UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
BARBARA J. BUESCHER	)	Docket No. TSCA-7-2000-053
	)	
Respondent	)	

DEFAULT ORDER AND PENALTY ASSESSMENT

INTRODUCTION

This proceeding was initiated by the Environmental Protection Agency, Region VII ("EPA" or "Complainant") pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), as amended (15 U.S.C. § 2615(a)). The Complaint in this case was filed on August 28, 2000. Respondent Barbara J. Buescher (Respondent) filed a timely answer on October 30, 2000. The Complaint charges the Respondent with violating TSCA Section 409 (15 U.S.C. § 2689), by failing to comply with the regulatory requirements of 40 C.F.R. part 745, Subpart F (the "Disclosure Rule "), promulgated to implement the provisions of the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA"; 42 U.S.C. § 4851 et seq.). In its Complaint, Complainant requests a penalty of $33,000. For the reasons set forth below, the request is granted.

The undersigned issued an Order Establishing Procedures on November 29, 2000. This order directed the filing of Complainant's and Respondent's prehearing exchange by January 16, 2001, and February 6, 2001, respectively. The order also provided for Complainant's rebuttal prehearing exchange to be filed by February 20, 2001, if necessary. Further, the order required the Respondent to serve a statement of notice by February 6, 2001, if Respondent elected to conduct a cross-examination of EPA witnesses and forgo the presentation of answering evidence.[1] Respondent failed to file any prehearing exchanges and did not serve a statement of notice for election of cross-examination.

On February 5, 2001, Respondent's counsel, Mr. Beetem, filed a motion to withdraw from the case. Complainant filed a response stating no objections to the granting of the motion. Subsequently, the undersigned issued an order granting the motion for good cause shown. The

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[1] Under 5 U.S.C. §556(d), the Respondent has the right to defend herself against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses.

order also directed the Complainant to file a status report no later than March 14, 2001.

On February 20, 2001, Complainant filed a Motion to Strike the exhibit submitted by the Respondent as part of Respondent's prehearing exchange. In Respondent's Answer, Respondent denied all of the allegations set forth in the Complaint, except for the allegation that she entered into a rental agreement with Roosevelt Stallings for the lease of Respondent's property for residential use, which she admitted. As support for her Answer, Respondent attached Exhibit A, which is a copy of the pamphlet Protect Your Family from Lead in Your Home to her Answer. This document, which is an approved lead hazard disclosure form, had a certification of accuracy that appeared to be signed by both the Respondent and Roosevelt Stallings. In its Motion to Strike, Complainant alleged the exhibit contained a forged signature. In an order, the undersigned denied Complainant's motion, finding that the motion was premature because the Respondent had not yet proposed that the exhibit be entered into the record as evidence.[2]

On July 5, 2001, the undersigned issued an Order Setting Hearing Date, scheduled for November 28, 2001, in Kansas City, Missouri. The order also directed the Complainant, in the interim and after consultation with Respondent, to file status reports on August 15, 2001, and October 31, 2001.

Pursuant to the July 5 Order, Complainant filed three status reports on August 15, 2001, October 16, 2001, and October 30, 2001. In each status report, Complainant stated that despite numerous attempts to contact Respondent, no further discussions had taken place since February 20, 2001, and that Respondent had failed to respond to telephone calls and correspondence. During this time, Complainant filed a motion for a prehearing conference on October 4, 2001, which the undersigned granted by order on October 29, 2001. The order set a telephone conference to take place on Wednesday, November 7, 2001, at 3:00 p.m. Eastern Time (2:00 p.m. Central Time).

The telephone prehearing conference took place as scheduled, with both parties present. During this prehearing conference, the undersigned stated that if a party failed to appear at the hearing without good cause, the undersigned would take the evidence proffered by the party in attendance and render an initial decision based upon that evidence. Hearing Transcript, p. 3.

On Wednesday, November 28, 2001, the hearing took place. Respondent did not appear at the hearing. Complainant stated that, prior to the hearing, he had sent the Respondent a set of the exhibits that were to be introduced into evidence at the hearing, and would also provide a copy of the hearing transcript to Respondent. Complainant also informed the Respondent that at the hearing, the undersigned established the schedule for the filing of post-hearing briefs. Initial briefs from both parties were due on January 31, 2002, and reply briefs were due on February 15, 2002.

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[2] Respondent's Exhibit A, also referred to as Respondent's Exhibit 1, was never entered into the record as evidence.

On January 29, 2002, Complainant filed proposed findings of fact, conclusions of law, and order; and a trial brief in support thereof ("Initial Brief") against the Respondent. The Initial Brief set forth the same allegations and requests for relief as the original Complaint. Respondent failed to file an initial brief or a reply brief.

Section 22.17 of the Consolidated Rules of Practice allows entrance of a default judgment "(1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer; or (3) after motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown." 40 C.F.R. § 22.17(a). Because Respondent failed to appear at the hearing or file an initial brief, she has waived any objection to the complaint, and has defaulted under 40 C.F.R. § 22.17(a).

Default by a respondent "constitutes, for the purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations." 40 C.F.R. § 22.17(a). Therefore, the Respondent is deemed to have admitted all of the facts alleged in the Complaint and has waived her right to a hearing on these facts. Where a respondent has defaulted, "[t]he relief proposed in the complaint...shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(d). The relief proposed by the Complaint is consistent with the record and with RLBPHRA. The findings of fact and conclusions of law are set forth below.

DISCUSSION

Background

This case has been brought under the regulations promulgated pursuant section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), which sets forth requirements for providing lead hazard information to lessees, and is also known as the Real Estate Notification and Disclosure Rule ("Disclosure Rule"). Title 40 C.F.R. § 745.107(a)(1) states that before a lessee is obligated under any contract to lease target housing, the lessor of target housing must provide the lessee with an EPA-approved lead hazard information pamphlet.

The Respondent in this case is a lessor as defined by the RLBPHRA. A "lessor" is defined as "any entity that offers target housing for lease, rent, or sub-lease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations." Title 40 C.F.R. § 745.103. "Target housing" is defined by section 745.103 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." Section 745.103 also defines "lessee" as "any entity that enters into an agreement to lease, rent, or sublease target housing, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations."

Section 745.113(b)(1) states that the lessor is required to include a specifically worded lead warning statement in each contract to lease target housing, either as an attachment or within the contract. Subpart (b)(2) states that the lessor is required to include in each contract to lease target housing, either as an attachment or within the contract, a statement by 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 or the presence of lead-based paint and or lead-based paint hazards. Subpart (b)(3) states that the lessor is required to include in each contract to lease target housing, either as an attachment to or within the contract, 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, or an indication that no such records or reports were available if that is the case.

Respondent entered into an oral rental agreement ("Contract") with Roosevelt and Donna Stallings for the lease of Respondent's residential property located at 504 E. State Street, Jefferson, Missouri. Under the terms of the contract, the Stallings agreed to pay Respondent $280 per month as rent. Respondent failed to provide an EPA-approved lead hazard information pamphlet to Roosevelt or Donna Stallings prior to their being obligated under the Contract. Respondent also failed to include the lead warning statement as part of the Contract. Respondent also failed to include as part of the Contract either a statement disclosing Respondent's knowledge of or a list of records or reports of the presence of lead-based paint and or lead-based paint hazards.

After the Contract was executed, Donna and Roosevelt Stallings moved into the Property with their two children, aged 1 and 2. Donna Stallings was pregnant at the time they moved into the Property, and gave birth to a third child after living in the Property for approximately seven months. During the time they lived at the Property, the Stallings observed chipping, peeling, and flaking paint in several areas. In August 1999, the Stallings had their children's blood tested and discovered that their two youngest children were lead poisoned. The Stallings informed Respondent of their children's lead poisoning and repeatedly asked her to repair the deteriorated condition of the Property's paint. The Stallings eventually moved out of the Property due to Respondent's refusal to make repairs.

Complainant initiated an investigation into Respondent's compliance with the Disclosure Rule after receiving a tip from former tenants Roosevelt and Donna Stallings. On March 27 and 28, 2000, EPA Inspector Keith Thompson conducted an inspection of Respondent, and concluded that she had failed to meet any of the requirements of the Disclosure Rule when she rented properties to the Stallings and other tenants. On August 28, 2000, Complainant initiated a civil administrative proceeding for the assessment of a civil penalties pursuant to the Disclosure Rule.

Complainant has set forth four counts against the Respondent. Complainant alleges that respondent has violated sections 745.207(a)(1), 745.113(b)(1), 745.113(b)(2), and 745.113(b)(3) of the Code of Federal Regulations.

Count I

Count I of the Complaint alleges that the Respondent did not comply with the requirements of section "745.107" of the Lead Disclosure Rule. This section requires the lessor of target housing to provide the lessee with an EPA-approved lead hazard information pamphlet before the lessee is obligated under any contract to lease target housing. 40 C.F.R. §"745.107"(a)(1). Complainant alleges that Respondent violated 40 C.F.R. §"745.107"(a)(1) by failing to give the Stallings, as prospective tenants, a copy of the EPA pamphlet Protect Your Family From Lead in Your Home before they became obligated under the lease. Currently, Protect Your Family From Lead in Your Home is the only pamphlet approved for use in Missouri. Further, it is alleged that the Respondent violated 40 C.F.R. § "745.113(b)(4) because she failed to obtain a written certification from tenants acknowledging their receipt of the pamphlet.

The Rules of Practice provide that a complainant has the burden of "going forward with and proving that the violation occurred as set forth in the complaint..." 40 C.F.R. § 22.24. The complainant must, in accordance with this rule, establish a prima facie case against the Respondent, by a preponderance of the evidence. 40 C.F.R. § 22.24. This standard requires that the evidence must support a finding that a fact is more likely to be true than untrue. Therefore, the Complainant must prove that the Respondent committed its alleged violation by a preponderance of the evidence.

Complainant supports its allegations that the Respondent failed to meet the requirements of §745.107(a)(1) and 40 C.F.R. § 745.113(b)(4) with the hearing testimony of the Stallings. Both Roosevelt and Donna Stallings testified that Respondent never provided them with a copy of the pamphlet, and further, that Respondent did not ask them to sign any documents whatsoever related to lead-based paint. Additionally, Complainant offers testimony from Inspector Thompson stating that during his inspection, Respondent failed to produce any lead disclosure forms for him that would demonstrate that she had documented disclosure activities for her lease with the Stallings, or for any other tenant for the properties that she personally managed. Therefore, Complainant has proved the allegations in Count I.

Count II

Complainant alleges in Count II that the Respondent violated 40 C.F.R. § 745.113(b)(1) by failing to include a specifically worded lead statement in each contract to lease target housing, either as an attachment to or within the contract. This requirement must be fulfilled even if a written lease is not used, and must be included either on a lead disclosure form or within the lease itself. 61 Fed. Reg. at 9068. Respondent did not use a written lease, and therefore was required to use a lead disclosure form to meet the requirements of 40 C.F.R. § 745.113(b)(1). In addition, 40 C.F.R. § 745.113(b)(1) requires the tenants' acknowledgment that they received a copy of the pamphlet, as required by the regulation cited in Count I. 40 C.F.R. § 745.113(b).

As discussed above, the Stallings both testified that Respondent never provided them with any documents that related to lead-based paint, in any manner whatsoever. Further, Inspector Thompson's testimony supports the conclusion that Respondent failed to produce any lead disclosure forms demonstrating that the lead warning statement had been provided to either of the Stallings.

Count III

Count III alleges that Respondent violated 40 C.F.R. § 745.113(b)(2) because Respondent failed to include a disclosure statement. 40 C.F.R. § 734.113(b)(2) requires a lessor to include in each contract to lease target housing, either as an attachment to or within the contract, 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. Like the other counts listed in the Initial Brief, this requirement must be satisfied even when no written lease was used, and must be included either on a lead disclosure form or within the written lease itself. 61 Fed. Reg. 9068. Similar to Count II, because Respondent did not use a written lease, she was required to use a lead disclosure form in order to meet this requirement. 40 C.F.R. § 745.113(b).

As with the other counts, the Stallings testimony and the testimony of Inspector Thompson adequately demonstrates that the Respondent failed to include a disclosure statement.

Count IV

Count IV alleges that Respondent failed to list records or reports as required by 40 C.F.R. § 745.113(b)(3). Under 40 C.F.R. § 745.113(b)(3), a lessor is required to include in each contract to lease target housing, either as an attachment to or within the contract, 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 given to the lessee, or an indication that no such records or reports were available if that is the case. As with Counts I, II, and III of the Complaint, this requirement must be fulfilled even when no written lease is used, and must be included either on a lead disclosure form or within the written lease itself. 61 Fed. Reg. 9068.

As stated above, the testimony of the Stallings and Inspector Thompson shows, by a preponderance of the evidence, that the Respondent failed to list records and reports, as required by the Disclosure Rule. Because Respondent has not rebutted any of this testimony, she has, in effect, admitted to the allegations in the Complaint. These allegations are consistent with the record and the RLBPHRA. Therefore, the relief sought in the Complaint shall be ordered.

Penalties

Part 22 of EPA's regulations, 40 C.F.R. part 22, directs the Presiding Judge to consider the Agency's penalty policies.[3] A Presiding Judge may deviate from the Penalty Policy after considering these guidelines,[4] if the decision to do so is supported by adequate reasoning and evidence in the initial decision. In this case, the record supports the use of the Penalty Policy as a basis for determining the penalty amount.

The Administrator is authorized to impose civil penalties of up to $11,000 per violation of the Disclosure Rule.[5] The Judge, in determining the amount of a civil penalty for TSCA § 409 violations, "shall take into account the nature, circumstances, extent, and gravity of the violation or violations, and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior violations, the degree of culpability, and such other matters as justice may require." 15 U.S.C. § 2615(a)(2)(B).

The Disclosure Rule Enforcement Response Policy ("Penalty Policy") provides guidelines whereby an appropriate penalty can be calculated in accordance with TSCA and RLBPHRA.[6] The penalty determination is made in two stages. In the first stage, the gravity-based penalty is calculated, which refers to the overall seriousness of the violation. The gravity-based penalty considers the nature, circumstances, and extent of harm of the violation. The second stage allows for adjustments to the gravity-based penalty based on factors including ability to pay, history of prior violations, degree of culpability, and other factors as justice may require, such as voluntary disclosure and cooperation.

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[3]The Regulations provide that the Presiding Officer not only "shall determine the amount of the recommend civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act" but also "shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. §22.27(b).

[4]In re Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, 6 E.A.D. 735, (EAB, Feb. 11, 1997).

[5] TSCA § 16(a)(2)(B) authorizes the Administrator to impose civil penalties of up to $25,000 per violation, but this maximum penalty amount has been limited by the Residential Lead-Based Paint Hazard Reduction Act Section 1018(b)(5), 42 U.S.C. § 4852(b)(5), which makes violations of the Disclosure Rule enforceable under TSCA § 409, and states that the maximum penalty amount for Disclosure Rule violations is $10,000. EPA issued a final rule adjusting the $10,000 amount upward by 10%, pursuant to the Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2961, as amended by the Debt Collection Improvement Act, 31 U.S.C. § 3701. Therefore, $11,000 is the maximum penalty amount per violation.

The Disclosure Rule requirements are categorized by the Penalty Policy as "hazard assessment" in nature because they are designed to give prospective purchasers and lessees information that will allow them to weigh the risks of buying or renting a particular property. The Penalty Policy further categorizes each possible violation as being within one of six circumstance levels, with Level 1 constituting the most serious violation level. The Policy then breaks down the extent of the violation, finding it either major, significant, or minor. All of these factors are taken and applied to a matrix, which produces dollar amounts ranging from $110 to $11,000.

The RLBPHRA was specifically enacted to prevent situations just like the one in this matter. "Lead poisoning in children causes quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavior problems." Penalty Policy at 1. Effective prevention these life-altering problems is the purpose of the Disclosure Rule. In the case of the Stallings, each violation committed by Respondent falls into a major extent category because the Stallings family not only had two children under the age of 6 years old at the time of the violations, but also, Donna Stallings was pregnant. Respondent failed to comply with the RLBPHRA disclosure and reporting requirements, and as a direct result, two of the Stallings children are lead-poisoned. Both Roosevelt and Donna Stallings testified that if they had been given the proper information, they either would have made sure the necessary repairs to the property were made, or they would have rented elsewhere. Further exacerbating Respondent's violations is her decision to ignore the Stallings' repeated requests to make repairs, and her apparent knowledge of her duty to disclose to her lessees the valuable information she is required by law to provide.

In calculating the gravity-based penalty using the Penalty Policy, Complainant determined that Respondent's failure to provide the Stallings with the pamphlet Protect Your Family From Lead in Your Home (Count I), has a circumstance level of 1, meaning that the violation has the highest probability of causing harm to tenants. A level 1 violation carries with it the maximum penalty of $11,000. For failing to include the lead warning statement with the lease contract (Count II), Complainant determined that the violation had a circumstance level of 2, resulting in a penalty of $8800. The violations of failing to include a statement disclosing Respondent's knowledge of lead-based paint and/or lead-based paint hazards of the rental property with the lease agreement (Count III) and failing to list requisite records and reports pertaining to lead-based paint (Count IV), have circumstance levels of 3 and 5, respectively. The penalty amount for level 3 is $6600 and for level 5 is $2200.
The total penalty amount for all for counts, after determining their circumstance levels, is $28,600.

Upon application of the adjustment factors in the second stage of the Penalty Policy's determination, the penalty for each violation was adjusted upward by 25% based on the Respondent's degree of culpability.[6] This upward adjustment is necessary because the

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[6]Counts II-IV were adjusted upward 25% pursuant to the Penalty Policy, but Count I was not adjusted upward because had already reached the maximum penalty amount of $11,000.

Respondent committed acts she knew would be a violation of the Disclosure Rule or hazardous to health. Inspector Thompson inspection produced a certification document which stated that Respondent's management company had informed her of her obligations under the Disclosure Rule. The Respondent signed the document, thereby attesting to the accuracy of the certification statement, and Respondent's awareness of the requirements of the Disclosure Rule. In terms of any downward adjustments, Complainant concluded that none of the Respondent's actions warranted a reduction in the penalties assessed, and the Respondent has provided no information that suggests there should be a downward adjustment. Thus, Complainant has met its burden with respect to the proposed penalty. The 25% upward adjustment based on culpability creates a total proposed penalty of $33,000.

CONCLUSION

Respondent Barbara Buescher, within 30 days after this decision becomes final, shall pay the civil penalty of $33,000 by submitting a certified or cashier's check in the amount of $33,000 payable to the order of "Treasurer, United States of America." The check shall reference the name and the docket number (TSCA-7-2000-053) in this action. Respondent shall mail the check to:

Mellon Bank
U.S. Environmental Protection Agency
Region VII
P.O. Box 360748M
Pittsburgh, PA 15251

Simultaneously with the submission of the payment, Respondent shall send notice of the payment, including a copy of the check, to the following:

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency Region VII
901 N. 5th Street
Kansas City, KS 66101

This order, as a default order, constitutes an initial decision. More specifically, Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. §22.28 (a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30(b), to review the Initial Decision. In addition, failure by Respondent to pay the penalty within the prescribed statutory time limit after the entry of the final order may result in the assessment of interest on

the penalties. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

Charles E. Bullock
Administrative Law Judge

Dated: May 1, 2002