UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
William A. Rowell,	)	
	)	
a/k/a William Rowell and as William A. Rowell, Jr.,	)	
	)	**Docket No. TSCA-03-2005-0110**
d/b/a Rowell Management Co., and as Southwest Trade School	)	
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This enforcement proceeding arises under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2692, and it involves alleged violations of Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA"), 42 U.S.C. § 4852d.[1] The United States Environmental Protection Agency ("EPA") has filed a complaint charging William A. Rowell, a/k/a William Rowell and William Rowell, Jr., d/b/a Rowell Management Company and as Southwest Trade School ("Rowell"), the owner of residential homes in the City of Philadelphia which are leased to tenants, with 48 violations of Section 1018. The cited violations are based upon respondent's alleged failure to comply with 40 C.F.R. Part 745, subpart F, "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale

[1] The RLBPHRA, Pub.L. No. 102-550, 106 Stat. 3672 (1992), amended TSCA and it is codified in chapters 15 and 42 of the United States Code. "The stated purposes of the RLBPHRA include 'develop[ing] a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as possible' and 'educat[ing] the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards.' 42 U.S.C. § 4851a(1)(7)." *Harpoon Partnership*, 11 E.A.D. __, slip op. at 4-5, TSCA Appeal No. 04-02, (EAB May 19, 2005). *See Sweet v. Sheahan,* 235 F.3d 80, 82-83 (2nd Cir. 2000).

or Lease of Residential Property" (referred to here as the "Lead-Based Paint Disclosure Rules").[2]

EPA charges non-compliance by respondent with Section 1018 of the RLBPHRA and with the Lead-Based Paint Disclosure Rules. It further charges that this non-compliance constitutes a violation of Section 409 of TSCA. 15 U.S.C. § 2615. EPA seeks a civil penalty of $167,363 for these violations, pursuant to Section 16 of TSCA. 15 U.S.C. § 2615. *See* Compl. at 130.

Rowell presently moves for a dismissal of the complaint pursuant to 40 C.F.R. 22.20(a).[3] Respondent seeks dismissal on three grounds. First, it argues that complainant has failed to state a claim on which relief may be granted "because it fails to allege a knowing violation as required by the Act." Mot. at 2. Second, respondent submits that the involved Lead-Based Paint Disclosure Rules "exceed statutory authority" and, therefore, are unenforceable. Mot. at 7. Finally, respondent argues that EPA has violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(D), by altering through its "Enforcement Response Policy" the manner in which it enforces these lead-based paint rules. Mot. at 12. EPA opposes the motion.

A Section 22.20(a) motion to dismiss is analogous to a motion to dismiss for failure to state a claim upon which relief may be granted under Section 12(b)(6) of the Federal Rules of Civil Procedure. *Asbestos Specialists, Inc.,* 4 E.A.D. 819, 827 (EAB 1993). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In reviewing the sufficiency of a complaint, "the allegations of plaintiffs' complaint must be assumed to be true, and further, must be construed in their favor." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

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[2] The Lead-Based Paint Disclosure Rules at issue in this case are Sections 745.107(a)(4) (requiring lessor to provide lessee with records or reports on lead paint or lead paint hazards), 745.113(b)(1) (requiring lessor to include a specific lead paint warning in lease contract), 745.113(b)(2) (requiring lessor to include in lease contract lessor's "knowledge" or "no knowledge" of lead paint), and 745.113(b)(4) (requiring lessor to receive from lessee a receipt for certain lead paint disclosures).

[3] Section 22.20(a) in part provides:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right of relief on the part of the complainant.

40 C.F.R. 22.20(a).

For the reasons set forth below, the motion to dismiss is *denied*.

A. Complainant Has Stated a Claim Upon Which Relief May be Granted

Rowell argues that the Residential Lead-Based Paint Hazard Reduction Act of 1992 requires that a violator act "knowingly" in order to be liable for monetary penalties. Mot. at 3. As support for this proposition, respondent cites to Section 1018 of the RLBPHRA, 42 U.S.C. § 4852d, as well as to Section 745.118(a) of the Lead-Based Paint Disclosure Rules. 40 C.F.R. 745.118(a). Respondent argues that EPA has failed to plead an essential element of liability because "[t]he Complaint does not state a knowing violation occurred nor allege any Respondent awareness that he was violat[ing] ... federal disclosure requirements." Mot. at 4. Respondent also argues that the complaint even fails to imply the requisite "knowledge" at the time that the alleged violations occurred. Mot. at 5-6.[4]

Respondent's argument is contrary to the plain wording of the pertinent statutory language and is therefore rejected. We begin with the language of Section 1018 of the RLBPHRA, titled, "Disclosure of information concerning lead upon transfer of residential property." Section 1018(a)(1) states:

> (a) Lead disclosure in purchase and sale or *lease* of target housing[[5]]
>
> (1) Lead-based paint hazards
>
> Not later than 2 years after October 28, 1992, the Secretary and the Administrator of the Environmental Protection Agency shall promulgate regulations under this section for the disclosure of lead-based paint hazards in target housing which is offered for

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[4] Rowell does, however, concede that the complaint recites the facts that it entered into the subject leases, that it was advised by the Philadelphia Department of Health as to the existence of lead paint, and that it even received "Clearance Letters" from the City's Department of Health concerning the respondent's lead paint remediation activities. Yet, respondent finds fault with the complaint because it omits the magic word "knowingly" -- *i.e.,* that EPA does not charge that "Respondent 'knowingly' violated the Act or the Lead Paint Disclosure Rules." Mot. at 4.

[5] "*Target housing* means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling." 40 C.F.R. 745.103 (emphasis in original).

> 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, as prescribed by the Administrator of the Environmental Protection Agency under section 406 of the Toxic Substances Control Act;
>
> (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; and
>
> (C) permit the purchaser a 10-day period (unless the parties mutually agree upon a different period of time) to conduct a risk assessment or inspection for the presence of lead-based paint hazards.

42 U.S.C. § 4852d (emphasis added).[6]

As noted, EPA charges that Rowell failed to comply with these Lead-Based Paint Disclosure Rules and that this non-compliance constitutes a violation of Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992. 42 U.S.C. § 4852d. The specific language of Section 1018(a)(1) does not impose a requirement that the violator "knowingly" commit the violation, as respondent maintains is the case.

In addition, Section 409 of TSCA, 15 U.S.C. § 2689, which makes it "unlawful" to fail to comply with Subchapter IV, "Lead Exposure Reduction" (and this includes the Lead-Based Paint Disclosure Rules at issue in this case) likewise does not contain the "knowing" prerequisite advanced by respondent.[7] In that regard, TSCA Section 409 provides:

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[6] In accordance with this directive, EPA promulgated the Lead-Based Paint Disclosure Rules, 40 C.F.R. 745, subpart F. *See* 40 C.F.R. 745.100.

[7] RLBPHRA Section 1018(b)(5) states:

> 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. For purposes of enforcing this section under the Toxic Substances Control Act, the penalty for each violation applicable under section 16 of that Act shall not be more than $10,000.

It shall be unlawful for any person to fail or refuse to comply with a provision of this subchapter, or with any rule or order issued under this subchapter.

15 U.S.C. § 2689.

Finally, Section 16(a) of TSCA, 15 U.S.C. § 2615(a), which provides the statutory authority to assess a civil penalty for a violation of this statute, serves as an additional bar to the statutory interpretation offered by Rowell.[8] Again, making no mention of a "knowing" requirement, Section 16(a) provides:

(1) Any person who violates a provision of section 2614 or 2689 [TSCA § 409] of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 or 2689 of this title.

15 U.S.C. § 2615(a)(1).

In sum, the statutory language of the Residential Lead-Based Paint Hazard Reduction Act of 1992, as well as the Toxic Substances Control Act, do not require that a violation of the Lead-Based Paint Disclosure Rules be a "knowing" violation in an enforcement proceeding being brought by the government. This result is consistent with the notion expressed by the Environmental Appeals Board ("Board") that "environmental statutes have long been construed as imposing strict liability for failure to meet their requirements." *Green Thumb Nursery, Inc.,* 6 E.A.D. 782, 296 (EAB 1997). In *Green Thumb Nursery, Inc.,* the Board went on to cite a number of its decisions upholding the strict liability nature of various environmental statutes. *See* 6 E.A.D. at 796-797. Among the strict liability cases cited by the Board was *Strandley*, 3 E.A.D. 718, 722 (CJO 1991), a case arising under the Toxic Substances Control Act.

Rowell's arguments for a contrary interpretation of the involved statutory language are misplaced. First, respondent is incorrect in citing the penalty language of RLBPHRA Section 1018(b)(1), 42 U.S.C. § 4852d(b)(1), as support for the proposition that any violation must be a knowing one. While this section does refer to "[a]ny person who knowingly violates any provision of this section," it does so in a non-EPA enforcement context. Section 1018(b)(1) goes on to state that such a violator will be subject to a civil penalty in accordance with the provisions of 42 U.S.C. § 3545, which is titled, "HUD Accountability." Respondent's problem

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42 U.S.C. § 4852d(b)(5).

[8] As noted, RLBPHRA Section 1018(b)(5) provides that non-compliance "with a provision of this section or with any rule or order issued under this section" is subject to a civil penalty pursuant to TSCA Section 16.

with this argument is that the present enforcement proceeding is being brought by EPA and not HUD.

Second, respondent also incorrectly relies upon Lead-Based Paint Disclosure Rule Section 745.118(a), which in part states, "[a]ny person who knowingly fails to comply with any provision of this subpart shall be subject to civil monetary penalties." 40 C.F.R. 745.118(a). Inasmuch as 40 C.F.R. 745, subpart F, is titled "Disclosure of *Known* Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (emphasis added), it is entirely consistent with the regulatory framework of subpart F for Section 745.118(a) to speak in terms of a knowing violation for penalty assessment purposes.

Third, Rowell also cites *Smith v. Coldwell Banker Real Estate Services, Inc.,* 122 F.Supp.2d 267, 273 (D.Conn. 2000), a case arising under the Residential Lead-Based Paint Hazard Reduction Act of 1992, as holding that Section 1018 of that Act requires that civil liability extends only to a "knowing" violation. Respondent argues that the Court "found against respondents who had '*stated they knew the existence of potential lead paint hazards should be disclosed*' and that they were '*aware of the disclosure requirements*' ... [and] in favor of respondents whose state of mind was not clear as to their knowledge of the regulatory requirements and their intent to circumvent the required disclosures." Mot. at 4 (respondent's emphasis), citing 122 F.Supp.2d at 275.

As argued by EPA, the case of *Smith v. Coldwell Banker* involved only private litigants in which a seller and his agent were charged with violating the RLBPHRA. This is a significant difference from the present enforcement case in which the Federal government is seeking to enforce an environmental statute against a private respondent. *See* Resp. at 16-18. In that regard, the "Civil liability" provision at issue in *Smith v. Coldwell Banker*, Section 1018(b)(3), states that "[a]ny person who knowingly violates the provisions of this section shall be jointly and severally liable to the *purchaser* or *lessee* in an amount equal to 3 times the amount of damages incurred by such individual." 42 U.S.C. § 4852d(b)(3) (emphasis added). Unlike *Smith v. Coldwell Banker,* the present case is not between private litigants. It is an enforcement proceeding filed by the government against a private respondent. Moreover, the civil penalty to be assessed in the present case, if any, will be under the Toxic Substances Control Act and there has been no showing by respondent that TSCA requires a "knowing" violation of the Residential Lead-Based Paint Hazard Reduction Act of 1992.

B. Respondent's Rulemaking Challenge

Rowell also moves to dismiss EPA's complaint on the ground that the Agency exceeded its statutory authority in promulgating three of the four Lead-Based Paint Disclosure Rules at issue. It maintains that these regulations are therefore invalid and unenforceable. Mot. at 8. Specifically, respondent submits that EPA went beyond its statutory authority with respect to 40 C.F.R. 745.113(b)(1), 745.113(b)(2), and 745.113(b)(4), wherein the Agency (according to Rowell) unlawfully extended the Lead-Based Paint Disclosure Rules to include real estate *lease* contracts in addition to real estate sales contracts. Essentially, respondent claims that Congress

did not give EPA the authority to promulgate regulations pertaining to leased property. Respondent maintains that such authority was limited to the *sale* of property. *See* Mot. at 7-12. For the following reasons, Rowell's arguments are rejected.

First, as a starting point, it must be acknowledged that rulemaking challenges are generally not appropriate in an EPA administrative proceeding. The Environmental Appeals Board has held that there is a "strong presumption against entertaining challenges to the validity of a regulation" in the context of an enforcement proceeding. *B.J. Carney Inductries, Inc.,* 7 E.A.D. 171, 194 (EAB 1997); *see Woodkiln*, 7 E.A.D. 254, 269 (EAB 1997) (Board declining to entertain challenge to technical Clean Air Act regulations); *see also, Norman J. Echevarria et al.,* 5 E.A.D. 626, 634 (EAB 1994) (consideration of such a regulatory challenge is "at best discretionary").

Second, even if this were a proper forum for respondent's rulemaking challenge, it nonetheless would fail on the merits. It is this Tribunal's view that the statutory language of the Residential Lead-Based Paint Hazard Reduction Act of 1992 authorized EPA to promulgate the challenged regulations.

We begin with Sections 1018(a)(1)(A) & (B) of the RLBPHRA, which direct the Administrator of EPA to promulgate regulations requiring that the lessor provide to the lessee "a lead hazard information pamphlet," disclose to the lessee "the presence of any known lead-based paint, or any known lead-based paint hazards," and provide "any lead hazard evaluation report" available to the lessor. 42 U.S.C. §§ 4852d(a)(1)(A) & (B). Thus, the plain language of the Residential Lead-Based Paint Hazard Reduction Act authorizes EPA to promulgate two of the three challenged regulations -- *i.e.,* Section 745.113(b)(2) (statement as to presence of known lead-based paint or lead-based paint hazards) and Section 745.113(b)(4) (statement of lessee affirming receipt of certain information required by paragraphs (b)(2) and (b)(3)). Thus, given the clear language of the statute, Rowell's rulemaking challenge as to these two regulations would fail in any event.

Next, we address respondent's rulemaking challenge to Section 745.113(b)(1), the Lead Warning Statement requirement. This challenge likewise would fail. In that regard, Rowell correctly notes that RLBPHRA Section 1018(a)(2), titled, "Contract for purchase and sale," states:

> Regulations promulgated under this section shall provide that every contract for the *purchase and sale* of any interest in target housing shall contain a Lead Warning Statement....

42 U.S.C. § 4852d (emphasis added). Comparing the above provision with Section 1018(a)(1), Rowell argues:

> Congress knew how to require, and did require, regulation mandating lead paint disclosures and warnings in real estate sales

> contracts. In the adjacent section of the Act, Congress withheld mention of any such requirement as to lease contracts. EPA's regulatory approach ignores the obvious statutory differences and proceeds as if sales and leases were statutorily equivalent. *EPA may not substitute its approach, however it may be scientifically defensible, for the legislative will of Congress.*

Mot. at 9 (emphasis added).

Adoption of respondent's argument would be contrary to the intended remedial purpose of the Residential Lead-Based Paint Hazard Reduction Act of 1992. *See* n.1, *supra*; *see also*, 42 U.S.C. § 4851a (purposes of the Act include intent to develop national strategy "to eliminate lead based paint hazards in all housing," to encourage effective action to prevent childhood lead poisoning, and "to ensure that the existence of lead-based paint hazards is taken into account in the development of Government housing policies and in the sale, *rental*, and renovation of homes and apartments"). Emphasis added.

Respondent's reading of the Residential Lead-Based Paint Hazard Reduction Act of 1992 would provide protection, by way of a Lead Warning Statement, to purchasers of property but no such protection would be afforded individuals who lease property (arguably the group in most need of this Act's protection). Thus, in respondent's view, an investor purchasing targeted housing would be statutorily entitled to a Lead Warning Statement and a person seeking to rent the same property would not. Moreover, under respondent's view of the statute, the purchaser of the targeted housing could then immediately turn around and rent this targeted housing to an individual and in so doing could choose not to provide the lessee with the very type of Lead Warning Statement that it had previously received during the sale. This distinction advanced by Rowell would simply turn the Residential Lead-Based Paint Hazard Reduction Act of 1992 on its head and would not provide the protection to individuals to lead-based paint and lead-based paint hazards that Congress intended.

Moreover, while respondent invokes the "legislative will of Congress," it overlooks a pertinent passage in the Senate Report to this Act which expresses that will. In discussing the "[d]isclosure of information concerning lead upon transfer of residential property," the Senate Report states:

> Subsection [1031] (b) would require the Secretary to issue regulations within 2 years for the disclosure of lead-based paint hazards in pre-1978 private *rental* housing. The regulations would require lessors to provide prospective tenants with a lead hazard information pamphlet and disclose any lead-based paint or lead-based paint hazards known to the lessor, including copies of lead evaluation reports. *The regulations would also require written leases of one year or more to contain the following Lead Warning Statement....*

S. Rep. No. 102-332, at 199 (1992) (emphasis added). The above legislative history is entirely consistent with the purposes of the Act as set forth at RLBPHRA Section 1003. 42 U.S.C. § 4851a.

In addition, consistent with this congressional intent, in the preamble to the Lead-Based Paint Disclosure Rules (40 C.F.R. 745, subpart F), EPA stated:

> While sections 1018(a)(2) and (3) mandate lead warning language for all sales transactions, the inclusion of such language as an attachment to leases is not specifically mandated by Title X [*i.e.*, the Residential Lead-Based Paint Hazard Reduction Act of 1992]. EPA and HUD, however, believe that it is necessary to include the warning language in leases as well. *Further, the completion and retention of disclosure and acknowledgment language is a necessary component of any effective, enforceable disclosure requirement for leasing transactions.*

61 Fed. Reg. at 1071 (emphasis added). This language accurately represents the broad protection intended by Congress.

C. <u>The Enforcement Response Policy Challenge</u>

Finally, Rowell argues that EPA violated the Administrative Procedure Act (5 U.S.C. § 706(2)(D)), stating that, without "notice and comment," the Agency "has reversed course on its interpretation of how the Act's disclosure requirements are to be enforced against landlords and other persons subject to the Act." Mot. at 12. For example, Rowell states that when EPA promulgated 40 C.F.R. 745, subpart F (the Lead-Based Paint Disclosure Rules), it announced that "outreach and compliance assistance will be a major component of the section 1018 compliance program so that individuals are fully informed of the new requirements and their obligations." Mot. at 13, citing 61 Fed. Reg. 9077-9078 (March 6, 1996). Rowell argues that three years after announcing this "common sense result," the Agency changed its enforcement approach and that it did so without public notice and comment. Mot. at 14.

This argument is unpersuasive. The Enforcement Response Policy is a guidance document only. EPA readily admits this fact. *See* Resp. at 34-35; *see also, M.A. Bruder and Sons,* 10 E.A.D. 598, 608 (EAB 2002) (respondent "cites the well-established principle that a penalty policy lacks the force of law and is, therefore, not binding"). Thus, the Agency is not required to engage in notice and comment rulemaking pursuant to the Administrative Procedure Act any time that it decides to embark on a new and different enforcement strategy.

In any event, Rowell does not even allege that EPA's conduct in this matter is contrary to the overall provisions of its Enforcement Response Policy (a more forceful argument). Nor does respondent show in any way how the Agency's conduct exceeds its enforcement authority.

Accordingly, for the foregoing reasons, Rowell's Motion to Dismiss is *denied*.

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Carl C. Charneski
Administrative Law Judge

Issued: September 28, 2005
Washington, D.C.