UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
BILLY YEE,	**)**	**Docket No. TSCA-7-99-0009**
	)	
Respondent.	**)**	

INITIAL DECISION

DATED: June 6, 2000

TSCA: Pursuant to Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689, Respondent Billy Yee is assessed a penalty of $29,700 for six violations of federal regulations promulgated under the Residential Lead-Based Paint Hazard Reduction Act based upon: (a) his failure to provide an EPA-approved lead hazard information pamphlet to his lessee prior to her being obligated under the rental contract; as well as (b) his failure to include, either as an attachment to or within the rental contract, (1) a lead warning statement; (2) a statement disclosing his knowledge of the presence of lead-based paint and/or lead based paint hazards in the property or indicating that he had no such knowledge; (3) a list of any records or reports available to him pertaining to lead-based paint and/or lead-based paint hazards in the property that had been provided to the lessee, or an indication that no such records or reports were available; (4) a statement by his lessee affirming her receipt of the aforesaid information and pamphlet; and (5) his signature and that of his lessee, certifying to the accuracy of their statements; all as required by 40 C.F.R. § 745.113(b)(1)-(4) and 745.107(a)(1).

PRESIDING OFFICER: CHIEF ADMINISTRATIVE LAW JUDGE SUSAN L. BIRO

APPEARANCES:

For Complainant: Claude Walker, Esquire
Enforcement Counsel
U.S. EPA, Toxics and Pesticides Enforcement Division
Washington, D.C.

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For Respondent: William A. Shirley, Esquire
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I. PROCEDURAL HISTORY

This proceeding was initiated by the Environmental Protection Agency, Region 7 (EPA) on February 4, 1999, pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), as amended (15 U.S.C. § 2615(a)). The Complaint charges Respondent, Billy Yee, 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 (42 U.S.C. § 4851 *et seq.).* The Complaint alleges that Respondent violated the Disclosure Rule when he entered into a contract to lease an apartment and failed to provide his lessee with certain information concerning lead-based paint prior to the lessee becoming obligated under the lease contract. Six counts of violation are alleged, for which Complainant proposes a total penalty of $29,700.

On February 26, 1999, Respondent, through an attorney, filed an "Answer and Request for Hearing and Informal Settlement Conference" which set forth some defenses to the allegations of violation in the Complaint, but which failed to "clearly and directly admit, deny or explain each of the factual allegations contained in the complaint," as required by the Consolidated Rules of Practice, 40 C.F.R. § 22.15. By Initial Prehearing Order dated May 8, 1999, Respondent was ordered to file an Amended Answer complying with the requirements of 40 C.F.R. § 22.15 by May 28, 1999. Upon Respondent's failure to file an Amended Answer by that date, Respondent was Ordered to Show Cause by June 17, 1999, why a default should not be entered against him based upon his failure to abide by the prior Order. Upon substitution of counsel, Respondent filed an Amended Answer on June 10, 1999, and subsequently, on June 16, 1999, filed a Response to the Order to Show Cause.

Pursuant to a Prehearing Order, Complainant and Respondent each filed Prehearing Exchanges. On October 5, 1999, and October 28, 1999, Complainant supplemented its Prehearing Exchange twice pursuant to unopposed motions granted by the undersigned. On October 21, 1999, the parties filed a "1st Joint Set of Stipulated Facts, Exhibits and Testimony" ("Stipulations").

On October 8, 1999, Complainant filed a Motion for Partial Accelerated Decision as to Liability on all counts of the Complaint, on the basis that there are no genuine issues of material fact as to Respondent's liability and that Complainant should be granted judgment as a matter of law. Respondent filed no written opposition to the Motion. On November 8, 1999, the undersigned granted Complainant's Motion and entered judgment in favor of Complainant on the issue of liability as to each of the six counts in the Complaint.

A hearing was held in this matter before the undersigned on December 21, 1999, in St. Louis, Missouri, to resolve the remaining issue in this case, that of the appropriate penalty to be assessed against Respondent. Complainant presented four witnesses at the hearing: Karen Lovett, Dr. Don Weiss, Martha Talley, and Jamie Estes. Respondent testified on his own behalf

in the proceeding. Complainant introduced eleven exhibits into evidence; Respondent introduced four exhibits into evidence.

The transcript of the hearing was received by the undersigned and the parties on or about January 31, 2000.[1] Each of the parties submitted a post-hearing brief and the record was closed on March 17, 2000.

II. PENALTY CRITERIA

As discussed above, Respondent's liability has already been determined and the sole remaining issue in the instant proceeding is the determination of an appropriate civil penalty. The assessment of civil administrative penalties in this context is governed by the Consolidated Rules of Practice. 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.

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

Respondent has been found to have violated the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("the Act"), 42 U.S.C. § 4851-56 (1995). The Act provides that the violation of any of its requirements "shall be a prohibited act under section 409 of the Toxic Substances Control Act [15 U.S.C.A. § 2689] . . . [and] the penalty for each violation under section 16 of that Act [15 U.S.C.A. § 2615] shall not be more than $10,000."[2] The applicable statutory criteria for the assessment of a penalty are, therefore, delineated in TSCA.

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 violations and, with respect to the violator, ability to pay, effect on ability to continue in business, 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 January 1998, EPA's Office of Regulatory Enforcement, Toxic and Pesticide

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[1] Citation to the transcript of the hearing will be in the following form: "Tr."

[2] The Civil Monetary Penalty Inflation Rule increases the maximum penalty of $10,000 stated in the Statute by ten percent to a maximum penalty of $11,000 per violation. *See,* 61 Fed. Reg. 69361 (1996).

Enforcement Division issued its Interim Enforcement Response Policy ("ERP") for the Residential Lead-Based Paint Hazard Reduction Act of 1992. This policy, with minor exceptions, follows the penalty factors set forth in the statute.

The ERP begins with the proclamation that it is EPA's intent to issue mere "Notices of Noncompliance" to first time violators of the Disclosure Rule, unless a child or a pregnant woman is put at risk of lead poisoning. C's Ex. 7 at pp. 3, 7. The ERP characterizes violations involving risks to women and children as "egregious" and consequently, deems such violations, even by first time violators, as warranting the imposition of civil penalties. C's Ex. 7 at p. 7.

Where a violation warranting a penalty has occurred, the ERP utilizes a two stage process for determining an appropriate penalty amount. 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. C's Ex. 7 at pp. 10-14. These factors are incorporated into a penalty matrix (the Gravity Based Penalty Matrix) which specifies the appropriate gravity-based penalty. C's Ex. 7, Appendix B, at p. 30. 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. C's Ex. 7 at pp. 14-19.

The ERP characterizes as "major" violations, those where there is potential for "serious" damage to human health, such as in cases where children under six reside in 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."

III. FACTUAL FINDINGS

For the past seven years, Respondent Billy Yee has been engaged in the business of buying, renovating and renting out older residential housing in the St. Louis, Missouri area. Tr. 122. The Disclosure Rule requires a lessor of housing constructed prior to 1978 (known as "target housing") to disclose to the lessee the presence of any known lead-based paint and/or lead-based paint hazards, provide available records and reports, provide a lead hazard information pamphlet, and attach specific disclosures and warning language to the leasing contract before the lessee is obligated under a contract to lease target housing. 40 C.F.R. §§ 745.100, 745.103, 745.107, 745.113(b). Respondent entered into an oral lease with Karen

Lovett in or around November 1997 for premises located at 3306 Cherokee Street, St. Louis (the "Property"). This dwelling was constructed in or about 1904 and as such, fell under the definition of "target housing" set forth in the Disclosure Rule. *See*, Stipulations, dated October 21, 1999. In the Order on Accelerated Decision, Respondent was found to have violated the Disclosure Rule requirements in his rental of this property. Specifically, it was found that:

(1) Mr. Yee did not provide an EPA-approved lead hazard information pamphlet to Ms. Lovett prior to her being obligated under the rental contract as required by 40 C.F.R §745.107(a)(1) (Count 1);

(2) Mr. Yee did not include, either as an attachment to or within Ms. Lovett's rental contract, a lead warning statement as required by 40 C.F.R. § 745.113(b)(1) (Count 2);

(3) Mr. Yee did not include, either as an attachment to or within Ms. Lovett's rental contract, a statement disclosing his knowledge of the presence of lead-based paint and/or lead based paint hazards in the Property or indicating that he had no such knowledge, as required by 40 C.F.R. § 745.113(b)(2) (Count 3);

(4) Mr. Yee did not include, either as an attachment to or within Ms. Lovett's rental contract, a list of any records or reports available to him pertaining to lead-based paint and/or lead-based paint hazards in the Property that have been provided to her, or an indication that no such records or reports are available, as required by 40 C.F.R §745.113(b)(3) (Count 4);

(5) Mr. Yee did not include, either as an attachment to or within Ms. Lovett's rental contract, a statement by Ms. Lovett affirming her receipt of the information required by 40 C.F.R. § 745.113(b(2) and (3) and the lead hazard information pamphlet required under 40 C.F.R. § 745.107(a)(1), as required by 40 C.F.R. § 745.113(b)(4) (Count 5); and

(6) Mr. Yee did not include, either as an attachment to or within Ms. Lovett's rental contract, his signatures and that of Ms. Lovett, certifying to the accuracy of their statements as required by 40 C.F.R. § 745.113(b)(6) (Count 6).

In this proceeding, Complainant proposed a total combined penalty of $29,700, based on Complainant's application of the ERP to Respondents' violations. Complainant classified all of Respondent's violations as "egregious" and "major" because of the presence of Ms. Lovett's children under the age of 6 in the home. It classified Count 1 as a "Circumstance Level 1 (high impact)" violation, with a proposed gravity-based penalty of $11,000; Counts 2 and 3 as Circumstance Level 2 (medium impact) violations with proposed gravity-based penalties of $6,600; Counts 4 and 5 as Circumstance Level 5 (low impact) violations with proposed gravity-based penalties of $2,200; and Count 6 as a Circumstance Level 6 violation (lowest impact) with a proposed gravity-based penalty of $1,100. Complainant made no adjustments to the gravity-based penalty, explaining at the hearing, through witness testimony, that none were warranted.

During the hearing Respondent asserted an inability to pay the penalty and requested that the proposed penalty be significantly reduced or eliminated altogether.[3]

A. Testimony of Complainant's Witnesses

Complainant's first witness, Karen Lovett, testified that on November 8, 1997, she rented a four bedroom townhouse located at 3306 Cherokee Street, in St. Louis, Missouri from Mr. Yee. Tr. 13-14. On or about that date, she moved into the premises, along with her 6 children, 2 girls and 4 boys, ranging in age from 18 months to 13 years. Tr. 15, C's Ex. 3, 5. Ms. Lovett testified that prior to entering into the lease, Mr. Yee did not provide her with the EPA pamphlet, "Protect Your Family from Lead in Your Home," did not provide her with a lead disclosure form to sign, and did not provide her with any reports relating to lead based paint. Tr. 14-15, C's Ex. 3. After renting the apartment, Ms. Lovett paid her rent in cash on a monthly basis to Mr. Yee, personally, on all occasions except one, when she paid Mr. Yee's wife. Tr. 25, 27.

Ms. Lovett stated that before she moved into the apartment, her children's health was "fine." Tr. 16. However, after moving in, Ms. Lovett claimed her children's eating and sleeping habits deteriorated. Tr. 16. In February 1998, her four boys were diagnosed with lead poisoning and were hospitalized. Tr. 17, C's Ex. 5. She testified that two of the boys were hospitalized twice, two were hospitalized a total of five times, in each case for a five day chelation treatment for lead poisoning. Tr. 17, 24-25, see C's Ex. 5.[4] The four boys are still under medical care for lead poisoning. Tr. 18.

As a result of her children's diagnoses, the City of St. Louis Department of Health and Hospitals inspected the Cherokee Street premises Ms. Lovett had rented from Mr. Yee. Tr. 18-19, C's Ex. 6. During its inspection, the Department of Health discovered accessible lead based paint in several areas of the rental Property, and sent a letter to Mr. Yee detailing the violations

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[3] At the hearing, Respondent objected to EPA initiating this case on the basis that the regulations at issue here "were not in effect" at the time of the violations. Tr. 12. This argument is based upon the fact that, although OMB approved the information collection requests in the Disclosure Rule on April 22, 19*96*, "Effective Date Notes" to 40 C.F.R. §§ 745.107 and 745.113 of the Disclosure Rule, as printed in the July 1996, 1997 and 1998 editions Code of Federal Regulations, stated that those sections "contain[] information collection requirements and will not become effective until approval has been given by the Office of Management and Budget [OMB]," suggesting to Respondent that the regulations were "pending," rather then "in effect." Respondent originally raised this defense in his Answer, and while he did not file any written opposition to the Complainant's Motion for Accelerated Decision, this defense was nevertheless considered and addressed in the Order granting the Motion. Respondent never moved for reconsideration of that Order or for interlocutory review of it and, for the reasons stated in the Order on Accelerated Decision, his renewed Motion made at the hearing was denied. Tr. 12.

[4] The medical records in evidence (C's Ex. 5) indicate that one of the boys, Kayveond, was hospitalized four rather than five times.

and requiring that the premises be brought into compliance. Tr. 18-19, C.'s Ex. 6. In light of the Department of Health's findings, the children were not allowed to return home to the premises after their second hospitalization, and alternative living arrangements had to be made for them. Tr. 21-22.

Ms. Lovett testified that the apartment she rented from Mr. Yee had cracking and peeling paint around the door, in the children's bedroom closet and in other areas of the house. Tr. 18. She stated that had she been given information on lead paint before moving into the Cherokee apartment she probably would not have rented it. Tr. 20. Ms. Lovett continued living in the apartment while her children lived elsewhere because she didn't have anywhere else to go. Tr. 21. Ms. Lovett finally moved out in February 1999. Tr. 15, 21.

Complainant's second witness, Dr. Don Weiss, testified that for the past three years he has been a pediatrician and physician for the City of St. Louis Department of Health. Tr. 28-29. Along with his medical degree, he has a Master of Public Health degree in epidemiology. Tr. 29. As a medical resident, Dr. Weiss testified that he trained with "two pioneers in lead poisoning research." Tr. 30. Since then he has conducted his own research projects on lead poisoning, authored papers on childhood lead poisoning, lectured in the field of lead poisoning, and has over the past 10 years treated approximately 125 to 130 children suffering from lead poisoning. Tr. 30-32. At the hearing, Dr. Weiss was offered and qualified, without objection, as an expert in the field of childhood lead poisoning. Tr. 33.

Dr. Weiss testified that the leading cause of childhood lead poisoning was "hand-to-mouth" activity, such as eating paint chips or simply putting lead paint dust covered fingers into the mouth. Tr. 33, 43. The current treatment method for lead poisoning consists of removing the child from the exposing environment and initiating treatment with one or more chelation drugs, if the lead levels reach above 45 micrograms per deciliter. Tr. 33, 36. However, Dr. Weiss testified, the drug treatment is not very efficient, in that in any one treatment only 10 to 15 percent of the lead in the body is removed. Tr. 34. As a result, repeated drug treatments, which can be painful, are frequently required. *Id.* The symptoms of low level lead poisoning are inattentiveness as well as hearing, speaking and learning difficulties. Tr. 34-35. At higher levels, children experience hyperactivity, loss of appetite, constipation and nerve conduction problems. At the highest levels, levels closer to 100 mg/dc, children experience seizures, develop comas, brain edema and can die. Tr. 35. Even at low levels (10-15 mg/dc), lead poisoning can have long-term health and social consequences for children, including irreversible difficulty learning and aggressive behavior. *Id.*

Beginning in February 1998, due to his speciality in lead poisoning, Dr. Weiss was consulted regarding treatment for two of Ms. Lovett's sons (Korshawn - then age 22 months and Kayveond- then age 37 months) when tests showed them as having lead levels above 45 mg/dc.

Tr. 37-38.[5] Repeat blood level testing was then performed on the children, and both Kayveond and Korshawn's levels were found to be near to or above 70 mg/dc. Tr. 37, C's Ex. 5. They had symptoms of hyperactivity, speech delay, and appetite and developmental difficulties. Tr. 38. Dr. Weiss testified that both children's blood lead levels posed serious risks and required immediate treatment. Tr. 40-41. Furthermore, Dr. Weiss testified that Korshawn's blood lead level, which was greater than 70 mg/dc, constituted a "class 5" level of lead poisoning, a level "which is the highest classification" and if not treated immediately, would pose a serious brain damage risk. Tr. 40. In light of both children's elevated blood lead levels, Dr. Weiss immediately hospitalized the two children and began dual (two drug) chelation therapy. Tr. 41. Ms. Lovett's two other sons (Kristopher-then age 56 months and Kaywand- 67 months) were subsequently hospitalized for treatment, due to high lead levels. Tr. 40- 41, C's Ex. 53. In March, 1998, and thereafter, the four boys were rehospitalized for treatment. Tr. 17, 38, 41- 42. Ms. Lovett's daughter Lakesha, who was almost eight years old, was found to have a blood lead level of 22 mg/dl in February 1998, and 31 mg/dl in March 1998. C's Ex. 5, Tr. 43. Similarly, during that time, four-year-old Kristopher's blood lead level increased from 38 mg/dl to 52 mg/dl. Tr. 41-42, 56-57, C's Ex. 5. Dr. Weiss stated that even now, two years later, the children continue to receive follow up iron medication to block the absorption of lead and reverse the effects. Tr. 48.

The high lead levels in the Lovett children's blood triggered a priority inspection of their home by the City of Saint Louis Department of Health and Hospitals, Dr. Weiss said. Tr. 44-45, C's Ex. 6. The inspection found high levels of lead paint on the doors, windows, walls, and stairs. Tr. 45-46, C's Ex. 6. Dr. Weiss opined that the children could have been poisoned by the lead paint in the home on Cherokee Street, where they had lived for the prior approximately four months. Tr. 50, 56.

Dr. Weiss testified that there are possible significant long term negative consequences for Ms. Lovett's sons as a result of suffering lead poisoning, particularly because they incurred the poisoning during the first six years of their life, when the brain and nervous system are still developing. Tr. 59. The negative consequences Dr. Weiss anticipated included attention deficit and loss of intelligence quotient points with resultant difficulties in school and lost income. Tr. 46. Dr. Weiss characterized the health situation of Ms. Lovett's children as "the most traumatic case of lead poisoning" with which he had ever been involved. Tr. 47.

Martha Talley, EPA Region 7's Regional Lead Coordinator for the Toxic Substances Control Act, testified as Complainant's third witness. Tr. 65. Ms. Talley testified that in February 1998, EPA received a "tip and complaint" from the City of St. Louis Department of Health that Mr. Yee had failed to comply with the real estate Disclosure Rule prior to Ms. Lovett being obligated under her rental contract. Tr. 68. In response, EPA began an investigation to

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[5] The medical records of the five youngest children (C's Ex. 5) show that four of the children had been previously tested for lead during routine annual check-ups and the highest lead level among them before had been 18mg/dc. *See* Tr. 52-53. Respondent characterized this as being indicative of prior lead exposure. R's Brief at 3.

determine whether a violation, in fact, occurred. In furtherance of that investigation, in March of 1998, EPA issued an information request letter to Mr. Yee. Tr. 69. However, Mr. Yee never responded to the request and so in May 1998, a second information request letter was sent. *Id.* Mr. Yee also failed to respond to EPA's second request letter and so, on July 2, 1998, EPA issued a subpoena to Mr. Yee to obtain the relevant information. Tr. 68-69, C's Ex. 1. Mr. Yee responded to the subpoena. Tr. 69-70, C's Ex. 2. In his response, Mr. Yee acknowledged entering into a month to month oral lease for the Cherokee Street premises with Ms. Lovett on or about December 20, 1997, and not providing Ms. Lovett with the EPA pamphlet on Lead Paint, claiming that he had no information on lead based hazards at the premises and therefore did not disclose such information to Ms. Lovett. C's Ex. 2. In furtherance of its investigation of the matter, EPA also obtained an affidavit from Ms. Lovett, the medical records of Ms. Lovett's children, the City's lead inspection report of Ms. Lovett's apartment; as well as a tax assessor report on the Cherokee Street property (showing it was built in 1904) and approximately 29 other properties owned by Mr. Yee in the St. Louis area. C's Exs. 3, 4, 5 and 6, Tr. 70-73.

After reviewing various documents acquired in the investigation, Ms. Talley concluded that Mr. Yee had committed six violations of the Disclosure Rule. Tr. 72. Although he was a first-time violator, Ms. Talley determined that the appropriate response to the violations was the issuance of an Administrative Complaint with a proposed penalty rather then the issuance of a Notice of Non-Compliance because the violations were deemed "egregious" under the ERP, due to the non-disclosure, the lead paint found in the premises and the children's elevated blood levels. Tr. 74-75, C's Ex.7 pp.7-8.

Relying upon the ERP, Ms. Talley calculated a penalty to be proposed in the Complaint. In doing so, Ms. Talley testified that she first characterized the extent of all six violations as "major" because of the age of the housing and the fact that the youngest child in the home was one year old, meaning there was potential for "serious" damage to human health. Tr. 76, C's Ex 7 pp. 12, 30.

Next, utilizing the ERP's Circumstance Level Matrix (C's Ex. 7 pp. 27-29), she categorized the violation set forth in Count 1 of the Complaint -- Respondent's failure to provide an EPA-approved lead hazard information pamphlet to Ms. Lovett -- as a Circumstance Level 1 -- high impact violation. Ms. Talley considered that the pamphlet states identification points for lead based paint so a lessee can be aware of the risks, and it also describes the potential health effects from lead based paint poisoning, and information regarding prevention. Tr. 78. The gravity based penalty for this violation established by the ERP matrix is $11,000. Tr. 77-79.

Ms. Talley went on to testify as to the violations in Counts 2 and 3 -- the failure to include with or within the lease, a lead warning statement advising of the risks of lead based paint chips or dust to children, and a disclosure statement, advising the tenant of known lead based paint hazards in the premises or the lessor's lack of knowledge. She characterized Counts 2 and 3 as Circumstance Level 3 violations with penalties of $6,600 each. Tr. 79-81. The violations in Counts 4 and 5 -- the failure to include, with or within the lease, a list of documents pertaining to

lead-based paint and the hazards thereof in the premises provided to the lessee, or an indication that no such documents are available, and a statement by lessee affirming her receipt of the information required by the Disclosure Rule -- were categorized by Ms. Talley as Circumstance Level 5 violations with penalties of $2,200. Tr. 81-83. The violation in Count 6 -- Mr. Yee's failure to include with or within the lease, a document bearing the signatures of the lessor and lessee certifying the accuracy of their statements regarding compliance with the Disclosure Rule – was categorized as a Circumstance Level 6 violation with a penalty of $1,100. Tr. 83.

Ms. Talley stated that after calculating the aggregate gravity-based penalty for all the violations as $29,700, she considered whether any adjustments were appropriate. The first adjustment considered was based upon "inability to pay." Ms. Talley stated that in connection therewith, she had Mr. Yee complete a financial information form (R's Ex. 3) and obtained Mr. Yee's mortgage loan applications from the PinnFund USA Bank (C's Ex. 10). Ms. Talley stated that Mr. Yee was asked to provide EPA with copies of his recent tax returns as filed, but that no such documents were received. Tr. 86. Ms. Talley then gave Mr. Yee's financial information to Ms. Jamie Estes, an EPA accountant, to perform an ability to pay analysis. Ms. Estes reported back to Ms. Talley that Mr. Yee *had* the ability to pay the proposed penalty of $29,700, and so, Ms. Talley did not adjust the gravity-based penalty downward on this basis. Tr. 84-86.

As to other adjustments, the ERP provides for a 25% increase in the penalty for prior violations. However, since Mr. Yee did not have any history of prior violations, no such upward adjustment was made. Tr. 86-87. The ERP also provides for a 25% upward adjustment for prior knowledge of the regulation, but since Mr. Yee claimed to have had no prior knowledge of the regulations before the violation occurred, no upward adjustment was made for culpability. Tr. 87. As to attitude, Ms. Talley stated that the ERP provides for a downward adjustment for attitude, but did not feel it warranted in this case because Mr. Yee did not respond to EPA's information request letters, and did not provide all the financial data requested by EPA (*i.e.*, his tax returns), and was slow to provide disclosure forms evidencing compliance after being made aware of the Disclosure Rules requirements.[6] Tr. 87-90. As to adjusting the penalty based upon the size of Mr. Yee's business, Ms. Talley stated that such an adjustment only applies to individuals who own one property, not real estate professionals such as Mr. Yee.[7] Tr. 90. There is no sliding scale for reductions based upon the size of business. Tr. 98. Ms. Talley indicated at the hearing

[6] Although he owns over 30 rental properties and claims a high turnover rate in tenants, Mr. Yee provided EPA with only approximately a dozen disclosure forms and/or receipts for pamphlet, after being provided with the forms in April 1998. Tr. 89-90.

[7] Ms. Talley's reference (on page 90 of the transcript) to the criterion of the size of Mr. Yee's business, as applied to individuals who own only one property, is apparently in error. The appropriate criterion meeting that description in the ERP is the adjustment for small independent owners and lessors. C's Ex. 7 p. 18.

that EPA's Small Business Policy,[8] which permits elimination of entire penalties in certain circumstances, was not applied to reduce the penalty in this case because the violations here involved a significant health threat and Mr. Yee did not meet the criteria of participating in a compliance assistance program or reporting his violations prior to their discovery by EPA. Tr. 99, 101-103.

Ms. Estes, Complainant's final witness, testified that she has been an accountant in EPA Region 7's comptroller's office since 1992. Tr. 110. Among her duties is performing ability to pay analyses which involves an assessment of an individual's financial status to determine if a proposed penalty will hamper the individual's ability to retain ordinary and necessary business assets or produce income. Tr. 111-12. Ms. Estes was qualified at the hearing as an expert in the field of general accounting. Tr. 112. Ms. Estes stated that she performed a cash-flow and debt capacity assessment in conjunction with Mr. Yee's ability to pay the penalty of $29,700 proposed in this case. In doing so, she relied upon the financial data form provided by Mr. Yee (R's Ex. 3), his mortgage loan application submitted to PinnFund, some United States Census Bureau data to determine food costs, and some additional information on debts that were paid off after the PinnFund loans were acquired. Tr. 114-15. Based upon her analysis, Ms. Estes opined that Mr. Yee could pay the proposed penalty. She based this conclusion on her calculations that Mr. Yee had an average annual income of $212,000, and personal living expenses of $112,000, leaving him approximately $100,000 of annual uncommitted income to pay the penalty. Tr. 116-117. In terms of debt assessment, Ms. Estes calculated that Mr. Yee could assume a short term, 14% interest, loan for the penalty and still not exceed the 36% debt capacity ceiling that is standard in the commercial industry. *Id.*

B. <u>Testimony of Respondent</u>

Testifying on his own behalf at the hearing, Mr. Yee stated that since 1993, he has been engaged in the business of purchasing, rehabilitating and selling or leasing real property in the St. Louis, Missouri area. Tr. 122. He began his business with one property and currently he owns approximately 32 buildings, most of which are single family or two family homes. Tr. 121-22. Mr. Yee testified that he usually buys these properties as "shells," *i.e.* these homes are typically uninhabitable with no windows, electricity or plumbing, for $500 to $4,000 (depending on the location), rehabilitates them, and then rents them or sometimes sells them. Tr. 121. Mr. Yee testified at the hearing that he currently has five such rehabilitation projects underway. Tr. 143.

Mr. Yee stated he had never attended a seminar on lead based paint, had only a few of his buildings tested for lead based paint, and had no idea of the applicable lead disclosure regulations until he was cited in connection with Ms. Lovett's premises in February 1998. Tr. 123, 126, C's

[8] The ERP cites to EPA's Interim Policy on Compliance Incentives for Small Businesses, 61 Fed. Reg. 27984 (June 3, 1996)(effective June 10, 1996), which was recently replaced by EPA's Small Business Compliance Policy, 65 Fed. Reg. 19630 (April 11, 2000).

Ex. 6. He did not begin to come into compliance until June 1998. Tr. 89, 127, 160, R's Ex. 2. He stated that he had previously rented Ms. Lovett's apartment to a Section 8 tenant and the premises had been inspected in connection therewith by the St. Louis Housing Authority for, among other things, flaking paint, and no violations were found. Tr. 123-24. He stated he has never been otherwise cited for lead based paint violations since February 1998. Tr. 129-130.

Mr. Yee testified that he bought the Cherokee Street property at issue in 1993 or 1994 for $10,000, and rehabilitated it at a cost of $25,000, converting it from a four family to a two family building. Tr. 154-155. Mr. Yee testified that he sold the property in August 1998 for $30,000 to pay off a loan. Tr. 155-156.

Mr. Yee stated that if he had to pay the penalty proposed of $29,700 it would "put [his] operating on halt" because of "all of the money I got to put to reinvest, rebuild the city, no more money to reinvest." Tr. 129. Mr. Yee estimated that his rental properties are approximately 70% occupied at any one time and he incurs from $6,000 to $7,000 per month in repair and rehabilitation expenses. Tr. 122, 126. In addition, he testified that the taxes for all his properties total approximately $32,000 per year. Tr. 121-122. According to him, it is difficult to sell his properties because of the neighborhoods in which they are located. Tr. 145. He stated that he has only sold one piece of property in the past and it was listed for 2 ½ years. *Id.* Mr. Yee testified that he does not have a savings account, he has not yet filed Federal income tax returns for 1994, 1996 and 1998, and he is behind in his real estate taxes. Tr. 125-26, 141. He asserted that his net income in 1997 was only $12,000. Tr. 125. He also testified that his ownership of six automobiles, including a 1999 SUV and 1999 Nissan truck, is a necessity, because each member of his family - which includes four children ranging in age from 14 to 23 years old --needs a car to go to work and to school.[9] Tr. 139, and, *see,* R's Ex. 3.

Some discrepancies in Mr. Yee's financial information were addressed at the hearing.[10] During his testimony, Mr. Yee was questioned about the discrepancy between the value of his properties reported on his Pinnfund Loan Application forms (C's Ex. 10) and the value reported on his "Ability to Pay Claim" form (R's Ex. 3). The Pinnfund forms indicate that his properties have a total value of close to $1.5 million while the "Ability to Pay Claim" form indicates an $860,000 value. Tr. 128-129. Mr. Yee testified that this discrepancy is attributable to the fact that he "purchased all [his] property on the wholesale market" so the value reflected on his "Ability to Pay Claim" form is the wholesale market value while the value on the Pinnfund forms

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[9] Mr. Yee's testimony that he sold one of the automobiles, a 1986 Honda Prelude worth $500, is noted. Tr. 138, *see* R's Ex. 3.

[10] An inconsistency in the record is noted as to Mr. Yee's expenses for his children's tuition. When questioned at the hearing whether he is paying tuition for his two children in college and one in law school, he answered in the affirmative. Tr. 163. However, on his "Ability to Pay Claim" form (R's Ex. 3), he left blank the space provided for "current school tuition/expenses." R's Ex. 3.

is the retail value. Tr. 129.

Mr. Yee was also questioned about additional discrepancies between the information reported on the two kinds of forms. For example, Respondent reported on the loan application forms that one of his cars had a value of $17,000 while on his "Ability to Pay Claim" form he reported that this same vehicle had a value of $8,000. Mr. Yee testified that with regard to the differences in the information he provided on his "Ability to Pay" form and his Pinnfund forms, his intent was not "to cheat." Tr. 147. According to Mr. Yee, he may have overlooked the inclusion of certain items, or may have purposefully omitted other items, because he did not deem them significant. Tr. 147.

IV. DISCUSSION

As indicated above, under the ERP, a penalty determination consists of two stages: (1) the calculation of the gravity-based penalty; and (2) the adjustment of the gravity-based penalty on the basis of any of the applicable adjustment factors set forth in the ERP. C's Ex. 7 pp. 10-11.

A. Gravity Based Penalty

At the hearing, Respondent did not challenge the calculation of the gravity based penalty, but did challenge the lack of downward adjustment due to an inability to pay. Nevertheless, it is appropriate to review Complainant's justification for the gravity-based penalty as well as to consider whether any adjustments are warranted.

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

The testimony of Dr. Weiss persuasively described the serious and substantial danger of lead poisoning to children. The Disclosure Act was explicitly enacted in response to this clear danger to provide information to the parents and/or guardians of children to make them aware of the sources and danger of lead paint. Although Complainant unfortunately did not submit as exhibits a complete set of the Lead Disclosure documents Mr. Yee should have provided to Ms. Lovett, it is clear from the testimony of Ms. Talley and documents submitted by Respondent (Ex. 2) that if Mr. Yee had provided the information to Ms. Lovett she would have been informed about the dangers of lead-based paint as well as about the steps which can be taken to limit and/or respond to the risk, such as having her children tested for lead, cleaning the window sills in her home, etc. Tr. 20. The failure to provide Ms. Lovett with this information warrants the

imposition of a substantial penalty.[11]

Mr. Yee raises an issue regarding characterizing the penalties as "egregious," due to the age of the children, suggesting it is unfair to penalize him for children being exposed when discrimination laws prevent him from lawfully inquiring into the existence and/or ages of Ms. Lovett's children. R's Brief at 3. However, the Regulations do not impose a higher disclosure burden based on the presence of young children in the home. The duty to disclose remains the same. The penalty, however, is increased due reasonably to the risk related to exposure of a small child.

Mr. Yee also challenges the gravity-based penalty calculations as to Count 3, stating that the ERP does not provide a penalty for failing to disclose the presence of lead based paint hazards where the lessor is unaware of the presence of lead based paint. R.'s Br. at 4. Respondent's failure to include a disclosure statement either as an attachment to or within the rental contract disclosing Respondent's knowledge of the presence of lead-based paint hazards are the violations of the Disclosure Rule addressed in Count 3. According to Respondent, the ERP only addresses the failure to include "a statement by the lessor disclosing the presence of known lead-based paint or lead-based paint hazards . . ." Id. Respondent points out that he had no such knowledge, and the ERP does not categorize the failure to include a statement where the violator had no knowledge of the presence of lead based paint, and therefore, Mr. Yee argues, the value assigned to Count 3 is "arbitrary and capricious." R's Brief at 4. I agree that the level of harm that comes from not disclosing something that you are not aware of seems at first glance to be insignificant, but it is not, since the lessor's lack of knowledge could serve as impetus to the lessee to investigate the matter. Furthermore, it is the fact that Mr. Yee is the owner of "target housing" as defined by the Act which subjects him to the Disclosure Rule requirements and he is required to comply with these requirements regardless of whether the subject house in fact has any lead based paint. *See, Ric Temple and Paul Nay & Associates,* EPA Docket No. TSCA 5-99-015 (ALJ, April 27, 2000). Thus, the fact that Mr. Yee may have been unaware of the presence of lead based paint within his rental property does not serve to remove his responsibility to disclose the extent of his knowledge and so, does not serve to prevent the assessment of civil administrative penalties for his failure to disclose.

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[11] However, I am not convinced that the EPA's Interim Response Policy appropriately characterizes the comparative circumstance level of the various violations of the Act. In particular, I am disturbed that under the ERP, a lessor's failure to provide a lessee with a statement which discloses the landlord's knowledge of the actual presence of lead based paint in the home is classified as a level 3 violation, regardless of whether the situation is deemed egregious or not, whereas the lessor's failure to provide a pamphlet on lead paint is a level 1 or 2 violation. Although apparently not the case here, in a situation where the landlord is actually aware that the premises contain lead based paint, the failure to warn of that specific danger appears to be a much more egregious violation then failing to provide a pamphlet with general risk information. *See,* C's Ex. 7 pp. 27-28.

Therefore, I find the proposed gravity-based penalty to be appropriate and consistent with the statutory penalty factors and the ERP.

B. Adjustments to the Gravity Based Penalty

1. Ability to Pay/Continue in Business

The Respondent challenged the penalty proposed in this case during the hearing and in his brief, asserting his entitlement to an adjustment based upon the adjustment factor of "inability to pay." The burden of proof with regard to the ability to pay a penalty was discussed by the Environmental Appeals Board (EAB) in *New Waterbury Ltd.*, 5 E.A.D. 529 (EAB 1994). The EAB stated therein as follows:

> Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross-examination it must discredit the respondent's contentions.

5 E.A.D. 542- 543 (italics in original).

Recently discussing this decision, the EAB clarified that *New Waterbury* established that:

> the Complainant has the initial burden of production to establish that the penalty is appropriate and as part of that burden, that a respondent generally has the ability to pay the proposed penalty. The burden of production then shifts to the respondent to establish with specific information that the proposed penalty assessment is excessive or incorrect. If a respondent satisfies its burden of production, the Complainant must rebut respondent's contentions through rigorous cross-examination or through the introduction of additional information.

Chempace Corporation, FIFRA Appeal Nos. 99-2 & 99-3, __ E.A.D. __ (EAB, May 18, 2000) (footnotes omitted).

Moreover, case law establishes that if Respondent proves inability to pay, it is a mitigating

consideration in determining the penalty, and does not preclude assessment of any penalty. The EAB found in *New Waterbury* that "[a] successful demonstration of inability to pay a proposed penalty would not automatically justify the non-assessment of a penalty." 5 E.A.D. at 540. The penalty may, therefore, be reduced on this basis rather than be completely eliminated.[12] For example, in *Commercial Cartage Company*, CAA App. 97-9, 1998 EPA App. LEXIS 87 (EAB, July 30, 1998), the EAB reduced the penalty for two violations of the Clean Air Act by 75 percent, despite the fact that the violations were "serious" because respondent's unrebutted evidence showed that it was no longer in business and had debts of approximately $500,000 at the time of the hearing. Noting that the respondent did not establish that it was unable to pay any penalty, and that it may have had residual funds to pay a penalty or could decide to resume operations in the future, the EAB reduced the $10,500 penalty to $2,625.

In support of its assertion that Mr. Yee can pay the proposed penalty of $29,700, Complainant produced tax assessor reports for some 28 properties which were owned by Mr. Yee, alone or with his wife as of the September 8, 1999 print date of the reports. C.'s Ex. 9. The tax assessor's report reflected these properties as having a cumulative value of approximately $1,000,000. *Id.* In addition, Complainant proffered four Verbal Employment Verifications and Uniform Residential Mortgage Applications Respondent submitted to Pinnfund, USA in an attempt to obtain four "stated-income" loans secured by four of his rental properties.[13] Three of the Pinnfund forms are dated December 4, 1998, and one of the forms evidences a June 30, 1999 execution date. On the June 30, 1999 form, Mr. Yee claimed he had a gross monthly income of $17,414, including a net rental income of $7,414. He represented on this form that he presently had personal monthly expenses of $1,215, including a mortgage of $965.12 per month and $250 per month in real estate taxes on his housing. In terms of assets and liabilities, the June 1999 loan application indicated that Mr. Yee and his wife had $3,500 in cash, life insurance with a cash value of $42,000, real estate worth $1,455,000, a vested retirement account of $4,000, and two automobiles worth $23,000, for a total of $1,527,500 in assets. The liabilities Mr. Yee identified as having on the loan application totaled only $146,578 and included mortgage and credit card debt. Attached to the loan application was a listing of 25 properties owned by Mr. Yee with an estimated market value of $1,455,000, on which he had $184,000 in loans, a gross rental income of $14,815 and net monthly rental income of $7,714, after mortgage, insurance, maintenance, taxes and miscellaneous expenses of $2,966 per month. The form reflected that of the 25 properties, Mr. Yee owned all but four, free and clear. The forms also indicated that Mr. Yee

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[12] If a penalty cannot be paid in a lump sum, a respondent may request a penalty payment schedule. *See, New Waterbury, Ltd.*, 5 E.A.D. at 549; *Leonard Strandley*, TSCA Appeal No. 89-4, at 10 (CJO, Nov. 25, 1991).

[13] The cover letter from PinnFund accompanying these forms indicated that a "stated-income" loan is a "high-risk loan; the only documentation used to qualify a borrower is a completed Application indicating the borrower's income and a verbal employment verification." The cover letter also indicates that one of the loans, that secured by Mr. Yee's property situated at 3331-33 Texas Avenue, was "canceled/denied." C's Ex. 10.

was not delinquent on any Federal debt. According to the loan application form, Mr. Yee had a net worth of $1,380,922. The loan application was signed by Mr. Yee and his wife immediately under a certification which reads: "I/We certify that the information in this application is true and correct as of the date set forth opposite my/our signature(s) on the application . . ." C.'s Ex. 10.[14]

As part of Respondent's inability to pay argument, Respondent alleged in his Answer to the Complaint that previous judgments had been sought against him and that future litigation and/ or the assessment of civil penalties is possible and he argues that if a penalty is assessed against him in the instant case, his ability to continue in business may be severely compromised. R.'s Answer at 11-12. This particular line of argument is unsupported by the evidence in the record. Complainant has pointed out in its brief that each of Mr. Yee's two judgments were for less than $500 each and has submitted documentary evidence in support. C.'s Brief at 20. Complainant has produced a Satisfaction of Judgment indicating that as of December 17, 1997, Mr. Yee had satisfied a debt of $471 to the Metropolitan Sewer District and in March 13, 1996, he satisfied a debt of $437.56 owed to the State of Missouri for tax years 1987/1988. C's Ex. 11. Additionally, there is no evidence to support Mr. Yee's assertions of "future litigation" or the potential assessment of other civil penalties.[15]

In support of his claimed inability to pay, Mr. Yee also produced a form entitled "Individual Ability to Pay Claim," dated July 8, 1999. R's Ex. 3. The financial data request form reflects that in terms of income and expenses, at that time, Mr. Yee and his wife claimed to have a joint monthly gross (pre-tax) rental income of $11,100, or $133,200 per year. The form reflects the Yees claimed current *personal* living expenses of $11,015 per month, including $3,500 in mortgage payments, $1,600 in car payments, $450 per month in auto insurance, $2,200 per month in property taxes and $1,500 per month in Federal taxes. R's Ex. 3.

In terms of assets and liabilities, on the "Individual Ability to Pay Claim" form, Mr. Yee indicated that he owns 28 rental properties with an estimated current market value of $860,000, a home worth $230,000, and six automobiles worth $45,000. In addition, he claims as assets $6,000 in cash and an IRA estimated at $14,000, for a total of $1,155,000 in assets. In terms of liabilities, Mr. Yee's form reflects $48,100 in automobile loans, $17,200 in credit card debt, $26,500 debt for 1997 real estate taxes and sewer debt of $8,000. In addition, on the form, Mr. Yee reported that he had refinanced seven buildings and that his mortgages for the properties will

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[14] The three loan application forms dated six months earlier, in December 1998, each reflect slightly different amounts in terms of net monthly rental income (ranging from $6,653 to $7,317) and slightly lower amounts as to the total present market value of the real estate ($1,448,000 and $1,451,000). However, the personal expenses of $1,215 and loans on the real estate of $184,000 remain the same. C's Ex. 10.

[15] At hearing, Ms. Lovett was asked whether she has made a legal claim against Mr. Yee, *i.e.*, for civil money damages for the injuries suffered by her children. Ms. Lovett answered in the affirmative (tr. 26-27), but Mr. Yee denied that he had notice of any such lawsuit (tr. 124).

be approximately $3,200 per month, which reflects an estimated mortgage debt of $420,000.[16] R's Ex. 3. Using this assumption his total liabilities would be approximately $489,800, giving him a net worth of $665,200.

Respondent asserted in his brief that Complainant failed to consider the "illiquidity of [] Respondent's holdings" in its calculation of the proposed penalty. R's Brief at 5. As part of this argument, Respondent, referencing his testimony at the hearing, asserted that his real property holdings could require "as long as two and a half years to liquidate for the purposes of obtaining money to pay such a penalty" because of their locations in "lower value areas" of St. Louis. *Id*. Respondent further asserted that the assessment of a penalty in the amount proposed by the Complainant would reduce Respondent's cash flow because Respondent's business is the purchasing of "shell" houses and the "fixing-up" of said houses. The imposition of the proposed penalty, he asserts, would prevent Respondent from continuing his "fixing-up" operation. R's Brief at 6.

Respondent also argues in his brief that "although Respondent may have worth on paper, his annual income is approximately $12,000." *Id.* Furthermore, Respondent argues, the value of some of his personal property "is less than the amount owed on the property." *Id.* As a result of the above, Respondent asserts, "[a] fine in the amount of that proposed would significantly reduce the income of the Respondent." *Id.*

After listening to the testimony of the witnesses, observing their demeanor at the hearing, and considering the evidence admitted into the record, I find Mr. Yee's claim that $12,000 is representative of his general annual income to be inherently incredible, unsupported by the record and inconsistent with the evidence proffered. First, Mr. Yee acknowledged not filing Federal income tax returns for a number of years and did not provide in this proceeding the returns he did file, any other accounting records, or a detailed itemization explaining how he calculated his "net" income as $12,000 in 1997 or his income during prior or subsequent years. Tr. 125. Second, his acknowledged expenses of supporting his wife and four children, providing them all with automobiles, and paying tuition for three of the children to attend college and graduate school, is not suggestive of $12,000 in net annual income. *See*, Tr.138-139, 162-163. Third, all of the financial records submitted in this case clearly evidence that Mr. Yee's gross income from his real estate investment business, less properly attributed business expenses, creates a "net" income far in excess of $12,000. Fourth, Mr. Yee admitted at the trial that he had five rehabilitation projects underway at that time, belying his suggestion that he was under any serious financial strain. Tr. 143.

[16] Mr. Yee did not disclose in the Form (R's Ex. 3) the precise principal amount of his alleged mortgage loans. However, it is possible to extrapolate from a monthly payment of $3,200, and the terms of the loan as described in the PinnFund loan application forms (interest rate of 8.5%/30 year mortgage) the principal amount as being approximately $420,000, although the four PinnFund applications only represent requests for a total of $142,000 in loans.

As to the limited liquidity of Mr. Yee's substantial real estate holdings, while he testified that he had only sold one of his properties and that it took 2 ½ years to sell (tr. 145), he also testified that he sold the property at issue in this case on Cherokee Street in August 1998 "[b]ecause at that time my bank that I have note due, the loan offer call for the loan, so I had to sell some property or one or two to make the money to pay off the loan." Tr. 155-56. This testimony suggests that Mr. Yee is, in fact, able to turn his properties into cash in a relatively brief period when he so desires.

Finally, while it is clear that the figures on the PinnFund Loan form and the "Ability to Pay Claim" form differ, I find that difference immaterial. Accepting the financial data on either form as true, evidences that Mr. Yee has a net worth in excess of $500,000. I find this is a sufficient amount to pay a penalty of only $29,700.

2. History of Prior Violations

The ERP provides that when a violator has a history of prior violations of the Disclosure Rule, the penalty can be adjusted upward by a maximum of 25%. The parties agreed that the Respondent had no prior history of Disclosure Rule violations, and so an upward adjustment was not made on this basis.

3. Degree of Culpability

The ERP provides that:

> The two principal criteria for assessing culpability are: (a) the violator's knowledge of the Disclosure Rule, and (b) the degree of the violator's control over the violative condition. For penalty purposes, when a violator intentionally commits an act which he knew would be a violation of the Disclosure Rule or would be hazardous to health, or has been issued a prior NON, the penalty may be increased by up to 25%.

C's Ex. 7, p. 16.

In calculating the penalty in this case, EPA characterized Mr. Yee as being unfamiliar with requirements of the Disclosure Rule at the time the violations occurred and, therefore, did not increase the penalty amount under the ERP's culpability provision. In doing so, EPA accepted at face value Mr. Yee's claim that he was unaware of the Disclosure Rule until he was cited for lead violations in *February 1998* in connection with this case. *See,* C's Ex. 2 and Tr. 123, 126-127. However, a careful review of Respondent's Exhibit 2 evidences that Mr. Yee was aware of, *and complying with, at least to some extent*, the Disclosure Rule, months earlier, in *December of*

1997, in that at that point he had one of his tenants or potential tenants, Ruby L. Stokes, execute a Disclosure of Information on Lead-Based Paint and Lead Based Paint Hazards Form. Tr. 161, R's Ex. 2. The Disclosure Form Mr. Yee provided to this tenant in December 1997 specifically states that tenants must receive a Federally approved pamphlet on lead poisoning prevention. See, R's Ex. 2. Thus, this Exhibit suggests that, in all likelihood, Mr. Yee was aware of the Disclosure Law *shortly after, if not before,*[17] he entered into the lease with Ms. Lovett, but for whatever reason, did not comply with the law in regard to her. However, since Complainant did not make this specifically part of its penalty calculations and Respondent, therefore, did not prepare to respond to this issue, no increase in the penalty at this point seems warranted.

4. Other Factors as Justice May Require

The ERP classifies under this heading of adjustments a number of varied issues, including attitude, supplemental environmental projects, voluntary disclosure, size of business, adjustment for small independent owners and leasors and economic benefit of noncompliance. Except for attitude, these adjustments are not relevant here.[18] The "attitude" component was raised in Respondent's brief, in Respondent's testimony and in testimony given by Ms. Talley during the hearing.

The ERP provides that EPA may reduce the proposed civil penalty by a maximum of 30% for "attitude," which consists of three components: (a) cooperation, (b) immediate steps taken to comply with the Disclosure Rule; and (c) early settlement. In light of the fact that this case went through the hearing process, cooperation and immediate compliance are the only applicable factors to be considered.[19] The ERP provides that:

> (a) The EPA may reduce the base penalty up to 10% based upon a respondent's cooperation throughout the entire compliance, case development, and settlement

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[17] Mr. Yee in his Affidavit responding to the Subpoena swore that he entered into the lease with Ms. Lovett "[o]n or around December 20, 1997." C's Ex. 2. Ms. Lovett indicated in her Affidavit that she entered into the lease "[o]n or about November 1, 1997" (C's Ex. 2) and at trial that she entered into the lease on "November 8, 1997." Tr. 14.

[18] Supplemental environmental projects are not considered in penalty assessments after hearing, there is no issue regarding the lack of voluntary disclosure in this case, and there was no evidence as to the economic value of Mr. Yee's non-compliance. The adjustment for small independent owners/lessors does not apply to individuals who own more than one rental property. C's Ex. 7 p. 18. The size of Respondent's business is discussed below.

[19] The "early settlement" criterion permits a penalty reduction of 10% if the case is settled before the filing of the prehearing exchange. This case was tried rather then settled, so this criterion is inapplicable.

process; and

(b) The EPA may also reduce the base penalty up to 10% based upon a respondent's immediate good faith efforts to comply with the Disclosure Rule and the speed and completeness with which it comes into compliance;

C's Ex. 7, p. 16.

At trial, Ms. Talley testified that she did not reduce the penalty on the basis of cooperation because Mr. Yee did not respond to the two initial information request letters sent to him regarding this violation (tr. 69) and Mr. Yee did not turn over tax returns requested by EPA in connection with his claim of inability to pay, although Mr. Yee did complete and provide to EPA a financial form. Tr. 86. Respondent acknowledged not coming into compliance with the Disclosure Rule immediately upon being notified of the violation, on the basis that he "didn't know the severity of the violation," (tr. 127), but he asserted in his brief that he complied within "180 days" of notification of the violation. R.'s Brief at 7. The evidence in this case indicates that Respondent attempted to comply with the regulations approximately 4 months after notification. Tr. 89. The file also reflects that Mr. Yee failed to comply with procedural deadlines set in this case, necessitating the issuance of a Show Cause Order, which unnecessarily delayed proceedings in this case. Upon consideration of the totality of evidence in this case, I do not find a downward adjustment for attitude appropriate in this matter.

Respondent testified during the hearing that he was unaware of the Lead Disclosure Regulations prior to his citation by the St. Louis Health Department in February 1998, and he came into compliance when he became aware of the severity of his violations. Tr. 126-127. Respondent argues in his brief that the proposed penalty should be reduced because he "made good faith efforts to comply" with the applicable requirements, pointing out that as of June 1998, Respondent had made good faith efforts to provide tenants with disclosure forms. Tr. 89. R's Brief at 4-5, 7. However, in reviewing the disclosure forms Respondent submitted at trial, they evidence only 13 forms. R.'s Ex. 2. Yet, Mr. Yee has many more rental units than that; in fact, he owns more than twice as many buildings.[20] Mr. Yee testified that he owns approximately 32 buildings, each with 1-2 rental units, and he estimated that at the time of the hearing he had 21 or 22 tenants. Tr. 121, 165. Furthermore, he also testified that at any one time approximately 70% of his buildings are occupied, and that he has an average lessee turnover rate of 2 years. Tr. 122, 163-164. Mr. Yee's building ownership and occupancy rates suggest that he would have many multiples of disclosure forms as compared to units. Thus, this evidence does not suggest full compliance. Moreover, coming into compliance four months after being notified of the violation is not sufficient when compliance required minimum effort, *i.e.* the provision of disclosure forms, on Mr. Yee's part.

[20]All of the buildings for which evidence of the year of construction is in the record, were constructed prior to 1978 and are thus "target housing" subject to the Disclosure Rule. C's Ex. 5.

5. Size of Business

Mr. Yee asks in his brief that discretion be exercised and the penalty in this case be mitigated based upon the size of Mr. Yee's business, although he does not meet the exact criteria of EPA's Policy on Compliance for Small Businesses ("Policy")(June 10, 1996). This policy is cited in the ERP as providing one of the bases for an adjustment to a violator's gravity based penalty. The intent of the Policy is "to promote environmental compliance among small businesses..." and it seeks to "encourage[] small businesses to expeditiously remedy all violations discovered through compliance assistance and environmental audits." 61 Fed. Reg. 27984 (June 3, 1996)(emphasis added). Under the Policy the mitigation of civil penalties is based on the following criteria:

> (1) The small business has made a good faith effort to comply with applicable environmental requirements, as demonstrated by satisfying either a. or b. below
>
> > (a) Receiving on-site compliance assistance from a government or government supported program that offers services to small businesses (such as a SBAP or state university), and the violations are detected during compliance assistance. If a small business wishes to obtain a corrections period after receiving compliance assistance from a confidential program, the business must promptly disclose the violations to the appropriate regulatory agency.
> >
> > (b) Conducting an environmental audit (either by itself or by using an independent contractor) and promptly disclosing in writing to EPA or the appropriate state regulatory agency all violations discovered as part of the environmental audit pursuant to section H of this Policy.
>
> (2) This is the small business' first violation of this requirement. This Policy does not apply to businesses that have previously been subject to an information request, a warning letter, notice of violation, field citation, citizen suit, or other enforcement action by a government agency for a violation of that requirement within the past three years. . . .
>
> (3) This business corrects the violation within the corrections period set forth below. Small businesses are expected to remedy the violations within the shortest practicable period of time not to exceed 180 days following the detection of the violation. . . .
>
> (4) The Policy applies if:
>
> > (a) The violation has not caused actual serious harm to public health, safety, or the environment; and
> > (b) The violation is not one that may present an imminent and substantial endangerment to public health or the environment; and
> > (c) The violation does not present a significant health, safety or environmental

threat(e.g. violations involving hazardous or toxic substances may present such threats); and
(d) The violation does not involve criminal conduct.

61 Fed. Reg. 27984.[21]

Respondent does not meet all of the criteria for the application of the Policy. While Respondent arguably achieved compliance within 180 days of notification of his violations and he is a first-time violator, his violations were not detected in an on site compliance assistance program nor were they detected during the course of an environmental self-audit and then voluntarily disclosed to the EPA or a state agency. Moreover, the record strongly indicates that Respondent has yet to achieve full compliance with the Disclosure Rule. In addition, as indicated earlier in the instant Order, Mr. Yee has not engaged in any notable good faith efforts to comply. Furthermore, Mr. Yee's violations of the Disclosure Rule present significant threats to the health and safety of his tenants as evidenced by the fact that lead poisoning may have already caused significant life-long detrimental health effects on Ms. Lovett's children. Respondent's actions in this case are directly contrary to both the intent of the Policy and to its delineated requirements. Thus, there is no supportable basis for the application of the Policy to the Respondent.

V. CONCLUSION

In light of all of the factors of this case, I find appropriate to impose against Respondent Billy Yee an aggregate civil penalty in the amount of $29,700 for failing to provide an EPA-approved lead hazard information pamphlet to Ms. Lovett prior to her being obligated under the rental contract, as well as for failing to include a lead warning statement, either as an attachment to or within the rental contract; a statement disclosing his knowledge of the presence of lead-based paint and/or lead based paint hazards in the Property or indicating that he had no such knowledge; a list of any records or reports available to him pertaining to lead-based paint and/or lead-based paint hazards in the Property that have been provided to the Lessee, or an indication that no such records or reports are available; a statement by Ms. Lovett affirming her receipt of the aforesaid information and pamphlet; and his signature and that of Ms. Lovett, certifying to the accuracy of their statements, as required by 40 C.F.R. § 745.113(b)(1)-(4) and 745.107(a)(1).

[21] Compare the revised Small Business Compliance Policy, effective May 11, 2000, which does not apply if: there is a noncompliance history; the violation has caused actual serous harm to public health, safety or the environment; the violation involves criminal conduct, or the violation was discovered through, *inter alia,* an information request, inspection, or reporting by a member of the public to a Federal, state or local agency.

ORDER

1. A civil penalty of $29,700 is assessed against Respondent Billy Yee..

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c) , as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $29,700, payable to the Treasurer, United States of America, and mailed to:

Mellon Bank
EPA - Region 7
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, PA 15251

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

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

5. Pursuant to 40 C.F.R. §22.27(c)(64 Fed. Reg. 40,186 (July 23,1999)), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. §22.30(b).

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Susan L. Biro
Chief Administrative Law Judge

Date: June 6, 2000
Washington, D.C.