UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
HARPOON PARTNERSHIP,	)	**Docket No. TSCA-05-2002-0004**
RESPONDENT	)	

INITIAL DECISION

Pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), Harpoon Partnership is assessed a civil penalty of $37,037 for violations of Section 409 of TSCA, 15 U.S.C. § 2689, and its implementing regulations for disclosure of known lead-based paint or lead-based paint hazards upon sale or lease of residential property found in 40 C.F.R. Subpart F.

Issued: May 27, 2004

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

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I. Procedural History

This civil administrative penalty proceeding arises under the authority of Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On March 19, 2002, the United States Environmental Protection Agency, Region V ("Complainant" or the "EPA") filed a Complaint against Harpoon Partnership ("Respondent"), alleging violations of TSCA and its implementing regulations for the disclosure of lead-based paint and lead-based paint hazards found in 40 C.F.R. Part 745, Subpart F ("Lead Disclosure Rule"). Complainant seeks a civil administrative penalty of $56,980 for these alleged violations in regard to nine units in an apartment building constructed before 1978, owned by Respondent, located at 5134-5136 S. Harper, Chicago, Illinois. Complainant filed an Amended Complaint on April 10, 2002 and a Second Amended Complaint ("Complaint") on April 16, 2003.[1]

Specifically, Counts 1 through 9[2] in the Complaint allege that Respondent failed to include, either within the contract to lease or as an attachment to the contract, a Lead Warning Statement before the lessees of Apartments 2B, 1B, 4A, 2A, 2E, 4C, 1C, 3B, and 4B of 5134-5136 S. Harper, Chicago, Illinois ("target apartments") were obligated under each contract in violation of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R.

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[1] Complainant's Motion to File the Second Amended Complaint was granted on April 9, 2003, which sought to add, *inter alia*, financial information regarding individual partners that comprise Harpoon Partnership and Respondent's ability to pay, and greater specificity about the Complainant's calculation of the proposed penalty. *See* In the Matter of Harpoon Partnership, Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 24, at *2, *8 (April 9, 2003)(Order Granting Complainant's Motion to File the Second Amended Complaint).

[2] Complainant had, for the sake of clarity, grouped the violations by each type of violation of the Lead Disclosure Rule.

§§ 745.113(b)(1) and 745.100. Counts 10 through 18 allege that Respondent failed to include, either within each contract or as an attachment to each contract, a statement disclosing either the presence of any known lead-based paints and/or lead-based paint hazards in the target housing, or a lack of knowledge of such presence before the lessees in the target apartments were obligated under each contract in violation of Section 409 of TSCA and 40 C.F.R. §§ 745.113(b)(1) and 745.100. Counts 19 through 27 allege that Respondent failed to include, either within the contract or as an attachment to the contract, a list of any records or reports available to the lessor regarding lead-based paints and/or lead based paint hazards in the target housing, or a statement that no such records exist before the lessee in each target apartment was obligated under each contract in violation of Section 409 of TSCA and 40 C.F.R. §§ 745.113(b)(1) and 745.100.

Counts 28 through 36 allege that Respondent failed to include, either within each contract or as an attachment to each contract, a statement by the lessee affirming receipt of the information set out in 40 C.F.R. §§ 745.113(b)(2) and (b)(3) and the Lead Hazard Information Pamphlet before the lessees were obligated under each target apartment contract in violation of Section 409 of TSCA and 40 C.F.R. §§ 745.113(b)(1) and 745.100. Counts 37 through 45 allege that Respondent failed to include, either within the contract or as an attachment to the contract, the signatures of the lessor and the lessee certifying to the accuracy of their statements or the dates of such signature before the lessee in each target apartment was obligated under the leasing contract in violation of Section 409 of TSCA and 40 C.F.R. §§ 745.113(b)(1) and 745.100.

For these alleged violations, Complainant considered the statutory penalty factors in Section 16(a)(2)(B) of TSCA, and calculated the proposed penalty by applying the methodology of the EPA's Section 1018 Disclosure Rule Enforcement Response Policy, dated February 2000.

Respondent filed its Answer and Affirmative Defenses to Amended Complaint on May 20, 2002, clarified its first affirmative defense in Respondent's Motion to Supplement First Affirmative Defense to the Amended Complaint on January 24, 2003, and answered the Second Amended Complaint on May 6, 2003, denying many of the factual allegations made in the Complaint and raising several defenses. Respondent's first defense raises two issues. First, Respondent contends that it is not the "lessor" as defined by the regulations because it did not offer the target property for lease or have any contact with the lessees of the target

housing.[3] Second, Respondent contends that the language of 40 C.F.R. Part 745 is vague and ambiguous so as to not provide adequate notice that Respondent was a lessor and responsible for disclosure of the presence of lead-based paint or lead-based paint hazards.[4]

On May 19, 2003, Complainant moved to strike Respondent's first defense in its Response to Respondent's First Affirmative Defense. In turn, on June 3, 2003, Respondent replied to the Complainant's motion to strike in its Response to Complainant's Response to Respondent's First Affirmative Defense, claiming that defendant mischaracterized the nature of Respondent's defense.[5]

Subsequently, during a telephonic conference with Respondent and Complainant on June 6, 2003, the hearing date set for June 23, 2003 through June 27, 2003 was postponed and a schedule was established for the submission of briefs addressing the legal questions of whether the statutory and regulatory meaning of the term "lessor" includes the owner of the target housing, whether a lessor's responsibilities may be contracted away to a third party, and whether the regulations afforded Respondent "fair notice."

In the Order Granting Complainant's Request for Partial Accelerated Decision and Denying Respondent's Request for Partial Accelerated Decision, entered on August 4, 2003 ("Order on Accelerated Decisions"), Complainant's Request for Partial Accelerated Decision was granted and Respondent's Request for Partial Accelerated Decision was denied. The Order on Accelerated Decisions included the following determinations:

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[3] Respondent states that it was merely the owner and that its management company, Hyde Park Realty, Inc., transacted with the lessees and therefore was the lessor with regard to the leased units listed in the Complaint.

[4] Respondent added the issue of fair notice in Respondent's Motion to Supplement First Affirmative Defense to the Amended Complaint. Respondent's motion was granted on January 27, 2003.

[5] Complainant contends that Respondent's arguments are first, that Respondent contracted away its responsibility as an "owner" under Subpart F, and second, that Respondent had no fair notice that it could not contract away its disclosure requirements to a management company to act as a lessor. *See* Complainant's Response to Respondent's First Affirmative Defense.

there were no genuine issues of material fact; there was no uncertainty as to how the regulations were to be applied to the facts in this case and the Lead Disclosure Rule provided fair notice to the regulated community; the owner of target housing, Respondent, was the "lessor" under the Lead Disclosure Rule when it contracted with an "agent," Hyde Park Realty, Inc. ("Hyde Park"), for the purpose of leasing its property; and Respondent was ultimately responsible for any failure to comply with the lead Disclosure Rule and could not contract away its responsibilities for compliance.[6] The Order on Accelerated Decisions, attached hereto, is incorporated by reference in this Initial Decision.

Respondent's second affirmative defense contended that its operations and management were unrelated to any other properties in which Gerald M. Fisch ("Gerald Fisch") may have an interest and Respondent requested that any allegation pertaining to Acres Real Estate, Ltd. be stricken from the Complaint. Respondent's Motion to Strike any Allegations Pertaining to Acres Real Estate, Ltd. was denied in an Order issued on August 12, 2002. *See* Order Denying Respondent's Motion to Strike Any Allegation Pertaining to Acres Real Estate, Ltd. from the Complaint.

An evidentiary hearing was held from August 27 through 29, 2003 in Chicago, Illinois.[7] Both parties have since filed post-hearing briefs and post-hearing reply briefs. For the reasons discussed below, having fully considered the record in the case, the arguments of counsel, and being fully advised, I find Respondent to be in violation of TSCA as alleged in Counts 1-45 of the Complaint. For these violations, Respondent is liable for a civil administrative penalty in the amount of $37,037.

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[6] In the Order on Accelerated Decisions, dated August 4, 2003, I found that the EPA has provided the requisite fair notice, through the text of the regulations and the discussion in the preamble concerning its provisions and the rulemaking process, that this was the EPA's interpretation. *See* Order on Accelerated Decisions, p. 20.

[7] At the hearing, Complainant presented leases and application forms for the apartments at issue that contained confidential information. C's Ex. 4. These documents have been treated as confidential, and no confidential information is contained in this decision.

II. Findings of Fact

1. Harpoon Partnership, the owner and lessor of the target housing at 5134-5136 S. Harper Avenue, Chicago, Illinois, failed to include, either within or as an attachment to the leasing contracts for Apartments 2B, 1B 4A, 2A, 2E, 4C, 1C, 3B, and 4B before the lessees were obligated under each lease: (1) a Lead Warning Statement; (2) a disclosure statement where the lessor either provides actual information about lead-based paint hazards in the building or states he has no knowledge of this; (3) a list of any records or reports of lead-based paint or a statement that no such records are available; (4) a statement by each tenant affirming receipt of the aforementioned information; (5) and certifying signatures and dates from each tenant, lessor and any agent.

2. For Counts 1, 10, 19, 28, and 37, where there was a child under the age of 6, a penalty of $15,015 is reasonable and appropriate.

3. For Counts 9, 18, 27, 36, and 45, where there was a child between the ages of 6 and 18, a penalty of $9,509.50 is reasonable and appropriate.

4. For the remaining counts, where there were no children under the age of 18 and no pregnant women, a penalty of $12,512.50 is reasonable and appropriate.

III. Liability

A. Counts 1-45

The Complaint alleges that Respondent failed to include, either within the leasing contract or as an attachment to the contract: (1) a Lead Warning Statement; (2) a statement disclosing either the presence of any known lead-based paints and/or lead-based paint hazards in the target housing or a lack of knowledge of such presence; (3) a list of any records or reports available to the lessor regarding lead-based paints and/or lead based paint hazards in the target housing or a statement that no such records exist; (4) a statement by the lessee affirming receipt of the information set out in 40 C.F.R. §§ 745.113(b)(2) and (b)(3) and the Lead Hazard Information Pamphlet; and (5) the signatures of the lessor and the lessee certifying to the accuracy of their statements or the dates of

such signature, before the lessees of Apartments 2B[8], 1B[9], 4A[10], 2A[11], 2E[12], 4C[13], 1C[14], 3B[15], and 4B[16] of 5134-5136 S. Harper, Chicago, Illinois, were obligated under each contract in violation of Section 409 of TSCA and 40 C.F.R. §§ 745.113(b)(1) and 745.100.

B. Lessor Requirements Under the Lead Disclosure Rule

Section 745.113(b) provides that:

> [e]ach contract to lease target housing shall include, as an attachment or within the contract, the following elements, in the language of the contract (e.g., English, Spanish):
> (1) a Lead Warning Statement with the following language:
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> > Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly.

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[8] The leasing contract at issue for apartment 2B is dated February 15, 1999.

[9] The leasing contract at issue for apartment 1B is dated December 22, 1997.

[10] The leasing contract at issue for apartment 4A is dated July 1, 1998.

[11] The leasing contract at issue for apartment 2A is dated February 15, 1998.

[12] The leasing contract at issue for apartment 2E is dated June 1, 1998.

[13] The leasing contract at issue for apartment 4C is dated June 15, 1998.

[14] The leasing contract at issue for apartment 1C is dated April 17, 1998.

[15] The leasing contract at issue for apartment 3B is dated August 1, 1998.

[16] The leasing contract at issue for apartment 4B is dated September 1, 1998.

> Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.
>
> (2) 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 of the presence of lead-based paint and/or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or the lead-based paint hazards, and the condition of the painted surfaces.
>
> (3) A list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the housing that have been provided to the lessee. If no such records or reports are available, the lessor shall so indicate.
>
> (4) A statement by the lessee affirming receipt of the information set out in paragraphs (b)(2) and (b)(3) of this section and the lead hazard information pamphlet required under 15 U.S.C. 2696....
>
> (6) The signatures of the lessors, agents, and lessees, certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature.

40 C.F.R. §§ 745.113(b).

Further, 40 C.F.R. § 745.100 directs that all the information enumerated above must be attached to the leasing contract "before the purchaser or lessee is obligated under a contract to purchase or lease target housing." The information required under 40 C.F.R. § 745.113(b) for purposes of this decision will be referred to as the "lessor requirements."

C. Complainant's Prima Facie Case

In demonstrating Respondent's liability as charged, Complainant must establish a number of prima facie elements: (1) Respondent's apartment building is "target housing;"(2)

Respondent is a "lessor" and Hyde Park is Respondent's "agent;" (3) that each individual target apartment renter is a "lessee;" and (4) that Respondent did not include the lessor requirements in each target apartment's contract to lease or as an attachment thereto before the lessee was obligated to lease the target housing.

Target housing is defined in the regulations as 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. *See* 40 C.F.R. § 745.103. Respondent admits that its apartment building at 5134-5136 S. Harper, Chicago, Illinois was constructed prior to 1978[17] and that the building is "target housing" pursuant to the regulations. *See* Answer, p. 4, ¶¶ 18,19; *see also* Proposed Conclusions of Law, ¶ 6.

Under the Disclosure Rule, the term "lessor" means any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian Tribes, and nonprofit organizations. *See* 40 C.F.R. § 745.103. As indicated in the Order on Accelerated Decisions, I have determined that Respondent is the lessor for the transactions alleged in the Complaint for the purposes of liability. *See* Order on Accelerated Decisions.

Pursuant to 40 C.F.R. § 745.103, an "agent" is any party who enters into a contract with a seller or a lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing. In the Order on Accelerated Decisions, I found that Hyde Park was the agent for these leasing transactions. *See* Order on Accelerated Decisions, August 4, 2003.

The Disclosure Rule defines a "lessee" as any entity that enters into an arrangement to lease, rent, or sublease target

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[17] EPA Investigator Reginald Arkell's report indicates that based on publicly available information, the apartment building in question was constructed in circa 1912. *See* Tr. at 52. Respondent's attempts to impeach the reliability of the public records for the property at issue based on several inaccuracies in the Cook County land records is rejected. Respondent demonstrated no significant inaccuracies that affect the EPA's jurisdiction over this matter or the outcome of this case.

housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian Tribes, and nonprofit organizations. 40 C.F.R. § 745.103. Respondent concedes that the individuals in the target apartments to whom the agent leased units are "lessees" as that term is defined by regulation. *See* Respondent Harpoon Partnership's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof ("Respondent's Post-Hearing Brief"), November 24, 2003, Conclusions of Law, ¶ 4.

D. Respondent's Arguments

With regard to the final element of Complainant's prima facie case, the inclusion of the lessor requirements in each target apartment's contract to lease or as an attachment thereto, Respondent argues that, as early as January 3, 1998, it complied with the regulatory requirements, through its agent Hyde Park, and attached to every lease a Disclosure Form[18] containing the information required under 40 C.F.R. § 745.113(b)(1)-(4) and distributed to every lessee an EPA pamphlet containing information about lead-based paint and the hazards involved therein prior to the dates of obligation of the leases. *See* Tr. at 380-84, 386, 387, 448-49, 486-87; R's Ex. 11; Respondent's Post-Hearing Brief, Section II, ¶ 18. Respondent argues that the Disclosure Form specifically contained the Lead Warning Statement, a statement disclosing the presence of lead-based paint and paint hazards, an indication whether records concerning lead-based paint are available, and an affirmation by the lessee that the lessee received the US E.P.A. pamphlet, disclosure statement, and any available reports. *See id.*

Respondent also explains that its agent periodically reviewed its files for signed and dated Disclosure Forms for each lease. *See* Tr. at 384-86. When Hyde Park identified that the signed Disclosure Form was not "returned" to them, they would send out a reminder letter. *See id.*

In support of these arguments, Respondent notes that included in the documents submitted by Hyde Park in response to the EPA's administrative subpoenas were photocopies of letters

[18] This form has been described variously by the witnesses at the hearing as the "Disclosure Form," "Section 1018 Form," and the "Disclosure checklist." For the purposes of this decision, this form will be referred to as the Disclosure Form.

dated February 10, 1999, and March 19, 1999, reminding the tenants to return their completed Disclosure Forms. Respondent contends that these reminder letters show that the Disclosure Forms were given to the tenants when they received their leases and that disclosure of the lessor requirements was made in a timely manner. Respondent also notes that the record includes Disclosure Forms signed by the tenants of units 2A (dated February 15, 1999) and 1B (dated January 3, 1998 and March 31, 1999), as well as two additional reminder letters dated September 3, 1999.

In further support of its arguments, Respondent points to the testimony of Gerald Fisch, the managing partner of Harpoon Partnership, Joseph Zugalj, the president of Hyde Park, and Michael Ahmed, the tenant of unit 1B since 1998. Respondent submits that Mr. Fisch testified that he supplied Carl Collina, the president of Hyde Park, now deceased, with the Disclosure Form in 1997 and recommended that Hyde Park distribute these forms as required, that Mr. Zugalj testified that he did attach the Disclosure Forms to the leases as a standard practice, and that Mr. Ahmed testified that he received a Disclosure Form at the time he signed his lease for unit 1B in December 1997.

E. Analysis of Respondent's Arguments and Evidence

The record before me discloses that on December 10, 1998, the EPA conducted an inspection of Hyde Park, a management company for many apartment units for several different owners in the Chicago area, which included Harpoon Partnership. On April 27, 1999, the EPA sent Hyde Park an administrative subpoena to produce all leasing records since September 1996. *See* C's Ex. 2. Hyde Park, in response to the April 27, 1999 EPA administrative subpoena, submitted copies of all available leases and attachments for the apartments, including the nine units in question owned by Harpoon Partnership. *See* C's Exs. 3 and 4. Later in response to a subsequent subpoena in March 2000, Respondent verified that all available records had been produced in its earlier response. *See* C's Ex. 6.

A review of the leases and attachments produced by Hyde Park in June 1999 in response to the EPA's first subpoena discloses that none of the contracts to lease the target housing identified in the Complaint were in compliance with the requirements of 40 C.F.R. § 745.113(b). Each contract to lease did not include as an attachment, or within the contract, the lessor requirements set forth at 40 C.F.R. § 745.113(b). C's Ex. 4. The only two Disclosure Forms produced by Hyde Park pursuant to the EPA subpoenas were dated by the tenants February 15, 1999 and March

31, 1999, for units 2A and 1B, respectively, and were attached to leases not at issue in this matter.[19]

Respondent's argument that the "reminder letters" establish that the Disclosure Forms were given to each tenant at the time of leasing and, thus, there was no violation of the Lead Disclosure Rule is unavailing. The Lead Disclosure Rule specifically directs that *prior to* the lessee becoming obligated, the lessor must certify and the lessee must acknowledge that the lessor requirements were met and such were included in the leasing contract or as an attachment to it. *See* 40 C.F.R. §§ 745.100 and 745.113(b)(Emphasis added). Respondent is charged with failing to include the Certification and Acknowledgment information in the lease or as an attachment to the lease.

Here, the required regulatory language for the certification and acknowledgment of the lessor requirements was not contained in or attached to any of the leases and the existence of reminder letters is not sufficiently probative to show that the Disclosure Forms with Respondent's certifications were provided to the lessees before they were obligated under their leases. Rather, the six "reminder letters" in evidence sent by Respondent's agent to each lessee, which were all dated February 10, 1999 or later, indicate that the required certifications and acknowledgments were not made before or at the time of the execution of the leases, and confirm that completed Disclosure Forms for these target apartments were not retained by Hyde Park. I note that each of the reminder letters was sent between one to eight months after the lessee became obligated under the leasing contract. See C's Ex. 4, Attachments 1, 5-9; R's Ex. 1. I further note that Bruce Adelmann, the author of the "reminder letters," did not testify. See Tr. at 365-66.

The record indicates that the EPA investigation in December 1998 may have prompted Hyde Park to review its records and send out reminder letters to lessees to furnish completed Disclosure Forms. Such action, however, does not negate the fact that the leases at issue do not meet the regulatory requirements of 40 C.F.R. § 745.113(b) for certification and acknowledgment of the disclosure information.

I now turn to the testimony of Respondent's witnesses. Mr. Fisch testified that he attended a training session given by the Chicago Association of Realtors regarding the lead disclosure

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[19] The Disclosure Forms were signed by Joseph Zugalj of Hyde Park but were not dated by him.

rules in late 1996. Tr. at 357. Mr. Fisch credibly testified that he relayed his knowledge of the Lead Disclosure Rule to Carl Collina and Joe Zugalj at Hyde Park, provided Mr. Collina a copy of the Disclosure Form, and requested them to send the Disclosure Forms to the tenants. Tr. at 344.

Although Mr. Fisch's testimony that he relayed the requirements of the Lead Disclosure Rule to Hyde Park is credible, the testimony of Mr. Zugalj is not sufficiently credible or persuasive to show that Hyde Park actually gave a Disclosure Form to each tenant before or contemporaneously with the execution of the leasing contract. First, I observe that there are no documents corroborating Mr. Zugalj's alleged practice. Again, I note that the only Disclosure Forms presented and the reminder letters postdated the leases at issue. I also note that none of the Lead Disclosure Forms signed by Mr. Zugalj are dated by him. *See* R's Ex. 11. Second, Mr. Zugalj's testimony was vague because he did not have personal knowledge of the leasing transactions, and he was unable to recall and verify many of the dates and information at issue. *See* Tr. at 395-97. Mr. Zugalj's testimony was not corroborated by the testimony or affidavit of his partner, Bruce Adelmann. Finally, I note that Mr. Zugalj's testimony concerning has compliance with the Lead Disclosure Rule was self-serving and is not considered credible or probative, particularly in light of his 1993 conviction under the Federal Frauds and Swindles Statute. *See* C's Ex. 24; Tr. at 400.

Michael Ahmed, tenant of unit 1B, the only one of the nine target apartment lessees to testify or submit a statement, testified that he received a Lead Disclosure Form when he received the lease for 1B in December 1997. *See* Tr. at 449. Mr. Ahmed further testified that he signed the lease and paid Hyde Park a security deposit on December 22, 1997 which was non-refundable, that he moved into the unit on January 1, 1998, that he signed a Disclosure Form on January 3, 1998,[20] and that he signed another disclosure form in March of 1999. *See* C's Ex. 4, Attachment 2. At the hearing, Respondent proffered a faxed copy of a completed Disclosure Form dated January 3, 1997 by Mr. Ahmed. *See* R's Ex. 11. Mr. Ahmed explained that the correct date must have been January 3, 1998. This form was not included

[20] The Disclosure Form executed by Mr. Ahmed on January 3, 1998 indicates that there was no information about lead-based paint or lead-based paint hazards in his unit or any common areas of the building at 5134-5136 S. Harper Avenue. *See* Tr. at 449, R's Ex. 11.

in the documents submitted by Hyde Park in response to the EPA's subpoenas, and again, this form is not dated by Mr. Zugalj. The *misdated* Lead Disclosure Form for Mr. Ahmed apparently had remained in his possession until a week before the hearing.[21]

Although Mr. Ahmed's testimony appeared to be somewhat credible, such does not show that Respondent complied with the certification and acknowledgment of the lessor requirements at 40 C.F.R. § 745.113(b). The lease in question was dated December 22, 1997 and the Disclosure Form was dated January 3, 1998. *See* R's Ex. 11. Mr. Ahmed testified that he signed the Disclosure Form on January 3, 1998. Mr. Ahmed signed the Lead Disclosure Form two weeks after becoming obligated under the apartment lease. Thus, the record does not demonstrate that the lessor requirements were certified and acknowledged before the lessee was obligated under the contract to lease. 40 C.F.R. § 745.113(b).

Respondent argues in the alternative that even if it cannot produce the records for the certification and acknowledgment of the lessor requirements because of the sloppy record keeping practices of its agent, it has shown that timely disclosure of the lessor requirements was made to the lessees. Thus, Respondent asserts that it should not be penalized for Hyde Park's minor "paperwork" violation. Respondent's argument is rejected.

Again, I point out that the Complaint does not charge Respondent for failure to notify each lessee of the lessor requirements, but for the failure to include the required information in each lease and which is evidenced by the lessor's certification and the lessee's acknowledgment pursuant to § 745.113(b). These violations are not the mere "paperwork" violations or ministerial acts as argued by Respondent. In this regard, I observe that the purpose of the Lead Disclosure Rule "is to ensure that families are aware of: (1) [t]he existence of lead-based paint or lead-based paint hazards in target housing, (2) the hazards of exposure to lead-based paint, and (3) ways to avoid such exposure before they become obligated to purchase or lease housing that may contain lead-based paint." Proposed Rules, 59 Fed. Reg. 54984 (Nov. 2, 1994).

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[21] Mr. Ahmed's testimony also indicated that lead testing was performed at his apartment and that he has never been given the results of any lead-based paint testing performed at 5134-5136 S. Harper Avenue. *See* Tr. at 454. I note that any action pertaining thereto is not cited in the Complaint before me.

Documentation of the lessor's and agent's compliance with the lessor requirements set forth at § 745.113(b) through certification and acknowledgment is the prescribed method of ensuring disclosure, which is the sole purpose of the Lead Disclosure Rule. The most effective and only realistic method of ensuring disclosure is to incorporate the language of the lessor requirements in the leasing contract or as an attachment thereto before the lessee is obligated under the contract. Otherwise, proof of disclosure would be reduced to a "he said, she said" controversy. The purpose of the Lead Disclosure Rule would be defeated without these "record keeping" requirements.

I note Respondent's argument that it should not be held accountable for the tenants' refusal to sign and return the Disclosure Forms in a timely manner. New leases should not have been executed without the required certification and acknowledgment of the lessor requirements, and such was enforceable by not providing the tenant with the lease and keys to the apartment until the Disclosure Form was completed. *See* Tr. at 407. Respondent could have addressed the question of renewals of existing leases by incorporating the lessor requirements in the language of the lease. In this case, however, there is no probative or credible evidence in the record showing refusal to sign by tenants.[22]

F. Retention of Certification and Acknowledgment Information

In its defense, Respondent also argues that it was not required to maintain documentation for more than three years from the commencement of the leasing period. *See* 40 C.F.R. § 745.113(c)(1). Respondent contends that Complainant cannot prove that violations occurred between 1997 and 1999 in a case filed in March 2002 because there is no regulatory requirement to keep records after three years. *See* Respondent's Post-Hearing Brief.

The regulatory requirement at 40 C.F.R. § 745.113(c)(1) provides that in leasing situations, the lessor and any agent must retain a copy of each completed attachment or contract containing the required information in § 745.113(b) for no less than three years from commencement of each lease. The purpose of the record keeping requirements in the Lead Disclosure Rule is to maintain copies of the information provided to demonstrate the lessor's compliance with the Lead Disclosure Rule, documenting

[22] The testimony of Patrick T. Connor is immaterial and did not include reference to the apartments at issue in this matter. *See* 466-76.

the completion of all disclosure activities by the responsible parties and providing a record of compliance for use by EPA enforcement officials. *See* 61 Fed. Reg. 9081.

In this case, the administrative subpoenas issued to Hyde Park in April 1999 and March 2000 put Respondent on notice of a possible enforcement action. During early 2000, Respondent participated in discussions with the EPA concerning the EPA's enforcement action against Hyde Park. *See* Tr. at 313-14. In December 2000, the EPA sent Respondent a Pre-Filing Notice letter advising Respondent of its potential liability in this matter. *See* C's Ex. 10. Moreover, on July 19, 2001, Complainant sent Respondent's bank and titleholder of the trust, American National Bank, a letter notifying them of potential violations of federal lead-based paint disclosure laws by Respondent. *See* C's Ex. 9. At no time from the EPA's investigation in December 1998 through the hearing has Respondent indicated that it had any exculpatory documents concerning the leasing contracts for the nine units at issue other than the January 3, 1998 Disclosure Form faxed by Mr. Ahmed to Respondent one week before the hearing. The evidence produced by Respondent's agent, Hyde Park, in response to Complainant's administrative subpoenas is deemed adequate to sustain the charges against Respondent. Further, such evidence is sufficient to meet the preponderance of the evidence standard for Complainant's burdens of presentation and persuasion that the violations occurred as set forth in the Complaint. See 40 C.F.R. § 22.24.

G. Conclusion

In view of the foregoing, I find Respondent liable for failing to include, either within the contract or as an attachment to the contract, the lessor requirements before the lessees of Apartments 2B, 1B, 4A, 2A, 2E, 4C, 1C, 3B, and 4B of 5134-5136 S. Harper, Chicago, Illinois, were obligated under each contract cited in the Complaint pursuant to 40 C.F.R. §§ 745.113(b) and 745.100. In making this finding, I have considered the documentary and testimonial evidence presented by Respondent individually and collectively. There is no direct evidence that there was compliance with the certification and acknowledgment of the lessor requirements under § 745.113(b), and the circumstantial evidence presented is not sufficiently probative or credible to establish compliance.[23]

[23] I note that Respondent has not introduced evidence to support its earlier assertion that several documents related to the leasing transactions were lost or destroyed in a flood at

IV. Penalty

The Consolidated Rules of Practice govern the assessment of civil administrative penalties in this proceeding. Section 22.27(b) of the Consolidated Rules of Practice provides in pertinent part:

> [i]f the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.... If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b)(64 Fed. Reg. 40186 (July 23, 1999)).

The Board has recently interpreted this rule in *US Army, Ft. Wainwright Central Heating and Power Plant*, CAA Appeal No. 02-04, slip op. at 61-62 (EAB, June 5, 2003) and determined that a proposed penalty based upon the CAA Penalty Policy may be completely disregarded as long as the ALJ "adequately explains" her reasons for departure. The Board stated: "[t]he Part 22 regulations and the Board's decisions, however, make clear that the ALJ has significant discretion to assess a penalty other than that calculated pursuant to a particular penalty policy." *Id*. at 61 (citing 40 C.F.R. § 22.27(b); *In re Allegheny Power Serv. Corp. & Choice Insulation, Inc.*, 9 E.A.D. 636 (EAB 2001), appeal docketed, No. 6:01-CV-241 (S.D. W. Va. Mar. 16, 2001); *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997).

The ALJ's decisions must contain a reasoned analysis of the basis for the penalty assessment, but the ALJ is free to depart from the penalty policy as long as she adequately explains her rational. *Id*. at 61 (citing *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 535 (EAB 1998). *See also In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758-9 (EAB 1997) (The ALJ's penalty

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Hyde Park's offices in 1998. *See* Respondent's Answer, Fourth Affirmative Defense.

assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty, by the Agency's regulatory requirement (40 C.F.R. § 22.27(b)) to provide 'specific reasons' for rejecting the complainant's penalty proposal, and by the general Administrative Procedure Act requirement that a sanction be rationally related to the offense committed (i.e., that the choice of sanction not be an 'abuse of discretion' or otherwise arbitrary and capricious) (*quoted in US Army, Ft. Wainwright Central Heating and Power Plant*, CAA Appeal No. 02-04, slip op. at 61-62 (EAB, June 5, 2003)).

In another decision, issued the same day as *Ft. Wainwright*, the Board stated that:

> ALJ's are not compelled to use penalty policies in setting penalties. Instead an ALJ, 'having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand.' If the ALJ chooses not to apply the penalty policy, the ALJ must explain his reasons for forgoing the penalty policy. If the Board determines these reasons to be persuasive or convincing...the Board will defer to the ALJ's penalty analysis.

In re CDT Landfill, CAA Appeal No. 02-02, slip op. at 42 (June 5, 2003) (citations omitted) (quoting *In re Capozzi*, RCRA Appeal No. 02-01, slip op. at 30 (EAB March 25, 2003)).

As described above, Respondent has been found to have violated Section 409 of TSCA and its implementing regulations at 40 C.F.R. § 745.113(b) for certification and acknowledgment of disclosure.

Pursuant to the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) and the regulations promulgated thereunder[24], for violations occurring on and after January 31, 1997, the statutory maximum penalty for each violation shall be $11,000. Pursuant to the Rules of Practice, the EPA bears the burden of proof to show that any penalty sought

[24] *See* Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69360 (December 31, 1996), codified at 40 C.F.R. Part 19 (March 15, 2004).

is appropriate.[25] *See In re John A. Capozzi*, RCRA (3008) Appeal No. 02-01, slip op. at 28, 11 E.A.D. __ (EAB, Mar. 25, 2003).

Section 16 of TSCA provides that:

> [i]n determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, gravity of the violation or any history of such prior violations, the degree of culpability, and such other matters as justice may require.

15 U.S.C. § 2615(a)(2)(B). In proposing a penalty of $56,980, the EPA employed the Section 1018 - Disclosure Rule Enforcement Response Policy[26] dated February 2000 ("ERP" or "Disclosure Guidance Document"), which was designed by the Agency to guide its calculation of civil penalties against sellers, lessors, and agents who fail to comply with certain requirements when selling or leasing target housing. *See* Section 1018 - Disclosure Rule Enforcement Response Policy, February, 2000, C's Ex. 11. This policy, with minor exceptions, follows the penalty factors set forth in the statute. The purpose of the Lead Disclosure Rule is to ensure that individuals and families receive the information necessary to protect themselves and their families from lead-based paint and/or lead-based paint hazards. *Id.* at 2. This information "will help families and individuals make informed housing decisions to reduce their risk of exposure to lead hazards." *Id.*

While the ERP is not binding on Administrative Law Judges, the EAB has emphasized that the Agency's penalty policies should be applied whenever possible because such policies "assume that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." *In re M.A. Bruder & Sons*, RCRA (3008) Appeal No. 01-04, slip op. at 21, 10 E.A.D. __ (EAB, July 10, 2002); *In re Carroll Oil Co.*, 2002 WL 1773052 EPA, July 31, 2002.

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[25] "The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a).

[26] The ERP was developed under the general framework established by the *Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy*, 45 Fed. Reg. 59770 (1980)(TSCA Civil Penalty Guidelines).

A. Disclosure Penalty Policy Methodology

In lieu of a civil administrative complaint, the EPA may issue a notice of noncompliance ("NON") as determined on a case-by-case basis when justice would best be served. *See* ERP, at 6. In this case, Complainant determined that an NON would not be sufficient to address the violations involving apartments with children of various ages. This is a matter of prosecutorial discretion.

Where a violation warranting a penalty has occurred, the Disclosure Penalty Policy utilizes a two stage process for determining an appropriate penalty amount. *See* Disclosure Guidance Document, p. 9. The first step is the determination of a "gravity-based penalty" taking into account the nature of the violation, the circumstances of the violation, and the extent of harm that may result from a given violation. *See id.* These factors are incorporated into a penalty matrix (the Gravity-Based Penalty Matrix) which specifies the appropriate gravity-based penalty. *See id.* The second stage involves the upward or downward adjustment of the gravity-based penalty in consideration of the violator's ability to pay/continue in business, history of prior violations, degree of culpability, and "such other factors as justice may require," such as attitude, supplemental environmental projects, voluntary disclosure, size of business, single unit owners, and/or economic benefit of non-compliance. *See id.*

The Disclosure Penalty Policy characterizes as "major" violations those where there is potential for "serious" damage to human health, such as in cases where children under six reside on the premises and/or the housing was built prior to 1960, *i.e.*, prior to the time when lead levels in paint were reduced. It characterizes the nature/circumstances of egregious violations at various levels. Those violations which have a *high* probability of impairing the ability to access the information required to be disclosed are classified as "level 1 violations;" violations having a *medium* impact of impairing the ability to access the information are "level 2 or 3 violations;" and violations having a *low* impact on the ability to access the information required to be disclosed are "level 4, 5, or 6 violations."

B. Gravity-Based Penalty

The first stage, determining the gravity-based penalty for the violations, consists of determining the nature, circumstances and gravity of the violations that provides a penalty amount from the Gravity-Based Penalty Matrix.

1. The Nature, Circumstances, Extent and Gravity of the Violations

The TSCA Civil Penalty Guidelines discuss the "nature" of the violation as the essential character of the violation, and incorporate the concept of whether the violation is of a chemical control, control-associated data gathering, or hazard assessment nature. *See* ERP, at p. 9. The "circumstances" reflect the probability of harm resulting from a particular type of violation. *Id.* at 10. The primary circumstance to be considered is the lessee's ability to properly assess and weigh the factors associated with human health risk when leasing target housing. *See id.* Thus, the greater the deviation from the regulations (such as no disclosure), the greater the likelihood that the lessee will be uninformed about the hazards associated with lead-based paint, and, consequently, the greater the likelihood of a child being exposed to lead-based paint hazards. *See id.* And lastly, extent is used to consider the degree, range, or scope of the violation. *See id.*

The ERP explicitly provides that "[t]he harmful effects that lead can have on children under the age of six warrant a major extent factor." *Id.* at 11. Complainant appropriately placed each of the violations for Apartment 4B which are Counts 1, 10, 19, 28, and 37 in the "major" extent category because there was one child three years of age residing in the target apartment. *See* C's Ex. 4, Attachment 9. The ERP further provides that "[c]hildren age of six or above can also be harmed by exposure to lead-based paint and lead-based paint hazards; therefore, the extent factor takes this fact into consideration as well." *Id.* Complainant placed each of the violations for Apartment 3B which are Counts 9, 18, 27, 36, and 45 in the "significant" extent category because there was one child eleven years of age residing in the target apartment. *See* C's Ex. 4, Attachment 8. The remaining seven target apartments and the thirty-five related violations fall into the "minor" extent category as there were no other children under 18 years of age known to be residing in the property and there were no pregnant women known to be living in the target housing.

Next, for Counts 1 through 9, Complainant assigned each count a Level 2 "circumstance" value because the ERP designates the failure to include the Lead Warning Statement as a "circumstance" Level 2 indicating that each of these violations has a high probability of impairing the ability to assess the information required to be disclosed. *See* ERP, at B-1, 10. Based on these "extent" and "circumstance" classifications, Complainant calculated a gravity-based penalty of $8,800 for Count 1, $5,500 for Count 9, and $9,240 for Counts 2 through 8 (or $1,320 per count).

For Counts 10 through 18, Complainant assigned each count a Level 3 "circumstance" value because the ERP specifically designates this violation as a Level 3 indicating that each of these violations has a medium impact of impairing the ability to assess the information, as the lessor's disclosure statement is intended to provide a description of what the landlord knows about the historical presence of lead-based paint or the related hazards. *See* ERP, at B-1, 10. Based on these "extent" and "circumstance" classifications, Complainant calculated a gravity-based penalty of $6,600 for Count 10, $4,400 for Count 18, and $4,620 for Counts 11 through 17 (or $660 per count).

For Counts 19 through 27, Complainant assigned each count a Level 5 "circumstance" value because the ERP designates the failure to include a list of records or reports that are available to the lessor which pertain to lead-based paint or related hazards to be at Level 5, indicating that each of these violations has a low impact on the ability to assess the information required to be disclosed. *See* ERP, at B-1, 10. Based on these "extent" and "circumstance" classifications, Complainant calculated a gravity-based penalty of $2,200 for Count 19, $1,430 for Count 27, and $1,540 for Counts 20 through 26 (or $220 per count).

For Counts 28 through 36, Complainant assigned each count a Level 4 "circumstance" value because the ERP designates the failure to include a statement by the lessee affirming receipt of the required information to be at Level 5, indicating that each of these violations has a medium impact on the ability to assess the information required to be disclosed. *See* ERP, at B-1, 10. Based on these "extent" and "circumstance" classifications, Complainant calculated a gravity-based penalty of $4,400 for Count 28, $2,750 for Count 36, and $3,080 for Counts 29 through 35 (or $440 per count).

For Counts 37 through 45, Complainant assigned each count a

Level 6 "circumstance" value because the ERP designates the failure to include the signatures of the lessor and the lessee certifying to the accuracy of their statements to the best of their knowledge along with the dates of signature to be at Level 6, indicating that each of these violations has a low impact on the ability to assess the information required to be disclosed. *See* ERP, at B-1, 10. Based on these "extent" and "circumstance" classifications, Complainant calculated a gravity-based penalty of $1,100 for Count 37, $550 for Count 45, and $770[27] for Counts 38 through 44 (or $110 per count).

The sum gravity-based penalty for all 45 counts is $56,980. Respondent has not challenged the calculation of the penalty or the characterizations of the circumstance or extent classifications assigned by the EPA in calculating the penalty. Rather, Respondent argues that the proposed penalty is excessive for paperwork violations and that the five counts for each leased unit is cumulative in nature. In other words, when a Respondent cannot produce the Disclosure Form, there are five separate violations rather than one violation.

As discussed above in the liability determination section, Respondent's violations are not merely "paperwork" violations.[28] When the Disclosure Form is absent, the ERP provides that each lessor requirement constitutes a violation, i.e., the failure to provide a Lead Warning Statement. *See* 40 C.F.R. § 745.113(b)(1). However, the proposed penalty for each leasing unit does not exceed the amount of penalty allowed by Section 16 of TSCA for the violation. The EPA's method allows for apportionment of the penalty when only certain elements of the certification and acknowledgment requirements are not met.

Respondent contends that the penalty in this case should be examined in the light of the $20,000 settlement made in the EPA's

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[27] Complainant apparently made an arithmetic error where it had indicated $660 as the sum of seven violations at $110 each. The correct amount is indicated above. However, the total proposed penalty was correctly calculated to be $56,980.

[28] The regulatory requirement that the lessor, and any agent, shall retain a copy of the completed attachment or lease contract containing the certification and acknowledgment information for no less than three years from the commencement of the leasing period set forth at 40 C.F.R. § 745.115(c)(1) is characterized as a "record keeping requirement" but such does not diminish the requirement's importance to the regulatory scheme.

enforcement action against Hyde Park. *See* Tr. at 389. I emphasize to Respondent that such settlement is not dispositive because the lessor, as a party named in the statute and regulations as obligated by their requirements, is ultimately responsible and liable for failure to comply with the certification and acknowledgment of disclosure requirements. I note that TSCA is a strict liability statute that holds that where there is more than one party, each is held to be jointly and severally liable. *See* discussion *infra* p. 26 (discussing TSCA's strict liability).

C. Adjustments to the Gravity-Based Penalty

1. Ability to Pay

In Respondent's Answer to EPA's Amended Complaint, dated May 20, 2002, Respondent raised its ability to pay the $56,980 proposed penalty[29] and did not alter its position in its Motion to Supplement its First Affirmative Defense to the Amended Complaint, dated January 24, 2003. In Respondent's Answer and Prehearing Exchange, Respondent failed to provide facts or information which would indicate that the proposed penalty should be adjusted due to Respondent's ability to pay the proposed penalty. Although Respondent contends that they place a majority of their profits directly back into their partnership, there is no claim that an assessment of the proposed penalty would affect their ability to continue in business or that they would not be able to pay the complete penalty amount.

Subsequently, Respondent withdrew its inability to pay claim in Respondent Harpoon Partnership's Response to Complainant's Motion to File second Amended Complaint filed on March 24, 2003. At hearing, Respondent stipulated to its ability to pay the proposed penalty. *See* Tr. at 339. Therefore, Complainant correctly did not apply a downward adjustment for Respondent's ability to pay.

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[29] In its Second Affirmative Defense, Respondent argues that "Harpoon is without sufficient funds to [pay] the civil penalty required by the U.S. EPA." *See* Respondent Harpoon Partnership's Answers and Supplemental Affirmative Defenses to the Amended Complaint, January 24, 2003, at p. 20. Specifically, Harpoon requests that EPA take into account "Harpoon's financial situation, without regard to any alleged connection between Gerald M. Fisch and other properties in which he may or may not have an interest, when requesting penalties." *Id.*

2. History of Prior Violations

When a violator has a history of having previously violated the Lead Disclosure Rule, the gravity-based penalty should be adjusted upward by a maximum of 25%. *See* ERP, at 15. In the instant case, Respondent had no history of prior violations and Complainant correctly did not make an upward adjustment to increase the gravity-based penalty.

3. Degree of Culpability

The ERP provides two principal criteria for assessing culpability: (a) the violator's knowledge of the Lead Disclosure Rule; and (b) the degree of the violator's control over the violative condition. *See* ERP, p. 15. When the violator intentionally commits an act which he knew would be a violation of the Lead Disclosure Rule or hazardous to health, the proposed penalty may be increased by up to 25%. *See id.*

In this case, Complainant did not increase the initial gravity–based penalty due to culpability. In reviewing the provision of the ERP which provides an increase in the penalty for culpability, Complainant states that it "has no information that the violations were intentional or that Respondent had previously received a NON." Complainant's Post-Hearing Brief, at 78. Complainant did not consider a downward adjustment of the proposed penalty on the basis of culpability because Complainant determined that the ERP does not provide for such a reduction. *See id.* at 78; Tr. at 184, 254.

Respondent points out that pursuant to the TSCA Guidelines, the gravity-based penalty may be decreased for the "innocent landowner" on the basis of degree of control. *See id.* Respondent argues that a significant reduction of the proposed penalty is warranted on the basis of its lack of culpability in this case, particularly as its agent was responsible for compliance with the Lead Disclosure Rule.

As indicated above, the ERP is based on the statutory factors set forth in Section 16(a)(2)(B) of TSCA and was developed under the general framework established by the Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy, 45 Fed. Reg. 59770 (1980) ("TSCA Guidelines"), C's Ex. 12, ERP at p. 9. The TSCA Guidelines provide a reduction of a gravity-based penalty by up to 25% for the adjustment factor of culpability. *See* TSCA Guidelines, at 59733. In providing that a reduction may be warranted, the TSCA Guidelines recognize that "another company

may have had some role in creating the violative conditions and thus must also share in the legal responsibility for the resulting consequences." TSCA Guidelines, at 59733.

TSCA is a strict liability statute that holds each party jointly and severally liable for violations of the statutory provisions. *See* In the Matter of *Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 EPA ALJ; In the Matter of *Leonard Strandley*, TSCA Appeal No. 89-4, 3 E.A.D. 718, 722 (CJO, Nov. 25, 1991). Nevertheless, culpability is a statutory factor that must be addressed when calculating the penalty amount. Although the ERP only specifies that an upward adjustment may be made for culpability, it does not explicitly exclude a downward adjustment for this factor. *See* ERP, p. 15.

Respondent's argument concerning a reduction for the mitigating factor of culpability is persuasive. An adjustment for culpability was clearly contemplated by the enabling statute. The TSCA Guidelines provide a reduction of the gravity-based penalty for the adjustment factor of culpability. To find that the ERP does not allow for a downward adjustment for culpability when the TSCA Guidelines do would be an inconsistent interpretation of the same penalty factor by the two TSCA penalty policies. Complainant's reason for not recognizing a reduction because the ERP does not provide explicitly for such is not compelling.

Additionally, failure to recognize a reduction of a penalty for the adjustment factor of culpability in situations where an owner of target housing employs an agent to lease the property does not address the possible question of the respondent's control or the agent's sharing in the legal responsibility. The text of the regulations, as well as the ERP, indicates that primary responsibility for compliance with the Lead Disclosure Rule lies with the management company that serves as the lessor's agent. Indeed, the regulations direct the agent to ensure compliance. 40 C.F.R. §§ 745.113(b)(5), 745.113(a).

The ERP recognizes that a "Property Management Firm" normally is empowered to perform certain duties on behalf of the lessor, including "showing the target housing to prospective Purchasers or Lessees and ensuring that all sales and leases are *properly executed* by the parties." (Emphasis added.) ERP, at A-1. In many instances, the Property Management Firm has primary responsibility for lease matters and this should be taken into consideration when analyzing the culpability factor. This does not mean, however, that an owner's use of a management company automatically warrants a reduction of a penalty for the owner

based on the culpability factor. Rather, the facts of each case must be examined to determine the owner's degree of culpability. Interestingly, I note that the ERP does not discuss responsibility apportionment and other relationship intricacies between the owner and the agent, one of the most common leasing scenarios in the business.

In view of the foregoing, I find that the EPA incorrectly determined that a downward adjustment of a gravity-based penalty in consideration of the violator's degree of culpability is not allowed under the ERP. *See* 15 U.S.C. § 2615(a)(2)(B).

I now turn to an examination of the facts in this case to determine Respondent's degree of culpability. There is no dispute that Mr. Fisch, the managing partner for Respondent, knew of the Lead Disclosure Rule and its requirements. As described in the liability section, Mr. Fisch testified that he attended a training session given by the Chicago Association of Realtors regarding the lead disclosure rules in late 1996. Tr. at 357. The testimony, however, indicates that only one of the partners in the partnership who owns the target housing, Mr. Fisch, had knowledge of the Lead Disclosure Rule.

Mr. Fisch testified on behalf of the Respondent that Hyde Park was purposely employed by the owner to take care of such leasing matters.[30] Moreover, Mr. Fisch credibly testified that he conveyed his knowledge of the lessor requirements and that he told Carl Collina, and later Mr. Zugalj, to give the Disclosure Form to the tenants. Tr. at 344. Mr. Fisch provided Hyde Park with a copy of the Disclosure Form. *See id.* According to Mr. Fisch's testimony, he was assured by Mr. Collina and Mr. Zugalj that Hyde Park was complying with the Lead Disclosure Rule. *See id.* Thus, the degree of control by the owner in the instant case appears to be minimal.

In view of this testimony by Mr. Fisch, the full reduction of 25% based on culpability is warranted. Further, I find that under the particular facts and circumstances of this case, the culpability factor deserves an additional 10% adjustment. A 35% reduction of the gravity-based penalty amount is more reasonable

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[30] The target housing's tax documentation is sent to Mr. Fisch's office at Acres Real Estate, not to the agent's office. Tr. at 328. However, Mr. Fisch testified that Hyde Park paid the taxes and mortgage, procured an insurance policy, and paid the bills on behalf of the Respondent. *See* Tr. at 302-3, 340, and 343-44.

and appropriate based on the facts here. The primary reason for the departure from the penalty policy is that Mr. Fisch took steps to ensure that the Lead Disclosure Rule was followed by relaying the information he received to his agent and inquiring whether the Lead Disclosure Rule was being followed. He was assured by Hyde Park that the requirements of the Lead Disclosure Rule were being met. As such, justice and fairness dictate that in this particular case, the culpability factor should have a greater reduction than that suggested in the ERP. I attach significance to the fact that the EPA, when seeking information concerning compliance with the Lead Disclosure Rule, subpoenaed Hyde Park and not Respondent.

Application of the 35% downward adjustment to the gravity-based penalty for the culpability factor results in a total penalty of $37,037. The penalty for Counts 1, 10, 19, 28, and 37, pertaining to apartment 4B where there was a child under the age of 6, is $15,015. The penalty for Counts 9, 18, 27, 36, and 45, pertaining to apartment 3B where there was a child between the ages of 6 and 18, is $9,509.50, and the penalty for the remaining counts, where there were no children under the age of 18 and no pregnant women, is $12,512.50.

Finally, I observe that the total penalty amount should not reflect that the Lead Disclosure Program is an abatement program.[31] *See* 40 C.F.R. § 745.107(a). The testimony of Mr. Cooper indicated that the EPA was seeking abatement of the lead paint hazards as part of its enforcement action. *See* Tr. at 217, 220. Although abatement of lead-based paint hazards may be an excellent Supplemental Environmental Project ("SEP") used to offset part of a monetary penalty, assessment of penalties should not be used as a means to convert the Lead Disclosure Program into an abatement program. The Lead Disclosure program is an informational program. The regulation explicitly states that "[n]othing in this section implies a positive obligation on the seller or lessor to conduct any evaluation or reduction activities." 40 C.F.R. § 745.107(a).

Furthermore, even if it were found that a downward adjustment for culpability could not be made as an adjustment to the gravity-based penalty, I note that a downward adjustment would then be warranted for other factors as justice may require.

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[31] Mr. Fisch testified that the EPA ultimately was seeking abatement. *See* Tr. at 314.

4. Other Factors as Justice May Require

a. No Known Risk of Exposure

Complainant may also make a downward adjustment of 80% when the responsible party provides documentation that the target housing is certified lead-based paint free. *See id.* In this case, Respondent has not provided any documentation that the property is lead-based paint free. Thus, Complainant appropriately did not make the downward adjustment of 80% for the documentation that the target housing is certified to be lead-based paint free.

b. Other Factors

Pursuant to the ERP, Complainant may also reduce the proposed civil penalty for other enumerated factors: a 30% adjustment for attitude; an adjustment of the value of a SEP; a potential 100% reduction for the audit policy outlined in the *Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66706 (Dec. 22, 1995); a reduction of up to 50% for voluntary disclosure; a discretionary reduction for the size of business pursuant to *EPA's Policy on Compliance Incentives for Small Business* (June 10, 1996); an adjustment of 50% for small independent owners and lessors where there is no agent involvement; or an adjustment for the economic benefit of noncompliance. *See* ERP at 16-18.

Complainant did not adjust the gravity-based penalty for any of the other factors as justice may require because none of the factors were applicable to Respondent's situation. *See* Complainant's Post-Hearing Brief, at 80-82. Therefore, the adjusted gravity-based penalty amount is $37,037.

Accordingly, Respondent is hereby assessed a civil penalty of $37,037. This amount is appropriate for the gravity of the violations committed and the nature of Respondent's operations. Specifically, I find this penalty amount to be reasonable when taking into account the seriousness of the violations and the culpability of Respondent pursuant to the Lead Disclosure Rule. Furthermore, the penalty amount is meaningful and sufficient to serve as a deterrent.

V. Conclusions of Law

1. The term “lessor”, as used in the Lead Disclosure Rule, includes an “owner” of target housing. 40 C.F.R. § 745.103.

2. Complainant has sustained its burden of proof and has shown by a preponderance of the evidence that Respondent, as owner and lessor, failed to provide, pursuant to 40 C.F.R. § 745.113(b)(1)-(4), either within or as an attachment to the leasing contracts for apartments 2B, 1B 4A, 2A, 2E, 4C, 1C, 3B, and 4B: (1) a Lead Warning Statement; (2) a disclosure statement where the lessor either provides actual information about lead-based paint hazards in the building or states he has no knowledge of this; (3) a list of any records or reports of lead-based paint or a statement that no such records are available; (4) a statement by each tenant affirming receipt of the aforementioned information; (5) and certifying signatures and dates from each lessee, lessor and any agent before each lessee was obligated to lease the target housing. 40 C.F.R. §§ 745.113 and 745.100.

3. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and the ERP, as well as fairness and justice, require that Respondent is assessed a penalty of $37,037.

VI. Order

1. Respondent Harpoon Partnership, Inc. is assessed a civil administrative penalty in the amount of $37,037.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after the effective date of the Final Order by submitting a cashier's check or certified check in the amount of $37,037, payable to the “Treasurer, United States of America,” and mailed to:

EPA Region 5
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

3. A transmittal letter identifying the subject case title and EPA docket number (TSCA-05-2002-0004), as well as Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. § 901.9.

Appeal Rights

Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: May 27, 2004
Washington, DC

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	
HARPOON PARTNERSHIP,	**)**	**Docket No. TSCA-05-2002-0004**
	)	
	)	
RESPONDENT	**)**	

ORDER GRANTING COMPLAINANT'S REQUEST FOR PARTIAL ACCELERATED DECISION AND DENYING RESPONDENT'S REQUEST FOR PARTIAL ACCELERATED DECISION

Factual and Procedural Background

This civil administrative penalty proceeding arises under the authority of Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On March 19, 2002, the United States Environmental Protection Agency, Region V (the "EPA" or "Complainant") filed a Complaint against Harpoon Partnership ("Respondent"), alleging violations of TSCA and its implementing regulations for the disclosure of lead-based paint and lead-based paint hazards found in 40 C.F.R. Part 745, Subpart F. Complainant seeks a civil penalty of $ 56,980 for these alleged violations in regard to nine units in an apartment building constructed before 1978, owned by Respondent, located at 5134-5136 S Harper, Chicago, Illinois. Complainant filed an Amended Complaint on April 10, 2002 and a Second Amended Complaint on April 16, 2003. Respondent filed its Answer and Affirmative Defenses to Amended Complaint on May 20, 2002, clarified its first affirmative defense in Respondent's Motion to Supplement First Affirmative Defense to the Amended Complaint on January 24, 2003, and answered the Second Amended Complaint on May 6, 2003, denying many of the factual allegations made in the Complaint and raising several defenses.

Respondent's first defense raises two issues. First, Respondent contends that it is not the "lessor" as defined by the regulations because it did not offer the target property for lease or have

any contact with the lessees of the target housing.[1] Respondent states that it was merely the owner and its management company, Hyde Park Realty, transacted with the lessees and therefore was the lessor with regard to the leased units listed in the Complaint. Second, Respondent contends that the language of 40 C.F.R. Part 745 is vague and ambiguous so as to not provide adequate notice that Respondent was a lessor and responsible for disclosure of the presence of lead-based paint or lead-based paint hazards.[2]

On May 19, 2003 Complainant moved to strike Respondent's first defense in its Response to Respondent's First Affirmative Defense. In turn, on June 3, 2003 Respondent replied to the Complainant's motion to strike in its Response to Complainant's Response to Respondent's First Affirmative Defense, claiming that defendant mischaracterized the nature of Respondent's defense.[3] Subsequently, during a telephonic conference with Respondent and Complainant on June 6, 2003, the hearing date set for June 23, 2003 through June 27, 2003 was postponed and a schedule was established for the submission of briefs addressing the legal questions of whether the statutory and regulatory meaning of the term "lessor" includes the owner of the target housing, whether a lessor's responsibilities may be contracted away to a third party, and whether the regulations afforded Respondent "fair notice." Briefs and reply briefs have been timely filed. For the reasons stated below, Complainant's request for partial accelerated decision[4] is granted and Respondent's request for partial accelerated decision is denied.

Statutory and Regulatory Background

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[1] The burden of production and persuasion rests with Complainant's prima facie case with regard to whether Respondent is within the jurisdiction of the regulations cited in the Complaint. *See* 40 C.F.R. § 22.24. Regardless of whether Respondent withdraws the jurisdictional defense from its Answer, the EPA must still prove that Respondent is a lessor as defined by the regulations. Therefore, the jurisdictional issue raised by Respondent in its Answer is not a true affirmative defense as alleged. *See* 2A Moore's Federal Practice 8.27[4] at 8-179 (2d ed. 1996) ("a true affirmative defense, which is avoiding in nature, raises matters outside the scope of the plaintiff's prima facie case."). On the other hand, the fair notice issue raised by Respondent is an affirmative defense in which the Respondent carries the burden of production and persuasion. *Rogers Corporation v. EPA*, 352 F.3d 1096, 1103 (D.C. Cir. 2002).

[2] Respondent added the issue of fair notice in Respondent's Motion to Supplement First Affirmative Defense to the Amended Complaint. Respondent's motion was granted on January 27, 2003.

[3] Complainant contends that Respondent's arguments are first, that Respondent contracted away its responsibility as an "owner" under Subpart F, and second, that Respondent had no fair notice that it could not contract away its disclosure requirements to a management company to act as a lessor. *See* Complainant's Response to Respondent's First Affirmative Defense. In support of its motion to strike, Complainant merely states that as a matter of law owners cannot contract away their responsibilities under Subpart F, and raises factual issues as to the nature of the Respondent's relationship with its management company, Hyde Park Realty. *See id.* Similarly, Respondent's reply to Complainant's motion to strike cursorily supports its contention that the definition of "lessor" in Subpart F does not include an "owner" who retains a management company to lease its property. *See* Respondent's Response to Complainant's Response to Respondent's First Affirmative Defense.

[4] Respondent and Complainant requested in their briefs that the issues discussed herein be analyzed for the purpose of an accelerated decision.

The legal questions in this case present an issue of first impression involving Title X, Section 1018 of Housing and Community Development Act of 1992, Pub. L. 102-550, § 1018, 106 Stat. 3681 (codified at 42 U.S.C. § 4852d). The stated purpose of Title X, known as the Residential Lead-Based Paint Hazard Reduction Act (the "Lead-Based Paint Act") (codified at 42 U.S.C. §§ 4851-4856), is to establish a national objective to develop the infrastructure and standards necessary to eliminate lead-based paint hazards in residential housing. 42 U.S.C. § 4851a(1). The thrust behind this enactment is documented in the congressional findings, which state that lead poisoning has affected as many as three million children under the age of six and recognize that the ingestion of household dust arising from lead-based paint is the most common cause of lead poisoning in children. 42 U.S.C. § 4851(1), (4). The infrastructure Congress envisioned as a national strategy to address this human health crisis focuses on, inter alia, financing and guidelines for the reduction of lead-based paint hazards, disclosure of information pertaining to lead upon the transfer of residential property, and occupational safety for workers in the construction industry. 42 U.S.C. §§ 4852, 4852c, 4852d, 4853.

Specific to the case at hand, Section 1018 of the Lead-Based Paint Act directs the Secretary of the Department of Housing and Urban Development ("HUD") and the Administrator of the EPA to promulgate regulations mandating the disclosure of lead-based paint hazards in residential housing constructed before 1978 (hereinafter "target housing") that is sold or leased within two years of the effective date of the Act. 42 U.S.C. § 4852d(a)(1). *See* 42 U.S.C. § 4851b(27) (defining target housing). In essence, Congress sets out a broad canvass of guideline requirements as a backdrop for the agencies to craft more refined implementing requirements to best effectuate the transfer of information during the sale or lease of residential property.

Further, Section 1018 directs the regulations to require the seller or lessor to disclose information pertaining to lead-based paint hazards "before the purchaser or lessee is obligated under any contract to purchase or lease target housing." 42 U.S.C. § 4852d(a)(1). The information and provisions Congress intended the seller or lessor to provide are as follows: any knowledge that the seller or lessor possesses concerning any lead based-paint or lead-based paint hazards in the target housing to be sold or leased, any available lead hazard reports, a lead hazard information pamphlet, and a ten-day period for the purchaser to conduct a risk assessment or inspection for the presence of lead-based hazards. 42 U.S.C. § 4852d (a)(1)(A)-(C). Further, Section 1018 provides additional requirements for contracts involving the purchase and sale of residential housing. The contract must contain a Lead Warning Statement and a statement signed by the purchaser confirming that the purchaser reviewed and understands the Lead Warning Statement, received a lead hazard information pamphlet, and that the purchaser was given the ten-day inspection and assessment period. 42 U.S.C. § 4852d (a)(2)(A)-(C).

Finally, Congress dedicated a section to account for situations where a seller or lessor has entered into a contract with an agent for the purpose of selling or leasing target housing, by mandating that the regulations require the agent to, on behalf of the seller or lessor, ensure compliance with Section 1018. 42 U.S.C. § 4852d (4). Although the Lead-Based Paint Act provides a definition section, the Act does not define the terms "seller," "lessor," "owner,"

"lessee," "purchaser," or "agent." *See* 42 U.S.C. § 4851b.

The EPA and HUD published proposed regulations in November 1994 to comply with Congress' mandate to promulgate regulations implementing the Lead-Based Paint Act for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease. *See* Lead; Proposed Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing, 59 Fed. Reg. 54984 (Nov. 2, 1994). Approximately 200 comments were received before the ending of the comment period on February 9, 1996, with the largest number, twenty-five percent, of the responses coming from the real estate industry. Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg 9064, 9066 (March 6, 1996) ("Lead-Based Paint Final Rule"). The final rule was published in the Federal Register four months past the effective date mandated by Congress. The final rule became applicable on September 6, 1996 for owners of more than four residential dwellings, and December 6, 1996 for owners of one to four residential dwellings. Lead-Based Paint Final Rule, 61 Fed. Reg. at 9064 (codified at 24 C.F.R. Part 38 and 40 C.F.R. Part 745).

The purpose of the 40 C.F.R. Part 745, Subpart F (the "Lead Disclosure Rule") is to implement the provisions of Section 1018. 40 C.F.R. § 745.100. First and most important to the present case, the regulations define lessor as "any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations ...." 40 C.F.R. § 745.103. The regulations further define owner as "any entity that has legal title to target housing, including but limited to individuals, partnerships, corporations ..., except where a mortgagee holds legal title to property serving as collateral for a mortgage loan, in which case the owner would be the mortgagor." 40 C.F.R. § 745.103. And "agent" is defined as "any party who enters into a contract with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing." 40 C.F.R. § 745.103.

Second, the regulations exclude from the requirements of the Lead Disclosure Rule the sale of target housing at foreclosure, the lease of target housing that has been certified under a Federal certification program to be free from lead-based paint, short term leases of one hundred days or less, and renewals of existing leases where the lessor has previously disclosed all information required by the Lead Disclosure Rule. 40 C.F.R. § 745.101 (a)-(d).

Third, the regulations implement the disclosure requirements in much the same way as Section 1018 of the Lead-Based Paint Act, but more specifically detail the information to be disclosed and provide an opportunity for both the purchaser and lessee to review the information and amend the offer if desired. *See* 40 C.F.R. § 745.107. The regulations further require that the seller or lessor disclose information or reports concerning lead-based paint or lead-based paint hazards to the agent who is selling or leasing the target housing. 40 C.F.R. § 745.107 (3). Subpart 745 further explains the agent's compliance responsibilities as set forth in the Lead-Based Paint Act. *See* 40 C.F.R. § 745.115. In particular, the regulations require that the agent inform the seller or lessor of his/her obligations under the Lead Disclosure Rule, and ensure that the seller or lessor has complied or personally ensured compliance with the Lead Disclosure Rule.

40 C.F.R. § 745.115(a). If the agent complies with the above-mentioned requirements, he/she is then free from liability if the purchaser or lessee is not informed as required under the Lead Disclosure Rule. 40 C.F.R. § 745.115(b).

Fourth, the regulations provide for the certification and acknowledgment of disclosure by sellers and lessors. *See* 40 C.F.R. § 745.113. Under the heading "[l]essor requirements," this section requires six additions to a contract to lease target housing, either as attachments or embodied within the contract. 40 C.F.R. § 745.113 (b). The EPA and HUD included the Lead Warning Statement as a required addition to the lease contract where Section 1018 only included such statements in contracts for the purchase and sale of housing. 40 C.F.R. § 745.113(b)(1). *See also* Lead-Based Paint Final Rule, 61 Fed. Reg at 9071 (explaining that the EPA and HUD found it necessary to include the Lead Warning Statement in leases as well). In addition, the regulations require an attached statement by the lessor disclosing the presence or lack of knowledge of the presence of lead-based paint or lead-based paint hazards, a list of reports or records available to the lessor pertaining to lead-based paint and/or lead-based paint hazards, and a statement by the lessee confirming receipt of the lessor's disclosure and list of reports. 40 C.F.R. § 745.113(b)(2)-(4). Furthermore, the regulations require that a statement must be attached or included with a lease contract when one or more agents are involved confirming that the agent has informed the lessor of the lessor's obligations under the Lead-Based Paint Act and which attests that the agent is aware of his/her duty to ensure compliance with the Lead Disclosure Rule. 40 C.F.R. § 745.113(b)(5)(i)-(ii). The final element requires the signatures of the lessors, agents, and lessees in a contract to lease target housing, certifying the accuracy of their statements to the best of their knowledge. 40 C.F.R. § 745.113(b)(6).

Finally, the regulations impose a record-keeping requirement on sellers, lessors, and agents. In leasing situations, the lessor and any agent must retain a copy of a completed attachment or contract containing the required information in section 745.113 paragraph (b) for no less than three years from commencement of the lease. 40 C.F.R. § 745.113(c)(1).

Standard for Adjudicating a Motion for Accelerated Decision

Complainant filed its Motion to Strike Respondent's first affirmative defense pursuant to the Federal Rules of Civil Procedure Rule 12(f) as incorporated into the Rules of Practice governing judicial proceedings by administrative law judges. *See In re Lazarus, Inc.*, TSCA Appeal No. 95-2, 7 E.A.D. 318, 330 n.25, 1997 EPA App. LEXIS 27, at *29 n. 25 (EAB 1997). As discussed in the telephonic conference where I set the briefing schedule for the issues addressed herein and as requested in both Respondent and Complainant's briefs, I find it appropriate to treat Respondent and Complainant's briefs on the issues of jurisdiction and fair notice as motions for partial accelerated decision.

Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40

C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., BWX Technologies*, 9 E.A.D. at 74-5; *In the Matter of Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ, September 11, 2002). Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59; *see also Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In assessing materiality for summary judgment purposes, the Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson*, 477 U.S. at 248; *Adickes*, 398 U.S. at 158-159. The substantive law involved in the proceeding identifies which facts are material. *Id.*

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. *Id.* In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. *Anderson*, 477 U.S. at 252.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." The Supreme Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not

defeat a properly supported motion for summary judgment, as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; *see In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position. Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.[5]

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

Discussion

EPA jurisdiction under Lead Disclosure Rule

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[5] Under the governing Rules of Practice, an Administrative Law Judge serves as the decisionmaker as well as the fact finder. *See* 40 C.F.R. §§ 22.4(c), 22.20, and 22.26.

A. Whether Harpoon Partnership, the owner of the target housing, is also the "lessor"

1. Respondent's Argument

Respondent, Harpoon Partnership, contends that the term "lessor," as used in the Lead-Based Paint Act and 40 C.F.R. Part 745, Subpart F does not include the owner, particularly a "passive owner," of target housing that retains an agent to offer such housing for lease. Respondent essentially provides four arguments for its reading of the statute. First, Respondent notes that Section 1018 of the Lead-Based Paint Act never defines the terms "lessor" or "owner" and only uses the term "lessor" when referring to the requirements for disclosure. With this in mind, Respondent claims that the industry's use and understanding of the term "lessor" pertain to the management company, if one is retained to lease and operate the target housing. In addition, Respondent contends that an owner is lead to believe that the disclosure requirements fall on the agent hired to lease the property by the language in Section 1018, subsection (a)(4), which requires the "agent, on behalf of the seller or lessor, to ensure compliance with the requirements of this section."

Second, Respondent notes that the regulations in Part 745, Subpart F use the term "owner," but never in the context of the requirements under the Lead Disclosure Rule. Respondent points out that 40 C.F.R. § 745.102 uses the term "owner" merely to establish the effective dates of the disclosure requirements for owners depending on the number of units owned. In addition, Respondent emphasizes the fact that the regulations define the term "owner" in 40 C.F.R § 745.103, but nowhere do the regulations utilize the term within the regulations. Therefore, Respondent contends that an owner that retains a management company as an agent for the purpose of leasing target housing was not intended to comply with the disclosure requirements.

Third, Respondent contends that the definition of "lessor" in 40 C.F.R § 745.103 only applies to the entity that "offers" the target housing for lease. Therefore, since the Respondent merely holds legal title to the property and the management company, as an agent, offers the property for lease**,** the Respondent avers that it is not a "lessor." Moreover, Respondent, citing to the provisions in 40 C.F.R. §§ 745.100, 745.107, and 745.113(b), contends that the term "lessor," not the term "owner," is assigned all responsibility for compliance with the Lead Disclosure Rule.

Finally, Respondent looks to the regulations' preamble to support its reading of the Lead Disclosure Rule. Respondent highlights that the term "owner" was not included in the list of parties affected by the Lead Disclosure Rule, which only references "lessor, agent, property manager, purchaser, and seller." Lead-Based Paint Final Rule, 61 Fed. Reg. at 9078. Respondent concludes that mention of a property manager as a directly affected party and not owner signifies that its interpretation that owners that retain a property management company are not responsible for complying with the disclosure requirements.

2. EPA's Argument

In contrast, Complainant contends that the common law meaning of the terms at issue in the Lead-Based Paint Act and its implementing regulations is controlling. In summary, Complainant argues that the basic principles of property law instill legal title and possessory interest in the term "lessor," and such status affords the right to transfer possession and thus the ability to create a leasehold estate. As argued by Complainant, these principles are incident to ownership as well and are incorporated into the term "owner " within the Lead Disclosure Rule. Therefore, Complainant concludes that the owner is the lessor in common law and within the requirements of the Lead-Based Paint Act and its implementing regulations.

Complainant further contends that the term "owner " as defined by the regulations is comprehensive and inclusive, thereby encompassing the term "lessor." The term "lessor" describes the activity that an owner engages in and thus creates a subclass of owners who are subject to the lead disclosure requirements. In further support of this reading, Complainant cites the original Senate bill which used the term "owner" when mandating the promulgation of regulations pertaining to the lease of target housing. As such, Complainant concludes that owners of target housing were always contemplated as responsible parties under the Lead-Based Paint Act.

Complainant also advances that the overall regulatory scheme is supportive of its contention that the owner of target housing is the lessor. First, Complainant states that the EPA defined the terms "agent," "lessor," and "owner" pursuant to the statutory directive. Second, Complainant argues that it is illogical under the regulation's definition of "agent" for the management company to be the lessor. The agent is in a contractual relationship with the lessor, therefore the agent and the lessor cannot be the same party. Third, the term "agent" is provided separate obligations than the term "lessor" in the regulations; the lessor must disclose and the agent must ensure compliance. Complainant contends that such substantive distinction highlights the intent of the regulations to obligate two different parties under the terms "agent" and "lessor" and not to transform an agent into a lessor by the mere act of facilitating the leasing process.

Finally, Complainant argues that the EPA's notice and comment process prior to the published final regulations, the preamble to the regulations in the Federal Register, and the EPA's guidance documents all support the intention that owners of target housing are regulated under the term "lessor." Complainant states that it used the term "owner" when it was referring to the lessors/landlords of target housing in its responses to comments to the proposed regulations. Furthermore, Complainant cites to discussions in the preamble where the term "owner" is used in instances where that discussion is equally applicable to the term "lessor," thereby demonstrating that the terms are interchangeable. Lastly, Complainant argues that its guidance documents, by explicitly indicating that the owners of co-operatives, condominiums, and timeshares are the responsible parties, confirm the inclusion of owners as lessor.

3. EPA's interpretation that an owner who retains an agent to lease his/her target housing is the lessor of the target housing is a permissible construction of the Lead-Based Paint Act

My analysis in this case begins with the statute enacted by Congress. The Lead-Based Paint Act does not impose any duties or responsibilities on private parties. Rather, Congress' first mandate within the Lead-Based Paint Act charges the EPA and HUD with the task of promulgating regulations which, in turn, impose obligations upon private parties to disclose lead-based paint hazards in target housing offered for sale or lease. *See* 42 U.S.C. § 4852d(a)(1) ("Not later than 2 years after the date of enactment of this Act [enacted Oct. 28, 1992], the Secretary and the Administer of the Environmental Protection Agency shall promulgate regulations under this section...."). Further, the essential components Congress contemplated for the regulations as set forth in the Lead-Based Paint Act are brief, especially considering Congress' lofty goals of "eliminat[ing] lead-based hazards in all housing as expeditiously as possible." 42 U.S.C. 4851(a)(1). In addition, the terms employed by Congress to identify the regulated community are broad and undefined.[6] Therefore, it can be concluded that Congress intended to delegate its authority to the EPA and HUD in order to expound upon the lead-based paint disclosure requirements through legislative rulemaking as recognized by the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.

The determination that the Lead Disclosure Rule regulations are legislative is supported by the Second Circuit's thorough analysis and conclusion in *Sweet v. Sheahan*, 235 F.3d 80, 90-94 (1st Cir. 2000). *See also generally American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109-12 (D.C. Cir. 1993) (discussing the D.C. Circuit's test for distinguishing legislative and interpretive rules which was cited by and assisted the *Sweet* court in its analysis of the Lead-Based Paint Act). In finding that the regulations were legislative rather than interpretive, the *Sweet* court found convincing the regulations' significant expansion of the class of persons required to be provided a lead warning statement;[7] the refinement and modification of a number of statutory provisions; Congress' expectancy that there would be at least a one-year delay between the time the regulations were promulgated and when those regulations would be effective; and the fact that the Agencies provided notice to the public and opportunity to comment under the APA. *Sweet*, 235 F.3d at 92-93.

Although "legislative rules are those that 'create new law, rights, or duties, in what amounts to a legislative act,'" *Sweet*, 235 F.3d at 91 (quoting *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993)), this authority is not unlimited. A court must reject an administrative regulation which is inconsistent with the mandating statute. *See Chemical Mfr. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116,151 (1985). *See also Sweet*, 235 F.3d at 93 (citing *United States v. Yuzary*, 55 F.3d 47, 51 (2d Cir. 1995) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)) ("a legislative rule is binding on a

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[6] The parties identified as covered by the Lead-Based Paint Act are the "lessor," "seller," "lessee," "purchaser," and "agent."

[7] For example, although not at issue in *Sweet*, the regulations allow for an agent of a purchaser to be included within the definition of "agent" if the agent enters into a contract with a seller, or with a representative of a seller, for the purpose of selling target housing. *See* 40 C.F.R. § 745.103.

court if the interpretation is a 'permissible construction of the statute.'").[8] Further, it must be understood that in my review of the regulatory language before me and the interpretation of such regulations as put forth by Complainant, I cannot give deference to Complainant's interpretation because such is not a final agency position or decision. *See In the Matter of General Motors Corp., General Motors Technical Center*, Docket No. RUST-002-93, 1995 EPA ALJ LEXIS 36, at *7 (ALJ, Jan. 18, 1995) (citing *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156 (1991); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)).

As such, I now turn to an examination of the Lead Disclosure Rule and the plain meaning of the language of the regulations.[9] The term "lessor" is defined at 40 C.F.R. § 745.103 as "any entity that offers target housing for lease, rent, or sublease ..." and the term "owner" is defined as "any entity that has legal title to target housing ...." As is similarly done under the Lead-Based Paint Act, the broad term "offer" is used to qualify the conduct that subjects parties to the disclosure requirements. *See* 42 U.S.C. § 4852d(a)(1) ("the Secretary and the Administrator ... shall promulgate regulations under this section for the disclosure of lead-based paint hazards in target housing which is *offered* for sale or lease.") (emphasis added).

Contrary to Respondent's contention, the term "offer" implicates the owner of the target housing. An owner has legal title to the property and is entitled to determine the disposition of his/her property.[10] Therefore, because the owner ultimately decides to place his/her property in the rental market, the term "offer" describes the owner's role in leasing situations. This is the owner's status regardless of the presence of an agent in the leasing arrangement. The definition of "lessor" does not explicitly or implicitly exclude the owner of target housing from the definition, thereby allowing an entity who owns target housing to qualify as a "lessor." Further,

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[8] Inasmuch as the implementing regulations are legislative the regulations receive substantial deference from the court, *see Sweet*, 235 F.3d at 9 (citing Keneth Culp Davis & Richard J. Pierce, Jr., 1 Administrative Law Treatise § 6.3, at 233-38 (3d ed. 1994)), and must avoid a clear contradiction with the statute. As noted in *Sweet* "'[a] reviewing court is not free to set aside [legislative] regulations simply because its would have interpreted the statute in a different manner...'" *Id.*at 91 (quoting *United States v. Chesterman*, 947 F.2d 551, 557-78 (2d Cir. 1991) (quoting *Batteron v. Francis*, 432 U.S. 416, 425-26 (1977)).

[9] "When construing an administrative regulation, the normal tenets of statutory construction are generally applied." *In re Bil-Dry Corp.*, RCRA (3008) Appeal No. 98-4, 9 E.A.D. 575, 595, 2001 EPA App. LEXIS 1, at *43 (EAB 2001) (citing *Black & Decker Corp. v. Commissioner*, 986 F.2d 60, 65 (4th Cir. 1993). "The plain meaning of words is ordinarily the guide to the definition of the regulatory term." *Id.* (citing *T.S. v. Bd. of Educ.*, 10 F.3d 87, 89 (2d Cir. 1993).

[10] The concept of *ownership* encompasses the "rights allowing one to use and enjoy property, including the right to convey it to others." Blacks Law Dictionary, 1131 (7th ed. 1999). In addition, when one *owns* property they possess "legal title." *Id.* at 1130. Notwithstanding these legal definitions, the regulations' definition section prescribes the owner as the entity with legal title or as the mortgagor when the bank holds legal title. *See* 40 C.F.R. § 745.103.

this interpretation is supported by the preamble to the final regulations. [11] A more detailed discussion of the preamble will be made with regard to the issue of fair notice.

Also contrary to Respondent's contention, the EPA and HUD's mere act of defining the term "owner" is not exclusive. In other words, when the EPA and HUD defined the term "owner" but did not utilize the term in the subsections that obligate the covered parties under the Lead Disclosure Rule, the regulations did not thereby exclude an owner of target housing from any of the disclosure requirements. In addition, the definition of "owner" does not explicitly or implicitly exclude an entity from also qualifying under the definition of "lessor." The regulations, by defining the term "owner," clarify those parties characterized as owners of target housing and thereafter capable of being lessors when the target housing is offered for lease.

Moreover, it is apparent that responsibilities attach to an owner of target housing because the EPA and HUD explicitly removed bank and loan institutions from liability under the Lead Disclosure Rule. This was achieved by defining the mortgagor as the owner when the bank retains legal title as collateral for a mortgage loan. 40 C.F.R. § 745.103. *See also* Black's Law Dictionary 1030 (7th ed. 1999) (defining mortgagor as "one who mortgages property; the mortgage-debtor, or borrower."). If an owner of target housing were not intended to be liable as a lessor under the Lead Disclosure Rule then there would be no purpose for this exclusion. *See* Lead-Based Paint Final Rule, 61 Fed. Reg. at 9070 (noting that the EPA and HUD revised the definition of owner to clarify who is considered the owner in situations where a mortgage is involved).

In conclusion, Respondent, Harpoon Partnership, as owner of the target housing at issue in the Complaint is deemed the lessor under the Lead-Based Paint Act as implemented by the regulations promulgated by the EPA and HUD. 24 C.F.R. Part 35 and 40 C.F.R. Part 745. The Congressional Act provided legislative authority to implement requirements for broad jurisdictional terms. The definitions provided by the regulations for the terms "lessor" and "owner" are not mutually exclusive and therefore allow the owner to qualify as a lessor. The EPA and HUD, by defining the parties identified in the Lead-Based Paint Act, have included owners who contract with an agent to lease his/her property in the definition of "lessor." Therefore, I find that the regulations and the EPA's interpretation are consistent with and a permissible construction of the provision of the Lead-Based Paint Act.

Although not controlling, I note Complainant's extensive analysis of property and landlord tenant law as it pertains to the relationships and legal status of the private parties

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[11] It is appropriate to use the preamble of a final rule to determine the meaning of a regulation and the promulgating agency's intent. *See HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 n.13 (10th Cir. 2000) (preamble to a regulation is evidence of an agency's contemporaneous understanding of its rules); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 100 F.3d 43, 53 (D.C. Cir. 1999) (while language in the preamble of a regulation is not controlling over the language of the regulation itself, it may serve as a source of evidence concerning contemporaneous agency intent); *Commonwealth of Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health and Human Serv.*, 101 F.3d 939, 944 (3d Cir. 1996) (preamble to regulations may be used as an aid in determining the meaning of the regulations); *Martin v. American Cyanamid Co.*, 5 F.3d 140, 145 (6th Cir. 1993) (same).

implicated by the Lead-Based Paint Act. Such analysis is concordant with the definitions in the regulations and EPA's interpretation of these regulations. However, I have placed no reliance on the common law meaning of the terms as put forth by Complainant because the terms are defined in the regulations[12] and the plain meaning of the regulations is sufficient to provide for the understanding that the owner is the lessor.

B. Whether Harpoon Partnership may contract away its responsibilities under the Lead Disclosure Rule

Respondent declares that it had an oral contract with Hyde Park Realty, an independent contractor, who agreed to comply with all applicable laws. In addition, Respondent contends that Section 1018, Subsection 4 of the Lead-Based Paint Act, 42 U.S.C. § 4852d(a)(4), provides the agent with responsibility for compliance with the Act, thereby permitting an owner to contract away any responsibility it may have under the Lead Disclosure Rule. Respondent concludes that the Illinois law of agency coupled with the ability to contract away its responsibilities under the Lead-Based Paint Act renders it not liable for the negligence of its independent contractor.

Complainant contends that TSCA is a strict liability statute, thus any party holding obligations under the regulations are ultimately liable for full compliance. Complainant further contends that the language of the Lead-Based Paint Act and its regulations does not suggest that a lessor can contract away its disclosure obligations. In addition, Complainant highlights similar findings under the Clean Air Act asbestos NESHAP requirements for building owners.

Although the regulations do not explicitly preclude a lessor from contracting away his/her lead disclosure requirements, doing so is not authorized by and is inconsistent with the Lead-Based Paint Act and its regulations. First, whereas the Lead-Based Paint Act and its regulations contemplate a lessor contracting with an agent for the purpose of leasing target housing, such does not suggest that the lessor can relieve itself from the disclosure requirements. *See* 42 U.S.C. § 4852d(4); 40 C.F.R. §§ 745.103, 745.115, 745.113(b)(5), 745.113(b)(6). Congress directed that the implementing regulations require that the agent ensure compliance "on behalf of the ... lessor." 42 U.S.C. § 4852d(4). As described earlier, the EPA and HUD were thereafter given authority to expound upon such basic guidelines. In doing so, the EPA and HUD promulgated separate requirements for the agent to inform the lessor of his/her obligations and to ensure compliance. 40 C.F.R. § 745.115(a)(1), (2). The regulations provide an avenue for the agent to avoid liability in the event the required disclosures were not made to the lessee. 40 C.F.R. §

[12] Likewise, the meaning attached to the terms "lessor," "lessee," "agent" or "owner" by the real estate industry and as advanced by Respondent is not considered relevant for liability purposes. Additionally, Respondent's reliance on *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) is distinguished, for in that case the term at issue was neither defined nor explained by the ordinance. In such cases it is common for undefined terms to take contemporary or common meaning. *See In the matter of Harley Brown (Brown's Valley Grocery)*, Docket No. RCRA-UST-VIII-90-02, 1995 EPA ALJ LEXIS 54, at *7 (1995)(quoting *Perrin v. United States*, 44 U.S. 37, 42 (1979). However, when a definition is provided in the regulation, as is the situation in the present case, it is the responsibility of the regulated community to interpret its obligations within the meaning provided by the agency.

745.115(b) ("If the agent has complied with [§ 745.115(a)(1)], the agent shall not be liable for the failure to disclose to a ... lessee the presence of lead-based paint and/or lead-based paint hazards known by ... a lessor but not disclosed to the agent."). No similar provision is provided by the regulations for a lessor. Indeed , the regulations explicitly require the lessor's signature along with the agent's signature for certification purposes. 40 C.F.R. § 745.113(b)(6). Further, no provision was set forth for the agent to sign in place of the lessor under the certification requirements.[13]

The preamble to the regulations also clearly indicates that the lessor is not permitted under the statute to contract away its disclosure requirements. In the EPA and HUD's summary of the regulatory impact analysis, the preamble states that "[t]he requirements of Section 1018 of the Act fall primarily on the seller and lessor of 'target housing.'" Lead-Based Paint Final Rule, 61 Fed. Reg at 9078. The preamble goes on to state that "if an agent or property manager acts on behalf of the seller or lessor, which EPA and HUD have estimated to be the case in most transfers, responsibility to ensure compliance falls to such agents or property managers *as well*." Lead-Based Paint Final Rule, 61 Fed. Reg at 9078 (emphasis added).

Second, as indicated by Complainant, TSCA, the statutory authority governing this civil administrative penalty proceeding, has been deemed a strict liability statute. *See In the Matter of Leonard Stradley*, TSCA Appeal No. 89-4, 3 E.A.D. 718, 722 (CJO, Nov. 25, 1991). This is consistent with the general nature of environmental statutes "as imposing strict liability for failure to meet their requirements." *In re Green Thumb Nursery, Inc. Canton, Ohio*, FIFRA Appeals No. 95-4a, 6 E.A.D. 782, 797 & n.28, 1997 EPA App. LEXIS 4, at *36, & n.28 (EAB 1997) (citations omitted). Thus, the lessor, as a party named in the statute and the regulations as obligated by their requirements, is ultimately responsible for any failure to comply with the disclosure requirements.

"Fair notice" under the Lead Disclosure Rule in 40 C.F.R. Part 745

A. Whether EPA's interpretation that an owner who retains an agent to lease his/her target housing is the lessor of the target housing provided fair notice to satisfy constitutional due process

1. Parties' Arguments

[13] The EPA and HUD's initial guidance document to the real estate community communicated its interpretations that "the seller or lessor may authorize a representative or agent to fulfill the seller or lessor's requirements under this rule; however the seller or lessor is ultimately responsible for full compliance with the requirements of this rule." Interpretive Guidance For the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing 5 (Question 11) (August 20, 1996) ("Interpretive Guidance Part I"). This document further states that "[i]f the representative or agent acting on behalf of the seller or lessor is also functioning as an Agent, as defined under 24 C.F.R. 35.86 and 40 C.F.R. 745.103, they are also required to carry out those duties and to sign the certification in that capacity." Interpretive Guidance Part I, *supra*, at 5 (Question 11). Hence, the EPA and HUD's interpretation, although allowing representation, does not relieve the lessor's obligations or liability.

Respondent states that its interpretation of the Lead-Based Paint Act and its regulations, as described above, was reasonable and acted upon in good faith. In addition, Respondent contends that the Lead Disclosure Rule fails on its face to provide fair notice of an owner's obligation as a "lessor." Thus, Respondent contends that the EPA's interpretation that the disclosure requirements in Section 1018 apply to the owner, as "lessor," that retains a management company to lease its property was not "ascertainably certain" and therefore fails to provide fair notice to the regulated community. Respondent further supports its contention by pointing out the failure of Agency guidance materials and training to provide clarity that owner's that retain management companies are responsible for the requirements of the Lead Disclosure Rule.

The EPA contends that the well-established body of common law which treats a property owner as the lessor in situations where the owner retains an agent for the purpose of leasing its property, coupled with the language of the regulations and the EPA's guidance documents, provided sufficient fair notice to Respondent that it was a lessor and obligated under the Lead-Based Paint Act and its implementing regulations.

2. The EPA's interpretation that an owner who retains an agent to lease his/her target housing is the lessor of the housing was ascertainably certain

My analysis of the question of whether Respondent had fair notice of the EPA's interpretation of the term "lessor" to include an owner begins with a reading of the regulations. In cases such as the present, where the Agency provides no pre-enforcement warning, the court "must determine whether the regulated party received, or should have received, notice of the Agency's interpretation in the most obvious way of all: by reading the regulations." *General Electric Co.*, 53 F.3d at 1329. *See also In re Coast Wood Preserving, Inc.*, EPCRA Apeal No. 02-01, slip op. at 30, 2003 EPA App. LEXIS 4, at *53 (EAB 2003). The court in *General Electric Co.* established the standard of review for fair notice of an agency's interpretation of its own regulations as whether "a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform ...." *General Electric Co.*, 53 F.3d at 1329. If after reviewing the language of the agency regulation and other public statements issued by the agency, the court determines that parties would be able to determine, with ascertainable certainty, the agency's interpretation, the agency has fairly notified the parties. *Id.*

The Environmental Appeals Board ("EAB") has further explained that the presence of ambiguity does not necessarily equate to a lack of fair notice; "the question is not whether a regulation is susceptible to only one possible interpretation, but rather, whether the particular interpretation advanced by the regulator was ascertainable by the regulated community." *Coast Wood Preserving, Inc.*, EPCRA Apeal No. 02-01, slip op. at 30, 2003 EPA App. LEXIS 4, at *53 (quoting *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 412, 2000 EPA App. LEXIS 25, at *120-21 (EAB 2000)). Constitutional protections against depriving a person of property without due process of law dictate that a penalty may not be assessed where notice to the regulated parties is

inadequate. *General Electric Co.*, 53 F.3d at 1328; *In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1, 17, 1995 EPA App. LEXIS 20, at *37-38 (EAB 1995).

(a) The regulatory language provided the requisite notice of the EPA's interpretation

A complete reading of the Lead Disclosure Rule gives the regulated community fair notice that an owner of target housing is the "lessor." The text of the regulations makes this interpretation ascertainably certain even in situations where the owner retains an agent to transact with the lessee in the leasing process and management of the target housing.

The first evidence to a reader that an owner of target housing is deemed to take the obligations of the term "lessor" within the Lead Disclosure Rule appears at the forefront of the regulations. After the Lead Disclosure Rule proclaims its purpose in 40 C.F.R. § 745.100, its scope and applicability in 40 C.F.R. § 745.101, and before the terms and requirements are defined, the regulations set forth the effective dates. The regulations declare as follows:

> The requirements in this subpart take effect in the following manner:
> (a) For *owners* of more than four residential dwellings, the requirements shall take effect on September 6, 1996.
> (b) For *owners* of one to four residential dwellings, the requirements shall take effect on December 6, 1996.

40 C.F.R. § 745.102 (emphasis added). Respondent contends that this section merely establishes the effective dates relative to the number of units owned by an individual owner. Rather, I read this section as setting the requirements dates for the base line member of the regulated community, the "owner." Such a pronouncement by the EPA signals that the owner's activity is what determines the obligations under the Lead Disclosure Rule. Once an individual assumes the status of an owner he/she obligates themselves depending on how many units owned and, as discussed later, whether the owner chooses to lease or sell the property. The obligations of the Lead Disclosure Rule may arise only once, intermittently or continuously during the ownership of target housing.

As mentioned earlier, the regulatory definitions for the terms "owner" and "lessor" are not mutually exclusive. Therefore, an entity could be classified as both an owner and a lessor depending on its legal status and conduct in regards to the target housing. Second, although the term "owner" is not specifically mentioned in the sections imposing obligations on the "lessor," the definition for "owner" itself suggests that liability is imposed upon the owner of target housing. Such is supported by the regulations' exclusion of the mortgagee, and therefore liability, within the definition of "owner." The regulated community, from reading these definitions provided by the Agency, should have reason to understand that the regulations classify an owner of target housing offered for lease as a "lessor."

Where the definitions of the terms "owner" and "lessor" allow a reasonable and

permissible interpretation which deems the owner to be a lessor, even in situations where the owner contracts with an agent to lease his/her target housing, the definition and use of the term "agent" within the Lead Disclosure Rule renders the EPA's interpretation ascertainably certain. By use of the term "agent" the Lead Disclosure Rule recognizes and accounts for complex real estate situations and places obligations on the agent to ensure that the parties comply with the disclosure requirements. As a practical matter, in residential leasing situations there is always a lessor offering the target housing and there is always a lessee who is renting the housing for residential purposes. In some leasing situations, but not all, an agent is involved who is contracted by the lessor to conduct some or all of the leasing process. The regulations delineate such an understanding. Most importantly, the regulations do not suggest that the designation of "lessor" switches to the agent when such a party is added to the leasing arrangement.

On the contrary, as Complainant points out, the regulations impose separate obligations on the agent involved in the leasing arrangement. Keeping in mind that the regulations do not provide separate obligations for the term "owner," an agent has the responsibility to ensure compliance with the Lead Disclosure Rule. *See* 40 C.F.R. § 745.115. The agent must inform the lessor of his/her obligations under the Lead Disclosure Rule. 40 C.F.R. § 745.115(a) (1). In addition, the agent must ensure that the lessor has performed his/her obligations, or ensure compliance by performing the lessors obligations themselves. 40 C.F.R. 745.115(a)(2). Hence, because the term "owner" has no obligations under the regulations, it is appropriate for an owner of target housing to assume the responsibilities of the term "lessor" under the Lead Disclosure Rule. This conclusion is further supported by the fact, as discussed previously, the owner "offers" the target housing because he/she has legal title or is the mortgagor.

Parties involved in leasing target housing, when reading this regulation, have two options among the terms that dictate the parties' responsibilities. If there is merely an owner of target housing and a party interested in leasing the property, the owner is the "lessor" offering the target housing to the "lessee." If there is an owner of target housing, an agent contracting with the lessor to lease the target housing, and a lessee wishing to lease the property, the owner is the "lessor" offering the target housing through an "agent" to the "lessee." If the regulations were read as a whole, using the terms provided, this interpretation is the only reasonable result. As Complainant highlights, if the management company were to assume the role of the lessor, while its status qualifies it as an "agent" because it has contracted with the lessor for the purpose of leasing the target housing under the regulations' definition, the practical effect of this reading would lead to an illogical result. Under Respondent's interpretation, Hyde Park Realty, its agent in the leasing process, would have to contract with itself under the definition of "agent" in order to qualify under the definition of "lessor."

Remembering that the "question is not whether a regulation is susceptible to only one possible interpretation," *Coast Wood Preserving, Inc.*, 2003 EPA App. LEXIS 4, at *53 (quoting *In re Tenn. Valley Auth.*, 9 E.A.D. at 412, 2000 EPA App. LEXIS 25, at *120-121), I find that the

language of the Lead Disclosure Rule alone provided fair notice to the regulated community.[14]

(b) The preamble to the final regulations provided the requisite notice of the EPA's interpretations

In accordance with the holdings in *General Electric Co.* and *Coast Wood Preserving,* my analysis continues with consideration of whether Agency public statements available to the regulated community during the relevant time period provided fair notice. Respondent and Complainant contend that the preamble to the regulations supports their respective positions on the issue of fair notice.

At the outset I note, as does Complainant, that the preamble interchanges the term "owner" with "lessor" throughout the preamble within similar textual discussions. *See, e.g.*, Lead- Based Paint Final Rule, 61 Fed. Reg. at 9067 Part IV.A.2, 9068-69 Part IV.B, 9069 Part IV.C.2, 9071-72 Part IV. D.2.b, 9076 Part IV.D. 4. This usage of the terms in the EPA and HUD's discussion of the regulations supplies notice of the EPA's interpretation that an owner of target housing is also the lessor.

Furthermore, the preamble, as in the codified regulations, sets out the effective dates at the beginning as applicable to owners depending on the number of units owned. *See* Lead- Based Paint Final Rule, 61 Fed. Reg. at 9064. Most compelling is the EPA and HUD's later discussion of the effective date whereby the preamble states that "[s]ellers and lessors who *own* more than four residential dwellings will have 6 months from the final rule's promulgation to implement full disclosure during sales and leasing transactions." Lead-Based Paint Final Rule, 61 Fed. Reg. at 9069 (emphasis added). In addition, the preamble states: "[b]elieving that property *owners* with four or fewer dwellings are more likely *to be non-professional sellers and lessors*, EPA and HUD are providing a 9-month phase-in period for such owners." Lead-Based Paint Final Rule, 61 Fed. Reg. at 9069 (emphasis added). The EPA and HUD in a discussion involving a very basic provision of the Lead Disclosure Rule - the date that the rule is to take effect upon the regulated community - state that the owner is the lessor. This declaration, in such a public statement as the preamble to the final regulations, satisfies fair notice.

Respondent points my attention to the portion of the preamble that discusses the EPA and HUD's regulatory impact analysis and lists parties directly affected to support its contention that fair notice was lacking. I find no significance in the EPA and HUD's omission of the term "owner" from the list "seller, lessor, agent, property manager, purchaser, and lessee." Lead-

[14] A good faith interpretation should be a conscious effort on behalf of the regulated community to glean the agency's interpretation, and not merely a interpretation that suits the regulated community's best interests and avoids a reading that would be more favorable to the intended results. *Cf. U.S. v. Drasen*, 845 F.2d 731, 737-38 (7 Cir. 1988).

Based Paint Final Rule, 61 Fed. Reg. at 9078. This list merely indicates the parties involved in the sale of target housing (seller, agent, and purchaser), and the parties involved in the lease of target housing (lessor, property manager, and lessee). The term "owner" would be redundant, because the owner is indicated by the inclusion of the terms "seller" and "lessor."

Therefore, because the language in the preamble of the Lead Disclosure Rule clearly supports that the EPA and HUD intended the owner of target housing to be the lessor, the regulated community received the requisite fair notice.

(c) Guidance documents

Respondent argues that EPA and HUD's guidance documents concerning disclosure requirements prior to 2000 did not address the issue of whether an owner who retains a management company as an agent for the purpose of leasing the owner's target housing is responsible for the lead disclosure requirements. *See* Interpretive Guidance For the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing (August 20, 1996) ("Interpretive Guidance Part I"); Interpretive Guidance For the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing Part II (December 5, 1996) ("Interpretive Guidance Part II"). Respondent concedes that the 2000 Agency interpretive guide inferred that the owner is the lessor, by explicitly stating that the agent is not the lessor. *See* Interpretive Guidance For the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing Part III 3 (Question 56) (August 2, 2000) ("Interpretive Guidance Part III"). Similarly, Respondent adverts that the EPA's penalty policy, which includes the owner as a responsible party, but did so in February 2000. *See* Section 1018 - Disclosure Rule Enforcement Response Policy app. A-4,-5 (Feb. 2000). Respondent concludes that the 1996 EPA guidance documents fail to provide fair notice because their particular situation was not addressed and the 2000 guidance document was made public after the relevant time period referenced in the Complaint.

On the contrary, Complainant contends that the very same interpretive guidance documents cited by Respondent provided notice to the regulated community that an owner was the lessor. Complainant argues that the 1996 guidance documents, by announcing that the owner is the responsible party in condominium, co-operative, and timeshare situations, gave notice that the owner was the responsible party in the Respondent's circumstances. *See* Interpretive Guidance Part I, *supra*, at 2 (Question 2); Interpretive Guidance Part II, *supra*, at 3 (Question 35, 36). In addition, Complainant argues that Respondent received fair notice because the guidance document actually uses "owner" and places the term "lessor" in parentheses under the EPA and HUD's discussion of the "Timing of Disclosure for Lessors." Interpretive Guidance Part I, *supra*, at 7 (Question 16). Further, Complainant points out that the EPA and HUD's first interpretative guidance explicitly states that owners have disclosure requirements in question 17. *See* Interpretive Guidance Part I, *supra*, at 8 ("Q: Can an owner send the disclosure forms to all existing tenants at one time ...? A: Disclosure may be made any time ...."). Finally, Complainant contends that Respondent received fair notice because EPA and HUD's guidance documents indicated that the owner should maintain a copy of inspection reports in regards to lead-based

paint free housing. *See* Interpretive Guidance Part II, *supra*, at 9 (Question 48).

The question of whether these guidance documents provided fair notice need not be reached because requisite fair notice was provided by the text of the regulations and the EPA's explanations in the preamble to the regulations. Furthermore, both Respondent and Complainant referenced in their briefs the intention to produce at the hearing several additional materials circulated in the real estate/rental community and testimony for the purpose of demonstrating their respective positions on fair notice.[15] Again, such evidence need not be considered for the reason stated above and my determination that the legislative nature of the regulations deems the definitions provided by the EPA to be controlling. Further, I note that such evidence is at the end of the spectrum of material to be considered as capable of providing fair notice.[16] However, inasmuch as any Agency public statements speak to the issue of fair notice, I find that the proposed evidence is not inconsistent with, and even supports Complainant's argument for its interpretation.

Conclusion

Under the standard for adjudicating motions for accelerated decision, the evidence must be viewed in the light most favorable to the non-moving party, and all references must be drawn in favor of the non-movant. Although some ambiguity exists to allow the possibility of more than one interpretation of the regulations at issue, there are no issues of material fact and no uncertainty as to how the regulations were to be applied to the facts in this case. The owner of target housing, Harpoon Partnership, was the "lessor" under the Lead Disclosure Rule when it contracted with an "agent," Hyde Park Realty, for the purpose of leasing its property. The EPA has provided the requisite fair notice, through the text of the regulations and the discussion in the preamble concerning its provisions and the rulemaking process, that this was the EPA's interpretation. Accordingly, Complainant has established that it is entitled to judgement as a matter of law. As such, Complainant's request for partial accelerated decision is granted and

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[15] In this case, materials and testimony proffered by Respondent and Complainant that were not published or disseminated by the EPA addresses the issue of whether there were multiple interpretations of the regulation, not directly whether the EPA provided fair notice of its interpretation.

[16] Relying on public statements, that have not been subject to public comment, to define regulatory language is a slippery slope. This trier of fact is concerned about where to draw the line in situations where the parties submit extensive renditions of regulatory history, from promulgation to a regulation's course of implementation, containing the use of such statements to supplement the text of the regulation. Far more troubling is the question of whether due process is even satisfied if it takes leaving no stone unturned as the courts and the regulated community sift through the Federal Register, web sites pages and links, slide shows presentations, letters, guidance materials, Agency created forms, affidavits, trade journals, and the Agency's pattern of enforcement to glean the possible interpretations to the regulatory language at issue to determine fair notice. This dubiety is heightened when, as is the case with the Residential Lead-Based Paint Hazard Reduction Act, a large section of the regulated community is not sophisticated business owners or operators, but average citizens with limited resources and knowledge of our Nation's complex regulatory scheme.

Respondent's request for partial accelerated decision is denied.

Order

Complainant's request for partial accelerated decision is **GRANTED** and Respondent's request for partial accelerated decision is **DENIED**.

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Barbara A. Gunning
Administrative Law Judge

Dated: August 4, 2003
Washington, DC

In the Matter of Harpoon Partnership, Respondent
Docket No. TSCA-05-2002-0004

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Complainant's Request For Partial Accelerated Decision And Denying Respondent's Request For Partial Accelerated Decision,** dated August 4, 2003, was sent this day in the following manner to the addressees listed below:

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: August 4, 2003

Original and One Copy by Pouch Mail to:

Sonja Brooks-Woodard
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In the Matter of Harpoon Partnership, Respondent
Docket No. TSCA-05-2002-0004

CERTIFICATE OF SERVICE

I certify that the foregoing Initial Decision, dated May 27, 2004, was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: May 27, 2004

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