

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
TYRONE TURNER,)	Docket No. TSCA-07-2001-0044
)	
Respondent)	

ORDER GRANTING COMPLAINANT'S MOTION FOR DEFAULT

Toxic Substances Control Act. On February 4, 2002, Complainant filed a Motion for Default pursuant to 40 C.F.R. Section 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits. This Motion for Default was based on Respondent's failure to file pre-hearing exchange information and his failure to comply with a Pre-Hearing Order issued on September 20, 2001, by the undersigned Administrative Law Judge. Respondent did not respond to Complainant's Motion. **Held:** Complainant's Motion for Default is **Granted**.

Before: Stephen J. McGuire
Administrative Law Judge

Date : April 2, 2002

Appearances:

For Complainant: Mike Gieryic
Assistant Regional Counsel
U.S. EPA-7
901 N. 5th Street
Kansas City, KS 66101

For Respondent: Tyrone Turner
2030 No. 36th Street
East St. Louis, IL 62204

This matter was initiated by the filing of a Complaint and Notice of Opportunity for Hearing on June 14, 2001. The Complainant in this matter is the Region 7 Office of the United

States Environmental Protection Agency (“EPA”). The Complaint alleges that Respondent, Tyrone Turner, violated the Toxic Substances Control Act (“TSCA”) by failing to provide a lead hazard information pamphlet to the lessor of his property located in St. Louis, Missouri. Respondent filed an Answer, in the form of a letter, to the Complaint on August 21, 2001. In its Answer to the Complaint, Respondent acknowledges that he failed to provide Tamela Wilson with the lead hazard information pamphlet as alleged in the Complaint. Respondent also requests a hearing in his Answer and contends that he had been unaware of the TSCA requirements and their application to his property when he leased it to Ms. Wilson. Additionally, Respondent asserts that he is unable to pay Complainant’s proposed penalty of \$11,000.

A Pre-Hearing Order was issued by the undersigned Administrative Law Judge on September 20, 2001, setting the schedule for the parties’ filing of their respective pre-hearing exchange information. The Pre-Hearing Order directed the Respondent to file his pre-hearing exchange information by December 20, 2001, and also stated that: “[i]f the Respondent intends to elect only to conduct cross-examination of complainant’s witnesses and to forgo the presentation of direct evidence, the Respondent shall serve a statement to that effect on or before the date for filing its pre-hearing exchange.” Pre-Hearing Order at 2. Respondent did not submit his pre-hearing exchange information and did not file a statement indicating an intent to only cross-examine Complainant’s witnesses during the hearing. On February 4, 2002, Complainant filed a Motion for Default, based on Respondent’s failure to comply with the September 20, 2001, Pre-Hearing Order. Complainant asserts in this Motion that Complainant had been unable to contact Respondent by phone and as a result, Complainant was unable to determine Respondent’s support or opposition to its Motion.

An Order Scheduling a Conference Call was issued on February 6, 2002, by the undersigned Administrative Law Judge. This Order directed the parties to participate in a conference call to discuss Respondent’s failure to comply with the Pre-Hearing Order and the scheduling of the hearing. Respondent failed to comply with this Order. On February 20, 2002, an Order to Show Cause was issued by the undersigned Administrative Law Judge directing Respondent to show cause by March 8, 2002, why Complainant’s Motion for Default should not be granted. Respondent did not respond to the Order to Show Cause.

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (“Rules of Practice”), 40 C.F.R. § 22.1 *et seq.*, set forth the applicable procedural rules governing this matter. With regard to default, the Rules of Practice provide that:

A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of §22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or a hearing. 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. Default by complainant constitutes, a waiver of complainant’s right to proceed on the merits of the action, and shall result in the

dismissal of the complaint with prejudice. 40 C.F.R. § 22.17(a).

Thus, default may issue pursuant to a motion filed by one of the parties. Section 22.17(b) of the Rules of Practice sets forth the requirements governing motions for default. Section 22.17(b) states: “[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.” 40 C.F.R. § 22.17(b).

In the instant matter, Complainant seeks the resolution of the entirety of this proceeding in its Motion for Default on the basis of Respondent’s failure to comply with the pre-hearing exchange requirements of Section 22.19(a), 40 C.F.R. § 22.19(a), and the Presiding Officer’s September 20, 2001, Pre-Hearing Order. Respondent’s non-compliance with the pre-hearing exchange requirements places him in violation of Section 22.19(a) of the Rules of Practice. Section 22.19(a) requires each party to file a pre-hearing information exchange in accordance with an order issued by the Presiding Officer. 40 C.F.R. § 22.19(a). Accordingly, Complainant, pursuant to Sections 22.17(a) and 22.19(a) of the Rules of Practice, seeks the issuance of an initial decision in its favor and the imposition of its proposed \$11,000 penalty against Respondent.

As noted above, Respondent failed to comply with the undersigned’s September 20, 2001, Pre-Hearing Order as well as the February 6, 2002, Order Scheduling a Telephone Conference and the February 20, 2002, Order to Show Cause. In addition, Respondent has failed to show cause by the March 8, 2002, deadline why the Complainant’s Motion should not be granted. In view of Respondent’s non-compliance with the pre-hearing exchange information requirements and the Orders issued by the undersigned, pursuant to Section 22.17(a), all facts alleged in the Complaint are deemed admitted and Respondent is deemed to have waived its right to a hearing. Furthermore, Respondent has failed to respond to Complainant’s Motion and this failure, according to Section 22.16(b) of the Rules of Practice, means that Respondent has waived any objection to the granting of the Motion. 40 C.F.R. § 22.16(b). Complainant’s Motion will, therefore, be **Granted**.

In addition, Complainant’s proposed penalty of \$11,000 will be imposed in the full amount. According to Section 22.17(c) of the Rules of Practice “the relief proposed in the complaint or 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(c). The relief proposed by Complainant, namely the imposition of an \$11,000 penalty against Respondent, is consistent with both the record of the proceeding and TSCA.

The instant Order will constitute the initial decision in this matter. Section 22.17(c) of the Rules of Practice states that if a default order resolves all of the “outstanding issues and claims in the proceeding, it shall constitute the initial decision.” 40 C.F.R. § 22.17(c). The instant

Order resolves all of the claims and issues raised in this matter and therefore, in accordance with Section 22.17(c), it will serve as the initial decision.

FINDINGS OF FACT

1. The Complainant, by delegation from the Administrator of the United States EPA, and the Regional Administrator of the Region 7 Office of the EPA, is the Director of the Air, RCRA and Toxics Division of Region 7 of the EPA.
2. The Respondent is Tyrone Turner, an individual residing in Illinois and doing business in St. Louis, Missouri.
3. The instant civil administrative proceeding commenced with the filing of a Complaint and Notice of Opportunity for Hearing on June 14, 2001, by Complainant.
4. The Complaint alleges that Respondent violated 40 C.F.R. § 745.107(a)(1) and Section 409 of TSCA, 15 U.S.C. § 2689, by failing to provide an EPA-approved lead hazard information pamphlet to prospective tenant, Tamela Wilson, prior to her becoming obligated under a lease agreement. Complainant also proposes that an \$11,000 penalty be imposed against the Respondent for this violation.
5. For all periods of time relevant to the violation alleged in the Complaint, Respondent owned a residential property (the "Property") which was constructed prior to 1978 and is located at 3316-A Sidney Street, St. Louis, Missouri.
6. The September 20, 2001, Pre-Hearing Order forewarned Respondent that his failure to file either his pre-hearing exchange or a statement that Respondent is electing to only conduct cross-examination of Complainant's witnesses and foregoing the presentation of direct and/or rebuttal evidence, could result in the issuance of a default judgement against Respondent.
7. Respondent has failed to file either: (a) his pre-hearing exchange; or (b) a statement that Respondent is electing to only conduct cross-examination of Complainant's witnesses and to forego the presentation of direct and/or rebuttal evidence.
8. On February 4, 2002, Complainant filed a Motion for Default, and proposed findings of fact, conclusions of law and proposed order. The Motion was sent to and thereby served upon Respondent via Federal Express, Overnight Delivery, on February 4, 2002.
9. Respondent has not filed, as of the issuance date of this Order, a response to Complainant's Motion for Default.

10. Respondent entered into a rental agreement with Tamela Wilson on or about July 6, 1999, for the lease of the Property for residential use.

11. Ms. Wilson moved into the Property with her one-year old child subsequent to her entering into the lease contract with Respondent.

12. Section 745.107(a)(1) of the implementing regulations states that before the lessee is obligated under contract to lease target housing, the lessor of target housing must provide the lessee with an EPA-approved lead hazard information pamphlet.

13. Respondent failed to provide Ms. Wilson with an EPA-approved lead hazard information pamphlet prior to her becoming obligated under the rental agreement.

14. Section 16(a) of TSCA, 15 U.S.C. § 2615(a) authorizes the imposition of civil penalty of no greater than \$25,000 against any person who violates Section 409 of TSCA, 15 U.S.C. § 2689.

15. Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C., §4852d(b)(5), makes violations of the Disclosure Rule enforceable under Section 409 of TSCA and limits the civil penalty which can be imposed on a violator to \$10,000.

16. The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Act of 1996, 31 U.S.C. § 3701, authorized a 10% adjustment of the maximum civil penalty amount assessed under the Residential Lead-Based Paint Hazard Reduction Act.

CONCLUSIONS OF LAW

1. Complainant's Motion for Default was served lawfully and properly under the requirements set forth in 40 C.F.R. § 22.7(c).

2. Respondent's failure to comply with the pre-hearing information exchanges requirements of 40 C.F.R. § 22.19(a) as well as its failure to comply with the September 20, 2001, Pre-hearing Order, the February 6, 2002, Order Scheduling a Telephone Conference and the February 20, 2002, Order to Show Cause, constitute a default, an admission of all facts alleged in the Complaint, and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

3. Respondent was required to file any response to Complainant's Motion within fifteen (15) days of service. 40 C.F.R. § 22.16(b).

4. Respondent's failure to respond to Complainant's Motion for Default is deemed a waiver of any objection to the granting of Motion, and thus, the issuance of this Initial Decision and Default Order is appropriate. 40 C.F.R. § 22.16(b).

5. Respondent is the “owner” of the Property as that term is defined by § 745.103. The Property is “target housing” as defined by 40 C.F.R. § 745.103.

6. As a result of the rental agreement between Respondent and Tamela Wilson, Respondent became a “lessor,” and Tamela Wilson became a “lessee,” as those terms are defined by 40 C.F.R. § 745.103.

7. Pursuant to 40 C.F.R. § 745.107(a)(1), before a lessee is obligated under any contract to lease target housing, the lessor of target housing must provide the lessee with an EPA-approved lead hazard information pamphlet.

8. Respondent’s violated 40 C.F.R. 745.107(a)(1), and Section 409 of TSCA, 15 U.S.C. § 2615(a), and Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(b)(5) when he failed to provide Ms. Wilson with an EPA-approved lead hazard information pamphlet prior to her becoming obligated under the rental agreement.

9. Respondent’s failure to provide an EPA-approved lead hazard information pamphlet to Tamela Wilson prior to her becoming obligated under the lease agreement is a violation of 40 C.F.R. § 745.107(a)(1), and section 409 of TSCA, 15 U.S.C. § 2689, for which Respondent is liable for a civil penalty under section 16(a) of TSCA, 15 U.S.C. § 2615(a), and section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(b)(5).

10. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(b)(5), authorize the assessment of a civil penalty of not more than twenty five thousand dollars (\$25,000) against Respondent for the violation.

11. Respondent’s failure to comply with the pre-hearing information exchanges requirements of 40 C.F.R. § 22.19(a), and the Court’s September 20, 2001 Pre-Hearing Order, is grounds for the entry of a default order against Respondent assessing a civil penalty for the violation. 40 C.F.R. § 22.17(c).

12. The assessment of a \$11,000 against Respondent is consistent with the record established in this proceeding and with TSCA.

Accordingly, for the foregoing reasons, and pursuant to 40 C.F.R § 22.17(a) of the Consolidated Rules of Practice, Complainant’s Motion for Default is **GRANTED**.

ORDER

Respondent is liable under Count I for failing to provide an EPA-approved lead hazard information pamphlet to Tamela Wilson prior to her becoming obligated under lease, and for such violation is assessed a penalty of \$11,000.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision and Default Order shall become a final order 45 days after its service upon the parties, unless an appeal is taken to the Environmental Appeals Board within 30 days of service of this Initial Decision and Default Order pursuant to 40 C.F.R. § 22.30(a), a party files a motion specified in 40 C.F.R. § 22.27(c)(3), or the Board elects to review this Initial Decision *sua sponte*, as provided by 40 C.F.R. § 22.30(b).

Unless a timely appeal of this Initial Decision and Default Order is taken, a party files a motion specified in 40 C.F.R. § 22.27(c)(3), or the Board chooses to review this Initial Decision and Default Order on its own initiative, payment of the full amount of this civil penalty shall be made within 30 days after the effective date of the final order. Payment shall be made by sending a cashier's check or certified check in the amount of \$11,000, payable to the Treasurer, United States of America, and mailed to:

EPA-Region 7
c/o Mellon Bank
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

A transmittal letter identifying the subject case and docket number, and Respondent's name and address, must accompany the check. Respondent shall serve copies of the check on the Regional Hearing Clerk and on Complainant. Respondent may be assessed interest on the civil penalty if he fails to pay the penalty within the prescribed period.

Stephen J. McGuire
United States Administrative Law Judge

Washington, D.C.