UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
MARK BROWN	)	**Docket No. TSCA-7-2001-0001**
	)	
Respondent	)	

INITIAL DECISION AND ORDER GRANTING MOTION FOR DEFAULT

On April 12, 2001, Complainant, the Director, Air, RCRA and Toxics Division of the United States Environmental Protection Agency (U.S. EPA), Region 7, filed its Motion for Default Order (Motion) pursuant to 40 C.F.R. § 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"). The Motion requests that the undersigned enter an order finding Respondent Mark Brown in default and assessing the full proposed penalty of $10,000 against Respondent.[1] For the reasons set forth below, the Motion is granted and a $10,000 penalty is assessed against Respondent.

The Complaint was filed against Respondent on October 17, 2000. Respondent filed its Answer on November 14, 2000.[2] Following the assignment of this case to the undersigned on December 20, 2000, I issued an order dated January 8, 2001, which, among other things, established dates for the parties to

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[1] The Motion was lawfully and properly served on Respondent by Federal Express, Overnight Delivery, on April 12, 2001. 40 C.F.R. § 22.7(c).

[2] Respondent admits to the violation but states that he did not know that he was required to give the Lead Hazard Information Pamphlet to his tenant. He also states that he cannot afford to pay $10,000 penalty as he gets "$750 a month." No support was presented for this latter assertion.

submit their prehearing exchanges. Complainant timely submitted its prehearing exchange on February 15, 2001. The January 8, 2001, order, pursuant to 40 C.F.R. § 22.19(a), directed Respondent on February 16, 2001, to file either: (a) its prehearing exchange or (b) a statement that it elects to conduct cross-examination of EPA witnesses and to forgo the presentation of answering evidence. Respondent made no filing. The January 8 order states that the "failure of Respondent to file either (a) its prehearing exchange or (b) a statement that Respondent is electing to forgo the presentation of answering evidence and is electing to cross-examine EPA witnesses, shall result in a default order being issued against Respondent." The basis of this statement is 40 C.F.R. § 22.17(a) which permits a default order to be issued against a party "upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer." Respondent's failure to comply with the above-cited provisions of the January 8 order and 40 C.F.R. § 22.17(a) support the issuance of this default order.

Default by a 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." 40 C.F.R. § 22.17(a). Therefore, Respondent in this proceeding is deemed to have admitted all of the facts alleged in the Complaint and has waived its right to a hearing on these facts. The findings of fact and conclusions of law are set forth below.

DISCUSSION

Liability

The Complainant alleges that Respondent violated 40 C.F.R. § 745.107(a)(1) and section 409 of TSCA, 15 U.S.C. § 2689, in that he failed to provide an EPA-approved lead hazard information pamphlet to his tenant, Ms. Carter, prior to her being obligated under the lease contract. The Complaint proposes to assess a penalty of ten thousand dollars ($10,000) for this alleged violation.

The Respondent is Mark Brown, an individual residing and doing business in St. Louis, Missouri. For all periods of time relevant to the violation alleged in the Complaint, Respondent owned a residential property located at 820 Hamilton Avenue, St. Louis, Missouri, (the "Property"). Title 40 C.F.R. § 745.103 defines "target housing" as "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." The Property was constructed prior to 1978.

Title 40 C.F.R. § 745.103 defines "lessor" as "any entity

that offers target housing for lease, rent, or sub-lease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations." Title 40 C.F.R. § 745.103 defines "lessee" as "any entity that enters into an agreement to lease, rent, or sublease target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations."

On or about July 1, 1997, Respondent entered into a rental agreement (the "Contract") with Rochelle Carter (Tenant) for the lease of Respondent's property for residential use. Tenant subsequently moved into the Property, pregnant at the time. She gave birth to her child after living in the property for less than two months. Title 40 C.F.R. § 745.107(a)(1), states that before the 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. Respondent did not provide an EPA-approved lead hazard information pamphlet to Tenant prior to her being obligated under the rental contract.

As noted above, the property is "target housing," as defined by 40 C.F.R. § 745.103. As a result of the rental contract entered into between Respondent and Tenant on or about July 1, 1997, for the lease of Respondent's Property for residential use, Respondent became a "lessor," and Tenant became a "lessee," as those terms are defined by 40 C.F.R. § 745.103.

Pursuant to 40 C.F.R. § 745.107 (a)(1), before the lessee is obligated under any contract to lease target housing, the lessor or target housing must provide the lessee with an EPA-approved lead hazard information pamphlet. Respondent's failure to provide an EPA-approved lead hazard information pamphlet to Tenant prior to her becoming obligated under lease 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).

PENALTY

Introduction

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 ten thousand dollars ($10,000) against Respondent for the violation. Respondent's failure to comply with the prehearing information exchanges requirements of

40 C.F.R. § 22.19(a), and the Court's January 8, 2001 Order is grounds for the entry of a default order against Respondent assessing a civil penalty for the violation.

Section 22.27(b) of the Rules of Practice provides in pertinent part: " . . . the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

TSCA § 16(a)(1), 15 U.S.C. § 2615(a)(1), provides that any person who violates section 409 of TSCA "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." However, this maximum penalty amount is limited by section 1018(b)(5) of Title X, 42 U.S.C. § 4852d(b)(5), which makes violations of the Disclosure Rule enforceable under TSCA § 409 and provides that "[f]or purposes of enforcing this section under the Toxic Substances Control Act, . . . the penalty for each violation applicable under section 16 of that Act . . . shall not be more than $10,000." Pursuant to 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, on June 27, 1997, EPA issued the Civil Monetary Penalty Inflation Adjustment Rule adjusting this $10,000 figure upward by 10% to $11,000 for violations that occur after July 28, 1997. 62 Fed. Reg. 35,037 (1997); 40 C.F.R. Part 19.

Section 16(a)(2)(B) of TSCA directs that in determining the amount of a civil penalty for violations of TSCA § 409: "the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require," 15 U.S.C. § 2615(a)(2)(B).

In February 2000, EPA issued the Section 1018 - Disclosure Rule Enforcement Response Policy (Penalty Policy) (Complainant's Prehearing Exchange Exhibit 10). The purpose of the Penalty Policy is to address violations of the Disclosure Rule and to provide procedures to determine the appropriate enforcement response to such violations. Penalty Policy at 1. The Penalty Policy provides a framework for calculating a proposed penalty. Penalty Policy at 9-18. In doing so, the Penalty Policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors enumerated above to particular cases.

Pursuant to the Penalty Policy, penalties are determined in two stages: 1) determination of a "gravity-based penalty," and 2) adjustments to the gravity-based penalty. The gravity-based

penalty is determined by considering: the nature and circumstances of the violation, as well as the extent of harm and overall gravity that may result from the violations. Penalty Policy at 9.

The Disclosure Rule requirements are categorized by the Penalty Policy as "hazard assessment" in nature, since they are designed to provide prospective purchasers and lessees of target housing with information that will permit them to weigh and assess the risks presented by the actual or possible presence of lead-based paint in the housing they might purchase or lease. Id. The hazard assessment nature of these types of violations has a direct effect on the measures used to determine which circumstance and extent categories are selected further in the penalty calculation process.

The Penalty Policy categorizes each possible violation of 40 C.F.R. Part 745, Subpart F, as being within one of six circumstance levels, based on the nature and circumstances surrounding each type of violation, and reflecting the probability of harm for each. Penalty Policy at 10. The circumstance levels range from Level 1, the most serious, to Level 6.

The Penalty Policy then categorizes the extent of the violation as either major, significant, or minor, through the use of an "Extent Category Matrix." Penalty Policy at B-4. The Extent Category Matrix determines the extent category taking into consideration the following two factors: 1) the age of any children living in the target housing; and 2) whether a pregnant woman lives in the target housing. Penalty Policy at 10-11.

These factors are then applied to a "Gravity-Based Penalty Matrix," which lists varying penalty amounts in 18 cells, ranging in values from $110 to $11,000.[3] Penalty Policy at B-4. The appropriate gravity-based cell is determined according to the circumstance level and extent category involved. Id.

After the gravity-based penalty is determined for a given violation, upward or downward adjustments are applied in consideration of the following statutory factors with respect to the violator: 1) ability to pay/ability to continue in business; 2) history of prior violations; 3) degree of culpability; and 4) such other factors as justice may require, which include: whether

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[3] The matrix assumes that the violations have occurred after July 28, 1997, and thus incorporates the 10% upward inflation adjustment pursuant to the Civil Monetary Penalty Inflation Adjustment Rule. *See* Penalty Policy at B-4 (footnote 3). In this matter, the violations are alleged to have occurred on July 1, 1997, prior to the cut-off date for the inflation adjustment. Therefore, use of the matrix in this matter requires adjusting the cell amounts to the pre-10% increase levels.

the housing has been certified to be free of lead-based paint, the violator's attitude and level of cooperation, consideration of supplemental environmental projects, application of various EPA voluntary disclosure policies, whether the respondent is a small independent owner or lessor, and the economic benefit of noncompliance. Penalty Policy at 14-18.

Calculation of the Penalty

The proposed penalty in this matter is based upon the facts alleged in the Complaint and upon those factors which Complainant must consider pursuant to section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), including the nature, circumstances, extent and gravity of the violation, and with respect to the Respondent, ability to pay, effect on ability to continue to do business, any history of prior such violations, degree of culpability, and other such matters as justice may require in accordance with the Penalty Policy.

A substantial penalty is appropriate in this matter considering the EPA-approved lead hazard information pamphlet *Protect Your Family From Lead in Your Home* that Respondent failed to give his lessee provides extensive and valuable information to parents of young children and expecting mothers.[4] *See In the Matter of Billy Yee*, 2000 EPA ALJ LEXIS 51, at *33-36, Initial Decision (ALJ June 6, 2000) (upholding EPA's assessment of an $11,000 gravity-based penalty for same violation); currently on appeal to the EAB on other grounds. In general, the pamphlet provides information about the dangers of lead-based paint and about steps which can be taken to limit and/or respond to the risk. Id.

a. Gravity-Based Penalty

In this matter, as in *Billy Yee*, Complainant, pursuant to the Penalty Policy, assigned the violation a circumstance Level 1, and an extent category of Major, resulting in a gravity-based penalty of $10,000 being proposed. For the reasons described in the preceding paragraph, the Level 1 circumstance classification assigned to the violation in this matter is appropriate. By failing to provide a lead hazard information pamphlet to his lessee, Respondent created a high risk of impairing the lessee's ability to assess the risks involved with living in pre-1978 housing, as they relate to childhood lead poisoning. Similarly, the Major extent category is an appropriate classification given that Ms. Carter was pregnant at the time she executed the lease

[4] To date, EPA has only approved a single lead hazard information pamphlet for use in the State of Missouri, *Protect Your Family From Lead in Your Home* (Complainant's Prehearing Exchange Exhibit 16).

with Respondent. Complaint at ¶7.[5] By failing to provide a lead hazard information pamphlet to his lessee, Respondent placed the lessee and her unborn child at a high risk for serious damage to their health, given that pregnant women, fetuses, and children under the age of 6 years old are the most likely groups to be adversely affected by the presence of lead-based paint. Penalty Policy at 11.

b. Adjustment Factors

In this matter, Complainant also considered all of the statutory penalty factors as they relate specifically to the violator, including: Respondent's ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. However, no adjustments were made to the gravity-based penalty in consideration of these factors since they are not warranted in this particular case. A discussion of each such adjustment factor considered follows.

i. Respondent's Ability to Pay/Continue in Business

In assessing Respondent's ability to pay and to continue in business, Complainant, prior to filing the Complaint, estimated the number of rental units owned by Respondent and the corresponding amount of rental income Respondent likely receives from his rental units. Complainant also estimated the value of the rental units. A Dun & Bradstreet report was not available for Respondent's rental business. Based on this financial information, and the lack of evidence or information indicating that Respondent may be experiencing financial hardship, Complainant made the determination that a $10,000 penalty is appropriate, and that such a penalty is not likely to jeopardize the continuation of Respondent's business.

In his answer, Respondent states that he can't afford a penalty of $10,000. Based on this statement, Complainant offered to perform an ability to pay analysis. *See* Complainant's Ex. 12. However, to date Respondent has refused or failed to provide Complainant with the financial information necessary to perform an analysis. *See* Complainant's Exs. 13, 14.

ii. History of Prior Such Violations

Pursuant to the Penalty Policy, when a violator has a history of having previously violated the Disclosure Rule, the gravity-based penalty should be adjusted upward by as much as 25%. Penalty Policy at 15. The Penalty Policy assumes as a

[5] By default, Respondent admits the factual allegation contained in paragraph 7 of the Complaint.

baseline that most respondents will not have a history of violation, thus the Penalty Policy does not allow for a downward adjustment where a violator has no history of violation. Since Respondent had no history of prior violations, no adjustment to the gravity-based penalty was made under this factor.

iii. Degree of Culpability

Under the Penalty Policy, when a violator commits an act which he knew would be a violation or the Disclosure Rule or would be hazardous to health, the gravity-based penalty should be adjusted upward by as much as 25%. Penalty Policy at 15. This adjustment factor assumes as a baseline that the violator did not have any such knowledge, and thus no downward adjustments are made based upon a respondent's showing that he was not aware of the requirements. Since it has not been shown that Respondent had knowledge about the Disclosure Rule requirements at the time of the lease, and because the evidence does not establish that Respondent knew the violation would be harmful to health, no adjustment was made.

iv. Other Factors as Justice May Require

Pursuant to the Penalty Policy, Complainant considered several factors under the category of other factors as justice may require. Penalty Policy at 16-18. After consideration, none of these factors resulted in an adjustment to the proposed penalty, as they either did not pertain to the matter or their requirements were not met. Factors considered under this category include:

(a) No Known Risk of Exposure

The Penalty Policy allows for an 80% reduction of the gravity-based penalty where a respondent proves that the housing is free of lead-based paint by submitting to EPA a report to that effect from a certified lead inspector. Penalty Policy at 16. In this matter, no such information was provided to Complainant by Respondent, nor is there any indication that the subject property has been found to be lead-free.

(b) Attitude

Pursuant to the Penalty Policy, three separate reductions of up to 10% each may be made to the gravity-based penalty in consideration of a violator's attitude, based upon the following components: (1) cooperation; (2) immediate steps taken to comply; and (3) early settlement. Penalty Policy at 16. Each of these is discussed in turn below.

(1) Cooperation

The Penalty Policy allows for up to a 10% reduction based upon a respondent's cooperation throughout the disposition of a matter. Id. In this case, a reduction of the gravity-based penalty under cooperation is not appropriate since Respondent has been very uncooperative.

Throughout the case development process Respondent was uncooperative in several respects. On numerous occasions Respondent failed to return telephone calls in response to messages left by Complainant's Patricia Scott. *See* Complainant's Ex. 5. Respondent also refused to accept a certified letter from Complainant which sought a copy of the lease involved in the subject rental transaction. Complainant's Exs. 4-6.

Now that the Complaint has been filed, Respondent continues to be uncooperative. Respondent has failed to respond in any manner to a series of letters from Complainant requesting additional information. For example, to date Respondent has not supplied information to Complainant indicating that he has corrected compliance deficiencies by providing his tenants with the required lead-based paint disclosure information. *See* Complainant's Ex. 15. Similarly, as discussed above, Respondent has also refused or failed to provide financial documentation to allow Complainant to perform an ability to pay analysis. *See* Complainant's Exs. 12-14.

(2) Immediate Steps Taken to Comply

The Penalty Policy allows for up to a 10% reduction based upon a violator's good faith efforts to comply with the Disclosure Rule and the speed and completeness with which

compliance is achieved. Penalty Policy at 16. As discussed in the paragraph above, to date Respondent has not submitted any evidence indicating that he has taken steps to correct his past violations of the Disclosure Rule, or that he is currently in compliance for all new leases. Therefore, this reduction is not appropriate either.

(3) Early Settlement

The Penalty Policy's allowance of a 10% reduction for early settlement does not apply since this matter has not been settled. Penalty Policy at 16.

(c) Supplemental Environmental Projects

Penalty reductions for the performance of supplemental environmental projects are only available as part of settlements with EPA, Additionally, Complainant is not aware of any such similar project having been conducted by Respondent. Therefore, this factor does not apply.

(d) Audit Policy, Voluntary Disclosure, & Size of Business

Under the Penalty Policy, penalties may be reduced or eliminated based upon the following penalty mitigation policies: Audit Policy, voluntary disclosure, and size of business (better known as the "Small Business Policy"). Penalty Policy at 17. However, in order for any of these categories to be relevant, the respondent must voluntarily disclose violations to EPA before EPA begins an investigation. In this matter, Respondent did not volunteer any such information to Complainant. Instead, Complainant initiated its investigation based on a referral that originated from the St. Louis Department of Health and Hospitals. Thus, neither of these three categories are pertinent to this matter.

(e) Adjustment for Small Independent Owners and Lessors

Although TSCA § 16(a)(2)(B) does not explicitly require consideration of the size of a violator's business when assessing a penalty, EPA interprets the phrase "such other factors as justice may require" in that section to require penalty mitigation where a violator is "generally not engaged in the selling or leasing of property as a business." Penalty Policy at 18. Under the Penalty Policy, the gravity-based penalty should be adjusted downward by 50% for individuals who own only one housing unit which is for sale or lease, if no agent was involved in the transaction. Id. This reduction reflects the fact that those not selling or renting properties as a business generally have fewer opportunities to become aware of the Disclosure Rule

requirements. This reduction does not apply to Respondent since he owns Multiple rental units, which he manages as a small business.

(f) Economic Benefit of Noncompliance

Pursuant to the Penalty Policy, if the gravity-based penalty has not adequately captured the economic benefit of noncompliance, EPA may calculate and add such amount to the gravity-based penalty. Penalty Policy at 18. In this matter, Complainant has determined that the economic benefit of noncompliance is adequately captured by the gravity-based penalty, and thus no adjustment is required.

c. Final Penalty

Having properly considered all of the penalty factors contained in section 16(a)(2)(B) of TSCA, Complainant's proposed penalty is consistent with the record of the proceeding and TSCA. Therefore, pursuant to 40 C.F.R. § 22.17(c), the penalty of $10,000 proposed in the Complaint should be assessed against Respondent.

ORDER

1. Respondent is assessed a civil penalty in the amount of ten thousand dollars ($10,000).

2. Respondent shall, pursuant to 40 C.F.R. § 22.31(c), within thirty (30) calendar days after this Initial Decision and Default Order becomes final, forward a cashier's or certified check in the amount of ten thousand dollars ($10,000), payable to the order of the "Treasurer, United States of America." The check shall reference the name and docket number of this matter. Respondent shall mail the check to the following address:

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

In addition, Respondent shall mail a copy of the check to the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, KS 66101

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, must accompany the check.

4. Failure upon the part of Respondent to pay the penalty within the prescribed statutory frame after entry of the final order may result in the assessment of interest on the civil penalties. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

5. The Consolidated Rules of Practice provide at 40 C.F.R. § 22.17(c) that a default order which resolves all outstanding issues and claims in the proceeding shall constitute an initial decision. This Order disposes of all such issues and claims, and therefore constitutes an Initial Decision. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become the final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to set aside a default order that constitutes an initial decision, pursuant to 40 C.F.R. § 22.17(c); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), **within thirty (30) days after the Initial Decision is served upon the parties**; or (3) the EAB elects, upon its own motion, to review the Initial Decision.

Charles E. Bullock
Administrative Law Judge

Dated: August 9, 2001
Washington, D.C.

IN THE MATTER OF MARK BROWN, Respondent
Docket No. TSCA-7-2001-0001

CERTIFICATE OF SERVICE

I certify that the foregoing Initial Decision and Order Granting Motion for Default, dated August 9, 2001, was sent in the following manner to the addressees listed below:

Original and Copy by Certified Mail, Return Receipt Requested to:

Ms. Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region VII
901 North 5th Street
Kansas City, KS 66101

Copy by Certified Mail, Return Receipt Requested to:

Counsel for Complainant:
Michael Gieryic, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region VII
901 North 5th Street
Kansas City, KS 66101

Copy by Certified Mail, Return Receipt Requested and by First-Class Mail to:

Respondent:
Mr. Mark Brown
4420 Chouteau Avenue
St. Louis, Mo 63110

_____
Marion Walzel
Legal Assistant

Dated: August 9, 2001