UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
5 POST OFFICE SQUARE, SUITE 100
BOSTON, MA 02109-3912

HAND DELIVERED

September 2, 2010

Ms. Wanda Santiago
Regional Hearing Clerk (ORA18-1)
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

RE: In the Matter of John Laughter; Docket No. TSCA-01-2010-0007

Dear Ms. Santiago:

Enclosed for filing in the above referenced matter are an original and one copy of the following documents:

-Motion for Default Order;
-Complainant's Memorandum in Support of Motion for Default Order; and
-Proposed Default Order.

I have sent by certified mail a copy of these documents to Mr. Laughter on September 2, 2010, and the original and one copy of the certificate of service is also enclosed.

Please contact me at 617-918-1438 with any questions.

Sincerely,

Sarah Meeks
Enforcement Counsel

Enclosures

In the Matter of John Laughter
EPA Docket No. TSCA-01-2010-0007

CERTIFICATE OF SERVICE

I certify that the following documents (1) Complainant's Motion for Default Order, (2) Complainant's Memorandum in Support of Motion for Default Order, and (3) Proposed Default Order were sent to the following persons, in the manner specified, on the date below:

Original and one copy,
hand-delivered:

Wanda Santiago
Regional Hearing Clerk (ORA18-1)
U.S. EPA, Region I
Five Post Office Square, Suite 100
Boston, MA 02109-3912

Copy by Certified Mail,
Return Receipt Requested:

John Laughter
17 Gano Avenue
Johnston, RI 02919

Dated: 9/2/10

Sarah Meeks
Enforcement Counsel
U.S. Environmental Protection Agency
Region 1
Five Post Office Square, Suite 100
Mail Code: OES04-3
Boston, MA 02109-3912
Tel (617) 918-1438
FAX (617) 918-0438

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

IN THE MATTER OF:	Docket No. TSCA -01-2010-0007
JOHN LAUGHTER 17 Gano Avenue Johnston, Rhode Island 02919	
Respondent.	

MOTION FOR DEFAULT ORDER

The Complainant, the United States Environmental Protection Agency, Region I ("EPA"), moves for the issuance of an order under 40 C.F.R. § 22.17, finding that Respondent John Laughter is in default in the matter captioned above, finding that Respondent violated Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689 (TSCA), by failing to comply with the Lead-Based Paint Disclosure Rule, 40 C.F.R. Part 745, Subpart F, and assessing a penalty of $30,960.

In support of its motion, EPA submits the attached Memorandum in Support of Motion for Default Order, with Exhibits 1 through 15, and a Proposed Default Order.

Respectfully submitted,

Sarah Meeks
Enforcement Counsel

Date: 9/2/10

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

IN THE MATTER OF: JOHN LAUGHTER 17 Gano Avenue Johnston, Rhode Island 02919 Respondent.	Docket No. TSCA 01-2010-0007

PROPOSED DEFAULT ORDER

I. Introduction

Complainant, the United States Environmental Protection Agency, Region I ("EPA") initiated this proceeding on January 19, 2010, by filing an Administrative Complaint and Notice of Opportunity for a Hearing ("Complaint") against Respondent, John Laughter. The Complaint charged Respondent with four violations of Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689 ("TSCA"), for failure to comply with the Lead-Based Paint Disclosure Rule ("Disclosure Rule") requirements of 40 C.F.R. Part 745, Subpart F (40 C.F.R. §§ 745.100-745.119). The Disclosure Rule was promulgated under Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851 *et seq*. (the "Act"). The Complaint proposed civil penalties of up to $11,000 for each violation against Respondent.

In August 2010, Complainant filed a motion for default stating that Respondent had failed to file a timely answer to the Complaint, and requested a penalty of $30,960 be

imposed against Respondent.

Based on the record in this matter and for the reasons discussed below, Respondent is found in default pursuant to Section 22.17(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. § 22.17(a), and is assessed a penalty of $30,960.

II. Findings of Fact and Conclusions of Law

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

1. Complainant is the United States Environmental Protection Agency, Region I.

2. Respondent is John Laughter, a lessor under 40 C.F.R. § 745.103.

3. At all times relevant, Respondent owned and offered for lease four residential apartment units at 92 Benefit Street and 290 Rathbun Street, Woonsocket, Rhode Island.[1]

4. The buildings at 92 Benefit Street and 290 Rathbun Street were constructed prior to 1978 and meet the definition of target housing under 40 C.F.R. § 745.103.

5. Unit 2 at 92 Benefit Street in Woonsocket, Rhode Island was subject to a lead inspection on December 1, 1999. From this inspection, an Environmental Lead Inspection Report ("RWE Report") was generated.

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1 290 Rathbun Street, Woonsocket, Rhode Island is referred to in several records as 288 or 292 Rathbun Street. The addresses 288, 290, and 292 Rathbun Street all belong to one building, and the City of Woonsocket's assessors office refers to the property as 290 Rathbun Street.

6. On January 17, 2001, the Rhode Island Department of Health ("RIDOH") issued a Notice of Violation ("NOV") under Rhode Island's Lead Poisoning Prevention Act to Respondent for lead hazard violations in 92 Benefit Street, Unit 2 and ordered abatement of the violations. The violations included lead hazards from a rear hall, exterior siding/trim, and soil. These areas are considered common areas under 40 C.F.R. § 745.103.

7. A Certification of Lead-Safe Status (interior only) dated March 27, 2001, was issued by RIDOH, and a Certification of Lead-Safe Status (exterior and soil) dated May 13, 2003, was issued by RIDOH.

8. Unit 2 at 288 Rathbun Street in Woonsocket, Rhode Island was subject to a lead inspection on December 28, 1999. From this inspection, an Environmental Lead Inspection Report ("ELD Report") was generated.

9. On January 25, 2000, RIDOH issued a NOV under Rhode Island's Lead Poisoning Prevention Act to Respondent for lead hazard violations in 288 Rathbun Street, Unit 2 Left and ordered abatement of the violations. The violations included lead hazards from common stairwells and porches, exterior trim, and soil. These areas meet the definition of common areas under 40 C.F.R. § 745.103.

10. On March 21, 2001, a Certification of Lead-Safe Status (interior only) was issued, and on October 22, 2001, a Certification of Lead-Safe Status (exterior and soil) was issued by the RIDOH.

11. Section 107(a)(4) of the Disclosure Rule 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. § 745.103.

12. The RIDOH notices and certificates, and ELD and RWE Reports referred to paragraphs 5 through 10 constitute "records or reports pertaining to lead-based paint or lead-based paint hazards" within the meaning of 40 C.F.R. § 745.107(a)(4).

13. These records were "available" to Respondent within the meaning of 40 C.F.R. § 745.103 prior to November 2006.

14. On or about November 5, 2006, Respondent leased 92 Benefit Street, Fourth Floor to one tenant.

15. On or about October 27, 2007, Respondent leased 290 Rathbun Street, Third Floor front (part of the 288-292 Rathbun Street property) to two tenants.

16. On or about January 1, 2008, Respondent leased 290 Rathbun Street, Third Floor rear (part of the 288-292 Rathbun Street property) to two tenants.

17. On or about April 13, 2008, Respondent leased 92 Benefit Street, First Floor to two tenants.

18. Respondent failed to provide available records or reports pertaining to the presence of lead-based paint or lead based paint hazards in the target housing to the lessees listed in paragraphs 13 to 16 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)(4), and therefore, Respondent violated 40 C.F.R. § 745.107(a)(4)

on four occasions.

19. Complainant requested information from Respondent regarding the ages of children living in the apartment units listed in paragraphs 13 to 16 above in a letter dated June 24, 2008 and a subpoena dated September 9, 2008. Respondent failed to respond to either of these requests.

20. Complainant filed the Complaint alleging four violations of 40 C.F.R. § 745.107(a)(4) with the Regional Hearing Clerk on January 19, 2010.

21. The Complaint was served on Respondent by first class certified mail, in accordance with Rule 22.5 of the Consolidated Rules of Practice, 40 C.F.R. § 22.5.

22. Respondent signed a receipt for delivery on January 22, 2010.

23. Respondent has not filed an answer to the Complaint.

24. Pursuant to Rule 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. Part 22.17(a), a party may be found in default upon the failure to file a timely answer to a complaint. Default by a respondent constitutes an admission of the facts alleged in the complaint and a waiver of the right to contest such facts.

III. Determination of the Civil Penalty Amount

25. Section 1018(b)(5) of the Act and the Section 745.118(f) of the Disclosure Rule, authorize 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 for violations occurring after July 28, 1997.[2]

26. Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires that the

2 For violations occurring after January 12, 2009, the penalty for each violation shall be no more than $16,000. 73 Fed. Reg. 75340 (December 11, 2008).

following factors be considered in determining the amount of any penalty assessed under Section 16: 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. EPA has issued guidelines for penalties under TSCA that incorporate the statutory factors listed above titled *Section 1018 Disclosure Rule Enforcement Response and Penalty Policy* ("ERPP"), dated December 2007 and updated by 73 Fed. Reg. 75340 (December 11, 2008).

27. 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 have found that the proposed penalty of $30,960 is an appropriate penalty.

28. Under the ERPP, penalties 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. The combination of circumstance level and extent determines the gravity-based penalty for each violation of the Disclosure Rule.

29. 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 record in this case supports a finding that Respondent's failure to provide to lessees the records referred to in paragraphs 5 though 10 above, resulted in a high probability of

impairing the ability of the lessees to assess the potential for exposure to lead-based paint. Without this information, the tenants could not accurately assess the potential for exposure to lead-based paint hazards. Therefore, it is appropriate to categorize such violations as Circumstance Level 1 for purposes of calculating the penalty.

30. 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 any pregnant women live in the target housing. The ERPP provides that where the age of the youngest individual residing in target housing is not known that EPA may use the Significant extent factor for purposes of calculating its penalty.

31. The record in this case supports a finding that all Respondent's violations are considered Significant extent under the ERPP. At this time, the ages of any children residing in the target housing units at issue are not known to Complainant despite its attempts to obtain this information.

32. Four violations at the Level I circumstance level and with a Significant extent factor warrant a penalty of $30,960 under the ERPP.

33. I have considered the record in this case in light of the remaining statutory penalty factors, and have found that no further adjustments to the gravity-based penalty are warranted.

34. The proposed penalty of $30,960 is an appropriate civil penalty to be assessed against Respondent because it fully supported by the statutory factors under TSCA to determine a civil penalty. 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 of Law filed in this proceeding and incorporate such rationale by reference into this Order.

IV. Order

Pursuant to the Consolidated Rules of Practice, 40 C.F.R. § 22.17(c), a Default Order and Initial Decision is hereby ISSUED and Respondent is order to comply with all the terms of this Order:

1. Respondent is assessed and shall make payment of a penalty in the amount of $30,960.

2. Payment shall be made within 30 days after this Default Order becomes final pursuant to 40 C.F.R. § 22.27(c), by submitting a certified or cashier's check in the amount of $30,960, payable to "Treasurer, United States of America," and mailed to:

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

A transmittal letter identifying the subject case and EPA docket number as well as Respondent's name and address, must accompany the check, and a copy of the payment shall be mailed to:

Regional Hearing Clerk
U.S. EPA, Region I
5 Post Office Square, Suite 100 (ORA18-1)
Boston, MA 02109-3912

3. This Default Order constitutes an initial decision under 40 C.F.R.

§§ 22.17(c) and 22.27(c), and shall become a final order 45 days after its service upon the parties unless: (1) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; (2) a party moves to set aside this Order, pursuant to 40 C.F.R. § 22.27(c)(3); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

IT IS SO ORDERED.

Dated:

_____
Jill T. Metcalf
Acting Regional Judicial Officer

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

IN THE MATTER OF:	Docket No. TSCA 01-2010-0007
JOHN LAUGHTER 17 Gano Avenue Johnston, Rhode Island 02919	
Respondent.	

COMPLAINANT'S MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT ORDER

The Complainant, the United States Environmental Protection Agency, Region I ("EPA"), has moved for the issuance of an order 1) finding that Respondent John Laughter is in default in the matter captioned above, 2) finding that Respondent violated Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the "Act"), 42 U.S.C. § 4851 *et seq*., and the federal regulations promulgated thereunder, set forth in 40 C.F.R. Part 745, Subpart F ("Lead-Based Paint Disclosure Rule" or "Disclosure Rule"), and 3) assessing a penalty of $30,960.

I. Respondent Should Be Found In Default

A party may be found in default after motion, upon failure to file a timely answer to the complaint under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. § 22.17. The Consolidated Rules of

Practice allow 30 days after service of the complaint for a respondent to file an answer. 40 C.F.R. § 22.15(a).

The Complaint in this action was filed with the Regional Hearing Clerk on January 19, 2010. In the Complaint, EPA alleged that Respondent violated TSCA Section 409, the Act, and the Disclosure Rule, and that Respondent is therefore subject to penalties under TSCA Section 16, 15 U.S.C. § 2689. A copy of the Complaint is attached as Exhibit 1. The Complaint was served on Respondent by first class certified mail, and Respondent signed a receipt for delivery on January 22, 2010. See Exhibit 2. The Consolidated Rules of Practice state that service of the complaint is complete when the return receipt is signed. 40 C.F.R. § 22.7(c). Accordingly, service was complete on January 22, 2010.

Respondent has not filed an answer or made any response to the Complaint, and the 30-day period for filing an answer lapsed on February 22, 2010. See 40 C.F.R. § 22.15(a). Because Respondent has not filed a timely answer to the Complaint, Respondent should be found in default. Such default constitutes an admission of all facts alleged in the Complaint and a waiver of any rights to contest the factual allegations of the Complaint. 40 C.F.R. § 22.17(a).

II. Respondent's Actions Violated TSCA, the Act, and the Lead-Based Paint Disclosure Rule

The following legal and factual grounds support a finding that the Complaint establishes a prima facie case that Respondent violated TSCA Section 409, the Act, and the Lead-Based Paint Disclosure Rule, as required by 40 C.F.R. § 22.17(b).

A. Legal Standards

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the "Act"), 42 U.S.C. § 4851 *et seq.*, in response to findings that low-level lead poisoning is widespread among American children. In 1996, EPA promulgated regulations to implement the Act. These regulations are set forth at 40 C.F.R. Part 745, Subpart F and known as the Lead-Based Paint Disclosure Rule or simply, the Disclosure Rule.

The Disclosure Rule requires sellers and lessors of "target housing" (defined below) to, among other things:

(a) provide to purchasers and lessees a lead hazard information pamphlet;

(b) disclose to purchasers and lessees, prior to their becoming obligated under any contract to purchase or lease target housing, the presence of any known lead-based paint and/or lead-based paint hazards;

(c) provide records or reports available to the lessor or seller pertaining to lead-based paint or lead-based paint hazards in the housing; and

(d) ensure that the contract to lease or sell includes the following items:

(i) a Lead Warning Statement;

(ii) a statement by the lessor or seller disclosing the presence of known lead-based paint or lead-based paint hazards, or indicating no knowledge thereof;

(iii) a list of any available records or reports pertaining to lead-based paint or lead-based paint hazards in the housing that have been provided to the lessee or purchaser, or an indication that no such records exist; and

(iv) the signature of the lessor or seller, certifying that the information in subparagraphs (ii) and (iii) above has been conveyed, and the signature of the lessee or purchaser, indicating that such information has been received.

"Target housing" is defined as any housing constructed prior to 1978, except housing for the elderly or persons with disabilities, or any 0-bedroom dwelling. 40 C.F.R. § 745.103.

Pursuant to Section 1018(b)(5) of the Act, 42 U.S.C. § 4852d(b)(5), and

40 C.F.R. § 745.118(e), failure to comply with the Disclosure Rule is a violation of TSCA Section 409, 15 U.S.C. § 2689. Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), provides that any person who violates a provision of TSCA Section 409, 15 U.S.C. § 2689, shall be liable to the United States for a civil penalty.

B. Factual Grounds

At all times relevant to the violations alleged in the Complaint, Respondent owned and offered for lease four residential apartment units at 92 Benefit Street and 290 Rathbun Street[1], Woonsocket, Rhode Island. See Exhibit 3 (copies of rent rolls and disclosure statements) and Exhibit 4 (printouts from the Woonsocket Assessor's On-line Database); see also Exhibit 1, paragraph 11. Each of the four units owned and leased by Respondent was constructed prior to 1978. At the time of the alleged violations and at the time of filing of the Complaint, none of the leased units qualified for any of the exemptions to the provisions of the Act or the Disclosure Rule. See Exhibit 4 (printouts from the Woonsocket Assessor's On-line Database); see also Exhibit 1, paragraph 14. Therefore, under the definition in 40 C.F.R. § 745.103, the four apartment units at 92 Benefit Street and 290 Rathbun Street, Woonsocket, Rhode Island are target housing, and Respondent is a lessor of target housing.

Records regarding lead-based paint stemming from lead inspections at 92 Benefit Street and 290 Rathbun Street were available to Respondent at the time he leased target housing units in these buildings. Unit 2 at 92 Benefit Street in Woonsocket, Rhode Island was inspected by certified environmental lead inspectors from RW Environmental, Inc. ("RWE") on December 1, 1999. From this inspection, RWE generated an

1 290 Rathbun Street, Woonsocket, Rhode Island is referred to in several records as 288 or 292 Rathbun Street. The addresses 288, 290, and 292 Rathbun Street all belong to one building, and the City of Woonsocket assessor's office refers to the property as 290 Rathbun Street.

Environmental Lead Inspection Report ("RWE Report," Exhibit 5) and a summary of its findings and recommendations which it sent to the Rhode Island Department of Health ("RIDOH"). The RWE Report identifies lead-based paint exposure hazards in locations at 92 Benefit Street described as "Rear Hall," "Exterior Paint," and "Soil." These locations are common areas "generally accessible to all residents/users" within the meaning of the Disclosure Rule. See 40 C.F.R. § 745.103.

On January 17, 2001, RIDOH issued a Notice of Violation ("NOV," Exhibit 5) to Respondent for lead hazard violations in 92 Benefit Street, Unit 2 under Rhode Island's Lead Poisoning Prevention Act and ordered abatement of the violations. The violations included lead hazards from interior surfaces, exterior siding/trim, and soil. A Certification of Lead-Safe Status (interior only) dated March 27, 2001, was issued by RIDOH. See Exhibit 6. RIDOH issued a Second NOV regarding the same lead hazard violations (exterior only) on April 30, 2002. In August 2002, the Rhode Island Office of the Attorney General issued a Notice of Intention to File Suit against John Laughter for his failure to completely abate lead hazards at 92 Benefit Street, as required in the second NOV. Subsequently, a certification of Lead-Safe Status (exterior and soil) dated May 13, 2003, was issued by RIDOH. See Exhibit 7.

Unit 2 at 288 Rathbun Street in Woonsocket, Rhode Island was inspected by certified environmental lead inspectors from Environmental Lead Detection ("ELD") on December 28, 1999. From this inspection, ELD generated an Environmental Lead Inspection Report ("ELD Report," Exhibit 8) and sent a summary of these findings and recommendations to RIDOH. The ELD Report identifies lead-based paint exposure hazards in locations at 288 Rathbun Street described as "Common Staircase," "First Floor

Front Porch," "House Body," and "Exterior Soil." These locations are common areas "generally accessible to all residents/users" within the meaning of the Disclosure Rule. See 40 C.F.R. § 745.103.

As a result of this 1999 inspection, on January 25, 2000, RIDOH issued a NOV to Respondent for lead hazard violations in 288 Rathbun Street, Unit 2 Left, under Rhode Island's Lead Poisoning Prevention Act and ordered abatement of the violations. See Exhibit 8. The violations included lead hazards from interior surfaces, common stairwells and porches, exterior trim, and soil. On May 8, 2000, RIDOH issued a Second NOV to John Laughter for his failure to fully abate lead hazards as ordered in RIDOH's initial NOV for the 288 Rathbun Street property. In December 2000, the Rhode Island Office of the Attorney General issued a Notice of Intention to File Suit against John Laughter for his failure to completely abate lead hazards at 288 Rathbun Street, as required in the second NOV. On March 21, 2001, a Certification of Lead-Safe Status (interior only) was issued, and on October 22, 2001, a Certification of Lead-Safe Status (exterior and soil) was issued by RIDOH. See Exhibits 9 and 10.

C. Respondent Failed to Provide Records to Lessees

Pursuant to 40 C.F.R. § 745.107(a)(4), lessors are required to provide lessees with any records or reports available to the lessors pertaining to lead-based paint and/or lead-based paint hazards in the target housing. This requirement includes records or reports regarding common areas. 40 C.F.R. § 745.107(a)(4). The initial NOVs and attached RWE and ELD reports, and the certificates of lead-safe status (Exhibits 5 through 10, collectively referred to as the "Records") discussed above are records that concern lead-based paint at 92 Benefit Street and 290 Rathbun Street. The Records were mailed to

Respondent between January 2000 and May 2003, and therefore, were "available" to Respondent prior to his leasing of the units listed below. Under 40 C.F.R. § 745.103, available means "in the possession of or reasonably obtainable" by Respondent. Once available, pursuant to 40 C.F.R. § 745.107(a)(4), Respondent was required to provide the Records to potential lessees at 92 Benefit Street and 290 Rathbun Street prior to lessees becoming obligated to lease apartments in these buildings.

However, Respondent failed to provide to the following lessees with the Records regarding 92 Benefit Street:

1. Tenants who became obligated to lease 92 Benefit Street, 1st floor, Woonsocket, Rhode Island on or about April 13, 2008;

2. A tenant who became obligated to lease 92 Benefit Street, 4th floor, Woonsocket, Rhode Island on or about November 5, 2006;

Respondent also failed to provide to the following lessees with the Records regarding 290 Rathbun Street:

3. Tenants who became obligated to lease 290 Rathbun Street, 3rd floor front, Woonsocket, Rhode Island on or about October 27, 2007; and

4. Tenants who became obligated to lease 290 Rathbun Street, 3rd floor rear, Woonsocket, Rhode Island on or about January 1, 2008.

By failing to provide available records regarding lead-based paint in the four lease transactions listed above, Respondent violated 40 C.F.R. § 745.107(a)(4) and TSCA Section 409, 15 U.S.C. § 2689 on four occasions.

III. A Penalty Of $30,960 Should Be Assessed

EPA's complaint proposed a civil penalty of up to $11,000 for each violation against Respondent.[2] At this time, Complainant recommends the imposition of a $30,960

2 The Complaint sought the maximum amount allowed under TSCA because information regarding the age of individuals in the affected units was unknown. As discussed more fully below, this information is

civil penalty. The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), support a finding that this proposed penalty amount is appropriate.

A. TSCA Provides for the Assessment of Penalties

Pursuant to Section 1018(b)(5) of the Act, 42 U.S.C. § 4852d(b)(5), and 40 C.F.R. § 745.118(e), failure to comply with the Disclosure Rule is a violation of TSCA Section 409, 15 U.S.C. § 2689. Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), provides that any person who violates a provision of TSCA Section 409, 15 U.S.C. § 2689, shall be liable to the United States for a civil penalty. Sections 1018(b)(5) of the Act and 40 C.F.R. § 745.118(f) provide that, for purposes of enforcing the Disclosure Rule under TSCA, the penalty for each violation applicable under Section 16 shall be no more than $11,000 except for violations occurring on or before July 28, 1997, for which the penalty shall be no more than $10,000.

B. The Penalty Amount Sought is Appropriate

The proposed civil penalty has been calculated in accordance with TSCA Section 16, 15 U.S.C. § 2615, and the provisions of 40 C.F.R. § 745.118(f). To determine the proposed penalty, Complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's December 2007 *Section 1018 Disclosure Rule Enforcement Response and Penalty Policy* ("ERPP"). See Exhibit 11. The ERPP establishes a framework for calculating penalties in Disclosure Rule enforcement cases, incorporating the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B). Those statutory factors are: 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,

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critical in determining the gravity-based penalty amount.

the degree of culpability, and such other matters as justice may require. See 15 U.S.C. § 2615(a)(2)(B).

1. Penalty Calculation Guidelines

As set forth in the ERPP, penalties are determined in two stages: first, determining a "gravity-based penalty;" and second, making adjustments to the gravity-based penalty. Gravity refers to the overall seriousness of the violation. Exhibit 11, ERPP, at 11. 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. Id. The ERPP assigns a "circumstance level" to each type of violation, and an "extent" of harm to each type of violation, and the combination of circumstance level and extent (on a penalty matrix) determines the gravity-based penalty for each violation of the Disclosure Rule. Id. at 11-13.

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 by the seller or lessor. Id. at 12. Circumstance levels range from 1 to 6, "Level 1 or 2" having the highest probability of impairing a tenant's ability to assess information required to be disclosed; "Level 3 or 4" having a medium probability of impairing a tenant's ability to assess information required to be disclosed; and "Level 5 or 6" having the lowest probability of impairing a tenant's ability to assess information required to be disclosed. Id.

The extent of harm under the ERPP considers the degree or scope of the violation's potential for harm. For the Disclosure Rule, 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. Id. at 13. Extent of

harm is determined by two facts: the age of any children living in the target housing at the time of the lease, and whether any pregnant women live in the target housing. Id. The ERPP provides that the agency may use a Significant extent factor when the age of the youngest individual is not known. Id. at 13. A violator may mitigate the extent factor by offering evidence that no children or pregnant women were living in the housing at the time of the violation. Id.

Under the ERPP, a violation involving a unit where a pregnant woman or a child under the age of 6 resides is considered a Major extent level because such violation has the potential to cause serious damage to human health. Id. at 13. The rationale for the Major classification is that children under the age of six are most likely to be adversely affected by the presence of lead-based paint and lead-based paint hazards because they are in the early stages of physical development and they have a propensity to come into contact with lead-based paint through play, putting things in their mouths and ingesting items they put in their mouths. See Id. The effects of lead exposure on children under six years old include intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavior problems. Exhibit 11, ERPP, at 1. Lead exposure before or during pregnancy can alter fetal development and cause miscarriages. Id. at 13.

A violation involving tenants whose youngest children are between the ages of 6 and 17 is considered a Significant extent level because such violation has the potential to cause significant damage to human health. Id. Exposure to lead-based paint and lead-based paint hazards also poses dangers to children between the ages of 6 and 18; however, the potential for harm from lead-based paint decreases as children grow older.

Id. A violation involving tenants who are all at least 18 years or older is considered a Minor extent level because such violation has the potential to cause a lesser amount of damage to human health. Id.

Once each of these factors is determined, the "Gravity-Based Penalty Matrix," which incorporates the factors into a chart, is used to determine the gravity-based penalty amount. Exhibit 11 at 30. The appropriate cell of the matrix, and corresponding penalty amount, is determined by the circumstance level and extent category of the violation. This process is repeated for each violation of a Disclosure Rule requirement. Penalties for each violation found in each individual lease transaction must be assessed separately as each lease is considered a "stand alone" transaction. Id.

After calculating the gravity-based penalty, EPA may adjust the penalty upward or downward based on the following factors: (1) ability to pay/ability to continue in business; (2) history of prior violations; (3) degree of culpability; and (4) such other factors as justice may require, which include: supplemental environmental projects, voluntary disclosure, potential for harm due to risk of exposure, litigation risk, the violator's attitude, size of business, and the economic benefit of noncompliance. Id. at 17-23.

2. Penalty Calculation for Violations by Respondent

In this case, Respondent failed to provide available records of any known lead-based paint or lead-based paint hazards to lessees prior to leasing target housing as required by 40 C.F.R. § 745.107(a)(4). The purpose of this requirement is to ensure that lessees are aware of the presence of lead-based paint and/or lead-based paint hazards and can incorporate this fact into their decision regarding whether to move into the housing.

If lessees choose to move into the housing, this requirement provides information that allows tenants to take steps to prevent exposure or poisoning. By failing to disclose to lessees the presence of known lead-based paint and/or lead-based paint hazards, the landlord denies tenants the right to make an informed decision as to whether or not to lease the housing. The potential harm is that tenants may unwittingly expose themselves and their families to lead-based paint and/or lead-based paint hazards, and thereby suffer the negative health effects associated with such exposure. See Exhibit 11 at 5.

Here, Respondent failed to provide records to several tenants before the tenants became obligated to lease units at 92 Benefit and 290 Rathbun Street. Respondent had available NOVs, Environmental Reports and Certificates of Lead-Safe Status (the "Records," Exhibits 5 through 10) related to the common areas in the properties at 92 Benefit Street and 290 Rathbun Street. Among other things, the Records describe lead-based paint and lead-based paint hazards in several common areas of the buildings. The Records also show that these common areas had been remediated and considered lead safe in 2001 and 2003. Notification remains important as remediated areas generally need to be properly maintained to remain lead-safe. With the information in these Records, future tenants can be cognizant that these areas need to be periodically inspected. In addition, lead paint in common areas can be an indication of lead paint throughout the building. In fact, there have been four instances of children under six with elevated blood lead levels living at 92 Benefit Street and 290 Rathbun Street. See Exhibit 12, RIDOH Report.

Failure to disclose the presence of any known lead-based paint and/or lead-based paint hazards represents the greatest deviation from the Section 1018 regulations and has

a high probability of impairing a lessee's ability to properly assess and weigh the factors associated with human health risk when leasing target housing. Consequently, under the Disclosure Rule ERPP, a violation of 40 C.F.R. § 745.107(a)(4) is a Level 1 violation, the highest circumstance level.

As discussed above, the extent of harm is determined next by considering the age of children and the presence of any pregnant women occupying the target housing. It is unknown whether any children or pregnant women reside in any of the units at issue. Respondent has failed to respond to a letter request and subsequent subpoena for information regarding the age of persons occupying these units. See Exhibits 13 and 14. The ERPP provides that the agency may use a Significant extent factor when the age of the youngest individual is not known. Exhibit 11 at 13.

Looking to the Gravity-Based Penalty Matrix, a violation at the Level I circumstance level and with a Significant extent warrants a penalty of $7,740. See Id. at 30. Thus, a penalty of $30,960 is appropriate for the four violations of this provision discussed above. This amount is the gravity-based penalty amount.

Next, the Complainant considered whether the $30,960 penalty should be adjusted based on: (1) ability to pay/ability to continue in business; (2) history of prior violations; (3) degree of culpability; and (4) such other factors as justice may require, which include: supplemental environmental projects, voluntary disclosure, potential for harm due to risk of exposure, litigation risk, the violator's attitude, size of business, and the economic benefit of noncompliance. See Exhibit 11 at 17-23. At present, Complainant has some information that suggests Respondent may have a limited ability to pay. Based on information from the City of Woonsocket Assessor's Office, it appears that the 92

Benefit Street property has been foreclosed on and is currently owned by the Federal National Mortgage Association. See Exhibit 4. Also, Respondent lost ownership of the property at 290 Rathbun Street for a period of time due to a tax lien sale. However, Respondent was able to recover ownership of this property through a right of redemption. See Exhibit 15. Complainant is not aware of any prior violations of the Disclosure Rule.

Based on the information available at present, Complainant determined no increase or decrease of the gravity-based penalty amount was appropriate. If the Regional Judicial Officer is able to obtain additional information regarding the age of individuals residing in the units at issue, or any of the statutory factors listed above, EPA would support adjusting the penalty to more accurately reflect the circumstances of the case. In addition, if the Regional Judicial Officer is able to obtain additional information regarding Respondent's ability to pay, EPA would support a downward adjustment of the penalty, in accordance with the criteria outlined in TSCA Section 16, 15 U.S.C. § 2615 and EPA's ERPP guidance. As noted above, Respondent has not filed an Answer, and has not documented a claim of any adverse economic impact on Respondent. Absent documentation from Respondent regarding his ability to pay, EPA continues to believe, in light of all applicable penalty assessment factors, that the amount of the proposed penalty is appropriate.

IV. Conclusion

The Complainant requests that the Regional Judicial Officer issue an order: (1) finding that Respondent is in default; (2) finding that Respondent violated the federally enforceable provisions of Section 409 of TSCA, 15 U.S.C. § 2689, and the Disclosure Rule, 40 C.F.R. Part 745, Supbart F; and (3) assessing an appropriate penalty in the

amount of $30,960.

Respectfully submitted,

Sarah Meeks
Enforcement Counsel

Date: 9/2/10