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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

EDWARD L. MURRAY, JR.

Respondent

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Docket No. TSCA-05-2007-0013

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

The United States Environmental Protection Agency, Region 5 (U.S. EPA or Complainant), in accordance with the April 15, 2008 Prehearing Order issued by the Presiding Officer, Susan L. Biro, respectfully submits the following Complainant's Initial Prehearing Exchange pursuant to Section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, codified at 40 C.F.R. § 22.19.

I. EXPECTED WITNESSES

This section includes the names of witnesses Complainant intends to call, together with a brief narrative summary of each witness' expected testimony as required by Paragraph 1.(A) of the Presiding Officer's April 15, 2008 Prehearing Order.

1. Terence Bonace: Terence Bonace is a Life Scientist with the Land and Chemicals Division,¹ U.S. EPA, Region 5. Mr. Bonace's duties include serving as an enforcement officer

¹ The Land and Chemicals Division was formerly known as the Waste, Pesticides and Toxics Division. The Chemicals Management Branch was formerly known as the Pesticides and Toxics Branch, and the Pesticides/Toxics Compliance Section was formerly known as the Pesticides and Toxics Enforcement Section.

and a case developer in the investigation of lead disclosure violations under TSCA. Mr. Bonace will testify as to his review of the evidence compiled as a result of U.S. EPA's regulatory oversight of Respondent's rental business, and the factual basis for his determination that Respondent is in violation of TSCA and the regulations promulgated thereunder. He will also testify as to how the penalty proposed in the referenced Complaint was calculated applying the statutory penalty factors set forth within Section 16(a)(2)(B) of TSCA, 15 U.S.C.

§ 2615(a)(2)(B), as explained by U.S. EPA's Section 1018 - Disclosure Rule Enforcement Response Policy, dated February 2000, and as set forth in greater detail in Section VI, below. He will offer his assessment as to the appropriateness of the penalty proposed in the Complaint, considering the nature, circumstances, extent, and gravity of the violations, and with respect to the Respondent, ability to pay, effect of ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

Mr. Bonace will testify regarding the delegation of authority pertaining to the Complaint. As Respondent admits that the subject properties were constructed prior to 1978, Mr. Bonace will not testify regarding how Complainant established this information.

If necessary, Mr. Bonace will provide testimony sufficient to authenticate certain exhibits contained in this prehearing exchange.

2. James O'Neil: James O'Neil is a Multi-Program Inspector in the Senior Environmental Employment (SEE) program with the Land and Chemicals Division, U.S. EPA, Region 5. His duties include serving as an inspector in the investigation of lead disclosure violations under the TSCA. Mr. O'Neil will testify about the inspection conducted on August 26th, 2004 at 3527 North College Avenue, Indianapolis, Indiana and any follow-up to that

inspection.

If necessary, Mr. O'Neill will provide testimony sufficient to authenticate certain exhibits contained in this prehearing exchange.

3. Edward R. Pilny: Edward Pilny is a Multi-Program Inspector in the Senior Environmental Employment (SEE) Program with the Land and Chemicals Division, U.S. EPA, Region 5. His duties include serving as an inspector in the investigation of lead disclosure violations under the TSCA. Mr. Pilny will testify about the inspection conducted on August 26th, 2004 at 3527 North College Avenue, Indianapolis, Indiana, and any follow-up to that inspection, including obtaining and review of documents from Mr. Murray.

If necessary, Mr. Pilny will provide testimony sufficient to authenticate certain exhibits contained in this prehearing exchange.

4. Teresa Kirby or a designated official of the Marion County Health Department: Teresa Kirby may provide testimony regarding an inspection and a re-inspection made by the Marion County Department of Health of the property at 814 East 46th Street, Indianapolis, Indiana on September 19th, 2001, and May 23, 2001. Ms. Kirby may also provide testimony regarding the Code of Health and Hospital Corporation of Marion County, Indiana.

If necessary, Ms. Kirby will provide testimony sufficient to authenticate certain exhibits contained in this prehearing exchange.

5. Dr. Christopher Weis

Senior Toxicologist
National Enforcement Investigations Center
United States Environmental Protection Agency

Dr. Weis is a Senior Toxicologist at the National Enforcement Investigations Center in

Denver, Colorado. He may be called as an expert witness to testify about the hazards and adverse health effects associated with lead, including how lead based paint may be ingested by small children, and how the lead in the paint can affect a child's nervous system. Dr. Weis may testify about the extensive studies conducted on the effects of lead on human health or the environment. Much of this research is identified in Dr. Weis's bibliography which is attached hereto as Complainant's Exhibit 19. Dr. Weis may also testify in U.S. EPA's rebuttal case, in response to testimony and other evidence presented by Respondent. Dr. Weis' CV is attached as Complainant's Exhibit 19.

6. Dr. David E. Jacobs, Director of Research, National Center for Healthy Housing, formerly director of the Office of Healthy Homes and Lead Hazard Control at the U.S. Department of Housing and Urban Development. Dr. Jacobs is responsible for the lead-based paint hazard control and healthy homes grant programs, and related research, public education, enforcement and training activities. He has testified before Congress on several occasions and has published numerous articles and scientific papers. He is a principal author of the President's Task Force report on childhood lead poisoning prevention, the HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing, and several reports to Congress. Dr. Jacobs' CV is attached as Complainant's Exhibit 17. Dr. Jacobs' October 18, 2007 written statement before the U.S. Senate Committee on Environment and Public Works Committee is included as Complainant's Exhibit 18.

7. Financial Expert to be identified to opine on Respondent's ability to pay the proposed penalty in response to any financial information provided by Respondent. Respondent has not stated that he has an inability to pay and has not provided any information to support an

inability to pay the proposed penalty. However, if Respondent provides probative documentation of its inability to pay, U.S. EPA will retain a financial expert to provide an expert opinion regarding such documentation.

Complainant reserves the right not to call any of the above-listed witnesses at hearing. In addition, Complainant reserves the right to expand, or otherwise modify the scope, extent, and areas of testimony of any of these witnesses where appropriate. Such changes may be occasioned by the discovery of new evidence or witnesses, the unavailability of one or more witnesses, prehearing stipulations of fact between the parties, rulings on motions, or for any other legitimate purpose.

II. DOCUMENTS AND EXHIBITS

Copies of documents and exhibits which Complainant intends to introduce into evidence at the hearing are attached hereto as Complainant's Exhibits, and are numbered sequentially. Included with these documents are those that the Court ordered to be exchanged in Paragraphs 1. and 2. of the Presiding Officer's April 15, 2008 Prehearing Order.

Complainant's Exhibit 1: August 26, 2004 Notice of Inspection signed by Edward L. Murray.

Complainant's Exhibit 2: November 23, 2004 Inspection Report, File Number 04TL766.

Complainant's Exhibit 3: September 1, 2004 Request for Information from Anthony L. Restaino, U.S. EPA, to Edward L. Murray Jr.

Complainant's Exhibit 4: September 13, 2004 correspondence from Edward L. Murray to Edward R. Pliny regarding Mr. Pliny's September 1, 2004 correspondence.

Complainant's Exhibit 5: Communication log created by Edward R. Pilny.

Complainant's Exhibit 6: November 19, 2004, Receipt for Documents from E.L. Murray & Co.

Complainant's Exhibit 7: Copies of leases and attachments pertaining to the violations alleged in the Complaint.

Complainant's Exhibit 8: September 19, 2000 Marion County Health Department Notice of Violation addressed to Edward Murray for the property at 814 E. 46th Street Indianapolis, Indiana.

Complainant's Exhibit 9: May 30, 2001 Marion County Health Department Notice of Violation addressed to Edward Murray for the property at 814 E. 46th Street Indianapolis, Indiana.

Complainant's Exhibit 10: November 15, 2004 correspondence from E.L. Murray to Ed Pliny attaching a list of rental properties.

Complainant's Exhibit 11: U.S. EPA Region 5 1018 Inspection Questions with James O'Neill's handwritten notations.

Complainant's Exhibit 12: November 21, 2006 correspondence from E.L. Murray to Cynthia King, U.S. EPA.

Complainant's Exhibit 13: U.S. EPA's August 21, 2006 certified Pre-Filing Notice letter to Edward L. Murray.

Complainant's Exhibit 14: U.S. EPA's Section 1018 - Disclosure Rule Enforcement Response Policy, dated February 2000 (Penalty Policy).

Complainant's Exhibit 15: U.S. EPA's Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy, 45 Fed. Reg. 59770

(1980).

Complainant's Exhibit 16: Interpretative Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing, dated August 20, 1996, Part II dated December 5, 1996, and Part III dated January 2, 2000.

Complainant's Exhibit 17: Resume of Dr. David E. Jacobs.

Complainant's Exhibit 18: October 18, 2007, written statement by David Jacobs before the U.S. Senate Committee on Environment and Public Works.

Complainant's Exhibit 19: Resume and Bibliography of Dr. Christopher Weis.

Complainant's Exhibit 20: Article titled "Association of Prenatal and Childhood Blood Lead Concentrations with Criminal Arrests in Early Adulthood" by John Paul Wright, Kim N. Dietrich, M. Douglas Ris, Richard W. Hornung, Stephanie D. Wessel, Bruce P. Lanphear, Mona Ho, Mary N. Rae, PLoS Medicine, May 2008, Volume 5, Issue 5.

Complainant's Exhibit 21: Compendium of outreach efforts regarding Lead Disclosure Rule consisting of the following twenty-three documents:

1. Disclosure Rule Publications & Other Outreach Activities Completed by Dave Jacobs (Partial List), Director, HUD Office of Lead Hazard Control
2. HUD and U.S. EPA Move to Protect Children from Lead Based Paint in Homes, News Release, March 6, 1996
3. The Lead Post (HUD Publication), Summer 1996
4. New Rule Provides Lead Disclosure to Renters and Buyers, authored by D. Jacobs, Units Magazine, published by The National Apartment Association June, 1996
5. Government Set to Enforce Lead Paint Notice Requirements, Landlord's Advisor, February 1998
6. News release from National Multi-Housing Council and National Apartment Association, September 5, 1996
7. News release from the National Association of Realtors, March 6, 1996
8. Renters, Buyers to Get Lead Alerts, USA Today, March 1996
9. Rules on Lead Paint Take Effect, Washington Post, 1996
10. Sellers, Landlords To Disclose Lead Paint, The Washington Post, March 16, 1996

11. Lead Paint: New Rules, Old Questions, New York Times, February 12, 1995
12. Lead Paint Inspection Added to Sellers List, Free Lance-Star, October 13, 1995
13. Realtors Educate Public About Lead-Based Paint, Reno Gazette-Journal, April 11, 1998
14. Geico Direct, Fall 1996
15. Federal 'Lead Paint Rules' for Houses, Apartments, Lawyers Weekly, March 25, 1996
16. Federal Lead Law Protects Tenants, Buyers, Providence Journal Bulletin, May 12, 1998
17. Lead Poisoning Alert, Parents Magazine, March 1997
18. Tipper Gore Chairs Clinton Administration's Campaign for a Lead-Safe America, Lead Safe Housing Reporter, Winter 1998
19. How to Get the Lead Out, Times Union, Albany, New York, July 5, 1996
20. Monitoring Report on Lead Paint/New Guidelines for the period of December 1-9, 1996, prepared by Video Monitoring Services of America (note that the original document is missing pages 18, 36, and 37)
21. Lead Based Paint Rule Preview, Today's Realtor, January 1996
22. Rules on Lead Paint in Co-ops, New York Times, Real Estate Section, May 12, 1996
23. Getting the Lead Out, San Francisco Examiner, Real Estate Section

Complainant's Exhibit 22: Property record for 9410 Mercury Drive, Indianapolis, Indiana.

Complainant's Exhibit 23: Indiana Secretary of State Business Services business listings for "Murray."

Complainant's Exhibit 24: September 23, 2006 correspondence to Mardi Klevs from E.L. Murray.

Complainant reserves the right to add additional exhibits to rebut Respondent's testimony.

III. JUDICIAL NOTICE

Complainant hereby requests the Presiding Officer to take judicial notice of the following:

1. The Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq., and the regulations promulgated thereunder;

2. The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-56, including the legislative history, and the regulations promulgated thereunder;
3. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, as amended, including 61 Fed. Reg. 9064, March 6, 1996; and
4. Federal Register notices pertaining to OMB information collection requirements.

IV. LOCATION AND LENGTH OF HEARING

As required by Paragraph 1.(C) of the Presiding Officer's April 15, 2008 Prehearing Order, Complainant requests that the hearing in this matter be held at a suitable location in or near Indianapolis, Indiana. Indianapolis, Indiana is where Respondent resides and conducts the business which the hearing concerns.

Complainant anticipates needing approximately eight to twelve hours to present its direct case.

V. ADDITIONAL INFORMATION REQUIRED BY THE PREHEARING ORDER

As required by Paragraph 2.(A). Complainant provides the following:

1. Copies of any documents in support of allegations in Paragraph No. 3 of the Complaint: See Complainant's Exhibits 1, 2, 8, 9, 11-13, 22, and 23 which demonstrate that Edward L. Murray lives or has lived at 9410 Mercury Drive, Indianapolis, Indiana.
2. Copies of any documents in support of allegations in Paragraph No. 20 of the Complaint: See Complainant's Exhibits 7, 8, and 10.
3. Copies of any documents in support of allegations in Paragraph No. 21 of the Complaint: See Complainant's Exhibit 7.
4. Copies of any documents in support of allegations in Paragraph Nos. 32-42 of the

Complaint: See Complainant's Exhibit 7.

5. Copies of any documents in support of allegations in Paragraph Nos. 45-55 of the

Complaint: See Complainant's Exhibit 7.

6. Copies of any documents in support of allegations in Paragraph Nos. 58-68 of the

Complaint: See Complainant's Exhibit 7.

7. Copies of any documents in support of allegations in Paragraph Nos. 71-81 of the

Complaint: See Complainant's Exhibit 7.

As required by Paragraph 2.(B). Complainant provides the following:

1. A copy of the inspection report for the property at 3527 North College Avenue,

Indianapolis, Indiana: See Complainant's Exhibits 1, 2.

As required by Paragraph 2.(C). Complainant provides the following:

2. U.S. EPA's Section 1018-Disclosure Rule Enforcement Response Policy: See

Complainant's Exhibit 14.

VI. DETERMINATION OF THE PROPOSED PENALTY AMOUNT

As required by Paragraph 2.(D). Complainant provides the following narrative discussion of the proposed penalty:

Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d(b)(5), authorizes the imposition of a civil penalty of up to \$10,000 for each violation of a requirement of Section 1018 of that Act and its implementing regulations at 40 C.F.R. Part 745, Subpart F, to be assessed under Section 16 of TSCA, 15 U.S.C. § 2615. This figure has been adjusted upward by 10% pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, such that penalties of up to \$11,000 per violation are now authorized.

Complainant has relied on the Section 1018 - Disclosure Rule Enforcement Response Policy, dated February 2000 (Penalty Policy) (Complainant's Exhibit 14), in the calculation of the proposed penalty in this matter. The Penalty Policy is based on the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), which are the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, ability to pay, effect of the penalty on Respondent's ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. The Penalty Policy was developed under the general framework established by the Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB, 45 Fed. Reg. 59770 (1980) (TSCA Civil Penalty Guidelines) (Complainant's Exhibit 15).

Pursuant to the Penalty Policy, penalties are determined in two stages: 1) determination of a "gravity-based penalty," and 2) adjustments to the gravity-based penalty. The gravity-based penalty is determined by considering: 1) the nature of the violation; 2) the circumstances of the violation; and 3) the extent of harm that may result from the violation. See Penalty Policy at p. 9. The TSCA Civil Penalty Guidelines discuss the nature of the violation as the essential character of the violation, and incorporate the concept of whether the violation is of a chemical control, control associated data gathering, or hazard assessment in nature. The Penalty Policy categorizes the nature of all Section 1018 - Disclosure Rule violations as hazard assessment in nature, as the information is vital to purchasers and lessees in weighing the risks in purchasing or leasing target housing. The Penalty Policy categorizes the extent of the violation as either major, significant, or minor, through the use of an "Extent Category Matrix". Id. at p. B-4. The Extent Category Matrix determines the extent category taking into consideration the following two

factors: 1) the age of any children living in the target housing; and 2) whether a pregnant woman lives in the target housing. Id. at p. 10-11. The Penalty Policy then pre-categorizes each possible violation of 40 C.F.R. Part 745, Subpart F, as being within one of six circumstance levels, based on the nature and circumstances surrounding each type of violation, and reflecting the probability of harm for each. The levels range from Level 1, the most serious, to Level 6, the least serious. See Penalty Policy at p. 10. These factors are then applied to a "Gravity-Based Penalty Matrix", which lists varying penalty amounts in 18 cells, ranging in values from \$110 to \$11,000. Id. at p. B-4. The appropriate cell is determined according to the circumstance level and extent category involved.

Once the gravity-based penalty is determined for a given violation, upward or downward adjustments are applied in consideration of the following factors with respect to the violator: 1) ability to pay/ability to continue in business; 2) history of prior violations; 3) degree of culpability; and 4) such other factors as justice may require, which include: the violator's attitude, consideration of supplemental environmental projects, audit policy, voluntary disclosure, size of business, adjustment for small independent owners and lessors, and the economic benefit of noncompliance. Id. at p. 14-18

By letter dated, August 21, 2006, U.S. EPA advised Respondent that it was planning to file a civil administrative complaint against Respondent for alleged violations of Section 1018 and that Section 1018 authorizes the assessment of a civil administrative penalty. U.S. EPA asked Respondent to identify any factors Respondent thought U.S. EPA should consider before issuing the complaint, and if Respondent believed there were financial factors which bore on Respondent's ability to pay a civil penalty, U.S. EPA asked Respondent to submit specific

financial documents. Respondent did not claim an inability to pay a penalty and has provided no facts or information which would indicate that the penalty should be adjusted for financial or other factors related to the alleged violation.

In this matter, Terence Bonace made the penalty determinations for Complainant. A detailed count-by-count description of Mr. Bonace's penalty calculations is given below.

(Counts 1 - 50): In accordance with the Extent Category Matrix, Mr. Bonace determined that four violations fell into a major extent category since there was one child 3 years of age residing in the property at the time of four separate violations of the Section 1018 - Disclosure Rule and 46 violations fell into the minor extent category since there were no other children under 18 years of age residing in the property at the time of the 46 separate violations of the Section 1018 - Disclosure Rule.

Counts 1-10: (Failure to Include Statement Disclosing Presence or Lack of Knowledge of Lead-Based Paint in Ten Rental Transactions)

Mr. Bonace, after consulting Appendix B of the Penalty Policy, determined that the failure to include either within each contract, or as an attachment to each contract to lease target housing, a statement disclosing either the presence of any known lead-based paints and/or lead-based paint hazards in target housing or lack of knowledge of such presence before the lessee becomes obligated pursuant to 40 C.F.R. § 745.113(b)(2) in each of ten leasing transactions is a Level 3 - type violation. In accordance with the Extent Category Matrix, Mr. Bonace determined that one violation fell into a major extent category since there was one child 3 years of age residing in the property at the time of a violation of 40 C.F.R. § 745.113(b)(2) and nine violations fell into the minor extent category since there were no other children under 18 years of

age residing in the property at the time of the violations of 40 C.F.R. § 745.113(b)(2). Mr. Bonace calculated a gravity-based penalty of \$6,600 from the Gravity-Based Penalty Matrix for one major extent, Circumstance Level 3 violation and a gravity-based penalty of \$5,940 from the Gravity-Based Penalty Matrix for nine minor extent, Circumstance Level 3 violations. For Counts 1-10, Mr. Bonace calculated a subtotal gravity based penalty amount of \$12,540.

Counts 11-20: (Failure to List Records or Reports in Ten Rental Transactions)

Mr. Bonace, after consulting Appendix B of the Penalty Policy, determined that the failure to include as an attachment or within the contract for lease a list of any records or reports available to the lessor that pertain to lead hazard information or the failure to indicate that no such list exists pursuant to 40 C.F.R. § 745.113(b)(3) in each of ten leasing transactions is a Level 5 - type violation. In accordance with the Extent Category Matrix, Mr. Bonace determined that one violation fell into a major extent category since there was one child 3 years of age residing in the property at the time of a violation of 40 C.F.R. § 745.113(b)(3) and nine violations fell into the minor extent category since there were no other children under 18 years of age residing in the property at the time of the violations of 40 C.F.R. § 745.113(b)(3). Mr. Bonace calculated a gravity-based penalty of \$2,200 from the Gravity-Based Penalty Matrix for one major extent, Circumstance Level 5 violation and a gravity-based penalty of \$1,980 from the Gravity-Based Penalty Matrix for nine minor extent, Circumstance Level 5 violations. For Counts 11-20, Mr. Bonace calculated a subtotal gravity based penalty amount of \$4,180.

Counts 21-30: (Failure to Include Statement of Receipt and Lead Hazard Pamphlet in Ten Rental Contracts:

Mr. Bonace, after consulting Appendix B of the Penalty Policy, determined that the

failure to include, either within each contract or as an attachment to each contract, a statement by the lessee affirming receipt of the information set forth in 40 C.F.R. § 745.113(b)(2) and (b)(3) and the Lead Hazard Information Pamphlet before the lessees were obligated under the contracts pursuant to 40 C.F.R. § 745.114(b)(4) in each of ten leasing transactions is a Level 4 - type violation. In accordance with the Extent Category Matrix, Mr. Bonace determined that one violation fell into a major extent category since there was one child 3 years of age residing in the property at the time of a violation of 40 C.F.R. § 745.113(b)(4) and nine violations fell into the minor extent category since there were no other children under 18 years of age residing in the property at the time of the violations of 40 C.F.R. § 745.113(b)(4). He calculated a gravity-based penalty of \$4,400 from the Gravity-Based Penalty Matrix for one major extent, Circumstance Level 4 violation and a gravity-based penalty of \$6,160 from the Gravity-Based Penalty Matrix for nine minor extent, Circumstance Level 4 violations. For Counts 21-30, Mr. Bonace calculated a subtotal gravity based penalty amount of \$8,360.

Counts 31-40: (Failure to Include Certifying Signatures)

Mr. Bonace, after consulting Appendix B of the Penalty Policy, determined that the failure to include either within each contract or as an attachment to each contract to lease target housing, the signatures of the lessor and the lessee certifying to the accuracy of their statements to the best of their knowledge along with the dates of signature before each lessee became obligated pursuant to 40 C.F.R. § 745.113(b)(6) in each of ten leasing transactions is a Level 6 - type violation. In accordance with the Extent Category Matrix, Mr. Bonace determined that one violation fell into a major extent category since there was one child 3 years of age residing in the property at the time of a violation of 40 C.F.R. § 745.113(b)(6) and nine violations fell into the

minor extent category since there were no other children under 18 years of age residing in the property at the time of the violations of 40 C.F.R. § 745.113(b)(6). Mr. Bonace calculated a gravity-based penalty of \$1,100 from the Gravity-Based Penalty Matrix for one major extent, Circumstance Level 6 violation and a gravity-based penalty of \$990 from the Gravity-Based Penalty Matrix for seven minor extent, Circumstance Level 6 violations. For Counts 31-40, he calculated a subtotal gravity based penalty amount of \$2,090.

The total initial gravity based penalty was calculated by adding together the four subtotal gravity based penalties for the 40 counts (\$12,540 + \$4,180 + \$8,360 + \$2,090) for an initial gravity based penalty of \$27,170.

Adjustment Factors:

The second stage in determining an appropriate penalty is to apply the four TSCA statutory adjustment factors to the initial gravity based penalty. See Penalty Policy at p. 14.

I. Ability to Pay/Continue in Business

On August 21, 2006, U.S. EPA issued a Pre-Filing Notice Letter to Respondent informing Respondent that U.S. EPA was prepared to file a civil administrative penalty complaint against it for alleged violations of Section 1018 requirements. The Pre-Filing Notice Letter also extended an opportunity to Respondent to advise U.S. EPA of any factors which it believed U.S. EPA should consider before filing a complaint. The Pre-Filing Notice Letter specifically asked Respondent to provide financial information if Respondent believed it would have an inability to pay a penalty. The certified mail receipt for this Pre-Filing Notice Letter was signed by Melma Murray on August 29, 2006. In response to U.S. EPA's letter, Respondent did not claim an inability to pay a penalty or claim the impact of the penalty would affect his ability

to continue in business.

II. History of Prior Such Violations

U.S. EPA does not believe Respondent has a history of prior violations of Section 1018.

The initial gravity based penalty was not increased for history of prior such violations.

III. Degree of Culpability

The Penalty Policy provides for a 25% increase in penalty for intentional violation of Section 1018 or a violation where the violator has previously received a Notice of Noncompliance (NON) for Section 1018 violations. U.S. EPA has no information that the violations were intentional or that Respondent had previously received a NON. U.S. EPA has not increased the initial gravity based penalty for culpability.

IV. Other Factors as Justice May Require

A. No Known Risk of Exposure

U.S. EPA will adjust the penalty downward by 80% where the responsible party provides documentation that the target housing is certified lead-based paint free. Respondent has provided no such documentation to U.S. EPA. Therefore, U.S. EPA has not reduced the penalty for no known risk of exposure.

B. Attitude

U.S. EPA may reduce the proposed penalty by up to 30% for a respondent's cooperation, immediate good faith efforts to comply, and timely efforts to settle the case. U.S. EPA does not believe a reduction of the proposed penalty is appropriate based on this factor.

C. Supplemental Environmental Projects (SEPs)

The Respondent has not agreed to perform a SEP.

D. Audit Policy

Respondent did not disclose its violations of Section 1018 under U.S. EPA's Audit Policy, *Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations*, 60 FR 66706, December 22, 1995, so no adjustment was made to the proposed penalty based on this factor.

E. Voluntary Disclosure

The Penalty Policy provides that a violator who self-discloses a violation of Section 1018, but not under the Audit Policy, may still receive a reduction in penalty for such a voluntary disclosure. Respondent did not disclose its violations of Section 1018, so no adjustment was made to the proposed penalty based on this factor.

F. Size of Business

A violator may request assistance under the U.S. EPA's *Policy on Compliance Incentives for Small Businesses* (Small Business Policy). The Small Business Policy provides for the elimination of penalties if a small business meets its four qualifying criteria and agrees to participate in the compliance assistance program or conducts a voluntary self-audit. Respondent has not sought assistance under the Small Business Policy. Therefore, no adjustment was made to the proposed penalty based on this factor.

G. Adjustment for Small Independent Owners and Lessors

This adjustment factor applies to the owner of one target housing unit for lease or sale by owner. Respondent is the owner of multiple rental properties and is cited for violations involving 10 separate apartment units. Accordingly, no adjustment was made to the proposed penalty based on this factor.

H. Economic Benefit of Noncompliance

U.S. EPA believes the proposed penalty captures any benefit to Respondent from its noncompliance with section 1018.

In summary, the Initial Gravity Based Penalty has not been increased or decreased for other factors as justice may require. The penalty as proposed in the Complaint is \$27,170.

VII. APPLICATION OF THE PAPERWORK REDUCTION ACT

As stated in Paragraph 2.(E)., the Presiding Officer requested Complainant's position regarding the applicability of the Paperwork Reduction Act (PRA), 44 U.S.C. § 3501 et seq., to this proceeding, including whether there is a current Office of Management and Budget (OMB) control number involved and whether the provisions of Section 3512 of the PRA may apply to this case.

The PRA does apply to the information collection requirements of the lead-paint disclosure rule at 40 C.F.R. Part 745, Subpart F. U.S. EPA obtained OMB approval of the information collection requirements and the OMB control number assigned to the information collection requirements in the rule is 2070-0151. According to the preamble to the final rule, the rule contains the following information collection requirements: (1) disclosure of known lead-based paint and/or lead-based paint hazards; (2) provision of any available records and reports pertaining to lead-based paint in the housing; (3) provision of a federally-approved lead hazard information pamphlet; (4) completion and subsequent retention of disclosure and acknowledgment for 3 years; and (5) provision of a 10-day evaluation opportunity to purchasers before obligation under purchase contracts. See 61 Fed. Reg. 9081, March 6, 1996.

On May 31, 1996, U.S. EPA issued a notice in the Federal Register (61 Fed. Reg. 27348)

to announce that on April 22, 1996, OMB had approved the information collection requirements contained in 40 C.F.R. §§ 745.107, 745.110, 745.113, and 745.115. This notice stated that OMB control number 2070-0151 had been assigned to these collection activities, and was valid through April 30, 1999. On July 1, 1996 (61 Fed. Reg. 33851), U.S. EPA amended the table in 40 C.F.R. Part 9 to add this OMB control number to the listing of OMB control numbers for U.S. EPA's regulations that appear in Section 9.1. See 64 Fed. Reg. 39418 (July 22, 1999). The control number was renewed on September 28, 2001 (66 Fed. Reg. 49664), November 30, 2004 (69 Fed. Reg. 69598-69599) and most recently on April 4, 2008 (73 Fed. Reg. 20037). The OMB Control Number will not expire until March 31, 2011.

The transactions alleged in the Complaint occurred during the period of 2001 through 2005. Complainant states that there were no lapses in this OMB control number during the period of noncompliance cited in the Complaint. Thus, Complainant has fully complied with the PRA with respect to the counts at issue in this proceeding.

VIII. RESERVATION OF RIGHTS

Complainant respectfully reserves the right to call all witnesses called by the Respondent, to recall any of its witnesses in rebuttal, and to modify or supplement the names of witnesses and

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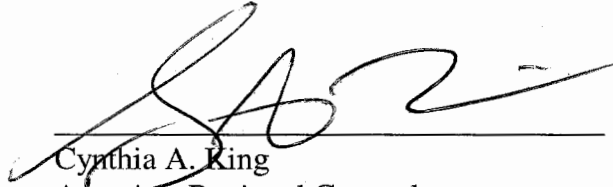
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exhibits prior to the Adjudicatory Hearing, pursuant to 40 C.F.R. Part 22, and upon adequate notice to the Respondent and the Presiding Officer.

Respectfully submitted,

U.S. Environmental Protection Agency



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In the Matter of Edward L. Murray, Jr.
Docket No: TSCA-05-2007-0013

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2008, I filed the original and one copy of this Prehearing Exchange and its attachments with Sonja Brooks-Woodard, Regional Hearing Clerk, U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois 60604, and placed for pickup to be mailed a copy of the Pre-hearing Exchange with attachments by Pouch Mail to:

Chief Judge Susan L. Biro
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

and placed for pickup to be mailed a copy of the Pre-Hearing Exchange with attachments by certified mail, certified receipt number _____, to:

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