

Attachment 9

Declaration of Demian P. Ellis

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of	:	
	:	
A&I Developers, Inc.,	:	
	:	<u>Honorable Helen Ferrara</u>
	:	Presiding Officer
	:	
Respondent,	:	Docket No. TSCA-02-2018-9289
	:	
Proceeding Under the Toxic Substances	:	
Control Act, as amended.	:	
	:	

DECLARATION OF DEMIAN ELLIS

I, Demian Ellis, Environmental Engineer, Enforcement & Compliance Assurance Division (“ECAD”), U.S. Environmental Protection Agency, Region 2 (“EPA”), declare that the following is offered in support of the motion for a default order in the above-captioned proceeding and is true and correct to the best of my knowledge, information and belief:

1. I have been employed by EPA since 1993. I have been involved with the lead-based paint program since 2003. I handle enforcement-related matters under the Toxic Substance Control Act (“TSCA”) and the lead-based paint regulations promulgated thereunder. I also have inspected numerous facilities and worksites for the purpose of evaluating compliance with the lead-based paint regulations under TSCA.
2. At the time of the issuance of the “Complaint, Compliance Order, and Notice of Opportunity for Hearing” (“Complaint”) against A&I Developers, Inc., (“Respondent” or “A&I Developers”), I was the Acting Team Leader for the EPA Region 2 Lead-based Paint Team. My duties involved supervision of six staff in selection of targets for inspections, preparation of information request letters, enforcement case development, preparation of administrative complaints, penalty computation and settlement of enforcement cases.
3. In the present civil administrative case involving the above-captioned respondent, one of EPA’s staff performed the following actions: (i) issued an Information Request Letter on March 5, 2016 concerning interior apartment renovation work at 2020 Honeywell Avenue, Bronx, NY which has 16 residential units and was built in 1931 to which it received a response from A&I Developers on May 27, 2016 from Ashad Ajim <ajimprobuiders@yahoo.com>; (ii) identified violations of the Renovation, Repair, and Painting (RRP) Rule promulgated under TSCA; and, (iii) calculated the penalty for violations under RRP in accordance with the statutory factors which are reflected in the

August 2010 Consolidated Enforcement Response and Penalty Policy (“LBP Consolidated ERPP”).

4. As part of my official duties at EPA as the Acting Lead Team Leader, I have reviewed the calculation of the penalties for the violations of the TSCA RRP requirements alleged in the Complaint in the above-captioned matter and I believe the calculations to be appropriate and in accordance with the TSCA statute as updated by the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended through 2015, codified at 40 C.F.R. Part 19, and with the LBP Consolidated ERPP as updated by the EPA January 11, 2018 Memorandum entitled “Amendments to the EPA’s Civil Penalty Policies to Account for Inflation (Effective January 15, 2018).” These were the penalties in effect at the time the Complaint was issued.
5. The civil penalty for the TSCA RRP violations alleged in the Complaint is laid out in the penalty calculation table and computes a penalty of \$32,814 to be assessed against the Respondent. See Memorandum of Law, Exhibit 3.

TSCA RRP Penalty Calculation

6. Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), in conjunction with penalty inflation regulations at 40 C.F.R. Part 19, currently authorizes the assessment of a civil penalty for violations of Section 409 of TSCA, 15 U.S.C. § 2689, up to a maximum of \$48,512 per violation for violations that occurred after November 2, 2015, and that are assessed on or after December 27, 2023. At the time of the Complaint filing the maximum was \$38,892 per violation. The current statutory maximum is \$48,512 per violation. EPA has not raised the penalty figures that were calculated when the Complaint was issued in September 2018.
7. Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), sets out several factors to also consider when setting penalty amounts: the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.
8. The LBP Consolidated ERPP provides a method for EPA personnel to calculate penalties in a rational, equitable, and consistent manner that addresses all the statutory factors. It does so by setting out five steps to be used by EPA staff when calculating penalties in a TSCA RRP administrative enforcement action. See Memorandum of Law, Exhibit 10.
9. The first several steps are designed to characterize the gravity of a violation (by considering two different factors) and then to select a penalty figure based on this assessment. The first step is to determine the “circumstance level” of the violation using Appendix A of the LBP Consolidated ERPP which assigns values to each type of possible violation of the RRP Rule depending on the probability of harm to human health resulting from the particular type of violation. Circumstance levels 1 and 2 are assigned for violations having a high probability of impacting human health and the environment.

Circumstance levels 3 and 4 are assigned for violations having a medium probability of impacting human health and the environment. Circumstance levels 5 and 6 are assigned for violations having a low probability of impacting human health and the environment. Appendix A designates Respondent's violations of 40 C.F.R. §§ 745.89(a), Failure to Obtain EPA Certification; 745.84(b)(1), Failure to Provide Lead Hazard Information Pamphlet; 745.87(b), Failure to Establish and Maintain Records of Compliance; 745.89(d)(1), Failure to Ensure Certification or Training of All Individuals Performing Renovation Activities; and 745.89(d)(2), Failure to Assign Certified Renovator as Circumstance Levels 3a, 1b, 3a, 3a, and 3a violations, respectively.

10. The second step is to determine the extent of potential harm level ("extent level") of the violation using Appendix A of the LBP Consolidated ERPP. As stated on page 16 of the ERPP, the primary consideration for determining the extent of harm is "whether the specific violation cited could have a serious or significant or minor impact on human health with the greatest concern being for the health of a child under 6 years of age and a pregnant woman in target housing." EPA designated Respondent's violations of 40 C.F.R. § 745.89(a) as "significant" extent. A&I Developers' Response to EPA's Information Request indicates that people were residing at the property at the start of the interior renovation work when a stop work order was issued, and that these occupants were subsequently relocated. Respondent provided no information about the youngest occupant. EPA designated the violations of 40 C.F.R. §§ 745.84(b)(1); 745.87(b); 745.89(d)(1); and 745.89(d)(2) as "minor" extent, since A&I Developers' Response to EPA's Information Request indicated occupants were relocated. See Memorandum of Law, Exhibit 12.
11. The next step is to use the gravity-based penalty matrices in the LBP Consolidated ERPP to select a base penalty amount that corresponds to the gravity of the violations that has been calculated based on the analysis in the first two steps. Failure to obtain firm certification, 40 C.F.R. § 745.89(a), with a significant extent level corresponds to a penalty of \$15,868. Failure to provide lead hazard information pamphlet, 40 C.F.R. § 745.84(b)(1), with a minor extent level corresponds to a penalty of \$2,945. Failure to establish and maintain records of compliance, 40 C.F.R. § 745.87(b), with a minor extent level corresponds to a penalty of \$4,667. Failure to ensure qualification of all individuals performing renovation activities, 40 C.F.R. § 745.89(d)(1), with a minor extent level corresponds to a penalty of \$4,667. Failure to assign certified renovator, 40 C.F.R. § 745.89(d)(2), with a minor extent level corresponds to a penalty of \$4,667. EPA staff found that the violations identified in paragraph 9 above resulted in a total recommended base penalty assessment of \$32,814.¹
12. In the next steps of the calculation the LBP Consolidated ERPP allows for the upward or downward adjustment of the penalty amount based on case-by-case analysis of factors specific to the violator. No decrease or increase was made to the gravity-based penalty for culpability or for history of prior violations.

¹ Violations and penalty amounts were calculated based on Appendix A and B of the LBP Consolidated ERPP, as updated for violations occurring after November 2, 2015 where penalties were assessed on or after January 15, 2018.

13. EPA staff next considered the company's ability to pay and the effect of the penalty on the ability of the Respondent to continue in business. In A&I Developers' May 27, 2016 response to EPA's information request, Respondent reported a year 2015 income greater than \$1.6 million. Without more detailed information on Respondent, and any information on Respondent's financial status, EPA staff were unable to conclude what effect the penalty would have on the company's ability to continue in business.
14. As set out above, the proposed penalty of \$32,814 against the Respondent was calculated in accordance with the statutory factors identified in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), and the LBPP Consolidated ERPP. The Complaint in this matter was issued in September 2018, and the penalty was calculated in accordance with the penalty inflation adjustment policy that was in effect at that time. EPA has not revised the penalty calculation since then.

Signed and Dated:

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