UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
The United States Department of the Navy, Kingsville Naval Air Station,	)	TSCA Docket No. VI-736C(L)
	)	
Respondent	)	
	)	

Order on Respondent's Motions for Accelerated Decision and for Discovery; and on Complainant's Motions for Accelerated Decision and to Strike

Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.* This proceeding involves a Complaint filed by the U.S. Environmental Protection Agency, seeking $408,375 in civil penalties against Respondent for six counts of alleged violation of Section 409 of the Toxic Substances Control Act, 15 U.S.C. Section 2689. Complainant asserts that Respondent failed to comply with the Real Estate Notification and Disclosure Rule requirements of 40 C.F.R. Part 745 Subpart F, a federal regulation promulgated pursuant to Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. Section 4852d.

Respondent has filed a total of seven Motions for Accelerated Decision and a Motion for Discovery. Complainant has filed a total of five Motions for Accelerated Decision and four Motions To Strike Respondent's Affirmative Defenses. Respondent, in assigning military family housing to military members is found, under the undisputed facts presented, to be a "person" and a "lessor" which entered into "contracts to lease" "target housing" under Section 1018 and Part 745 Subpart F. Such regulations are deemed to be effective and penalties against Respondent are not barred under the Paperwork Reduction Act.

Held: Complainant's Motions For Accelerated Decision on the issues addressed are **Granted;** Respondent's Motions For Accelerated Decision and Motion for Discovery are **Denied;** and Complainant's four Motions To Strike are **Denied.** As the absence of

genuine issues of material fact involving Respondent's liability under 40 C.F.R. Part 745 Subpart F and any penalty assessment therein are not yet established, these issues are reserved for further proceedings.

Before: Stephen J. McGuire Date: February 18, 1999
Administrative Law Judge

Appearances:

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I. Introduction

The Complaint initiating this proceeding was filed on July 28, 1998, pursuant to Section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615. The Complaint alleges that Respondent violated Section 409 of TSCA, 15 U.S.C. § 2689, by failing to comply with the Real Estate Notification and Disclosure Rule requirements of 40 C.F.R. Part 745 Subpart F, a federal regulation promulgated pursuant to Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the Act), 42 U.S.C. § 4852d. Complainant, EPA, charges Respondent with six counts of violation of the Rule, specifically: failure to provide a copy of an EPA approved lead hazard information pamphlet to lessees; failure to include in contracts to lease housing a Lead Warning Statement; disclosure of known lead-based paint or paint hazards; a list of pertinent records or reports available; the lessees' statements of receipt of such information; and the lessors' and lessees' signatures certifying accuracy of statements. For these alleged violations, Complainant proposes a penalty of $408,375.

Respondent filed an Answer to the Complaint, requesting dismissal and accelerated decision in its favor. On August 25, 1998, Respondent filed a motion for discovery,

which Complainant opposed, and Respondent submitted a rebuttal. On October 16, 1998, the undersigned was designated to preside in this proceeding.

On November 17, 1998, Respondent served a First and Second Motion for Accelerated Decision (First and Second Motion). On December 2, Complainant responded to those motions, and moved for Accelerated Decision in its favor and to Strike Affirmative Defenses (December 2 Opposition). On December 17, Respondent responded to Complainant's motion (December 17 Reply). On December 9, 1998, Respondent submitted a Third and Fourth Motion for Accelerated Decision (Third and Fourth Motion). On December 21, 1998, Complainant responded thereto, filed a Second and Third Motion for Accelerated Decision and Second Motion to Strike (December 21 Opposition). On January 4, 1999, Respondent responded thereto (January 4 Rebuttal), and on January 11, 1999 , filed a Fifth and Sixth Motion for Accelerated Decision (Fifth and Sixth Motion). On February 1, 1999, Complainant filed an opposition thereto, including a fourth and fifth motion for accelerated decision in its favor, and a third and fourth motion to strike (February 1 Response).

II. Respondent's First and Second Motions for Accelerated Decision, Complainant's First Motion for Accelerated Decision and Motion to Strike

A. Arguments of the Parties

The Complaint alleges that Respondent is the "lessor", as defined in 40 C.F.R. § 745.103, of military housing units for eleven enlisted personnel, and as such is subject to the requirements of 40 C.F.R. Part 745 Subpart F. In its First Motion for Accelerated Decision, Respondent argues that it is not a "lessor" under Part 745, because: it is a military department of the United States Government; the housing units are property belonging to the United States; the eleven active duty military members were "assigned" to their military housing units as part of their pay and allowances; and Respondent lacked legal authority to lease the housing units to active duty military members. Citing to a U.S. Attorney General Opinion, Respondent asserts that it cannot "dispose of" property belonging to the United States, by deed, lease or other instrument, unless Congress specifically provides for such authority. 34 U.S. Op. Att. Gen. 320, 322 (Oct 28, 1924) (Attorney General Opinion).

Respondent argues that the Secretary of the Navy is only given the authority to "assign" active duty military members to public quarters which does not create a landlord-tenant relationship, citing 10 U.S.C. Section 7571 and 37 U.S.C. Section 403. Respondent supports its argument with copies of documents indicating assignment of Navy quarters to the eleven military members (Respondent's First Motion for Accelerated Decision, Exhibit 2). Respondent also submits a declaration of David Michael Miller, a Supervisory Housing Management Specialist employed by Respondent, to the effect that all housing units at Respondent's facility were considered "adequate," and attached housing inventory sheets (Respondent's First Motion for Accelerated Decision, Exhibit 1).

In its Second Motion for Accelerated Decision, Respondent asserts that it did not enter into "contracts to lease" which would subject it to the regulatory requirements of 40 C.F.R. Part 745 Subpart F. Respondent argues that the Residency Occupancy Agreements (ROAs) between Respondent and the eleven military members were not contracts because they lack consideration (Respondent's Second Motion for Accelerated Decision, Exhibit 1). Respondent argues further that their employment by the Government is not by contract, but by appointment. Respondent asserts that active duty military personnel are entitled to housing by statute, under 10 U.S.C. § 7571 and 37 U.S.C. Section 403; that Respondent lacks authority to provide such entitlement by contract; and that the fulfillment of the entitlement to housing is not valid consideration to establish the existence of a contract.

In its December 2 Opposition, Complainant asserts that Respondent has the authority to enter into "contracts to lease;" that the ROAs are contracts to lease; and that therefore, Respondent is a "lessor" with regard to the eleven military housing agreements at issue. Complainant supports its argument by reference to the cited Attorney General Opinion, stating that although the Constitution prohibits the alienation of Government property without congressional sanction, the leasing of

military housing does not constitute "disposal" or "alienation" of federal property, but rather "use" of such property, control over which Congress has given to the federal agencies of the government.

Citing provisions in various treatises, Complainant further argues that the payment of rent as consideration is not necessary to establish a lessor/lessee relationship, but that the forfeiture of the military members' entitlement to Basic Allowance for Quarters (BAQ) by electing free military housing, is in fact, "consideration." Complainant points to pertinent language in the ROAs that it believes indicate a landlord-tenant relationship. Complainant also notes the legislative history of the Act, which emphasizes the purpose of protecting children from the dangers of lead-based paint in all housing in America and the application of the Act to the federal government.

Complainant further asserts that the addition of Section 408 to TSCA, 15 U.S.C. § 2688, requires each department of the federal government having jurisdiction over any property to comply with all federal requirements respecting lead-based paint. In this regard, Complainant, in support of its position, presents a Department of Defense memorandum from the Office of the Under Secretary of Defense to among others, the Assistant Secretary of the Navy (Installations & Environment), dated February 18, 1997 (DoD Memo), which states:

> These rules [Title 40 C.F.R. Part 745 Subpart F] apply to DoD family housing built before 1978 and to their disposal by lease or sale. Occupancy of DoD housing by military members and their families is considered to be leasing of housing, with regard to these rules. . . . Compliance with disclosure rules must be documented. . . . Disclosure of potential LBP [lead-based paint] hazards to occupants of military housing is an essential part of a comprehensive LBP management program. We request that you incorporate the responsibilities and procedures for implementing these requirements into your Components' LBP Management Plans.

(December 2 Opposition, Attachment I)

Complainant thus requests an accelerated decision finding that Respondent is a "lessor" within the meaning of 40 C.F.R. Part 745 Subpart F and that the ROAs are "contracts to lease" as that term is used in 40 C.F.R. Part 745 Subpart F. On the basis of its argument that Respondent is a "lessor" within the meaning of the Rule, Complainant moves to strike Paragraphs 40 and 41 of Respondent's Answer which allege, respectively, that Respondent assigned rather than leased the housing units, and that the Residency Occupancy Agreements are not contracts.

In reply to Complainant's opposition and motions, Respondent argues that the legislative history of the Act indicating its application to the federal government, refers to federally assisted housing, not assignment of military members to military housing. Respondent disagrees with Complainant's interpretation of the Attorney General Opinion, and distinguishes a lease, which results in the diminution of interest, control or right of the owner, from a license, which does not. Respondent cites to a Comptroller General Opinion which states, "in the absence of specific statutory authority therefor, government officers and heads of departments may not legally rent government-owned property, buildings or parts of buildings to private parties or private enterprises." 14 Comp. Gen. 169, 170 (1934). Respondent argues that the "use" of Government property connotes official uses, including licenses.

Respondent cites to common-law authority in Texas, where the facility is located, distinguishing a landlord-tenant relationship from a servant or employee who occupies a house on the premises of his employer, which is a master-servant relationship. *Eaton v. R.B. George Investments, Inc.,* 254 S.W.2d 189, 196 (Tex. Civ. App. Dallas 1952), rev'd on other grounds, 260 S.W. 2d 587 (Tex. 1953); *Moreno v. Stahmann Farms, Inc.,* 693 F.2d 106 (10th Cir. 1982). Respondent points out that there can be no lawsuits between Respondent and military members for breach of contract or wrongful eviction, and that they have no possessory interest in

military housing. Respondent asserts that forfeiture of housing allowance from military members' pay, for electing military housing, is not valid consideration because it does not confer a benefit on the government. Respondent argues that the DoD Memo is merely a policy and not a legal conclusion, which only the Department of Defense General Counsel can issue.

B. Discussion

A motion for accelerated decision, as a motion for summary judgment, may be granted only if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). See, Standard for Accelerated decision, *Cenex/Land O'Lakes Agronomy Company,* Docket No. 5-EPCRA-076-97 (Order Denying Cross-Motions For Accelerated Decision)(June 29, 1998). Complainant does not oppose Respondent's First and Second Motions for Accelerated Decision on the basis that genuine issues of material facts exist; rather, Complainant's position is that *it* is entitled to judgment as a matter of law on the issues raised by Respondent's First and Second Motions for Accelerated Decision. Respondent asserts that the Complainant's argument as to the content of the ROAs raises factual issues for which Complainant should be denied relief. December 17 Reply at 11.

It is well-settled that the law of the place where the premises are located and where the lease was executed governs the rights of the parties to the lease. 51 C.J.S. Landlord & Tenant § 205 p. 531 (West 1968). Because the location of Respondent's facility and of execution of the ROAs is in the state of Texas, case authorities from Texas courts will be referenced herein.

In determining whether an instrument is a lease or creates a relation other than that of lessor and lessee, the intention of the parties as ascertained from the instrument itself will govern. *Id.* § 202(5) p. 522-3; *National Union Fire Ins. Co. v. CBI Indus., Inc.,* 907 S.W.2d 517, 520 (Tex. 1995). The question as to the proper construction of an instrument is one of law. 51 C.J.S. Landlord & Tenant § 202(5), p. 522-3. It has been held that when a contract contains an ambiguity, the granting of summary judgment is improper because the interpretation of the instrument becomes a fact issue. *Coker v. Coker,* 650 S.W. 2d 391, 394 (Tex. 1983). Under Texas law, however, mere disagreement over the meaning of a contract provision does not render the provision ambiguous; it is ambiguous only if after examining the contract as a whole, its meaning remains uncertain. *Riley v. Champion Intern. Corp.*, 973 F.Supp. 634 (E.D. Tex. 1997).

Applying the rules of construction, certain terms in the ROAs in issue, namely "offer," "acceptance," "sublet," "renter's insurance policy," "eviction," the right of Respondent to make repairs, the requirement to abide by housing rules and regulations, provision of smoke detectors, and pet clause, indicate to Complainant, a lessor-lessee relationship. Although the terms are given different legal effect by Complainant and Respondent, they are not ambiguous. It is therefore concluded that there are no genuine issues of material fact on the questions raised in Respondent's First and Second Motions for Accelerated Decision and Complainant's First Motion for Accelerated Decision.

The central questions of law raised by the Motions however, are whether the housing units in issue were assigned to the eleven military members pursuant to "contract to lease" by the Respondent, and whether Respondent was a "lessor," within the meaning of Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 , 42 U.S.C. § 4852d, and the regulations promulgated thereunder. Section 1018 provides as follows, in pertinent part:

> (a) Lead Disclosure in Purchase and Sale or Lease of Target Housing.
>
> (1) Lead based paint hazards. Not later than 2 years after the date of enactment of this Act, the Secretary and the Administrator of the Environmental Protection Agency shall promulgate regulations under this section for the disclosure of lead-based paint in target housing which is offered for sale or lease. The regulations shall require that, before the purchaser or lessee is obligated under any contract to purchase or lease the housing, the seller or lessor shall

> (A) provide the purchaser or lessee with a lead hazard information pamphlet ***;
>
> (B) disclose to the purchaser or lessee the presence of any known lead-based paint, or any known lead-based paint hazards, in such housing and provide to the purchaser or lessee any lead hazard evaluation report available to the seller or lessor; * * *
>
> (b) Penalties for Violations.
>
> * * * *
>
> (5) Prohibited act. It shall be a prohibited act under section 409 of the Toxic Substances Control Act for any person to fail or refuse to comply with a provision of this section or with any rule or order issued under this section. * * * *

Pursuant thereto, regulations were promulgated at 40 C.F.R. Part 745 Subpart F (Subpart F), setting forth the above requirements in more detail. Section 745.107(a) requires, in pertinent part:

> The following activities shall be completed before the . . . lessee is obligated under any contract to . . . lease target housing * * * *
>
> (1) The . . . lessor shall provide the...lessee with an EPA-approved lead hazard
>
> information pamphlet ****
>
> (2) The . . . lessor shall disclose to the . . . lessee the presence of any known lead-based paint and/or lead-based paint hazard in the target housing being . . leased
>
> * * * *
>
> (4) The . . . lessor shall provide the . . . lessee with any records or reports available to the . . . lessor pertaining to lead-based paint and/or lead based paint hazards in the target housing being . . .leased * * * *

Section 745.113(b) provides, in pertinent part:

> *Lessor requirements.* Each contract to lease target housing shall include, as an attachment or within the contract, the following elements . . .:
>
> (1) A Lead Warning Statement . . .
>
> (2) A statement by the lessor disclosing the presence of known lead-based paint and/or lead based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead based paint hazards. * * * *
>
> (3) A list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the housing that have been provided to the lessee. * * * *
>
> (4) A statement by the lessee affirming receipt of the information set out in paragraphs (b)(2) and (b)(3) of this section and the lead hazard information pamphlet required under 15 U.S.C. 2696* * * *

The terms "lease" and "contract to lease" are not defined in Subpart F, but "lessor" is defined in Section 745.103 as "any entity that offers target housing for lease, rent, or sublease, including but not limited to . . . government agencies . . . ."

The DoD Memo states that "[o]ccupancy of DoD family housing by military members" -- which would include assignment to free military family housing is considered by the Department of Defense to be leasing of housing with regard to Subpart F. As a policy of the Department of Defense, the DoD Memo is not necessarily legally binding, but does offer guidance. Further analysis is required to consider the legal questions raised by the parties.

In arguing that Respondent lacks legal authority to enter into contracts or leases for "public quarters" (free military housing), Respondent is confusing the separate issues of whether Respondent, in providing military family housing pursuant to the ROAs is a "lessor" pursuant to a "contract to lease" for purposes of Section 1018 of the Act and Subpart F, and whether the terms "contract to lease" and "lessor" encompass Respondent's assignment of public quarters for purposes of interpreting the statutes that govern military housing and property. The DoD Memo contemplates the distinction between those issues, acknowledging that occupancy of DoD family housing is considered to be leasing of housing with regard to Subpart F. Thus, Respondent's citation to the language in the Comptroller General Opinion, 14 Comp. Gen. 169, 170 (1934), that "in the absence of specific authority therefor, government officers and heads of departments may not legally rent government-owned property, buildings, or parts of buildings to private parties or private enterprises," is inapposite, as it pertains to leases to private parties, not to military personnel.

Respondent's argument, citing to the Attorney General Opinion, 34 U.S. Op. Att. Gen. 320 (October 28, 1924), that the Property Clause of the United States Constitution prohibits the disposal of federal property without express Congressional authorization, is also without merit. Congress expressly authorized the assignment of military housing, stating that "public quarters . . . may be furnished for personnel . . .who are on active duty," at 10 U.S.C. § 7571(a). The instruments by which Respondent assigns public quarters, *e.g.*, contract to lease or other agreement, to its own personnel is not restricted by Congress. Thus, the question of whether or not public quarters are "disposed of" by assignment or lease is academic.

Respondent elected to assign Navy family housing by an instrument entitled "Residency Occupancy Agreement." Although not denominated a "lease," an instrument may nevertheless be given effect as a lease. 51 C.J.S. Landlord & Tenant § 202(5) p. 523; *In re Owl Drug Co.,* 12 F. Supp. 439 (D. Nev. 1935). Generally, a lease means the contract by which the relation of landlord and tenant is created, for the possession and profits of land and tenements, either for life, or for a certain period of time, or during the pleasure of the parties. *Id.* § 202(2), pp. 518-9; *Smith v. Royal Ins. Co.,* 111 F.2d 667 (9th Cir. 1940)(a lease is a conveyance of lands and tenements to a person for life, for years, or at will, in consideration of return of rent, or other recompense.).

The elements of a lease have been held to include a definition of the extent and boundary of the property, a definite and agreed term, a definite and agreed price and manner of payment, and a right to possess or occupy the property. *Vallejo v. Pioneer Oil Co.,* 744 S.W.2d 12, 14 (Tex. 1988). Creation of a lease requires an offer to create a lease, which may be the preparation of a written lease with terms and conditions, and an acceptance of such offer, which may be the signing of the lease by the lessee. 51 C.J.S. Landlord & Tenant § 208(b) p. 533. In general, a lease must set forth a date of commencement and a duration of the term of a lease, but parties to a lease may agree that it may be terminated at the will of either party, which is termed a tenancy at will or lease at will. 51 C.J.S. Landlord & Tenant § 215 pp. 545-6; *Holcomb v. Lorino,* 79 S.W.2d 307, 310 (Tex. 1935); Restatement of Property 2d Landlord & Tenant Vol. 1 § 1.6, p. 38 (agreement that the lease shall be terminable at the will of either party may be apparent from the circumstances; where the lease does not state a duration and no periodic rent is reserved or paid, a tenancy at will is presumed).[(1)]

The ROAs at issue in the instant case, contain the words "Offer" and "Accepted," describe the address (unit) and building of the housing to be assigned, include an "Assign date," and require the resident to "agree to reside in these quarters for a

period of at least six months." The ROAs require the resident to agree "I am aware that my housing unit is to be used as a private residence for myself and members of my family only" (Second Motion, Exhibit 2). Thus, the elements of a lease are present: offer and acceptance, commencement and duration of the lease, definition of the extent and boundary of the property, and exclusive occupancy by the resident and his family.

Respondent emphasizes that military members do not pay rent, and argues that the ROAs are not valid as leases or contracts because they lack consideration. Payment of rent however, is not a prerequisite to finding an instrument to be a lease. *Passailaigue v. United States*, 224 F.Supp. 682 (M..D. Ga 1963)(written lease of commercial property to a charitable organization set forth terms and conditions, including the usual provisions found in agreements establishing the landlord and tenant relationship, but stated that the tenant shall not pay any rent); *Biloxi Regional Medical Center v. Bowen,* 835 F.2d 345, 347 (D.C. Cir. 1987)(lease provided hospital with a rent free term of 25 years, with option to renew for an additional 25 years); *Chalfant v. Wilmington Institute,* 574 F.2d 739 (3rd Cir. 1978)(city leased property to library rent-free); *Jeanes v. Burke*, 226 S.W.2d 908 (Tex. App. 1950)(lease contract providing rent-free offices to doctors in medical center provided benefit to hospital, in that doctors were readily available to patients, constituting valuable consideration). Congress has even authorized the Army, under 10 U.S.C. § 2667(b)(5), to lease property rent-free in exchange for the lessee's agreement to undertake responsibility for the maintenance, repair and restoration of the property. *Abrams-Fogliani v. United States,* 952 F.Supp. 143 (E.D. NY 1996) (Department of the Army's lease of property to the City of New York found beneficial to both parties, strengthening ties between the military and City); *see also,* Restatement of Property 2d Landlord & Tenant §§ 2.2, 2.3, 12.1, pp. 81-82, 386 (no reservation of rent in a lease). [(2)]

For a lease to be valid, "any consideration sufficient to support a contract is all that is required to constitute an agreement from which a tenancy may result." 49 Am Jur 2d Landlord & Tenant § 25, p. 68. Consideration may be either a benefit to the promisor or a detriment to the promisee. *Pasant v. Jackson Mut. Life Ins. Co.,* 52 F.3d 94 (5th Cir. 1995)(applying Texas law); 1 Corbin on Contracts § 122 p. 523 (West 1963); Richard A. Lord, 3 Williston on Contracts § 7:4 pp. 36-7 (4th ed. 1992); *In re Alchar Hardware Co., Inc.,* 764 F.2d 1530 (11th Cir. 1985). For example, the agreement of a lessee to forego his right to insist on the lessor's performance of obligations under a previous instrument may be sufficient consideration for a lease. 51 C.J.S. Landlord & Tenant § 210 p. 536-537.

Detriment means giving up something which the promisee was theretofore privileged to retain, or refraining from doing something which he was privileged to do. See, 3 Williston on Contracts § 7:4 pp. 45-46. Even a provision requiring prior notice before a party withdraws from a contract terminable at will is sufficient to save a contract from a claim of invalidity due to lack of consideration, as the "detriment to the party required to provide such notice and the benefit to the party entitled to receive it are deemed to constitute sufficient consideration to hold each party to the terms of the agreement until it is properly terminated." *Walls v. Giuliani*, 916 F.Supp. 214, 220 (E.D. N.Y. 1996).

Assignment to public quarters forfeits the military member's entitlement to "basic allowance for housing" (also known as "basic allowance for quarters" or BAQ, i.e., money to pay for housing) in 37 U.S.C. Section 403(e), which provides that "a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service . . . is not entitled to a basic allowance for housing." Thus, by accepting public quarters, the military member suffers a detriment of forfeiting his privilege to receive BAQ and to live in off-base housing. In addition, the Respondent benefits from the military members' occupancy of public quarters, by its personnel being freely available for service on site. The "quarters furnished to military personnel are recognized as being solely for the benefit of the United States, not for the benefit of personnel." *United States v. County of Humboldt,* 445 F.2d F.Supp. 852, 856 (N.D. Cal. 1978), *aff'd,* 628 F.2d 549 (9th Cir. 1980); *Jones v. United States,* 60 Cl.Ct.

at 569, 574.

Respondent argues that occupancy of public quarters is a statutorily mandated benefit or allowance, and that Respondent lacks authority to contract with military members to provide them a statutorily mandated benefit, citing *Good v. United States,* 23 Cl.Ct. 744 (1991) (settlement agreement fails as a contract because performance of a pre-existing legal duty is not consideration), and *Jones v. United States, supra*. However, the provision of public quarters is not mandatory or a legal duty; rather, the entitlement to BAQ is required, and occupancy of public quarters is generally an option for military personnel instead of receiving their entitlement to BAQ. 10 U.S.C. § 7571 ("... public quarters may be furnished for personnel . . ."(emphasis added)); 37 U.S.C. § 403(e)("A member . . . who is assigned to quarters of the United States . . . may elect not to occupy those quarters and instead to receive the basic allowance for housing . . . .").

Respondent's reliance on *Jones v. United States* is misplaced, since the law in effect at the time of that decision required public quarters to be furnished to military members, and only in the absence of available public quarters were members entitled to BAQ. *Jones v United States,* 60 Ct.Cl. at 559-560 ("There are two essential conditions necessary to the receipt of rental allowance . . . [t]hat public quarters are not available . . . ." Army Regulations No. 35-4220, September 21, 1922).

Complainant and Respondent support their respective positions with the Attorney General Opinion's distinction between leases and licenses granted by the Navy, but the opinion addresses patents relating to radio communication rather than real estate. 34 U.S. Op. Att. Gen. at p. 325 (licenses to use Government-owned patents are within the Navy's power to grant without special Congressional authority and thus not in violation of the Property Clause of the Constitution). The analysis of whether the ROAs are leases need not be restricted to applications to the Navy or federal government; rather, the principles of general contract law apply to government contracts. *United States v. Anderson County, Tenn.,* 575 F. Supp. 574, 576 (E.D. Tenn. 1983).

Federal statutes can properly be construed in light of the common law, and must generally be given their common law meaning, unless there is a contrary indication. *Matter of Daben Corp.*, 469 F. Supp. 135, 141 (D. P.R. 1979). In terms of real estate, the two key elements distinguishing a license and a lease are that a lease grants exclusive possession of the premises, and conveys a definite space. *Id.* at 142-143, 144; 49 Am Jur 2d Landlord & Tenant § 21 p. 64; *In re Owl Drug Co.,* 12 F. Supp. 439, 442 (D.C. Nev. 1935) . A license, on the other hand, is "a 'catch-all' category for all consented occupation and use of real property which does not rise to the status of a lease" and is commonly defined as "a mere permit or privilege to do what otherwise would be unlawful." *Daben Corp.,* 469 F. Supp. at 142; *see also,* 51 C.J.S. Landlord & Tenant § 202(6) p. 526. For example, under Texas law, hotel guests are licensees rather than tenants. *Patel v. Northfield Ins. Co.,* 940 F. Supp. 995, 1002 (N.D. Tex. 1996).

Although there is no question that the ROAs in the case at bar conveyed a definite space, *i.e.*, the particular housing unit, the element of exclusive possession is an issue that must be addressed. Where a federal agency did not give up its right to leave and enter or to use the premises, and where it retained great control over a corporation's operation of the premises, and where the government's right of entry and inspection were so extensive -- allowing inspection whenever and however it deems appropriate -- as to negate any notion that a lease of the realty was intended or effected, the corporation's interest was held to be a mere license rather than a lease. *United States v. Anderson County, Tenn.,* 575 F. Supp. at 577-8.

Under a lease, an owner may have the right to enter the leased premises, but if the owner "has the right to limit access and enjoys a general right of entry for supervising purposes," then the owner rather than the occupant retains possession, indicating that there is not a lease but rather a license. *Daben Corp.,* 469 F. Supp. at 143 (not a lease but a license where owner had access at all times to

inspect operations of occupant); *Engblom v. Carey,* 677 F.2d 957, 960 (2nd Cir. 1982)(prison guards occupying prison staff housing held to be tenants (lessees) where overnight and long-term guests were prohibited and rooms were subject to inspection at any time).

The ROAs at issue reserve the right of Respondent "to enter resident occupied government quarters to ensure proper use and care of government property and to make repairs," specifying that representatives of the Commanding Officer or Housing Office have the right to "enter any unit of government quarters at reasonable times for the purpose including, but not limited to, inspection and making necessary repairs." (Respondent's Second Motion, Exhibit 2). However, an agreement was held to be a lease rather than a license where the occupant had exclusive possession of the premises, "subject only to the owner's power to enter if so required by governmental authority . . . or to make necessary repairs or alterations." *United States v. Real Property Located at Incline Village*, 976 F. Supp. 1327, 1357 (D. Nev. 1997)(lease for self-storage). (3)

The ROAs also limit access of guests to the residences to the extent that all visitors exceeding a 72 hour visit must register at the Housing Office, and visitors may be authorized for a period of up to 30 days. However, such a limitation is far less severe than that found in *Daben Corp.,* 469 F. Supp. at 140, 144, where an owner made rules as to the eligibility of persons allowed to enter the store and the occupant had no power over access, which limitation was one factor the court observed in finding that the owner licensed rather than leased the store premises.

Respondent does make a strong argument that military personnel occupy public quarters as an employee of Respondent rather than as a tenant or lessee, citing the following principle:

> The general rule is that when an employee occupies a house on the premises of his employer, and that occupancy is merely incidental to his employment, the relationship of landlord and tenant does not exist; rather, the rights and liabilities of the parties are governed by the law of master and servant.

Moreno v. Stahmann Farms, Inc., 693 F.2d 106, 107 (10th Cir. 1982)(free housing provided to farm worker only for duration of employment). Respondent also quotes from a Texas court, "One who, as a servant or employee, occupies with his family a house on the premises of his employer, is not a tenant, with his employer as landlord. The relationship between the parties is that of master and servant." *Eaton v. R. B. Investments, Inc.,* 254 S.W.2d 189, 196 (Tex.Civ. App. 1952), *rev'd on other grounds,* 260 S.W.2d 587 (Tex. 1953)(house furnished by employer to farm worker and his family was wholly subject to the tenure of the employment). However, in both of those cases, the employee did not sign any lease giving the employee the right to possession.

A master-servant or employer-employee relationship may co-exist with a landlord-tenant relationship, where the tenancy would end when the employment ends. *Exxon Corp. v. Tidwell,* 816 S.W.2d 455 (Tex.App. 1991)(oil company and service station operator were in landlord-tenant relationship pursuant to a lease as well as a master-servant relationship pursuant to a sales agreement); *see, United East & West Oil Co. v. Dyer,*162 S.W.2d 680, 683 (Tex. 1942)("A person may occupy premises as a tenant and yet be a servant of the owner; and where the occupation of the employer's premises is not a mere incident to the service, the principle of landlord-tenant applies, even though the rental is satisfied by service.") Such relationships may co-exist even where no rent is paid. *Brown v. Frontier Theaters, Inc.,* 369 S.W.2d 299 (Tex. 1963)(caretakers of theater property furnished with an apartment on the premises of employer were in a "dual relationship" of master-servant and landlord-tenant); *Folgueras v. Hassle,* 331 F. Supp. at 624 (migrant workers provided free housing by employers held to be in landlord-tenant relationship with employer).

Factors distinguishing a lessor-lessee relationship from mere occupancy incidental

to service as an employee are whether a lease was executed, and whether the employee had a choice to reside off of the employer's premises. *Turner v. Mertz,* 3 F.2d 348, 350 (D.C. Cir. 1924)(landlord-tenant relationship did not exist where employee's occupancy of premises was essential to the service, there was no written lease and no available living quarters elsewhere); *National Labor Relations Board v.. Bemis Bro. Bag Co.,* 206 F.2d 33 (5th Cir. 1953)(employees' occupancy of company owned housing was landlord-tenant relationship pursuant to a lease and was not mere "wages" or "other conditions of employment" where employees had choice to reside in housing available in the community).

A document entitled "Facility Housing -- Rules and Regulations" referring to "tenants" and signed by prison guards has been held to be "tantamount to a lease," and they occupied premises as a tenancy rather than mere occupancy incident to employment where the prison did not require them to occupy staff housing on the premises. *Engblom v. Carey,* 677 F.2d at 959, 963. Employee-occupied housing is held to be a tenancy rather than mere occupancy incidental to employment even where employees are not required to pay rent. *Walton v. Darby Town Houses, Inc.,* 95 F. Supp. 553 (E.D. Pa. 1975)(because resident manager of housing development executed a lease for free housing, he and his family occupied housing as tenants (lessees) rather than as merely incident to employment).

Even in the context of the military housing occupied by military personnel, albeit where they paid rent, the Comptroller General has stated that the government is "acting as a landlord." 21 Comp Gen. 260 (September 26, 1941). Where the Department of the Army assigned public quarters to a military member and his family, the Department was held to be subject to a duty as a landlord to provide safe premises to the occupants, where it had a "qualified possession" of the premises, retaining the specific right to inspect, maintain, repair, service and enter upon the premises. *Elliott v. United States,* 877 F. Supp. 1569, 1574 (M.D. Ga. 1992), *aff'd en banc by equally divided court,* 37 F.3d 617 (11th Cir. 1994).

Given the above-discussion, it is concluded, as a matter of law, that the ROAs in question contained all the pertinent elements to establish a valid landlord-tenant relationship between the Respondent and its military personnel. See, *Vallejo v. Pioneer Oil, supra.* By creating the extent and boundary of the property; a definite and agreed term and price; the tenant's right to possess and to occupy the property; consideration to support the lease; the benefit and detriment of the leasing parties; and the common law principles of construction, it is held that the eleven military members occupied the military family housing units referenced in the Complaint pursuant to a "contract to lease," with Respondent as "lessor," within the meaning of 40 C.F.R. Part 745 Subpart F and Section 1018 of the Act.

Accordingly, there being no genuine issues of material fact, Complainant is entitled to judgment on this issue as a matter of law and its First Motion for Accelerated Decision is **GRANTED.** Respondent's First and Second Motion for Accelerated Decision are **DENIED.** Complainant's First Motion to Strike is also **DENIED.** The paragraphs Complainant sought to strike, Paragraphs 40 and 41 of Respondent's Answer, have been adjudicated as a matter of law and therefore striking them from the Answer is unnecessary.

III. Respondent's Third Motion for Accelerated Decision and Complainant's Second Motion for Accelerated Decision

A. Arguments of the Parties

Respondent's Third Motion requests an accelerated decision and dismissal of the Complaint, on the basis that Complainant lacked statutory authority under Section 1018 of the Act to promulgate the Subpart F regulations as applied to Respondent's assignment of military personnel to military family housing. Respondent submits that any requirements applicable to federally-owned housing under the Lead based Paint Hazard Reduction Act are contained in Section 1013 of the Act, specifically section 1013(a)(3), entitled "Disposition of federally owned housing"and argues that an interpretation of the Act that subjects Respondent to the requirements of

both Sections 1013 and 1018 is contrary to Congressional intent and "unreasonable given both the apparent redundancies and variations in scope between the two provisions" (Respondent's Third Motion).

Respondent also submits that the legislative history of Section 1018 of the Act, namely a Senate Report referring to "private housing" H.R. Rep. No. 760, 102nd Cong., 2nd Sess. 1992, and a reference to "private and assisted housing," 138 Cong. Rec. S17904-02, S17906 (October 8, 1992), shows that Section 1018 did not apply to federally-owned housing.

Complainant opposes Respondent's Third Motion and moves for accelerated decision on grounds that Section 408 of TSCA and legislative history shows that Section 1018 applies to federal entities and federally owned housing; that Sections 1013 and 1018 of the Act play different roles in regard to preventing lead-based paint poisoning; and that the validity of Subpart F regulations cannot be challenged in an administrative penalty proceeding.

In reply, Respondent asserts that Section 3013 applies to federally owned housing, and that Section 1018 applies only to private housing. Respondent argues that in the present case, the challenge to EPA's rule-making authority should be considered, given Respondent's inability, under the Unitary Executive Theory, to take EPA to court to challenge Federal regulations.

B. Discussion

The parties do not dispute any issues of fact material to the question of whether Section 1018 applies to Respondent's federally owned military housing. Section 1018 pertains to "target housing," defined in the Act as housing constructed prior to 1978. 42 U.S.C. § 4851b(27). Respondent admits in its Answer that the eleven housing units were constructed prior to 1978.

The Subpart F regulations do not specifically state that they apply to federally owned or military housing, but the term "lessor" is defined as "any entity that offers target housing for lease . .. including but not limited to . . . government agencies . . . ." The Environmental Appeals Board has set forth and adhered to a presumption that final agency regulations are not reviewed in an administrative enforcement proceeding. *Woodkiln, Inc.,* CAA Appeal No. 96-2, slip op. at 21-23 (EAB, July 17, 1997); *Echevarria,* 5 E.A.D. 626, 634 (EAB 1994)(under established Agency precedent, "challenges to rule-making are rarely entertained in an administrative enforcement proceeding . . . [t]he decision to entertain such challenges is at best discretionary, and review of a regulation will not be granted absent the most compelling circumstances.")

Respondent has not set forth compelling circumstances for which to review the Subpart F regulations, nor has it cited to any authority, other than referring to the Unitary Executive Theory, holding that one component of the federal Government may not challenge in federal court a regulation promulgated by another component. Thus, to the extent that Respondent is challenging the substance of Subpart F regulations, the challenge will not be entertained. Respondent's arguments will be addressed to the extent that they challenge the application of Section 1018 of the Act and Subpart F to Respondent's assignment of military family housing to military personnel.

Section 1013 of the Act, 42 U.S.C. § 4822(a)(3), entitled "Requirements for housing receiving Federal assistance," provides in pertinent part:

> (3) Disposition of federally-owned housing
>
> (A) Pre-1960 target housing
> Beginning on January 1, 1995, procedures established under paragraphs (1) and (2) [elimination of hazards] shall require the inspection and abatement of lead-based paint hazards in all federally-owned target housing constructed prior to 1960

> (B) Target housing constructed between 1960 and 1978
> Beginning on January 1, 1995, procedures established under paragraphs (1) and (2) shall require an inspection for lead-based paint and lead-based paint hazards in all federally-owned target housing constructed between 1960 and 1978. The results of such inspections shall be made available to prospective purchasers, identifying the presence of lead-based paint and lead-based paint hazards on a surface-by -surface basis. * * * * (emphasis added).

Whereas Section 1018 by its terms applies to both purchasers and lessees of target housing, Section 1013 by its terms applies only to purchasers, not to lessees, of federally owned target housing. *See,* proposed regulations of Department of Housing and Urban Development (HUD) 24 C.F.R. Part 36 Subpart C, 61 Fed. Reg. 29170, 29177, 29179 (June 7, 1996). Section 1013 does not apply to the assignment of family military housing to military personnel, because they are not "purchasers" of the property. Therefore, it cannot be concluded that Section 1013 rather than Section 1018 applies to assignment of military family housing.

In arguing that Section 1018 does not apply to federally owned housing (such as military housing), Respondent finds it significant that Section 1018 refers to "target housing" but does not specifically refer to "federally owned housing," and that Section 1013 does specifically refer to "federally owned housing." The definition of "target housing" in the Act, Section 1004(27), is "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities . . . or any 0-bedroom dwelling." 42 U.S.C. § 4851b(27). "Federally owned housing" is defined as "residential dwellings owned or managed by a Federal agency . . . [which] includes . . . the Department of Defense." Section 1004(8), 42 U.S.C. § 4851b(8).

The term "target housing," as referenced in Section 1018 and Section 1004(27) of the Act, is broadly defined and encompasses "federally owned target housing." The paragraph headings and language of Section 1013 indicate that the term "federally owned target housing" is a subset of "target housing." Similarly under Section 1018, "target housing" would include "federally owned target housing" where not specifically excepted. *See,* 61 Fed. Reg. 29170 (June 7, 1996)(". . . Section 1018 of Title X separately requires all new purchasers and new tenants of target housing, including federally owned residential property . . . .")

Moreover, in Section 408 of TSCA, 15 U.S.C. § 2688, Congress made clear that departments of the federal Government are subject to all federal lead-based paint requirements, even if the terms of the requirements do not specifically state that they apply to the federal Government:

> Each department, agency and instrumentality of executive, legislative, and judicial branches of the federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in a lead-based paint hazard, and each officer, agent or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting lead-based paint, lead-based paint activities, and lead-based paint hazards in the same manner, and to the same extent as any non-governmental entity is subject to such requirements . . . .

Respondent believes that this provision means that the "federal Government, in the same manner and to the same extent as any non-governmental entity, shall comply with all requirements that it is subject to." January 4 Reply at 3. Respondent argues that Complainant's "assertion that Section 408 obligates the federal Government to comply with any requirement . . . irrespective of whether such requirement by its terms, applies to the federal Government goes too far and is contrary to fundamental notions of fairness and due process." *Id.* Respondent apparently argues that Section 408 only makes applicable to the federal Government only those provisions which by their terms apply to the federal Government.

To accept Respondent's argument obviously would render Section 408 useless.

Instead, Section 408 makes applicable to the federal Government those provisions which do not exclude application to the federal Government. There is nothing in the language of Section 1018 which either expressly or by implication would exclude its application to the federal Government. Thus, Section 408 of TSCA makes Section 1018 applicable to the federal Government in its capacity as a lessor or seller of target housing.

Therefore, Complainant did not exceed the scope of its authority under Section 1018 of the Act in applying Subpart F requirements as to "target housing" to Respondent in its assignment of federally owned family housing to military members. Complainant is entitled to judgment as a matter of law and accordingly Complainant's Second Motion for Accelerated Decision is hereby **GRANTED.** Respondent's Third Motion for Accelerated Decision is thus, **DENIED.**

IV. Respondent's Fourth Motion for Accelerated Decision, Complainant's Third Motion for Accelerated Decision, and Complainant's Second Motion to Strike

A. Arguments of the Parties

Respondent's Fourth Motion requests accelerated decision and dismissal of the Complaint, on the basis that the Subpart F regulations lack an effective date, and thus do not apply to Respondent. Respondent cites the note in the Federal Register publication of Subpart F (61 Fed. Reg. 9064 (March 6, 1996) stating that Sections 745.107 and 745.113, *inter alia,* contain information requirements that have not been approved by OMB [Office of Management and Budget] and that once approved, "EPA and HUD will publish a document giving notice of the effective date and adding the OMB approval number to 24 CFR part 35 and 40 CFR Part 9." 61 Fed. Reg. at 9064.

The 1997 and 1998 Code of Federal Regulations Title 40 include a note following sections 745.107 and 745.113 stating that they "will not become effective until approval has been given by the Office of Management and Budget." Respondent believes that OMB has not yet approved the regulations Complainant seeks to enforce against Respondent in this proceeding.

Respondent points out that EPA has merely added the OMB approval number to 40 C.F.R. Part 9, which was a "technical amendment which only updates the table to include any approvals that have [been] published in the Federal Register since July 1, 1995." 61 Fed. Reg. 33851 (July 1, 1996). Respondent asserts that no document has been published announcing the effective date for the regulatory provisions.

Complainant asserts that the information collection requirements of subpart F, including Sections 745.107 and 745.113 were approved by OMB on April 22, 1996 and assigned an OMB Control Number, and that this approval was published in the Federal Register on May 31, 1996. 61 Fed. Reg. 27348. Thus, the effective date of the regulatory provisions was April 22, 1996, according to Complainant. The C.F.R. publisher should have, but failed to, delete the note stating that they are not effective until OMB approval, Complainant explains.

In reply, Respondent asserts that the May 31, 1996 Federal Register publication failed to state an effective date for the regulations and thus fails the Administrative Procedure Act (APA) requirement to promulgate an effective date. Respondent asserts that the promulgation of an effective date of a regulation is a substantive rule subject to the full rule-making requirements of the APA, citing *Levesque v. Block,* 723 F.2d 175 (1st Cir. 1983). Respondent notes that the purported effective date, the date of OMB approval, was not an action taken by EPA pursuant to notice, and that EPA did not specifically identify April 22, 1996, as an effective date.

B. Discussion

The parties do not dispute any issues of fact material to the question of whether the Subpart F regulatory provisions at issue were effective at the times relevant to this proceeding, namely the times of alleged violation in September and November 1997. The question presented is thus, one of law.

The Subpart F Final Rule published in the Federal Register set forth an effective date of March 6, 1996, upon notice and comment specifically on the issue of the effective date. EPA and HUD requested and considered comments on extending the original effective date of the entire Final Rule in light of promulgation delays. Commenters submitted comments opposing an extension, on the basis that delay would increase the number of preventable exposures to lead-based paint hazards. Commenters also recommended delaying the effective date until certain related federal standards were issued. 61 Fed. Reg. 9064, 9068, 9069 (March 6, 1996). All concerns as to the effective date of the entire rule were addressed in the preamble to the Final Rule. Thus, the effective date for Subpart F, *i.e.,* March 6, 1996 (the date of publication in the Federal Register), was established in accordance with APA procedures. However, portions of Subpart F could not yet be effective on that date due to the fact that they contained information collection requirements and had not yet received OMB approval.

EPA published notice in the Federal Register that Subpart F requirements were approved by OMB on April 22, 1996. 61 Fed. Reg. 27348 (May 31, 1996). The listing of Part 745 Subpart F in 40 C.F.R. § 9.1 confirms OMB's approval of the information collection requests contained in Sections 745.107, 745.113, and others. Respondent cites no authority for the proposition that the May 31, 1996 Federal Register notice is inadequate to establish an effective date. Respondent vaguely asserts that the failure to promulgate an effective date is a violation of the APA, without citing to any particular provision of the APA.

When a rule is published, setting forth an effective date and excepting provisions which have not yet been approved by OMB from that effective date, the Federal agency subsequently publishes a notice announcing such approval. *Career College Association v. Riley,* 74 F.3d 1265 (D.C. Cir. 1996)(Department of Education "issued a notice that announced OMB approval for the information collection requirements, [and] explained that the . . . Rule was final and effective for the 1994-1995 award year. . . .") No notice and comment rule-making process is required for that announcement. There is no legal requirement cited by Respondent or otherwise found which requires an agency specifically to use the term "effective date" in such an announcement.

Where the rule gives advance notification that "a document giving notice of the effective date" will be published, and then the agency publishes a notice of the OMB approval date, the date of OMB approval may be assumed to be the effective date. In the absence of any legal requirement that such notice must use the words "effective date," it cannot be concluded that EPA's announcement in the Federal Register of the date of OMB approval of a regulatory provision does not set forth an effective date.

Accordingly, it is concluded that the requirements of Subpart F at issue were effective at all times relevant to this proceeding and that Complainant is entitled to judgment as a matter of law. Complainant's Third Motion for Accelerated Decision is **GRANTED.** Respondent's Fourth Motion for Accelerated Decision is **DENIED.** For the same reason that Complainant's First Motion to Strike was denied, Complainant's Second Motion to Strike is also **DENIED** .

V. Respondent's Fifth Motion for Accelerated Decision, Complainant's Fourth Motion for Accelerated Decision, and Complainant's Third Motion to Strike

A. Arguments of the Parties

Respondent in its Fifth Motion, requests accelerated decision on the basis that it is not a "person" under the Lead Based Paint Hazard Reduction Act and/or TSCA and therefore is not subject to civil penalties. Section 1018d(b)(5) of the Lead Based Paint Hazard Reduction Act makes the refusal or failure of "any person" to comply with a provision of that section, or rule or order issued thereunder, a prohibited act under Section 409 of TSCA (42 U.S.C. § 2689). The latter provision of TSCA makes unlawful the failure of refusal of "any person" to comply with the sub-chapter of TSCA entitled "Lead Exposure Reduction," or any rule or order issued thereunder. In turn, Section 16(a) of TSCA (15 U.S.C. § 2615(a) makes "any person"

who fails to comply with Section 409 of TSCA liable for a civil penalty. Respondent points out the lack of definition of the term "person" in the Lead Based Paint Hazard Reduction Act and in TSCA. Therefore, the applicable definition of "person" is in the dictionary section of the U.S. Code at 1 U.S.C. § 1, which definition does not list federal agencies or the federal Government .

Emphasizing concerns about separation of powers and federalism, based on the fact that Complainant and Respondent are both components of the federal Government, Respondent asserts that the statutes at issue must include an express statement by Congress authorizing assessment of penalties against Respondent in order for Complainant to have such authority. Respondent refers to an opinion of the Department of Justice Office of Legal Counsel, 18 U.S. Op. O.L.C. No. 29 (1994), finding that in the Federal Fair Housing Act did not authorize HUD to initiate enforcement actions against other federal agencies, where the term "federal agencies" was not included in the statutory definition of the jurisdictional terms "person" or "entity."

Respondent believes that Section 408 of TSCA is merely a waiver of a defense of sovereign immunity which does not expand Complainant's authority and which does not impose on Respondent an affirmative duty to comply with statutory or regulatory requirements which "by their terms" do not apply to Respondent. Respondent's Fifth Motion at 4. Respondent refers to a Supreme Court decision finding that a federal agency is not subject to penalties under the Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA) where those statutes' definitions of "person" did not include the federal Government. *United States Department of Energy v. Ohio,* 503 U.S. 607, 617-618 (1992). Respondent notes that the waiver of sovereign immunity in RCRA expressly amends the definition of "person" to include the federal Government. RCRA Section 1004(15), 42 U.S.C. 6903(15); Federal Facilities Compliance Act, Pub. L. 102-386, 106 Stat. 1505 (October 6, 1992).

Respondent argues that, given the focus of the term "persons" in Section 1018 on sellers and lessors of residential property, the term is not coextensive with the term as used in Sections 16 and 409 of TSCA. Respondent argues further that an interpretation of "person" in Section 1018(b)(5) as including the federal Government would necessitate the same interpretation of "person" in the other penalty provisions of Section 1018, which may encompass intentional torts and negligence situations, and as such may violate the Federal Tort Claims Act and the Feres Doctrine, *Feres v. United States,* 340 U.S. 135 (1950)(recovery under Federal Tort Claims Act against federal Government for injury to military member arising from activity incident to service is barred).

Complainant agrees with Respondent that Congress must make a clear statement granting a federal agency authority to assess civil penalties against another federal agency. Complainant argues that Congress has made such a clear statement in Section 408 of TSCA, and that an express definition of "person" as including the federal Government is not the only way Congress may make a clear statement of EPA's authority over a federal agency or department. Complainant points out that the definition of "person" in 1 U.S.C. § 1 includes an exception which allows an interpretation of the term "person" from the context of the statute.

B. Discussion

Section 1018(a) imposes on "lessors" the obligation to comply with lead based paint disclosure requirements. In order to enforce that provision against a lessor, *i.e.*, to find a lessor in violation of Section 1018(a), and in violation of Section 409 of TSCA, the lessor must be a "person," because it is a prohibited act under 1018(b)(5) of the Act and Section 409 of TSCA only for "any person" to fail or refuse to comply with Section 1018, or with a provision of the lead exposure reduction provisions of TSCA. 42 U.S.C. § 4852d(b)(5); 15 U.S.C. § 2689. Only a "person" may be subject to penalties therefor under Section 16(a) of TSCA, which provides that "[a]ny person who violates a provision of section . . . 2689 [TSCA § 409] of this title shall be liable . . . for a civil penalty. . . ." Thus, the term "person" in TSCA and in Section 1018(b)(5), must encompass the term "lessor." Neither TSCA nor Section 1018 of the Act defines the term "person" or "lessor."

Pursuant to express authority from Congress stated in Section 1018, EPA promulgated regulations in Subpart F. Therein, EPA has provided an interpretation of the statutory term "lessor" as "any entity that offers target housing for lease . . . including but not limited to . . . government agencies . . . ." 40 C.F.R. § 745.103. Respondent in effect is challenging this definition as inconsistent with Section 1018 and TSCA. Because a "person," under Section 409 of TSCA and under Section 1018(b)(5), must include a "lessor," EPA has established by regulation that the term "person" in TSCA encompasses government agencies in the context of Section 1018 violations. To the extent that Respondent challenges EPA's Subpart F regulation, *i.e.,* the definition of "lessor," the challenge will not be entertained. *Woodkiln, Inc., supra; Echevarria, supra.* Nevertheless, Respondent's arguments are addressed as follows.

As to Respondent's argument that Section 409 of TSCA and Section 1018 of the Act cannot apply to Respondent as a "person," Section 408 of TSCA is a clear statement of EPA's authority to enforce lead-based paint requirements, and to assess penalties for violation thereof, against a department of the United States. Section 408 states, in pertinent part:

> Each department . . . of the federal Government . . . having jurisdiction over any property or facility . . . shall be subject to, and comply with, all federal . . . requirements, both substantive and procedural . . . respecting lead-based paint . . . in the same manner and to the same extent as any non-governmental entity is subject to such requirements . . . The requirements . . . include . . . all . . . civil and administrative penalties . . . .

Thus, where a non-governmental "person" is subject to lead-based paint requirements, and penalties for violation thereof, a department of the federal Government is made subject thereto. This conclusion is not changed by the "default" definition of "person" in 1 U.S.C. § 1, which provides:

In determining the meaning of any act of Congress, unless the context indicates otherwise . . . [t]he words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . ." (emphasis added)

First, the word "include" is not exclusive in nature: the terms following the word "include" are not necessarily an exclusive list.

Second, the relevant context, namely Sections 408 and 409 of TSCA read together, indicates that the term "person" in Section 409 includes the federal Government. Section 409 is part of Subchapter IV of TSCA, entitled Lead Exposure Reduction, and is the mechanism for enforcement of the requirements in that subchapter. If Section 408 did not make the federal Government a "person" under Section 409, then those requirements could not be enforced against the federal Government. However, the language of Section 408 shows that Congress intended for the requirements respecting lead based paint to be enforced, and penalties assessed, against the federal Government: "[t]he federal . . . substantive and procedural requirements [which the federal Government is subject to] . . . include . . . all civil and administrative penalties . . . . The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any . . . civil or administrative penalty . . .)."

This language would be rendered useless as to federal requirements if the federal Government were not deemed a "person" under Section 409, and thus would violate the principles that statutes must be construed so as to give effect to every word in the statute, and that statutory provisions should not be interpreted in a way that renders other provisions of the same statute inconsistent, meaningless or superfluous. *Boise Cascade Corp. v. U.S. EPA,* 942 F.2d 1427, 1432 (9th Cir. 1991); *Sands, Sutherland Statutory Construction,* §§ 46.05, 46.06 (4th ed. 1984).[(4)]

Moreover, it should be noted that the federal Government's failure as seller or

lessor to disclose the dangers of lead-based paint to purchasers and lessees poses the same danger of lead poisoning as would such failure of any other "person." Congress could not have intended to exempt the federal Government from such requirements, thus endangering the lives and health of families and individuals purchasing or leasing property owned by the federal Government.

Respondent's argument regarding *U.S. Department of Energy v. Ohio* (a citizen suit by a State brought against the federal Government) does not support its position. The Court found that CWA and RCRA already included a definition of "person" which (in 1992) did not include the federal Government. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), Section 1004(15) of RCRA, 42 U.S.C. § 6903(15)(Congress later specifically amended (in the Federal Facilities Compliance Act) the term "person" in Section 1004(15) RCRA to include the federal Government). The Court concluded that the United States was not a "person" under those statutes on the basis that the statutory definitions of the term "person" listed many other governmental entities but failed to include the United States. 503 U.S. at 617-618. In contrast, Congress did not provide any definition of "person" in TSCA.

A premise to Respondent's argument that Section 408 does not impose an affirmative duty on Respondent to comply with Section 1018, is that Section 1018 and Subpart F "by their terms" do not apply to Respondent. As concluded above in the discussion of Respondent's First, Second and Third Motions for Accelerated Decision, this premise is without foundation.

Respondent argues that Complainant's interpretation of "person" in Section 1018(b)(5) would result in an inconsistency within Section 1018(b). However, such interpretation does not necessitate a finding that any actions under the other penalty provisions of Section 1018 against the Department of Defense necessarily must violate the Federal Tort Claims Act and Feres Doctrine. In the event such cases are brought against the Department of Defense, it may raise affirmative defenses under the Federal Tort Claims Act and Feres Doctrine without needing to address the definition of "person."

For the above-reasons, it is concluded that Respondent is a "person" within the meaning of Section 1018 (b)(5) of the Act and Section 409 of TSCA and that Complainant is entitled to judgment as a matter of law. Complainant's Fourth Motion for Accelerated Decision is **GRANTED.** Respondent's Fifth Motion for Accelerated Decision is thus, **DENIED.** For the same reason that Complainant's First Motion to Strike was denied, Complainant's Third Motion to Strike is **DENIED.**

VI. Respondent's Sixth Motion for Accelerated Decision, Complainant's Fifth Motion for Accelerated Decision, and Complainant's Fourth Motion to Strike

A. Arguments of the Parties

Respondent's Sixth Motion requests accelerated decision in its favor on grounds that EPA did not comply with the Paperwork Reduction Act (PRA) in promulgating 40 C.F.R. §§ 745.107 and 745.113. Respondent asserts that EPA failed to consult with all interested and/or affected entities, namely federal entities, in order to ascertain the "burden" on such entities of the collection of information pursuant to those provisions, prior to requesting OMB approval, as required by the PRA.

Respondent further argues that in providing OMB with certain information mandated by the PRA in order for those provisions to be approved by OMB, EPA failed to identify to OMB that a federal entity may be a likely respondent to an information collection request under Subpart F. Therefore, Respondent asserts, EPA did not obtain valid approval from OMB for applying those provisions to federal entities, and consequently cannot assess penalties against federal entities for violations thereof.

Respondent acknowledges that the PRA prohibits penalty assessment against a "person," and that the PRA definition of "person" does not include the federal Government, but submits that to the extent that Respondent is deemed a "person" under Section 409 of TSCA and 1018 of Title X, it must also be deemed a "person"

under the PRA.

In response, Complainant asserts that the PRA does not apply to information collection requirements of Subpart F as applied to Respondent, and thus EPA was not required to estimate the burden of Subpart F requirements on federal entities. Complainant points to the definition of "collection of information" in section 3502(3) of the PRA, 44 U.S.C. § 3502(3), which does not include information collection requirements imposed on the federal Government unless it is used for statistical purposes:

> [t]he obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency. . . calling for either: (i) answers to identical questions posed to, or identical reporting or record-keeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or (ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes. (emphasis added)

Complainant also quotes the OMB regulation defining "collection of information," which states that "collection of information includes questions posed to agencies, instrumentalities, or employees of the United States, if the results are to be used for statistical compilations of general public interest, including compilations showing the status or implementation of Federal activities and programs." 5 C.F.R. § 1320.3(c)(3). Complainant states that the lead-based paint information requirements imposed by Subpart F are not being used for such statistical purposes.

Complainant adds that, despite the fact that there is no requirement to estimate the burden on Respondent imposed by Subpart F information collection requirements, Respondent's burden nevertheless was assessed by EPA in developing Subpart F. Complainant asserts that Respondent would not be separately identified in its burden estimates, but would be included just as those for any other seller, lessor or agent of target housing. Complainant further asserts that no component of the Department of Defense commented on burden estimates upon EPA's solicitation of comment in the Federal Register, and that OMB could have disapproved Subpart F provisions if deficiencies existed.

B. Discussion

The PRA provision , 44 U.S.C. § 3512 , provides in pertinent part:

> **Public protection**
> Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved . . . does not display a current control number assigned by the Director [of OMB] . . . . (underlining added)

Thus, a "person" is protected from assessment of penalties for failure of an agency to comply with PRA requirements as to an "information collection request." The term "person" is defined in the PRA, 44 U.S.C.§ 3502(15), and the definition specifically includes a State, territorial, or local government or branch or political subdivision thereof. The omission of the federal Government from that definition, and the inclusion of other governments therein, indicates that Congress did not intend for the federal Government to be deemed a "person" within the meaning of Section 3512 of the PRA. *United States Department of Energy v. Ohio,* 503 U.S. at 617-18. The definition of a term in one statute does not implicate the same definition of that term in another, unrelated statute. As to the term "information collection request," it is defined in the PRA, 44 U.S.C. § 3502(11), as a type of "collection of information," which term, as Complainant asserts, does not apply to the Subpart F regulations to the extent that they seek information from Respondent, a federal entity.

Therefore, it is concluded that Complainant is not barred under the Paperwork

Reduction Act from seeking penalties against Respondent, and Complainant is entitled to judgment as a matter of law. Complainant's Fifth Motion for Accelerated Decision is **GRANTED.** Respondent's Sixth Motion for Accelerated Decision is thus, **DENIED.** For the same reason that Complainant's First Motion to Strike was denied, Complainant's Fourth Motion to Strike is **DENIED.**

VII. Respondent's Seventh Motion for Accelerated Decision

Respondent's Seventh Motion requests accelerated decision , dismissing Counts II, V and VI of the Complaint, on the basis that EPA exceeded the scope of its rule-making authority in promulgating certain provisions of the Subpart F regulations, 40 C.F.R. § 745.113(b)(1) and (b)(6). Respondent points out that Section 1018(a)(2) provides that only contracts for purchase and sale of target housing require a Lead Warning Statement and a signed statement of the purchaser. Respondent claims that EPA lacked authority to impose upon lessors those requirements. Respondent asserts that the legislative history of Section 1018 indicates that the Senate had considered requiring that a Lead Warning Statement be included in leases, but such requirement was rejected.

Respondent is clearly challenging the validity of Subpart F regulations on their face. As stated above, such a challenge will not be entertained in an administrative enforcement proceeding. *Woodkiln, Inc., supra; Echevarria, supra.*

As such, it is concluded that Respondent is not entitled to judgment as a matter of law. Accordingly, Respondent's Seventh Motion for Accelerated Decision is **DENIED.**

VIII. Respondent's Motion for Discovery

On August 18, 1998, the day after Respondent filed its Answer in this proceeding, it submitted a Motion for Discovery seeking certain information from Complainant including information as to circumstances of alleged violation in certain other enforcement actions. Complainant opposed the motion on September 1, 1998, on the basis, *inter alia*, that it was premature. Respondent submitted a rebuttal on September 14, 1998.

Complainant's position is well taken. The Rules of Practice at 40 C.F.R. Part 22 provide for discovery in a prehearing exchange, and to the extent that "further discovery" is needed, the parties may request such discovery upon a determination that such discovery (1) will not unreasonably delay the proceeding, (2) is not otherwise obtainable, and (3) has significant probative value. 40 C.F.R. Part 22.19(f). The prehearing exchange is not yet completed, and the information provided by Complainant therein may, to some extent, satisfy Respondent's discovery request. To the extent that it does not, after completion of the prehearing exchange, Respondent may file another motion for discovery.

Accordingly, Respondent's Motion for Discovery is **DENIED.**

ORDER

Respondent's seven Motions for Accelerated Decision are **DENIED** and Complainant's five Motions for Accelerated Decision are **GRANTED,** on the bases that the material facts are undisputed with respect to the particular issues raised in those motions, and that Complainant is entitled to judgment as a matter of law on those issues. Respondent admitted that it provided military housing to eleven named active military members and their families in eleven family housing units constructed prior to 1978 and owned by the United States at the Kingsville Naval Air Station. Respondent also admitted that these military members signed certain written agreements, entitled Residency Occupancy Agreement, with Respondent, setting forth conditions of occupancy of the units.

Under these facts, it is held that Respondent was a "lessor" which entered into "contract[s] to lease" federally owned "target housing" within the meaning of Section 1018 of Title X of the Residential Lead Based Paint Hazard Reduction Act of 1992 and 40 C.F.R. Part 745 Subpart F. Also under these facts, Respondent is a

"person" within the meaning of Section 1018(b)(5) of Title X and Section 409 of TSCA. It is also held that the regulations at 40 C.F.R. Part 745 Subpart F were effective at all times relevant to this case, that Complainant is not barred under the Paperwork Reduction Act from seeking penalties against Respondent, and that Respondent may not challenge the validity of the Subpart F regulations in an administrative enforcement proceeding. Respondent's Motion for Discovery, dated August 18, 1998, and Complainant's Motions to Strike are, for the reasons stated, **Denied.**

Complainant has not specifically requested an accelerated decision holding that Respondent is liable for the violations alleged in the Complaint as a matter of law. Moreover, it is unclear from the record, as it now stands, whether any genuine issue of material fact exists as to Respondent's liability for the alleged violations, as the prehearing exchange has not yet been completed. Therefore, any remaining issues as to Respondent's liability for the violations alleged in the Complaint, and issues as to the amounts of any penalty to assess for any violations found, are reserved for further proceedings. _____
Stephen J. McGuire
Administrative Law Judge

Washington, D.C.

1. The condition stated in the ROAs as to termination of assignment, that the resident must report to the Housing Office 30 days prior to vacating quarters to complete an Intent to Vacate Notice indicates that after the initial six months, the occupancy may be terminated at the will of the resident. Military members have no independent right to live in military housing beyond their active duty service, as Respondent asserts. December 17 Reply at 9. These facts do not preclude a finding that the ROA is a lease, as a lease may be a lease at will and may be terminable upon the occurrence of an event. Restatement of Property 2d Landlord & Tenant §§ 1.6, 1.7.

2. Arguably, the military members' service in the Navy may be considered as payment for military housing. *See, Folgueras v. Hassle,* 331 F.Supp. 615 (W.D. Mich 1971) (migrant workers' service pays for their rent-free housing while employed); *but see Jones v. United States,* 60 Ct.Cl. 552, 559 (1925)("The officer is not paid a salary and furnished a house to live in for his services; he is, on the contrary, paid a salary to live in the quarters furnished").

3. Military housing has been held to be "something less than possessory" for purposes of tax assessment. *United States v. Humboldt County, California,* 628 F.2d 549 (9th Cir. 1980)("[t]he government's right to terminate the tenancy at will makes the soldier, sailor or airman in effect a tenant at sufferance, and makes his interest something less than possessory"). However, the Ninth Circuit considered factors irrelevant to the present case, namely that if a soldier had to pay taxes on housing, his incentive to enlist would be reduced, and personnel in different states would have different tax requirements. Moreover, as discussed above, a tenancy at will does not negate the existence of a lease or a lessor-lessee relationship.

4. Another principle of statutory construction is that words used more than once in the same statute have the same meaning. *Boise Cascade Corp.* at 1432; *Sutherland* at § 46.06. The term "person" expressly includes the United States in the citizen suit provision of TSCA, Section 20(a)(1), 15 U.S.C. § 2619.

Last updated on March 24, 2014