UNITED STATES ENVIRONMMENTAL PROTECTION AGENCY
REGION 4

In the Matter of:	)	
	)	
John Rice, LLC	)	Docket No. TSCA-4-2012-2646
	)	
Respondent.	)	
	)	

INITIAL DECISION AND DEFAULT ORDER

This is a proceeding under authority of Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). The proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits ("Consolidated Rules"), codified at 40 C.F.R. Part 22.

Background

Complainant, Director of the Air, Pesticides, and Toxics Management Division of the United States Environmental Protection Agency (EPA) Region 4, filed an *Administrative Complaint and Notice of Opportunity for Hearing* ("Complaint") on May 25, 2012, and served it upon Respondent, John Rice, LLC. Complainant alleged that Respondent violated Section 409 of TSCA, 15 U.S.C. § 2689, the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851 *et. seq.*, and the federal regulations promulgated thereunder, set forth in 40 C.F.R. Part 745, Subpart F (also known as the "Disclosure Rule").

The section in the Complaint, entitled "Notice of Opportunity to Request a Hearing," provides information concerning Respondent's obligations with respect to responding to the Complaint. Specifically the Complaint states, in underlined type, "You must file a written Answer within thirty (30) days of receiving this Complaint to avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to a hearing, and to avoid having the above penalty assessed without further proceeding."

On April 2, 2013, Complainant filed a *Motion for Default*, contending that Respondent had neither filed an answer to the Complaint nor any other document in response thereto. The *Motion for Default* filed by Complainant in this proceeding sought an Order assessing a civil administrative penalty in the amount of $84,920 against Respondent. An "*Amended Motion for Default*" filed by Complainant sought an adjusted civil penalty in the amount of $38,660; this was later amended to a proposed civil penalty of $42,320. For the reasons set forth below, Complainant's *Motion for Default* as amended shall be granted.[1]

[1] Although the rules governing filing of motions as well as motions for default, 40 C.F.R. §§ 22.16 and 22.17, respectively, do not call for amending motions, there is no prohibition on doing so. However, since *Complainant's Amended Motion for Default* addresses penalty only and there was no withdrawal of the *Motion for Default.*, both the *Amended Motion for Default* and *Second Amendment to Motion* will be treated as amending but not replacing the

Procedural Background:

A *Motion for Default* filed by Complainant on April 2, 2013, sought an Order assessing a civil penalty of $84,920 against Respondent. Thereafter, two Orders to supplement the record were issued and responded to by Complainant: On July 18, 2013, Complainant satisfactorily clarified the exhibits that were attached to the Complaint, and fully explained the reference to the Proof of Service as "amended."[2] The *Order for Complainant to Submit a Second Supplement to the Record*, issued by the undersigned on December 13, 2013, specifically requested a) copies of the leases listed in Paragraph 15 of the Complaint; b) the Inspection Report or other evidence relied upon for finding the violations alleged in the Complaint; and c) a statement clarifying the discrepancy between numbers for the counts in the Complaint and those in the *Motion for Default*. On January 10, 2014, Respondent filed a *Response to Order to Submit a Second Supplement to the Record.* In addition to clarifying the discrepant counts, Complainant provided a) copies of three of the four leases and the first page of the fourth lease, all of which were listed in the Complaint; and b) four hand filled sheets pertaining to an inspection conducted on February 17, 2009 by W. C. Richardson, E.P.A. Region 4 Pesticides and Toxics Substances Branch at the facility referred to as "John Rice Realtors" at 930 Avenue A, Opelika, Alabama. The "Receipt for Documents" page reflects that the leases were collected at the time of the inspection.

Upon review of the second supplement, it appeared that two attachments may have contained personally identifiable information pertaining to third parties involved in this administrative enforcement matter. To address that issue, on July 1, 2014, by *Order to Withdraw Exhibits and Order to Show Cause,* Complainant was ordered to withdraw those attachments and to conduct a review to determine what, if any, information pertaining to persons not parties to the matter would be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 2.105. Complainant was then to resubmit those documents following the procedures covering Confidential Business Information set forth at Section 22.5(d) of the Consolidated Rules, 40 C.F.R. § 22.5(d).

In addition to the issues cited above, a review of the submitted leases s revealed discrepancies between tenant ages that were contained in the lease documents and those relied upon by Ms. Price-Lippitt, the EPA representative who calculated E.P.A.'s proposed penalty. By the aforementioned July 1, 2014, *Order to Show Cause*, Complainant was to address both concerns.

On August 4, 2014, in addition to re-submitting both redacted and clear copies of the aforementioned leases, Complainant confirmed the discrepancy suspected by the undersigned regarding the tenant ages. To address this discrepancy, on September 2, 2014, Complainant filed an "*Amended Motion for Default*," requesting that a different penalty amount be assessed.

Motion for Default. All three pleadings are pending before the undersigned and will be considered the *Motion for Default* as amended.

[2] An initial *Order to Supplement the Record* issued on July 2, 2013, ordered Complainant to clarify Exhibits referred to as "proof of service," intended to confirm service of the Complaint, as required by the Consolidated Rules of Practice at 40 C.F.R. §22.5(b)(1)(iii). Complainant sufficiently satisfied the requirement for proving service of the Complaint upon Respondent. *See* Attachment 1 to *Response to Order to Supplement the Record* and attachments thereto.

As the last steps to a rather lengthy and protracted pleading process, and as discussed more fully below, on November 13, 2014, a *Third Order to Supplement the Record* was issued, addressing further concerns and questions about the penalty portion of the proceeding. Upon the filing of *Complainant's Response to Third Order to Supplement Record* on December 5, 2014, the matter became ripe for determination.

Default Order Provisions

Section 22.17 of the Consolidated Rules, provides in pertinent part, as follows:

> (a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to 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. . .
>
> (b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.
>
> (c) *Default order.* When the Presiding Officer finds that a default has occurred he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. 40 C.F.R. § 22.17.

Findings of Fact

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following findings of fact:

1. Complainant is the Director of the Air, Pesticides and Toxics Management Division, EPA Region 4, who has been delegated the authority to institute this action.

2. Respondent is John Rice, LLC, who was a "lessor" of residential properties located at 215-B Samford Avenue, Opelika, Alabama; 1827 1st Avenue, Opelika, Alabama 104 14th Street, Opelika, Alabama; and 4006 US Highway 29N, Opelika, Alabama, as defined at 40 C.F.R. § 745.103.

3. The residential properties located at 215-B Samford Avenue, Opelika, Alabama; 1827 1st Avenue, Opelika, Alabama; 104 14th Street, Opelika, Alabama; and 4006 US Highway 29 N, Opelika, Alabama were constructed prior to 1978 and were "target housing" as that term is defined at 40 C.F.R. § 745.103.

4. Each of the four leases ("the leases" or "the four leases") was executed by an individual or individuals who are identified in the agreement as tenants.

   a. 215-B Samford Avenue was leased on January 2, 2008
   b. 1827 1st Avenue, Opelika, Alabama was leased on April 1, 2008
   c. 104 14th Street, Opelika, Alabama was leased on June 1, 2007
   d. 1006 US Highway 29 N. Opelika, Alabama was leased on June 1, 2008

5. The lease for 215-B Samford Avenue indicates occupants are 3 individuals, two of whom are 38 years of age; one of whom is 18 years of age.

6. The lease for 1827 1st Avenue is incomplete and does not contain the names, number or age of occupant(s)

7. No children are known to have lived at 104 14th Street.[3]

8. No children are known to have lived at 1006 US Highway 29 N. [4]

9. At the time that Respondent entered into the fours leases listed in Paragraph 4 above, Respondent did not provide the lessees with an EPA-approved lead hazard information pamphlet as required by 40 C.F.R. § 745.107(a)(1).

10. Respondent did not include, as an attachment to the leases or within the leases listed in Paragraph 4 above a Lead Warning Statement as detailed in 40 C.F.R. § 745.113(b(1).

11. Respondent did not include in the leases listed in Paragraph 4 above, a statement by Respondent disclosing the presence of known lead-based paint and/or lead based paint hazards in the units being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards, as detailed in 40 C.F.R. § 745.113(b)(2).

12. Respondent did not include a list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing that has been provided to the lessee or indicate that no such records or reports are available as detailed in 40 C.F.R § 745.113(b)(3).

[3] The Lease submitted indicates that the demised premises shall be occupied by no more than 1 person consisting of 1 adult and "No" children. This too is inconsistent with the information provided in the penalty calculation and will be discussed elsewhere in this Decision.

[4] The Lease submitted indicates the only occupants to be two individuals, both of whom signed the lease, and are therefore assumed to be over 18.

13. Respondent failed to include in the leases a statement by the lessees affirming receipt of the information set forth in 40 C.F.R. §§ 745.113(b)(2) and (3) and the lead hazard information pamphlet as required by 40 C.F.R. § 745.(b)(4).

14. Respondent did not include the signature of Respondent and the lessees certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature, as required by 40 C.F.R. § 745.113(b)(6).

15. On May 25, 2012, the Director, Air, Pesticides and Toxics Management Division, EPA, Region 4, issued a Complaint under Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

16. The Complaint was successfully served on May 25, 2012, via United Parcel Service, as specified in 40 C.F.R. § 22.5(b)(1). According to a Proof of Delivery along with an Amended Proof of Delivery, verification of service by UPS indicates delivery at Respondent's corporate office in Opelika, Alabama.

17. The Complaint alleged, in 24 separate counts, the violations recited in paragraphs 9-14 above for each of the four leases entered into by Respondent. [5]

18. The Complaint sought assessment of a civil administrative penalty of up to the $11,000 for each violation of Section 409 of TSCA.

19. 40 C.F.R. § 22.15(a) provides that a respondent must file an answer with the Regional Hearing Clerk within thirty (30) days after service of the complaint, and 40 C.F.R. § 22.15(c) provides that respondents have a right to request a hearing upon the issues raised by the complaint and answer.

20. 40 C.F.R. § 22.15(a) further provides that a party may be found in default "after motion, upon failure to file a timely answer to 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."

21. Respondent did not file an Answer to the Complaint within thirty (30) days of service and has not, to date filed an Answer or other response to the Complaint. Exhibit ("Ex.")[6] C

22. On April 2, 2013, Complainant filed a *Motion for Default* stating that Respondent failed to file an Answer to the Complaint.

23. Respondent did not file a response to the *Motion for Default*.

24. On July 2, 2013, the undersigned issued an *Order to Supplement the Record*, requiring complainant to submit 1) written clarification of certain exhibits attached to the

[5] The Counts in the Complaint are incorrectly numbered, e.g., Counts 10-13 followed Counts 5-8, omitting the number 9. This was addressed in Complainant's response to the Order to Supplement Record. While constituting faulty drafting, this was not deemed a fatal flaw.

[6] Exhibits are those attached to the *Motion for Default* unless otherwise indicated.

Complaint; and 2) written explanation of the reference to the Proof of Service as "Amended."

25. On July 18, 2013, Complainant filed a *Response to Order to Supplement the Record*, satisfactorily clarifying the Exhibits that were attached to the Complaint, and explaining the reference to the Proof of Service as "amended."

26. On December 13, 2013, the undersigned issued an *Order to Submit a Second Supplement to the Record*, requesting 1) copies of the leases listed in Paragraph 15 of the Complaint; 2) the Inspection Report or other evidence relied upon for finding the violations alleged in the Complaint; and 3) a statement clarifying the discrepancy in numbers for the Counts in the Complaint and those in the *Motion for Default*.

27. On January 10, 2014, Complainant filed a *Response to Order to Submit a Second Supplement to the Record*. In addition to clarifying the discrepant counts, Complainant provided a) copies of three of the four leases and the first page of one lease that were listed in the Complaint; and b) four hand filled sheets pertaining to an inspection conducted on February 17, 2009 by W C Richardson, EPA Region 4 Pesticides and Toxics Substances Branch at the facility referred to as "John Rice Realtors" at 930 Avenue A, Opelika, Alabama. The "Receipt for Documents" page reflects that the leases were collected at the time of the inspection.[7]

28. On July 1, 2014, the undersigned issued an *Order to Withdraw Exhibits and Order to Show Cause* requiring Complainant to: 1) withdraw certain attachments from the record that would be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, and the regulations at 5 C.F.R. § 2.105; b) refile the attachments in accordance with procedures set forth at Section 22.5(d) of the Consolidated Rules, 40 C.F.R. § 22.5(d); and c) show cause why certain information was used by EPA in calculating the proposed penalty in this matter, specifically as they related to occupant age.

29. On August 4, 2014, Complainant filed a *Response to Order* resubmitting the aforementioned lease documents in accordance with procedures set forth at 5 C.F.R. § 22.5(d), indicating that certain factors pertaining to penalty calculations were in error; and indicating intent to amend the previously filed Motion for Default.

30. On September 3, 2014, Complainant filed an *Amended Motion for Default* seeking assessment of the lower penalty amount of $38,660.

31. On November 13, the undersigned issued a Third Order to Supplement the Record.

32. On December 5. 2014, Respondent filed a Response to Third Order to Supplement the Record, including a *Second Amendment to Motion for Default.*

[7] A fifth lease is included on the list of documents received, but was not the subject of this enforcement action.

Conclusions of Law

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I reach the following conclusions of law:

1. The Complaint in this action was lawfully and properly served upon Respondent in accordance with the Consolidated Rules. See 40 C.F.R. § 22.5(b)(1)(i)-(ii)(A).

2. Respondent was required to file an Answer to the Complaint within thirty (30) days of service of the Complaint. See 40 C.F.R. § 22.15(a).

3. Respondent failed to file an Answer to the Complaint, and such failure to file an Answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. See 40 C.F.R. § 22.17(a)

4. Complainant's *Motion for Default, Amended Motion for Default* and *Second Amendment to Motion for Default* were lawfully and properly served on Respondent. See 40 C.F.R. § 22.5(b)(2).

5. Respondent failed to respond to the *Motion for Default* and both amendments thereto. Such failure to respond is deemed a waiver of any objection to the granting of the motion. See 40 C.F.R. § 22.16(b).

6. EPA has jurisdiction over this matter pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

7. The four leased properties are target housing as defined under 40 C.F.R. § 745.103.

8. At the time of each lease transaction, Respondent was a lessor.

9. At the time of each lease transaction, the person who rented target housing was a lessee.

10. Before the lessees were obligated under the contract to lease the target housing, Respondent did not satisfy one or more requirements of the Disclosure Rule.

11. Respondent failed to include, within or as an attachment to each contract, a Lead Hazard Information Pamphlet, before the lessees were obligated under the contracts for each of the four above-referenced leases as required by 40 C.F.R. § 745.107(a)(1).

12. Respondent's failures to provide the lessees with an EPA-approved lead hazard information pamphlet, as required by 40 C.F.R. § 745.107(a)(1) constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

13. Respondent failed to include, within or as an attachment to each contract, a Lead Warning Statement, containing language provided in 40 C.F.R. 745.113(b)(1), as required by 40 C.F.R. § 745.113(b)(1).

14. Respondent's failures to provide the lessees with a Lead Warning Statement as required by 40 C.F.R. § 745.113(b)(1) constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

15. Respondent failed to include within each lease a statement by Respondent disclosing the presence of known lead-based paint and/or lead-based paint hazards in the units being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards, as required by 40 C.F.R. § 745.113(b)(2).

16. Respondent's failure to include within each lease a statement by Respondent disclosing the presence of known lead-based paint and/or lead-based paint hazards in the units being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based hazards as required by 40 C.F.R. § 745.113(b)(2) constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

17. Respondent failed to include within each lease a list of any records or reports available to Respondent pertaining to lead-based paint and/or lead-based paint hazards in the units that had been provided to the lessees or indicate that no such records or reports are available, as required by 40 C.F.R. § 745.113(b)(3).

18. Respondent's failure to include within each lease a list of any records or reports available to Respondent pertaining to lead-based paint and/or lead-based paint hazards in the units that had been provided to the lessees or indicate that no such records or reports are available, as required by 40 C.F.R. § 745.113(b)(3) constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

19. Respondent failed to include within each lease a statement by the lessees affirming receipt of the information set forth in 40 C.F.R. §§ 745.113(b)(2) and (3) and the lead hazard information pamphlet required under 15 U.S.C. § 2696, as required by 40 C.F.R. § 745.113(b)(4).

20. Respondent's failure to include within each lease a statement by the lessees affirming receipt of the information set forth in 40 C.F.R. §§ 745.113(b)(2) and (3) and the lead hazard information pamphlet required under 15 U.S.C. § 2696, as required by 40 C.F.R. § 745.113(b)(4), constitute four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

21. At the times that Respondent entered into the four leases, Respondent did not include the signatures of Respondent and the lessees certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature, as require by 40 C.F.R. § 745.1113(b)(6).

22. Respondent's failure to include the signatures of Respondent and the lessees certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature, as require by 40 C.F.R. § 745.1113(b)(6), constitutes four violations of Section 409 of TSCA, 15 U.S.C. § 2689.

23. Respondent's failures to comply with requirements of 40 C.F.R. § Part 745, Subpart F, constitute violations of TSCA Section 409, 15 U.S.C. § 2689, for which Respondent is liable for civil penalties under TSCA Section 16, 15 U.S.C. § 2615.

Determination of Civil Penalty

Respondent's failure to file a timely Answer to the Complaint is grounds for the entry of a default order against Respondent assessing a civil penalty for the violations described above. 40 C.F.R. § 22.17(a)-(c). Having found that Complainant established Respondent's liability for all 24 alleged violations alleged in the Complaint, the undersigned must now determine an appropriate penalty for these violations. A penalty different from the amount proposed by Complainant can be reached, but in the case of a default proceeding, a Presiding Officer may not assess a penalty greater than that proposed in the motion for default. 40 C.F.R. § 22.27(a) and (b). Most importantly, however, the amount of any civil penalty must be based on the evidence in the record and in accordance with any penalty criteria set forth in the Act.

Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, and 40 C.F.R. Part 745, Subpart D, authorize the assessment of a civil penalty under section 16 of TSCA, 15 U.S.C. § 2615, of up to $10,000 for each violation of section 409 of TSCA, 165 U.S.C. § 2689. The statutory maximum civil penalty was subsequently raised to $11,000 per day for each violation that occurred after January 30, 1997, and to $16,000 per day for each violation that occurred after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2641, as amended, and its implementing regulation, the Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R. Part 19.

Complainant, in the *Motion for Default* sought the assessment of a civil penalty in the amount of $84,920, for the TSCA violations alleged in the Complaint, then reduced the proposed penalty for violations alleged in the Complaint to $38,660. Thereafter, Respondent further reduced the penalty sought to $42,320. The proposed penalty is to be based upon Complainant's consideration of the statutory penalty factors set forth in Section 16 of TSCA, 15 U.S.C. § 2615, with specific reference to EPA's December 2007 Section 1018 Disclosure Rule Enforcement Response and Penalty Policy ("ERP").

Section 16 of TSCA, 15 U.S.C. § 2615, requires EPA to take into account the nature, circumstances, extent, and gravity of the violations alleged as well as the violator's ability to pay, effect on ability to continue to do business, any history of prior violations, degree of culpability and other such matters as justice may require.

Under the ERP, the gravity-based penalty is determined by "nature," "circumstance," and "extent" level of the violations. The "nature" of the violation is described as the "essential character" of the violation; requirements of 40 C.F.R. §745, Subpart F, are considered hazardous

assessment in nature. ERP pp. 11-12. The "circumstance" examines the probability of harm resulting from a particular type of violation. For violations of 40 C.F.R. Part 745, Subpart R, the harm is associated with the failure to disclose the information on lead-based paint and/or lead-based paint hazards. Circumstances range from Level 1, the most serious, through Level 6: Levels 1 and 2, are attributable to those violations having a high probability of impairing the purchaser's or lessee's ability to assess the information required to be disclosed; Levels 3 and 4 are attributable to violations having a medium probability of impairing the purchaser's or lessee's ability to assess the information required to be disclosed; and Levels 5 and 6 are assigned to violations considered to having a low probability of impairing the purchaser's or lessee's ability to assess the information required to be disclosed. ERP, p. 12.
The "extent" level refers to the degree of the potential harm associated with the violation, with the focus on the intent of the rule to prevent childhood lead poisoning: The highest levels associated with the most vulnerable persons – children under the age of six and/or pregnant women occupying the property. Extent levels are "major" if there is potential for "serious" damage to human health or the environment; "significant" when there is potential for "significant" damage to human health or environment; and "minor" when the potential is for a "lesser" amount of damage to human health or the environment. ERP p. 13. A matrix contained in the ERP incorporates these factors, and was included in the ERP, attached as Exhibit B to the Motion for Default.

Pursuant to the Consolidated Rules, the relief proposed in the complaint or in the motion for default, as in the case here, shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. 40 C.F.R. § 22.17(c). It is a long standing, and well established principle, that the presiding officer shall not simply rubber-stamp the proposed penalty. See, *Katson Bros. Inc. v. U.S. EPA*, 839 F. 2d 1396 (10th Cir. 1988). To that end, one presiding over a matter does not "accept without question" the EPA's proposed penalty, but makes an independent assessment of the evidence and the statutory penalty factors, considers any applicable penalty policy, and independently calculates a penalty. See *In re Mountain Village Parks, Inc.*, SDWA Appeal No 12-02 (EAB Feb. 26, 2013), 15 E.A.D.__. The pleadings and exhibits submitted in this matter addressing liability contained a number of errors as discussed above, all of which were resolved through multiple orders to supplement and responses thereto. However, while those errors were rectified or in some instances clarified, the errors that arose in relation to the penalty calculation raised an additional level of concern and called for additional close scrutiny.

Upon review of the record in this case it appeared that the information contained in the Declaration of Andrea Price-Lippitt, attached to the *Motion for Default*, was in very significant part, erroneous. Paragraph 5 of the Declaration, states, "The "extent" level I chose was significant" because the case file does not include any information on the ages of the residents." Ex. F. However, upon examination of the leases which had only been submitted in response to the first *Order to Supplement the Record*, that statement was inconsistent with the occupant age-related information in three of the four leases.

Directed to explain the discrepancy, Counsel for Complainant filed a Response, confirming that the extent level designation of 'significant" for violations relating to the three leases was indeed in error, and clarifying that the extent level should be "minor." To correct the record,

Complainant then filed the *Amended Motion for Default*, reciting a summary of the penalty for all counts in the Complaint to reflect the reduction resulting from the change in "extent level" from "significant" to "minor." However, Complainant at that point, evidently chose not to submit a corrected/revised Declaration, leaving the one and only indication of how the penalty was calculated the same rather unreliable version initially filed.

Thereafter, another error discovered was in regard to the dollar amounts culled from the penalty policy matrices. It appears Complainant jumped from one ERP Matrix to the other, no explanation for doing so. There are two matrices on page 30 of the ERP: one for violations occurring on or after March 15, 2004; the second for violations occurring on or before March 14, 2004. All leases that are the subjects of this proceeding were dated after March 15, 2004; therefore, the first/top Matrix is applicable, and reflects different monetary amounts to be applied. The only dollar amount taken from the correct Matrix, was that proposed in the *Amended Motion for Default*. There was no explanation for reliance upon the two different tables, nor attempt to correct this error for the proposed penalties attributable to all other alleged violations.

In a last effort to ensure a ruling based upon an orderly and reliable record, the undersigned issued a *Third Order to Supplement the Record*, requiring the resubmission of a Declaration or Affidavit by Ms. Price-Lippitt or another agency representative, supporting the penalty proposed in the *Motion for Default*. Explaining the undersigned's concern about the reliability of all components of the statutory elements for assessing a penalty triggered by the errors and omissions contained in the initial Price-Lippitt Declaration, the new Declaration was to expand upon the information contained in the Declaration previously submitted.[8] In response, counsel for Complainant submitted a pleading on December 5, 2014, which, in pertinent part:

- Amended the previously requested relief, captioned as Paragraph A, "*Second Amendment to Motion for Default*," seeking a penalty of $42,320, 'which should correspond to a civil penalty that is based on the correct penalty matrix found in the ERP'[9];

- Attached a new Declaration of Andrea Price-Lippitt, which among other things, addressed why downward adjustments were not warranted;

- Argued that Respondent in default is deemed to have admitted all factual allegations, such that, "The facts 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.**" [emphasis added]; and

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[8] The *Third Order to Supplement the Record,* specifically noted, that "While these particular errors were of concern with respect to the gravity bases of the penalty calculations, they also called into question the general reliability of the initial Declaration of Andrea Price-Lippitt, to the extent she addresses, albeit briefly, the adjustment factors relied upon in calculating the proposed penalty: violator's ability to pay, and to continue in business, any history of prior such violations, the degree of culpability, and other matters as justice may require. TSCA§ 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B)."

[9] It is noted there was no explanation for the figure culled from the wrong matrix in the earlier pleadings.

- Stated that, "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;[10] . . . 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 gravity-based penalty based on the EPA penalty guidelines and the evidence requested in her Orders."

An Environmental Appeal Board's (EAB) decision in a matter under the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901, has particular relevance to the matter at hand. *In re John A. Biewer Co. of Toledo, Inc., & In re John A. Biewer Co. of Ohio, Inc.*, RCRA (3008) Appeal Nos. 10-01 & 10-02, slip op. (EAB Feb. 21, 2013), 15 E.A.D. ___, affirmed the Administrative Law Judge's (A.L.J.) imposition of a zero penalty as a sanction for refusal to comply with the ALJ's order to submit evidence at a hearing on penalty. While the EAB disagreed with the A.LJ.'s conclusion that there was no evidence in the record from which to determine penalty, it nevertheless agreed that the zero penalty was appropriate under the circumstances in that case. The EAB discussed at some length, the authority of the presiding officer under the Consolidated Rules to order a party, or an officer or agent thereof, to "produce testimony, document or other non-privileged evidence, and failing the production thereof without good cause being shown to draw adverse inferences against that party." *Id.* at 13; 40 C.F.R. § 22.4(c)(5). Additionally significant to the case at hand, was the EAB's observation that, ". . . the Agency's burden of persuasion as to penalty does not end with a concession of liability and a counsel's legal memorandum in support of the penalty assessment explaining how the penalty was derived...."*Id.*, at 17. Recognizing that while conceded violations alone can indeed form the base range for a penalty (under RCRA penalty guidance which was applicable in that case), EAB noted the RCRA penalty guidance provides discretion to adjust a penalty up or down based on various factors. Similarly, TSCA and the ERP, contain several areas for upward and downward adjustments to the base penalty contained in the penalty matrices. As in *Biewer,* and contrary to Complainant's position in the matter at hand, facts deemed admitted as a result of this Respondent's default, are not by themselves sufficient basis upon which the penalty is to be assessed.

It should be noted, however, that despite what appeared to be initial opposition, Complainant attached to the December 5, 2014, filing, a second Declaration of Andrea Price-Lippitt to support Complainant's position as to why downward penalty adjustments were not warranted. Ultimately, I find that the record, with the addition of Complainant's supplement containing the new Declaration of Ms. Price-Lippitt, and summary thereof pertaining to the downward adjustment factors, satisfied Complainant's burden of persuasion as to its proposed penalty. Furthermore, the undersigned also recognizes that it is ultimately the presiding officer's role and responsibility in adjudicating default cases to comb through the record to evaluate whether the facts as alleged establish liability, and whether the relief sought is appropriate. This is evidently the case even when the proposed penalty calculations are numerically and otherwise erroneous.

[10] There is no explanation of what information is "privileged" as pertains to penalty assessment.

See In Re Mountain Village Parks, Inc., supra. While the many errors and irregularities in Complainant's submissions have made this responsibility somewhat more challenging in the matter at hand, there is in the record sufficient evidence upon which to assess a penalty based upon the statutory penalty factors and applicable penalty policy.

Assessment of Base Penalty

Taking together the Complaint, *Motion for Default* as amended, and the full record in the case, in accordance with the factors for assessment of a penalty contained in TSCA and the ERP, the following penalty calculation is appropriate in this case:

Counts 1-4: Violations of 40 C.F.R. § 745.107(a)(1), failures to provide the lessees with an EPA-approved lead hazard information pamphlet:[11]

Nature: "Hazardous Assessment"
Circumstance: Level I (Appendix B Matrix)
Extent: Level "minor" for each of the three violations at properties where no children under age 6; "significant" at the property at 1827 1st Avenue, where age of occupant is not provided.[12]

Complainant contends that in applying the monetary values assigned to each category in the ERP Matrix, the total for Counts 1-4 is $14,340, as a result of assessing $2580 for the three violations where the extent level is minor; and $6,600 for the remaining one violation where the extent level was significant. However, it appears that Complainant errs here as well: These dollar amounts would be pulled from the wrong Matrix.[13] The correct monetary value in accordance with the ERP penalty matrix for violations where the extent level is significant is $7740.

The total for the four violations under Counts 1-4 is $ 15,480.

Counts 5-8: Violations of 40 C.F.R. §745.113(b)(1), failures to include a lead warning statement as an attachment to or within the lease:

Nature: "Hazardous Assessment"
Circumstance: Level 2

[11] Count numbers will correspond to those used in the Complaint, omitting the numbers 9, 14, 19, and 24, which counsel for Complainant explained was an "inadvertent clerical error." *Response to Order to Submit a Second Supplement to the Record.*

[12] Complainant correctly attributes an extent of harm of "significant" for the lease at 1st Avenue for all violations. As explained by Complainant, and in the ERP penalty policy revisions, an assignment of significant impact is appropriate unless the violator can proved that all residents are at least eighteen years of age. ERP, p. 13; *Complainant's Response to Third Order to Supplement Record.*

[13] This error occurred throughout Complainant's calculations. Rather than recite the error repeatedly, only the monetary penalty amounts drawn by the undersigned from the relevant matrix are included for the rest of the violations.

Extent: Level "minor" for each of the three violations at properties where no children under age 6; "significant" at the property at 1827 1st Avenue, where age of occupant is not provided.

Three violations with extent level "minor" is $1550 x 3= $4650; where extent level is "significant" at 1827 1st Avenue, $6450.

The total for the four violations under Counts 5-8 is $11,100.

Counts 10-13: Violations of 40 C.F.R. § 745.113(b)(2), failures to include in the leases a statement disclosing the presence of lead-based paint and/or lead-based paint hazards or indicating no knowledge of the presence of lead-based paint or lead-based paint hazards:

Nature: "Hazardous Assessment"
Circumstance: Level 3
Extent Level: "minor" for each of the three violations at properties where no children under age 6; "significant" at the property at 1827 1st Avenue where the age of occupant not provided.

The three violations with extent level "minor" is $ 770 x 3= $2,310; where extent level is "significant" at 1827 1st Avenue, $5160.

The total for the four violations under counts 10-13 is $7470.

Counts 15-18: Violations of 40 C.F.R. § 745.113(b)(3), failures to include in the leases a list of any records or reports available to Respondent pertaining to lead-based paint and/or lead-based paint hazards in the units that had been provided to the lessees or indicate that no such records or reports are available.

Nature: "Hazardous Assessment"
Circumstance: Level 5
Extent Level: "minor" for each of the three violations at properties where no children under age 6; "significant" at the property at 1827 1st Avenue where the age of occupant not provided.

The three violations with extent level "minor" is $260 x 3 = $780; where extent level is "significant" at 1827 1st Avenue, $1680.

The total for the four violations under counts 15-18 is $2460.

Counts 20-23: Violations of 40 C.F.R. § 745.113(b)(4), failure to include in the leases a statement by the lessees affirming receipt of the information set forth in In 40 C.F.R. § 745.113(b)(20 and (3) and the lead information pamphlet required under 15 U.S.C. § 2696

Nature: "Hazardous Assessment"
Circumstance: Level 4
Extent Level: "minor" for each of the three violations at properties where no children under age 6; "significant" at the property at 1827 1st Avenue where the age of occupant not provided.

The three violations with extent level "minor" is $520 x 3= 1560; where extent level is "significant" at 1827 1st Avenue, $3220.

The total for the four violations under counts 20-23 is $4780.

Counts 25-28: Violations of 40 C.F.R. § 113(b)(6), failure to include signatures of Respondent and the lessees certifying to the accuracy of their statements to the best of their knowledge, along with the dates of signature.

Nature: "Hazardous Assessment"
Circumstance: Level 6
Extent Level: "minor" for each of the three violations at properties where no children under age 6; "significant" at the property at 1837 1st Avenue where the age of occupant is not provided.

The three violations with extent level "minor" is $130 x 3 = $390; where extent level is "significant" at 1827 1st Avenue, $640.

The total for the four violations under Counts 25-28 is $1030.

Adjustment Factors

As discussed, in addition to taking into account the factors above – nature, circumstance, extent and gravity of the violations, Section 16 of TSCA, requires with respect to the violator, taking into account ability to pay, effect on ability to continue to do business, any history of prior such violations, degree of culpability and such matters as justice may require. TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). The ERP provides additional guidance on these factors as well. Under the ERP, consideration of these factors, as well as voluntary disclosure is the second stage of the penalty calculation process. ERP, p. 9. See, *In re Willie P. Burrell & The Willie P. Burrell Trust,* TSCA Appeal No. 11-05 (EAB Aug. 21, 2012).

Consideration of Ability to Pay and effect on ability to continue to do business: Complainant did not make a downward adjustment on this basis because Respondent neither filed an answer nor submitted any financial documents for consideration of an inability to pay. *Complainant's Response to Third Order to Supplement Record*, p. 2; Declaration of Price-Lippitt attached thereto, and Declaration of Price-Lippitt. Ex. F.

It has been consistently held that a respondent's ability to pay a proposed penalty may be presumed until it is put at issue by respondent. *See In re James Ikegwu and Martha Ikegwu,* Docket TSCA-03-2011-0217 (RJO Decision), April 2014; *In re Spitzer Great Lakes, Ltd.*, 9

E.A.D. 202, 219-21 (EAB 2000); *In re New Waterbury,* 5 E.A.D. 529, 541 (EAB 1994). This stems from the premise that since the complainant's ability to obtain financial information about a respondent is limited at the outset of the case, a respondent's ability to pay is presumed until respondent puts it in issue. It has been further held that only upon a challenge of an ability to pay does the complainant establish a *prima facie* case that a proposed penalty is nonetheless appropriate by presenting evidence that it considered respondent's ability to pay a penalty. *Id,* at 541. *See In Re Willie P. Burrell & the Willie Burrell Trust, supra,* citing *In re Donald Cutler,* 11 E.A.D. 622, 632 (EAB 2004, and *In re New Waterbury, Ltd., supra.* I am in agreement with Complainant that there is no justification for a downward adjustment for inability to pay the penalty.

History of Prior Violations: I am sufficiently persuaded that Complainant examined the record to determine whether there was a history of such violations prior to reaching the decision not to increase the base penalty proposed. Complainant had the opportunity to reexamine that, and reasserts this is the case in its *Response to Third Order to Supplement the Record.* See also Declarations of Price-Lippitt, attached thereto and as Exhibit F, in which Ms. Price-Lippitt avers, "I checked our Region 4 database, and Respondent does not have a prior history of violations."

Degree of Culpability: While TSCA is a strict liability factor, culpability may impact the penalty assessed. Pursuant to the ERP, such increase may be up to 25%. Complainant found no reason to increase the proposed penalty upon this basis, explaining that there was no evidence which would show a willful or knowing violation occurred."[14] In reviewing the record, I am persuaded that there is no such evidence, such that Complainant appropriately considered but did not include an upward adjustment for culpability.

Conclusion

I have determined that the penalty amount of Forty Two Thousand Three Hundred Twenty ($42,320) Dollars proposed by Complainant is not inconsistent with TSCA and the record in this proceeding and is appropriate based on the record and Section 16 of TSCA, 15 U.S.C. § 2615.

Order

Respondent is hereby ORDERED, as follows:

1. Respondent is assessed a civil penalty in the amount of **$42,320.**

2. Payment of the full amount of the civil penalty assessed shall be made within

[14] More specifically, the ERP expands on culpability as addressing the following criteria: (a) degree of violator's control over the events constituting the violation; actual knowledge of presence of lead-based paint or lead-based paint hazards; level of sophistication of the violator in dealing with compliance issues; and extent to which violator knew of the legal requirements.

thirty (30) days after this default order becomes final under 40 C.F.R. § 22.27(c) by submitting a certified check or cashier's check payable to "Treasurer, United States of America," and shall send the check to one of the following address by U.S. Postal Service:

BY MAIL:
U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

BY OVERNIGHT MAIL:
U.S. Environmental Protection Agency
Government Lockbox 979076
1005 Convention Plaza EPA
Mail Station SL-MO-C2-GL
St. Louis, MO 63101
(314) 425-1818

Respondent shall note on the check the title and docket number of this Administrative action.

Respondent shall serve a photocopy of the check on the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. EPA, Region 4
61 Forsyth St.
Atlanta, Georgia 30303

Each party shall bear its own costs in bringing or defending this action.

Should Respondent fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).

This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order unless: (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceeding within thirty (30) days from the date of service provided in the Certificate of Service accompanying this order; (2) a party moves to set aside the Default Order; or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty five (45) days after its service upon the parties.

IT IS SO ORDERED:

Dated: Jan. 20, 2015

Susan B. Schub
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Initial Decision and Default Order, in the Matter of John Rice, LLC, Docket No. TSCA-4-2012-2646, on the parties listed below in the manner indicated:

First Class Mail-Return Receipt Requested
John W. Rice
John Rice, LLC
930 Avenue A
Opelika, Alabama 36801

Intra-Office Mail:
Michiko Kono, Esq.
Office of Environmental Accountability
U.S. Environmental Protection Agency
Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Date: 1-20-15

Patricia A. Bullock
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303
404/562-9511