



ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:
Investment Properties, L.L.C.
Docket No. TSCA-01-2018-0017
TSCA Appeal No. 19-01

FINAL ORDER

In February 2018, the United States Environmental Protection Agency, Region 1 ("Region") filed a Complaint against Investment Properties, L.L.C. ("Investment Properties") for violations of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689; the Residential Lead Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-4856; and implementing regulations, entitled "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property," 40 C.F.R. part 745, subpart F ("Disclosure Rule"). Administrative Complaint and Notice of Opportunity for Hearing (Feb. 6, 2018) ("Complaint"). Following Investment Properties' failure to answer the Complaint, the Regional Judicial Officer ("RJO") issued an Initial Decision and Default Order assessing an \$82,896 civil penalty. Initial Decision and Default Order (May 23, 2019) ("Default Order"). The Environmental Appeals Board ("Board") exercised its authority pursuant to 40 C.F.R. §§ 22.27(c)(4) and 22.30(b) to conduct sua sponte review because of questions it had about the assessment of the penalty, and now modifies the Default Order to reduce the penalty to \$78,888. Order Electing to Exercise Sua Sponte Review and Establishing Briefing Schedule (July 3, 2019) ("Order Exercising Sua Sponte Review").

The Complaint and Default Order identified twenty violations of TSCA section 409, 15 U.S.C. § 2689, for Investment Properties' failure to comply with the Disclosure Rule when leasing nine residential apartments. Complaint ¶¶ 12, 25, 37, 49, at 3, 6, 8, 10; Default Order ¶¶ 12, 29-31, at 4, 6-7. The Complaint further proposed and the Default Order assessed an \$82,896 penalty, based on the statutory factors and EPA's residential lead-based paint disclosure rule penalty policy. Complaint ¶¶ 50-51, at 10-11; Default Order at 7-9; *see* Waste & Chem. Enf't Div., U.S. EPA, *Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy* (Dec. 2007) ("Penalty Policy"), [www.epa.gov/sites/production/files/documents/1018erpp-1207.pdf](http://www.epa.gov/sites/production/files/documents/1018erpp-1207.pdf).

As noted by both the Region and the RJO, the disclosure rule penalty policy considers the risk factors for exposure to lead-based paint and lead-based paint hazards. Under the policy, the potential for harm is measured by, among other things, the age of children living in the residential housing. Specifically, the harmful effect that lead can have on children "under the age of six" is categorized as "major" harm. The harmful effect that lead can have on children "between the ages of six and eighteen" is categorized as "significant" harm. Complaint attach. A at 1-2, 4; Default Order at 9; Penalty Policy at 13. Here, however, the Region and the RJO treated two of the violations as "major" although the youngest child living in the residence was aged six. Complaint attach. A at 3, 5; Default Order at 11, 14. If the two violations had been categorized as "significant," the total penalty would have been reduced by \$4,008 to \$78,888.

As the Board noted in its Order Exercising *Sua Sponte* Review, the Region and the RJO have the discretion to depart from a penalty policy in a specific case, but if they do so, the reasons for departure must be adequately explained. *See In re FRM Chem, Inc.*, 12 E.A.D. 739, 752-53 (EAB 2006) (describing discretion to depart from penalty policies and guidance and

requirement to adequately explain departures); 40 C.F.R. § 22.27(b); *cf. Keo Chan v. Gonzales*, 413 F.3d 161, 164 (1st Cir. 2005) (agency decision “must be upheld unless it was made without a rational explanation, [or] inexplicably departed from established policies” (quoting *Ven v. Ashcroft*, 386 F.3d 357, 360 (1st Cir. 2004))); *Telecomms. Research & Action Ctr. v. F.C.C.*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) (“When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms.”). The Board therefore requested that the Region file a brief addressing the application of the penalty policy to these two violations where the youngest child living in the residence was aged six and whether the violations should have been “significant” or “major.” Order Exercising *Sua Sponte* Review at 3. If the Region’s position was that these two violations should have been categorized as “major,” the Board requested that the Region provide its reasons for departing from the penalty policy in this instance. *Id.*

In response, the Region stated that “the categorization of these penalties as ‘major’ was an error, and that these penalties should have been characterized as ‘significant.’” Region 1’s Response to the Board’s *Sua Sponte* Review 1 (Aug. 1, 2019). As such, the Region agreed that “the total penalty assessed should be reduced by \$4,008 to \$78,888.” *Id.* at 1-2.

In an enforcement proceeding, the Board has the authority to “adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed.” 40 C.F.R. § 22.30(f). The regulations further authorize the Board to assess a penalty, “except that \* \* \* [in] a default order, the [Board] may not increase the amount of the penalty above that proposed in the complaint.” *Id.*

Based on the foregoing, the Board modifies the Default Order to assess a total civil penalty of \$78,888.<sup>1</sup> Within thirty days after issuance of this Final Order, consistent with 40 C.F.R. § 22.31(b) and (c), Investment Properties shall submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of **\$78,888.00** in one of the following ways:

**CHECK PAYMENTS:**

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

**WIRE TRANSFERS:**

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

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<sup>1</sup> In its Order Exercising *Sua Sponte* Review, the Board also noted that the Default Order contained an apparent typographical error. Order Exercising *Sua Sponte* Review at 3 n.2. In two paragraphs, the Default Order identified as a violation the failure to provide an EPA-approved lead hazard pamphlet to lessees at 184 Bartlett Street #1. Default Order ¶¶ 26, 29, at 6. Otherwise, the Default Order and the Complaint list this pamphlet violation as occurring at 141 Bartlett Street #1, and there are no other references in the pleadings to 184 Bartlett Street #1. See Default Order at 10; Complaint ¶¶ 16, 23, at 4-5; Complaint attach. A at 2. The Region has confirmed that the references to 184 Bartlett Street #1 are typographical errors, and the Board therefore modifies Paragraphs 26 and 29 of the Default Order to refer instead to 141 Bartlett Street #1.

**OVERNIGHT MAIL:**

U.S. Environmental Protection Agency  
Cincinnati Finance Center  
Government Lockbox 979077  
1005 Convention Plaza  
Mail Station SL-MO-C2-GL  
St. Louis, MO 63101  
Contact: 314-418-1818

**ON LINE PAYMENT:**

There is now an On-Line Payment Option, available through the U.S. Department of Treasury. This payment option can be accessed from the information below:

WWW.PAY.GOV  
Enter "sfo 1.1" in the search field. Open form and complete required fields.

Additional payment guidance is available at: [www.epa.gov/financial/makepayment](http://www.epa.gov/financial/makepayment).

Investment Properties shall note on the check the title and docket number of this administrative action. Investment Properties shall serve photocopies of any check or written notification confirming electronic fund transfer or on-line payment to:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 1  
Five Post Office Square  
Mail Code 04-6  
Boston, MA 02190-3912

and

Audrey Zucker  
Enforcement Counsel  
U.S. Environmental Protection Agency, Region I  
Five Post Office Square, Suite 100  
Boston, MA 02190-3912

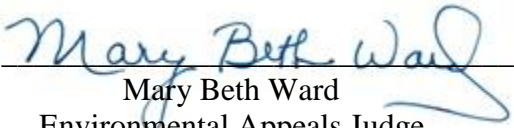
Each party shall bear its own costs in bringing or defending this action.

Should Investment Properties fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will be assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).<sup>2</sup>

So ordered.<sup>3</sup>

**ENVIRONMENTAL APPEALS BOARD**

Dated: August 13, 2019

By:   
Mary Beth Ward  
Environmental Appeals Judge

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<sup>2</sup> Following issuance of the Board's Order Exercising *Sua Sponte* Review, Frederick Lockwood of Investment Properties called the Clerk of the Board and left a voicemail stating that he was in bankruptcy court. As the Board has noted in previous cases, the automatic stay provision of section 362(a) of the Bankruptcy Code does not limit the government's power to determine the amount of the penalty, but only the government's ability to collect on a resulting money judgment outside of the bankruptcy proceeding. *In re Munce's Superior Petroleum Prods., Inc.*, 15 E.A.D. 746, 750-55 (EAB 2012); *see* 11 U.S.C. § 362(a).

<sup>3</sup> The three-member panel deciding this matter is composed of Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

**CERTIFICATE OF SERVICE**

I certify that copies of the foregoing *Final Order* in the matter of Investment Properties, L.L.C., TSCA Appeal No. 19-01, were sent to the following persons in the manner indicated:

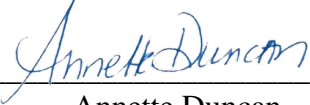
**By E-mail:**

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Dated: August 13, 2019

  
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Annette Duncan  
Administrative Specialist