

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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In the Matter of:)
)
John Rice, LLC)
)
Respondent)
_____)

Docket No. TSCA-4-2012-2646

Complainant's Response to Third Order to Supplement Record

Complainant herein responds to the Presiding Officer's Third Order to Supplement the Record, through the undersigned attorney.

A. Second Amendment to Motion for Default

Through this filing Complainant hereby amends the requested relief in this proceeding and asks that the Respondent be assessed a penalty of \$42,320, which should correspond to a civil penalty that is based on the correct penalty matrix found at page 30 of the Enforcement and Response Policy: The Lead-Based Paint Disclosure Rule.

B. Record Supporting Proposed Penalty

1. Liability – Not at Issue; Factual Admissions

Because the Respondent is in default, all factual allegations in the Complaint are deemed admitted. These admissions form the basis for finding the Respondent liable for all violations as alleged in the Complaint, and liability is not an issue in this proceeding.

The facts deemed admitted, and liability which is not at issue, are in the record and serve as the basis on which penalty determinations can be made. The admissions are evidence upon which a penalty calculation can occur.

2. EPA Enforcement and Response Policy, Leases and Other Information

a. Leases – Extent Levels can be determined

The record includes the leases, and the leases are evidence on which “extent level” determinations can be made.

b. Upward and Downward Penalty Adjustments

(1) Ability to Pay/Continue in Business

The record supports Complainant’s proposal not to make any downward penalty adjustments on this basis because the Respondent has not filed an Answer in this proceeding, nor has the Respondent submitted any financial documents for consideration of an ability to pay claim in this case. Respondent has not raised ability to pay in an Answer, and Respondent has not filed any objection on Complainant’s proposed penalty. Based on this record Complainant cannot support a downward penalty adjustment in consideration of this adjustment factor.

(2) History of Prior Violations

Page 19 of the Enforcement and Response Policy: The Lead-Based Paint Disclosure Rule states that only upward penalty adjustments can be made in consideration of this factor. Nothing in the record supports increasing Complainant’s proposed penalty in consideration of this factor; therefore, Complainant does not propose a higher penalty based on this factor.

(3) Degree of Culpability

Page 19 of the Enforcement and Response Policy: The Lead-Based Paint Disclosure Rule only provides for upward penalty adjustments based on this factor. The record does not support an upward penalty adjustment in consideration of this factor, and Complainant has not offered

evidence to support an upward penalty adjustment in consideration of this factor. Therefore, Complainant does not propose a higher penalty in consideration of this factor.

(4) Self-Disclosure

The record contains inspection related information following the Presiding Officer's Second Order to Supplement the Record. This information is evidence that the violations were discovered because of an inspection, not as a result of a self-disclosure. The Third Order to Supplement the Record discusses the inspection documents on page 1. This information is in the record, and supports a decision not to make a downward penalty adjustment on this factor. The record contains no information which supports a downward adjustment on this basis.

(5) Other Unique Factors

Page 20 of the Enforcement and Response Policy: The Lead-Based Paint Disclosure Rule begins a discussion of these factors with the following sentence – “This policy allows an adjustment in settlement for other factors that may arise on a case-by-case basis.” Under this Policy, these factors may be used in settlement. This matter is not in settlement, and therefore, these factors are not applicable.

Complainant avers that the record contains evidence which supports the requested relief, in part, because the Complainant was required to supply this information following issuance of the Presiding Officer's Orders, which occurred after Complainant filed the Motion for Default. The Consolidated Rules cannot require a Party to provide privileged information. Counsel for Complainant acknowledges that errors have occurred and has revised Complainant's requested relief as a result, not to correct the record, but to seek relief that is not clearly inconsistent with the record. The Presiding Officer has demonstrated through her Orders that she can make a

determination of a gravity-based penalty based on the EPA penalty guidelines and the evidence she requested in her Orders. The record does not support further penalty adjustments. It is not necessary to file a second more detailed declaration or affidavit from a representative in this matter to support the penalty. Nevertheless, Counsel attaches a second Declaration to provide additional support for the Presiding Officer that downward penalty adjustments are not warranted in this case because the Respondent has not provided documents to EPA which would support the calculation of a lower penalty. Counsel also attaches, as Attachment 2, a copy of a Memorandum from the EPA Director of the Waste and Chemical Enforcement Division dated December 20, 2007, which transmitted the revised enforcement response and penalty policy and contains a short discussion of revisions from the previous policy. On page 2, the Memorandum states that a major revision from the previous policy is as follows:

The assumption that all target housing units contain children under six years of age unless the violator proves otherwise, has been changed to the assumption that all violations have at least a significant impact unless the violator can prove that all residents are at least eighteen years of age.

This statement provides additional support that the significant extent level designation is appropriate for the violations relating to the lease with one page. The Respondent has not demonstrated that a lesser extent level designation is appropriate for those violations.

Wherefore, a Default Order should be issued under 40 C.F.R. § 22.17 regarding the violations of Respondent, and the requested relief is not clearly inconsistent with the record or the Act.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michiko Kono", with a horizontal line extending to the right.

Michiko Kono
Attorney for Complainant

Date: 12/5/2014

CERTIFICATE OF SERVICE

I certify that the original Complainant's Response to Third Order to Supplement Record, with attachments, in the John Rice, LLC matter, Docket Number TSCA-04-2012-2646, and a copy were filed with the Regional Hearing Clerk, and a copy of the Complainant's Response to Third Order to Supplement Record, with an attachment, was mailed to the addressees listed below on this 5th day of December, 2014.

Addressees:

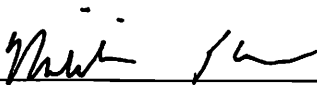
John W. Rice
John Rice, LLC
930 Avenue A
Opelika, Alabama 36801

(First class mail)

Susan Schub
Regional Judicial Officer
U.S. EPA Region 4
61 Forsyth Street
Atlanta, Georgia 30303

(Internal EPA mail)

Dec. 5, 2014
Date



Michiko Kono
Attorney for Complainant

ATTACHMENT 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

In the Matter of:

John Rice, LLC

Respondent

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) Docket No. TSCA-4-2012-2646
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Declaration of Andrea Price-Lippitt

I, Andrea Price-Lippitt, declare under penalty of perjury as follows:

1. I am employed by the United States Environmental Protection Agency (EPA), Region 4.
2. As part of my job, I work on enforcement cases that involve the TSCA lead-based paint regulations.
3. The John Rice, LLC matter is one of my cases.
4. Before the Complaint was filed in this matter, I made numerous efforts to settle this case.
5. I called Mr. Rice to try to settle this case. My calls were not returned. Some time afterwards, I drove to Opelika, Alabama, and saw several signs in front of residential housing which had John Rice LLC Realty written on them. My observations of these signs contributed to my belief that the company would not have an inability to pay claim regarding a penalty for violations of the TSCA lead-based paint regulations.
6. I drove to Mr. John Rice's office to try to settle this matter. I spoke with Mr. Rice at that time. Afterwards, he indicated that he would follow up further. However, this did not occur.
7. Mr. Rice has not made an ability to pay claim. He has not submitted financial documents to me in relation to an ability to pay claim.
8. Mr. Rice has not submitted any information to me which indicates that the housing at issue in this case is free of lead-based paint. He has not submitted any records about a reduced risk of exposure to lead-based paint hazards at housing at issue in this case.

12/5/14
Date


Andrea Price-Lippitt

ATTACHMENT 2



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 20 2007

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Revisions to the 2000 Section 1018 – Disclosure Rule
Enforcement Response Policy

FROM: Rosemarie A. Kelley, Director *Rosemarie A. Kelley*
Waste and Chemical Enforcement Division

TO: Regional Counsel, Regions 1 – 10
Regional Enforcement Division Directors, Regions 1, 2, 4, 6 and 8
Toxic Substances Division Directors, Regions 1-10

This memorandum transmits to you the final revised and consolidated Enforcement Response and Penalty Policy (ERPP) for actions taken under Title X: Residential Lead-Based Paint Hazard Reduction Act of 1992, (Title X), 42 U.S.C. § 4851, as enforced under § 409 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2689. This document, which is effective immediately, includes several revisions to the February 2000 ERPP, the most significant of which are referenced below. These revisions reflect case law and EPA policy that has evolved over the last seven years.

I would like to express my appreciation to the regional workgroup members whose persistence, hard work and informative review over the past nine months greatly improved the clarity of this policy, while maintaining the flexibility to address diverse regional housing situations. The workgroup crafted a document that significantly improves the ERPP and makes it an up-to-date, practical guide for the assessment of TSCA Lead-Based Paint penalties. In finalizing this document, the Office of Civil Enforcement, Waste and Chemical Enforcement Division, coordinated with TSCA regional enforcement managers, and relevant Headquarters offices.

As you know, the Enforcement Response and Penalty Policy provides guidance on selecting the appropriate response and developing penalty amounts that should be sought in administrative actions filed under TSCA and penalty amounts that would be acceptable in settlement of administrative and judicial enforcement actions under TSCA. The policy is immediately applicable and should be used to calculate penalties sought in all TSCA Lead-Based Paint Disclosure administrative actions or accepted in settlement of both administrative and judicial civil enforcement actions brought under the statute after the date of the policy, regardless of the date of the violation. To the maximum extent practicable, the policy shall also apply to the

settlement of administrative and judicial enforcement actions instituted prior to but not yet resolved as of the date the policy is issued.

As stressed in the ERPP, this document is only guidance and all penalties associated with TSCA enforcement actions must meet the statutory requirements of TSCA § 16, (15 U.S.C. § 2615).

The major revisions that have been made include:

1. The penalty numbers have been adjusted upward by 17.23% as required by the Civil Monetary Penalty Inflation Adjustment Rule, 40 CFR Part 19 (2004).
2. The assumption that all target housing units contain children under six years of age unless the violator proves otherwise, has been changed to the assumption that all violations have at least a significant impact unless the violator can prove that all residents are at least eighteen years of age.
3. A section was added to allow reductions in penalty for reduced risk of exposure.

If you would like to discuss this matter further, please contact Rosemarie Kelley of the Waste and Chemical Enforcement Division at (202) 564-4014 or your staff can contact Laura Livingston (732-906-6998), Dean Ziegel (202-564-4038) or Tony Baney (202-564-4169).

Attachment

cc: Lead Enforcement Coordinators, Regions 1-10
Walker Smith, Office of Civil Enforcement
Gary Jones, Office of Civil Enforcement
Karen Dworkin, U.S. Department of Justice
Brenda Mallory, Office of General Counsel
Maria Doa, Office of Pollution Prevention and Toxics
Ella R. Barnes, Office of Criminal Enforcement, Forensics, and Training
James Edwards, Office of Compliance