Level: The prohibited use of high-speed machinery, such as sanding and grinding without a HEPA shroud or containment system and vacuum attachment, results in lead paint and dust being released into the environment and causing a high probability that humans or wildlife could become exposed to lead, a toxic substance. As a result, under the LBP Consolidated ERPP Appendix A, a violation of 40 C.F.R. § 745.85(a)(3)(ii) is a *Level 1a* 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, if any, living in the target housing and/or the presence of pregnant women living in the target housing. The absence of children or pregnant women in this matter warrants a *minor* extent factor.

Respondent used high-speed sanders and grinders without a HEPA shroud or containment system and vacuum attachment.

Count 3 – Failure to Provide Notification of Renovation Activities to Residents of Target Housing

Provision Violated: 40 C.F.R. § 745.84(b)(2)(i) and (ii) requires firms performing renovations in common areas of target housing to, within 60 days before beginning renovation activities, notify in writing, or ensure written notification of, each affected unit. In addition, the firm must make EPA-approved lead hazard information pamphlet available upon request prior to the start of the renovation. Such pamphlets include the EPA document entitled “*Renovate Right*”, or an equivalent pamphlet that has been approved for use by EPA. The written notice shall describe general nature and locations of the planned renovation activities; the expected starting and ending dates; and a statement of how the occupant can obtain the EPA Pamphlet and a copy of the records required by 40 C.F.R. §§ 745.86(c) and (d), at no cost to the occupants. In the alternative, while the renovation is ongoing, the firm may post informational signs describing the general nature and locations of the renovation and the anticipated completion dates.

Circumstance Level: Failure to provide tenants with a notice of a renovation or to post informational signs and to make EPA-approved pamphlets available upon request pursuant to 40 C.F.R. § 745.84(b)(2)(i) and (ii), results in a high probability of impairing the tenant’s ability to properly assess information regarding the risks associated with exposure to lead-based paint and to weigh this information with regard to renovating the target housing in question. As a result, under the LBP Consolidated ERPP Appendix A, a violation of 40 C.F.R. § 745.84(a)(1) is a *Level 1b* 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, if any, living in the target housing and/or the presence of pregnant women

living in the target housing. The absence of children or pregnant women in this matter warrants a *minor* extent factor.

Respondent failed to provide tenants with a notice of renovations in a common-area or to post informational signs and to make EPA-approved pamphlets available upon request.

Count 4 – Failure to Obtain Written Acknowledgement of Notification to Owner

Provision Violated: 40 C.F.R. § 745.84(b)(1)(i) requires firms performing renovations to obtain, from the owner of target housing, a written acknowledgement that the owner received an EPA-approved pamphlet. In the alternative, 40 C.F.R. § 745.84(b)(1)(i) requires a firm to obtain a certificate of mailing of the pamphlet at least 7 days prior to beginning a renovation.

Circumstance Level: Failure to obtain a written acknowledgement of receipt of an EPA-approved pamphlet, or, in the alternative a certificate of mailing of the pamphlet at least 7 days prior to beginning a renovation, pursuant to 40 C.F.R. § 745.84(b)(1)(i), results in a high probability of impairing the owner's ability to properly assess information regarding the risks associated with exposure to lead-based paint and to weigh this information with regard to renovating the target housing in question. As a result, under the LBP Consolidated ERPP Appendix A, a violation of 40 C.F.R. § 745.84(b)(1)(i) is a *Level 4b* 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, if any, living in the target housing and/or the presence of pregnant women living in the target housing. The absence of children or pregnant women in this matter warrants a *minor* extent factor.

Respondent failed to either obtain a written acknowledgement that the owner of the property received an EPA-approved pamphlet or obtain a certificate of mailing of the pamphlet.

COUNT 5 - Failure to Adequately Cover Ground with Plastic Sheeting

Provisions Violated: 40 C.F.R. § 745.89(d)(3), requires firms performing renovations to ensure that all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85. Pursuant to 40 C.F.R. § 745.85(a)(2)(ii)(C), for exterior renovations, firms 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.

Circumstance Level: The failure to apply proper ground cover results in a high probability that lead dust and debris will contaminate surrounding soils. As a result, under the LBP Consolidated ERPP Appendix A, a violation of 40 C.F.R. § 745.85(a)(2)(ii)(C), is a *Level 2a* 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, if any, living in the target housing and/or the presence of pregnant women

living in the target housing. The absence of children or pregnant women in this matter warrants a *minor* extent factor.

Respondent failed to adequately 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, for the renovation project.

COUNT 6. Failure to Contain Waste from Renovation Activities

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

Circumstance Level: The failure to contain waste from a renovation project results in a high probability of the release of lead dust and debris to the air and surrounding soils. As a result, under the LBP Consolidated ERPP Appendix A, a violation of 40 C.F.R § 745.85(a)(4)(i), is a *Level 2a* 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, if any, living in the target housing and/or the presence of pregnant women living in the target housing. The absence of children or pregnant women in this matter warrants a *minor* extent factor.

Respondent failed to contain waste from renovation activities to prevent release of dust and debris.

The total penalty was increased by 25% for culpability because: (1) Respondent directed the work and was present for the duration of the renovation; (2) Respondent has a moderate level of sophistication as shown by the extent and complexity of their business operations; and (3) Respondent was aware of the legal requirements as shown by their employing an EPA-certified renovator and by statements made by Respondent's president and employee during the inspection. In addition, Respondent had received compliance assistance from the State of Connecticut in 2012.