

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

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

**ORDER ELECTING TO EXERCISE SUA SPONTE REVIEW
AND ESTABLISHING BRIEFING SCHEDULE**

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, 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 and assessed a \$82,896 penalty. Initial Decision and Default Order (May 23, 2019) (“Default Order”).

The Environmental Appeals Board (“Board”) has preliminarily examined the Default Order and is exercising its authority pursuant to 40 C.F.R. §§ 22.27(c)(4) and 22.30(b).¹ This

¹ Under the regulations governing the assessment of civil penalties, 40 C.F.R. part 22, the Board has forty-five days after service on the parties of an initial decision to exercise *sua sponte* review. 40 C.F.R. §§ 22.27(c), .30(b). As the Regional Hearing Clerk served the Default Order

Order constitutes notice of the Board's intent to review the Default Order on one issue: whether the penalties for Counts II and III are consistent with the penalty policy applicable to the violations in this case.

As noted by both the Region and the RJO, the penalty policy applicable to the violations in this case considers the risk factors for exposure to lead-based paint and lead-based paint hazards. Under the applicable penalty 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; *see* U.S. EPA, *Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy* 13 (Dec. 2007), <https://www.epa.gov/sites/production/files/documents/1018erpp-1207.pdf>.

Both the Region and the RJO calculated the penalties using the applicable penalty policy and noted no exceptions to the policy's application in calculating penalties in this case. Complaint attach. A at 1-2, 4; Default Order at 9. The Region and the RJO have the discretion to depart from a penalty policy in a specific case so long as the reasons for departure are adequately explained. *See In re FRM Chem, Inc.*, 12 E.A.D. 739, 752-53 (EAB 2006) (describing discretion

on the parties on May 23, 2019, the Board's exercise of *sua sponte* review is timely. The Board further notes that although the Regional Hearing Clerk certified that the Default Order was also sent to the Board on May 23, 2019, as required by 40 C.F.R. § 22.27(a), the Board did not receive the Default Order until June 24, 2019, in a parcel mailed from the Region on June 21, 2019. The Regional Hearing Clerk advised the Board that the delay was an oversight and that, in the future, the Board will be timely served.

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”); *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.”). However, it appears that the Region proposed and the RJO assessed penalties in two instances where the youngest child in the residence was aged six, and yet categorized the harm as “major” rather than as “significant” without any explanation for the departure from the penalty policy. Specifically, in Counts II and III, the Region and the RJO treated the two violations involving the residence at 166 Bartlett Street #3 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.

The Board therefore requests 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.” If the Region’s position is that these two violations should have been categorized as “major,” the Region shall provide its reasons for departing from the penalty policy in this instance.²

² The Board notes that the Default Order also contains an apparent typographical error in connection with Count I (failure to provide an EPA-approved lead hazard information pamphlet). In two paragraphs, the Default Order identifies 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.

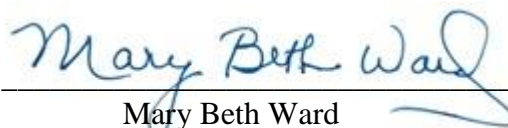
The Region's brief shall be filed on or before **Monday, July 15, 2019**. Investment Properties may file a response brief on or before **Monday, July 22, 2019**.

Pursuant to 40 C.F.R. § 22.6, the Board may also use e-mail (Clerk_EAB@epa.gov) to serve orders and decisions in this matter. Parties shall promptly file a notice in this matter informing the Board and the other parties if their e-mail addresses change.

So ordered.³

ENVIRONMENTAL APPEALS BOARD

Dated: July 3, 2019

By: 
Mary Beth Ward
Environmental Appeals Judge

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. It appears that this typographical error was imported into the Default Order by the RJO from language in the Region's Proposed Default Order, which was attached to its Motion for Default Order. *See* Proposed Default Order ¶ 18, at 3. The Board directs the Region to advise the Board in its brief if the Board's reading of the pleadings is correct and, if not, what the correct reading is and whether that reading has any impact on the assessment of a penalty under Count I.

³ The three-member panel deciding this matter is composed of Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Electing to Exercise Sua Sponte Review and Establishing Briefing Schedule* 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 First Class Certified Mail/Return Receipt Requested:

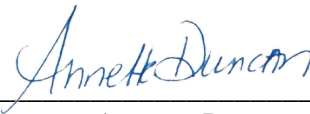
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Dated: July 3, 2019



Annette Duncan
Administrative Specialist