UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

IN THE MATTER OF:	)	
	)	
JOHN C. JONES 102 Cedar Street Roxbury, Massachusetts 02119	)	Docket No. TSCA-01-2010-0035
	)	
Respondent.	)	

PROPOSED DEFAULT ORDER

I. Introduction

This is a civil administrative proceeding instituted pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), 40 C.F.R. § 745.118, and the Consolidated Rules of Practice Governing the Administrative Assessment of Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22.

The Complainant, the United States Environmental Protection Agency ("Complainant" or "EPA") commenced this proceeding on May 6, 2010, by filing a Complaint and Notice of Opportunity to Request a Hearing ("Complaint") against Respondent, John C. Jones. The Complaint charged Respondent in five counts with fourteen (14) violations of Section 409 of TSCA, 15 U.S.C. § 2689, for failure to comply with the Lead-Based Paint Disclosure Rule ("Disclosure Rule") requirements of 40 C.F.R. Part 745, Subpart F, a rule promulgated under Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851 *et seq*. The Complaint proposed civil penalties in the amount of $84,600 against Respondent for the 14 violations. In the pending Motion for a Default Order, Complainant alleges that Respondent is in default for failure to file an Answer to the Complaint and requests that the full penalty of $84,600 be assessed, pursuant to Section 22.17(a) of the Consolidated Rules, 40 C.F.R. § 22.17(a).

Based on the record in this matter and the following Findings of Fact and Conclusions of

Law and Determination of Civil Penalty Amount, the Complainant's Motion for a Default Order is hereby GRANTED. For the reasons discussed below, Respondent is hereby found to be in default and a civil penalty in the amount of $84,600 is assessed.

II. Background

This proceeding under Section 16(a) of TSCA, 15 U.S.C. § 2615(a), was initiated by issuing a Complaint on May 6, 2010. Respondents were served with a copy of the Complaint by certified mail, return receipt requested. Rule 22.7(c) of the Consolidated Rules, 40 C.F.R. § 22.7(c), provides that service of a complaint is complete when the return receipt is signed. Therefore, service was complete on May 7, 2010. Under 40 C.F.R. § 22.15(a) of the Consolidated Rules, an Answer is due within thirty days after service of the Complaint.

In accordance with 40 C.F.R. § 22.17(a), the failure to file a timely Answer to the Complaint constitutes an admission of the facts alleged in the Complaint and grounds for the issuance of a Default Order. Forty C.F.R. § 22.17(c) provides that when the Presiding Officer finds that a party is in default, the Presiding Officer "shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued" and provides for the assessment of the proposed penalty. Consequently, I find Respondent in default for failing to answer the Complaint in this matter.

III. Findings of Fact and Conclusions of Law

Pursuant to 40 C.F.R. § 22.17(c) and based on the entire record, I make the following findings of fact:

1. At all times relevant to the Complaint, the Respondent, John Jones, was a "lessor," within the meaning of 40 C.F.R. § 745.103, of rental units located in Massachusetts at 20 Woodville Street #3 in Roxbury, 48 Edgewood Street #2 in Roxbury, 25 Southwood Street #1 in Roxbury, and 176-180 Quincy Street #2 in Dorchester.

2. The housing units that the Respondent offered for lease were constructed prior to 1978, fall within the definition of "target housing" in 40 C.F.R. § 745.103, and do not fall within any exemption to the Disclosure Rule.

3. On or about December 1, 2007, Respondent entered into a contract with a tenant with at least one child to lease 20 Woodville Street #3.

4. On or about April 1, 2007, Respondent entered into a contract with a tenant with at least one child to lease 48 Edgewood Street #2.

5. On or about July 1, 2008, Respondent entered into a contract with a tenant with at least one child to lease 25 Southwood Street #1.

6. On or about January 1, 2009, Respondent entered into a contract with a tenant with at least one child to lease 176-180 Quincy Street #2.

7. Forty C.F.R. § 745.107(a)(1) requires a lessor of target housing to provide lessees an EPA-approved lead hazard information pamphlet entitled *Protect Your Family from Lead in Your Home*, or an equivalent pamphlet approved by EPA for use in the state, before the lessee becomes obligated under any contract to lease target housing.

8. Respondent did not provide a copy of the EPA-approved lead hazard pamphlet, *Protect Your Family from Lead in Your Home*, or an EPA-approved equivalent pamphlet, to the four tenants described in paragraphs 3 through 6 above before these lessees became obligated under contracts to lease target housing from the Respondent, as required by 40 C.F.R. § 745.107(a)(1). All of these rental units were occupied by at least one child.

9. Respondent's failure to provide an EPA-approved lead hazard information pamphlet to the lessees described in paragraphs 3 through 6 above constitutes four (4) violations of 40 C.F.R. § 745.107(a)(1) and Section 409 of TSCA, 15 U.S.C. § 2689.

10. A Comprehensive Initial Inspection was conducted at 48 Edgewood Street #2 on December 14, 1991. As documented by the Childhood Lead Poisoning Prevention Program of the Massachusetts Department of Public Health, at this inspection, inspector Elton Kellman found lead paint violations on-site.

11. A Comprehensive Initial Inspection was conducted at 25 Southwood Street #1 on March 11, 2005. As documented by the Childhood Lead Poisoning Prevention Program of the Massachusetts Department of Public Health, at this inspection, inspector Warren Laskey found lead paint violations on-site. Additionally, a Post-Compliance Assessment Determination was conducted on September 1, 2005 for both 25 Southwood Street #1 and 23 Southwood Street #3, another unit in the same building. At this inspection, inspector Jack Kane found lead paint violations in the common areas of the building. These violations were documented in a Post-Compliance Assessment Determination Report.

12. Forty C.F.R. § 745.107(a)(4) requires a lessor to provide to the lessee, before the lessee becomes obligated under any contract to lease target housing, 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. This requirement includes common areas, defined in the Disclosure Rule as "portion[s] of a building generally accessible to all residents/users including, but not limited to, hallways, stairways, laundry and recreational rooms, playgrounds, community centers, and boundary fences." 40 C.F.R. § 745.107(a)(4); 40 C.F.R. § 745.103.

13. The records concerning the 1991 Comprehensive Initial Inspection and identification of violations at 48 Edgewood Street #2, the 2005 Comprehensive Initial Inspection and

identification of violations at 25 Southwood Street #1, and the 2005 Post-Compliance Assessment Determination and identification of violations at 25 Southwood Street #1, constitute records or reports pertaining to lead-based paint and/or lead-based paint hazards in the target housing being leased available to Respondent, within the meaning of 40 C.F.R. § 745.107(a)(4). Respondent did not provide these records or reports to the tenants described in paragraphs 4 and 5 above before the tenants became obligated under contracts to lease target housing from the Respondent, as required by 40 C.F.R. § 745.107(a)(4).

14. Respondent's failure to provide the tenants described in paragraphs 4 and 5 above with records and reports pertaining to lead-based paint and/or lead-based paint hazards at 48 Edgewood Street #2 and 25 Southwood Street #1 constitutes two (2) violations of 40 C.F.R. § 745.107(a)(4) and Section 409 of TSCA, 15 U.S.C. § 2689.

15. Forty C.F.R. § 745.113(b)(1) requires a lessor to include within, or as an attachment to the contract to lease target housing the "Lead Warning Statement."

16. Respondent did not include the Lead Warning Statement within, or as an attachment to, contracts to lease target housing with the tenants described in paragraphs 3, 4, and 5 above, as required by 40 C.F.R. § 745.113(b)(1).

17. Respondent's failure to include the Lead Warning Statement within, or as an attachment to, the contracts to lease target housing with the tenants described in paragraphs 3, 4, and 5 above constitutes three (3) violations of 40 C.F.R. § 745.113(b)(1) and TSCA Section 409, 15 U.S.C. § 2689.

18. Forty C.F.R. § 745.113(b)(2) requires a lessor to include within, or as an attachment to, the contract to lease target housing, 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 thereof.

19. Respondent did not include within, or as an attachment to, the contracts to lease target housing with the tenants described in paragraphs 3, 4, and 5 above, a statement by Respondent disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge thereof, as required by 40 C.F.R. § 745.113(b)(2).

20. Respondent's failure to include within, or as an attachment to, the contracts to lease target housing with the tenants described in paragraphs 3, 4, and 5 above, a statement by Respondent disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge thereof constitutes three (3) violations of 40 C.F.R. § 745.113(b)(2) and TSCA Section 409, 15 U.S.C. § 2689.

21. Forty C.F.R. § 745.113(b)(3) requires a lessor to include within, or as an attachment to,

the contract to lease target housing, a list of 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 that have been provided to the lessee or an indication that no such records or reports are available.

22. Respondent did not include within, or as an attachment to, the contracts to lease target housing with the tenants described in paragraphs 3 and 6 above, a list of any records or reports available to Respondent pertaining to lead-based paint and/or lead-based paint hazards in the target housing being leased that had been provided to the lessee or an indication that no such records or reports are available, as required by 40 C.F.R. § 745.113(b)(3).

23. Respondent's failure to include within, or as an attachment to, the contracts to lease target housing with the tenants described in paragraphs 3 and 6 above, a list of any records or reports available to Respondent pertaining to lead-based paint and/or lead-based paint hazards in the target housing being leased that had been provided to the lessee or an indication that no such records or reports are available constitutes two (2) violations of 40 C.F.R. § 745.113(b)(3) and TSCA Section 409, 15 U.S.C. § 2689.

IV. Determination of Civil Penalty Amount

In determining the amount of any penalty to be assessed, Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires the Complainant to consider the following factors: the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and other such matters as justice may require. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, and 40 C.F.R. Part 745, Subpart F, authorizes the assessment of a civil penalty under Section 16 of TSCA, 15 U.S.C. § 2615, of up to $11,000 for each violation of the Disclosure Rule occurring from July 28, 1997 through January 12, 2009, as adjusted by the Debt Collection and Improvement Act of 1996, found at 31 U.S.C. § 3701, and 40 C.F.R. Part 19.

Complainant requests the assessment of a penalty of $84,600 for the violations stated in the Complaint, based on its analysis of the particular facts and circumstances of this case with specific reference to EPA's guidelines for penalties under TSCA, entitled *Section 1018 Disclosure Rule Enforcement Response and Penalty Policy* ("ERPP") and dated December 2007. Section 22.17(c) of the Consolidated Rules provides, in pertinent part, that upon issuing a default order, "[t]he relief proposed in the complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or [the statute authorizing the proceeding.]" 40 C.F.R. § 22.17(c). I have considered the statutory criteria at 15 U.S.C. § 2615(a)(2)(B) and the guidance of the ERPP in light of the facts of this case, and I have found that the proposed penalty of $84,600 is not inconsistent with TSCA, the Residential Lead-Based Paint Hazard Reduction Act, the Disclosure Rule, or the ERPP.

Under the ERPP, penalties against responsible parties are determined in two stages: (1)

determination of a "gravity-based penalty," and (2) adjustments to the gravity-based penalty. The gravity refers to the overall seriousness of the violation, and the gravity-based penalty is determined by considering the nature and circumstances of the violation, and the extent of harm that may result from the violation. The ERPP assigns a "circumstance level" to each type of violation, and an "extent" to each type of violation, and the combination of circumstance level and extent determines the gravity-based penalty for each violation of the Disclosure Rule. Under the ERPP the "nature" of violations of the Disclosure Rule is a factor incorporated into the consideration of the "circumstances" and "extent" of the violations.

The "circumstance level" of the violation reflects the probability that a buyer or lessee of the property will suffer harm based on the particular violation. The harm under the ERPP is the degree to which the buyer or lessee is denied the ability to properly assess and weigh the potential for human health risk from exposure to lead-based paint when entering into a transaction to buy or lease target housing. Circumstance levels range from 1 to 6, "Level 1 or 2" having the highest potential for impairing a tenant's ability to assess information required to be disclosed; "Level 3 or 4" having a medium potential for impairing a tenant's ability to assess information required to be disclosed; and "Level 5 or 6" having the lowest potential for impairing a tenant's ability to assess information required to be disclosed.

The record in this case supports a finding that Respondent's four (4) violations of 40 C.F.R. § 745.107(a)(1), failing to provide the lead hazard information pamphlet, resulted in a high probability of impairing his tenants' ability to assess the potential for exposure to lead-based paint, and therefore, that it is appropriate to categorize these violations as Circumstance Level 1 for purposes of calculating the penalty. The record in this case supports a finding that Respondent's two (2) violations of 40 C.F.R. § 745.107(a)(4), failing to provide records or reports pertaining to the presence of lead-based paint or lead based paint hazards in the target housing, also resulted in a high probability of impairing his tenants' ability to assess the potential for exposure to lead-based paint, and therefore, that it is appropriate to categorize these violations as Circumstance Level 1 for purposes of calculating the penalty. The record in this case supports a finding that Respondent's three (3) violations of 40 C.F.R. § 745.113(b)(1), failing to include the "Lead Warning Statement" within, or as an attachment to, contracts to lease target housing, also resulted in a high probability of impairing his tenants' ability to properly assess the risks associated with exposure to lead-based paint, and therefore, that it is appropriate to categorize these violations as Circumstance Level 2 for purposes of calculating the penalty. The record in this case supports a finding that Respondent's three (3) violations of 40 C.F.R. § 745.113(b)(2), failing to include a statement of knowledge of lead-based paint and/or lead-based paint hazards within, or as an attachment to, the contract to lease target housing, resulted in a medium probability of impairing his tenants' ability to properly assess the risks associated with exposure to lead-based paint, and therefore, that it is appropriate to categorize these violations as a Circumstance Level 3 for purposes of calculating the penalty. Finally, the record in this case supports a finding that Respondent's two (2) violations of 40 C.F.R. § 745.113(b)(3), failing to include within the lease contract, or as an attachment thereto, a list of records pertaining to lead-based paint and/or lead-based paint hazards in the target housing that have been provided to the

lessee or to indicate that no such list exists, resulted in a medium probability of impairing his tenants' ability to properly assess the risks associated with exposure to lead-based paint, and therefore, that it is appropriate to categorize these violations as Circumstance Level 5 for purposes of calculating the penalty.

Under the ERPP, the "extent" of harm is determined to be major, significant, or minor, depending on whether the risk factors are high for childhood lead poisoning to occur as the result of the violation. "Extent" is determined by two facts: the age of any children living in the target housing at the time of the lease, and whether a pregnant woman lives in the target housing. A violation involving a unit where a pregnant woman or children under the age of six resides is considered a "Major" extent level because such a violation has the potential to cause serious damage to human health. A violation involving a unit where children aged six to eighteen years old resides is considered a "Significant" extent level because such a violation has the potential to cause significant damage to human health. A violation involving a unit where no child under eighteen years of age resides is considered a "Minor" extent level. The ERPP provides that where the age of the youngest individual residing in target housing is not known, EPA may use the "significant" extent level for purposes of calculating the penalty.

The record in this case supports a finding that each of Respondent's violations are considered to have a "significant" extent of harm under the ERPP because the tenants each occupied their apartments with children whose ages are not known to EPA. <u>See</u> ERPP at 13.

After calculating the gravity-based penalty, the ERPP provides for consideration of additional factors, consistent with TSCA: (1) the ability to pay/ability to continue in business; (2) any history of prior violations; (3) the degree of culpability; and (4) such other factors as justice may require, including the violator's attitude, supplemental environmental projects, voluntary disclosure, potential for harm due to risk of exposure, litigation risk, and size of business.

Complainant does not seek, and I do not find that the record supports, any upward adjustment of the gravity-based penalty for a history of violations. Further, despite evidence in the record that might support an upward adjustment of the gravity-based penalty for degree of culpability, Complainant does not seek an adjustment for this factor and I do not impose one.

With respect to Respondent's ability to pay and ability to continue to do business, I find that Respondent has waived any claim that he cannot afford to pay the penalty. The record reflects that Respondent had ample opportunity to raise and substantiate an inability-to-pay claim, both after filing the Complaint (when EPA supplied Respondent with a list of required financial documentation) and again during subsequent discussions between the parties. Respondent has not provided the necessary financial documentation.

Although EPA has the duty to make a *prima facie* showing that the penalty is appropriate based on a consideration of all of the statutory factors, including a respondent's ability to pay, EPA may *presume* that the respondent has an ability to pay the penalty if it has not been put at

issue by the respondent. See In re New Waterbury, Ltd., 5 E.A.D. 529, 541 (EAB 1994). See also In re Cutler, 11 E.A.D. 622, 632 (EAB 2004); In re CDT Landfill Corp., 11 E.A.D. 88, 122 (EAB 2003); In re Spitzer Great Lakes, 9 E.A.D. 320, 321 (EAB 2000), quoting In re New Waterbury, 5 E.A.D. at 541. The burden is then on the respondent to raise and support any claim of inability to pay by providing the relevant evidence. See Spitzer Great Lakes, 9 E.A.D. at 321. This is "because the Agency's ability to gather the necessary financial information about a respondent is limited, and the respondent is in the best position to obtain the relevant financial records about its own financial condition." CDT Landfill Corp., 11 E.A.D. at 122, citing New Waterbury, 5 E.A.D. at 540. If a respondent fails to properly notify EPA that it plans to assert an inability-to-pay claim or fails to produce supporting financial information, then the Presiding Officer has the discretion to waive consideration of the ability to pay factor. See In re Chempace Corp., 9 E.A.D. 119, 133 n.20 (EAB 2000); New Waterbury, 5 E.A.D. at 542 ("[W]here a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived . . . ."). Once a respondent places ability to pay at issue, EPA need only "rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced." CDT Landfill, 11 E.A.D. at 122, quoting New Waterbury, 5 E.A.D. at 542–43. At that point, "the burden of production shifts to the respondent to rebut the complainant's evidence with specific information of its own" that it lacks the ability to pay the penalty. Cutler, 11 E.A.D. at 632; see New Waterbury, 5 E.A.D. at 543. If the respondent does not produce evidence sufficient to support an inability-to-pay assertion, the Presiding Officer "may decide that the penalty is appropriate, at least with respect to the ability to pay issue." CDT Landfill, 11 E.A.D. at 122, citing In Re Lin, 5 E.A.D. 595, 599 (EAB 1994). If the respondent does counter with specific information supporting his claim, the burden shifts back to EPA to rebut this evidence through additional evidence or cross-examination. See Cutler, 11 E.A.D. at 632, citing Chempace, 9 E.A.D. at 133.

The record indicates that while Respondent may have suggested in discussions that he did not have the ability to pay the proposed penalty, he declined to support that claim by providing Complainant with the information needed for EPA to assess it. Accordingly, I find that Respondent has not raised, and so has waived, any claim of inability to pay. Further, the record reveals that Complainant considered the limited information available to it regarding Respondent's financial status, which included Respondent's significant real estate holdings and which suggested significant rental income. Therefore, even had Respondent successfully placed ability to pay at issue in this case, Complainant has shown that it relied on, at least, "general financial information" sufficient to "support the inference that the penalty assessment need not be reduced." CDT Landfill, 11 E.A.D. at 122, quoting New Waterbury, 5 E.A.D. at 542–43. Respondent has not rebutted this evidence with specific contrary evidence of his own. I find that there is no basis for reducing the penalty sought on ability-to-pay grounds. See id.

I have considered the record in this case in light of other such factors as justice may

require and have found that no further adjustments to the gravity-based penalty are warranted.

Having found that Respondent violated TSCA in fourteen (14) instances, and having considered the statutory penalty assessment criteria and the ERPP, I have determined that the proposed penalty of $84,600 is the appropriate civil penalty to be assessed against Respondent because it is neither clearly inconsistent with the record of the proceeding nor with the Residential Lead-Based Paint Hazard Reduction Act of 1992, TSCA, or the Disclosure Rule. In doing so, I have considered the nature, circumstances, extent, and gravity of the violation or violations and, with respect to Respondent, the ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and other such matters as justice may require, which are all the factors identified by TSCA Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

In assessing this penalty, I find persuasive the rationale for the calculation of the assessed penalty set forth in the Complaint and in the Complainant's Memorandum in Support of Its Motion for a Default Order filed in this proceeding and incorporate such rationale by reference into this Order.

V. Order

Pursuant to the Consolidated Rules, including 40 C.F.R. § 22.17, a Default Order and Initial Decision in hereby ISSUED and Respondent is hereby ORDERED, as follows:

(1) Respondent is assessed a civil penalty in the amount of $84,600;
(2) Respondent shall, within thirty (30) days after this Initial Decision becomes final, pay the civil penalty by submitting a bank, certified, or cashier's check in the amount of $84,600, payable to "Treasurer, United States of America." Respondent should note on the check the docket number for this matter (EPA Docket No. TSCA-01-2010-0035). The check shall be mailed to:

U.S. Environmental Protection Agency
Fines & Penalties
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

In addition, at the time of payment, notice of payment and copies of the check should be forwarded to:

Wanda I. Santiago, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 10
Mail Code ORA18-1
Boston, MA 02109-3912

and

Christine Foot, Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Mail Code OES04-2
Boston, MA 02109-3912

(3) A transmittal letter identifying the subject case and EPA docket number as well as Respondent's name and address, must accompany the check and copies.

(4) If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. See 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

(5) Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings, unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this initial decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this initial decision is served upon the parties, pursuant to 40 C.F.R. § 22.30(a); (3) a party moves to set aside a default order that institutes an initial decision; or (4) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

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Jill T. Metcalf
Regional Judicial Officer

Dated: