UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Robert Lauter d/b/a Prime Cut Paint,	)	**Docket No. TSCA-03-2023-0034**
	)	
Respondent.	)	

DEFAULT ORDER

I. Procedural Background

This civil penalty proceeding arises from an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") filed on December 7, 2022, by the Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency ("EPA" or "Agency"), Region 3 ("Complainant"), alleging that Robert Lauter d/b/a Prime Cut Paint ("Respondent") violated Sections 15 and 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C §§ 2614 and 2689, by failing to comply with the regulatory requirements of 40 C.F.R. Part 745, Subpart E, in relation to activities performed at four properties in the Commonwealth of Virginia. Specifically, the Complaint charges Respondent with 15 counts of violation and proposes a total civil monetary penalty of $117,250 in regard thereto. As reflected in the proof of delivery filed by Complainant, Respondent was served with a copy of the Complaint by commercial delivery service on December 8, 2022.[1]

On January 5, 2023, Respondent, appearing *pro se*, filed a document responding to the Complaint, and the Regional Hearing Clerk subsequently forwarded the matter to this Tribunal for adjudication. Upon review of the document filed by Respondent, I determined that it did not fulfill the requirements for an answer set forth in the Rules of Practice inasmuch as it failed to admit, deny, deny for lack of knowledge, or otherwise explain each paragraph of the Complaint alleging a fact or facts. Respondent also did not request a hearing.

Accordingly, in an Order to Respondent to File Answer, I directed Respondent to file an answer that complied with the Rules by February 10, 2023. Concurrently, I issued a Prehearing Order directing the parties first to engage in a settlement conference and then, if a settlement was

[1] This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice" or "Rules"), codified at 40 C.F.R. §§ 22.1 to 22.45. The Rules of Practice require a complaint to be served on the respondent, or a representative authorized to receive service on the respondent's behalf, personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery. 40 C.F.R. § 22.5(b)(1)(i). Service of the complaint is considered complete when the return receipt is signed. 40 C.F.R. § 22.7(c). Here, the proof of delivery filed by Complainant reflects that the Complaint was sent to Respondent by UPS Next Day Air, with signature required, and received by Respondent on December 8, 2022. Thus, service was complete on that date.

not reached in the meantime, to participate in a prehearing exchange of information pursuant to Section 22.19(a) of the Rules. Specifically, I directed Complainant to file its initial prehearing exchange by March 17, 2023, and Respondent to file his prehearing exchange by April 7, 2023. Additionally, I advised of the potential consequences of failing to participate in the prehearing exchange, namely, in the case of Respondent, that a default judgment could be entered against him. The Order to Respondent to File Answer and Prehearing Order were served together on Respondent by regular mail and email.[2]

In response to the Order to Respondent to File Answer, Respondent subsequently filed an Answer with this Tribunal by first class mail and served a copy on Complainant by email.[3] Therein, Respondent argues, among other things, that "the proper court of Jurisdiction" for the claims against him is the United States District Court for the Eastern District of Virginia, Answer ¶¶ 1, 5; and that "[t]he proper venue for a legal proceeding is a court of law not some administrative court," Answer ¶ 79.

Meanwhile, on February 15, 2023, Complainant timely filed a combined Status Report and Preliminary Statement. Therein, Complainant represents that Respondent rebuffed its efforts to engage in a settlement conference as directed by the Prehearing Order and that Respondent had previously stated his intent to file suit against EPA in district court rather than proceed through the administrative litigation process. Complainant then timely filed its Initial Prehearing Exchange ("Initial PHE") on March 16, 2023.

Conversely, Respondent failed to file his prehearing exchange by the deadline of April 7, 2023. The Headquarters Hearing Clerk subsequently contacted Respondent by email on April 14, 2023, to inform Respondent of the missed deadline and to inquire as to whether he had physically mailed his prehearing exchange as he had his Answer. On April 18, 2023, Respondent communicated to the Headquarters Hearing Clerk, by both telephone and email, that he had not filed a prehearing exchange because of his challenge to subject matter jurisdiction and his belief that engaging in any formal administrative proceeding would be inappropriate.

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[2] The Rules of Practice provide that service of rulings, orders, decisions, and other documents issued by the presiding Administrative Law Judge may be accomplished by various means, such as U.S. mail (including certified mail, with return receipt requested), any reliable commercial delivery service, and email, 40 C.F.R. § 22.6; and that such service is complete upon mailing, when placed in the custody of a reliable commercial delivery service, or upon electronic transmission, 40 C.F.R. § 22.7(c). Here, the Certificates of Service appended to the Order to Respondent to File Answer and Prehearing Order reflect that copies of those Orders were sent on January 19, 2023, by regular mail and email to the mailing address and email address on record for Respondent. Service was thus complete on that date, and the copies were not returned as undeliverable.

[3] Respondent did not inform the Headquarters Hearing Clerk of the mailing, as directed by Orders of this Tribunal, and it was overlooked until I issued an Order to Respondent to Show Cause, which prompted Respondent to communicate to the Headquarters Hearing Clerk that he had physically mailed the Answer to this Tribunal. The Headquarters Hearing Clerk accepted the Answer for filing on February 23, 2023, and I subsequently issued an Order Withdrawing Order to Respondent to Show Cause. Therein, I noted that Respondent still did not request a hearing in his Answer, but I advised the parties that pursuant to Section 22.15(c) of the Rules, I would nevertheless conduct a hearing and that the prehearing deadlines set forth in the Prehearing Order would remain in effect because the Answer raised issues appropriate for adjudication.

On April 20, 2023, Complainant filed a Rebuttal Prehearing Exchange, stating simply that it understood from Respondent's communications to date that he did not intend to participate in this proceeding. That same day, I issued an Order to Respondent to Show Cause for failure to file a prehearing exchange as required by Section 22.19(a) of the Rules of Practice and as directed by the Prehearing Order. Therein, I advised that under Section 22.17(a) of the Rules of Practice, a party may be found to be in default upon failure to comply with the requirement to exchange information pursuant to Section 22.19(a) or an order of the presiding Administrative Law Judge, and that default by a respondent constitutes an admission of all facts alleged in the complaint and a waiver of the respondent's right to contest those allegations. I then directed Respondent to file and serve a document, on or before May 12, 2023, showing good cause as to why he had failed to file a prehearing exchange and why a default order should not be entered against him. Copies of the Order to Respondent to Show Cause were served on Respondent by email, regular mail, and certified mail, return receipt requested.[4]

Respondent did not comply with the Order to Respondent to Show Cause. On May 30, 2023, the Headquarters Hearing Clerk contacted Respondent by telephone to inquire as to whether he had received the Order. According to the Headquarters Hearing Clerk, Respondent denied receiving it and stated that he was challenging jurisdiction and would not read any further emails from her. When she offered to mail Respondent another copy of the Order to Respondent to Show Cause, he responded with a raised voice that he had "cooperated" and "responded to all allegations" and that the telephone call from the Headquarters Hearing Clerk constituted "harassment." He then ended the call.

To date, Respondent has not communicated further with this Tribunal, filed a prehearing exchange, or responded to the April 20, 2023 Order to Respondent to Show Cause.

II. Standards for Default

When a party fails to exchange information as required by Section 22.19 of the Rules of Practice or comply with an order of the presiding Administrative Law Judge, the Rules authorize the Administrative Law Judge to find the party to be in default. 40 C.F.R. §§ 22.17(a), 22.19(g). Section 22.17 of the Rules describes the consequences of default as follows:

> (a) Default. . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

[4] As previously explained, the Rules of Practice provide that service of rulings, orders, decisions, and other documents issued by the presiding Administrative Law Judge may be accomplished by various means, such as U.S. mail (including certified mail, with return receipt requested), any reliable commercial delivery service, and email, 40 C.F.R. § 22.6; and that such service is complete upon mailing, when placed in the custody of a reliable commercial delivery service, or upon electronic transmission, 40 C.F.R. § 22.7(c). The Certificate of Service appended to the Order to Respondent to Show Cause reflects that the Order was sent on April 20, 2023, by regular and certified mail to the mailing address on record for Respondent and by email to the email address on record for Respondent. Service was thus complete on that date, and none of the copies were returned as undeliverable. With regard to the copy sent by certified mail, tracking information available on the website for the U.S. Postal Service indicates that the mailing was picked up at the post office on April 25, 2023. A signed domestic return receipt for the certified mailing was returned to this Tribunal, but it was not dated, and the signatory did not print his or her name on it.

* * * *

> (c) Default order. When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision . . . . The relief proposed in the complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17.

When the basis for default is a respondent's failure to adhere to a procedural requirement, the Environmental Appeals Board ("EAB" or "Board") has "traditionally applied a 'totality of the circumstances' test to determine whether a default order should be . . . entered . . . ." *JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005). The Board has considered several factors under this test, including, "[f]irst and foremost, . . . the alleged procedural omission," namely, whether a procedural requirement was indeed violated, whether the particular violation is proper grounds for default, and whether the respondent had a valid excuse for its failure to comply. *Id.* The Board has also considered the likelihood that the defaulting party would succeed on the substantive merits of the case if a hearing were held. *Id.* However, the defaulting party bears the burden of demonstrating that "there is more than the mere possibility of a defense, but rather a 'strong probability' that litigating the defense will produce a favorable outcome." *Pyramid Chem. Co.*, 11 E.A.D. 657, 662 (EAB 2004) (quoting *Jiffy Builders, Inc.*, 8 E.A.D. 315, 322 (EAB 1999); *Rybond, Inc.*, 6 E.A.D. 614, 628 (EAB 1996)).

With respect to the requirement that the parties engage in a prehearing exchange of information, the Board regards it not as "procedural nicety" but as a "pivotal function" in the administrative litigation process inasmuch as it compels parties to identify and exchange in one central submission all of the evidence intended to be presented at the hearing, thereby affording the parties and tribunal a meaningful opportunity to prepare and facilitating the expeditious resolution of the matter as intended for such litigation. *JHNY*, 12 E.A.D. at 382. Given the critical role of the prehearing exchange, the Board has recognized that "failure to comply with an ALJ's order requiring exchange is one of the primary justifications for entry of default." *Id.* (citing 40 C.F.R. § 22.17(a)).

As for explanations that a respondent could offer for its failure to comply with a procedural requirement, the Board has considered the fact that a party is not represented by counsel to be unavailing. Under the Rules, "[a]ny party may appear in person or by . . . other representative" and such representative "must conform to the standards of conduct and ethics required of practitioners before the courts of the United States." 40 C.F.R. § 22.10. Accordingly, the Board has rejected the contention that a party's lack of legal representation excuses its failure to comply with the Rules or with orders of the Administrative Law Judge. *See, e.g.*, *Rybond*, 6 E.A.D. at 626-627 ("[A] litigant who elects to appear *pro se* takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance.").

As noted above, once a default order has been entered against a respondent, the respondent is deemed to have waived its right to contest the facts alleged in the complaint. 40 C.F.R. § 22.17(a). The respondent retains its right, however, "to have [the presiding Administrative Law Judge] evaluate whether the facts as alleged establish liability and whether the relief sought is appropriate in light of the record." *Mountain Village Parks, Inc.*, 15 E.A.D. 790, 798 (EAB 2013). Thus, the responsibility of the Administrative Law Judge "in adjudicating default cases remains the same," namely, that the Administrative Law Judge "evaluate carefully complaints to determine both whether the facts as alleged establish liability, and whether the relief sought is appropriate." *Id.* at 797.

III. Entry of Default

Despite a clear warning of the consequences of a failure to comply, Respondent has not filed a prehearing exchange, in contravention of the Prehearing Order and the requirements of Section 22.19(a) of the Rules. It is clear from the record that this failure resulted not from a mere oversight but rather from Respondent's refusal to participate further in this proceeding on account of his unexplained belief that this Tribunal lacks jurisdiction.[5] Such a belief does not excuse Respondent from defying this Tribunal's directives, however. His lack of representation also does not justify his recalcitrance. Thus, the record does not show good cause as to why a default order should not be issued. *See* 40 C.F.R. § 22.17(c). Accordingly, based on his failure to file a prehearing exchange, Respondent is found to be in default and to waive his right to contest the facts alleged in the Complaint.[6] *See* 40 C.F.R. § 22.17(a).

IV. Respondent's Liability

Having found Respondent to be in default, the next step is to determine whether the facts alleged in the Complaint, deemed admitted by Respondent by virtue of the entry of default pursuant to 40 C.F.R. § 22.17, establish Respondent's liability for the violations charged therein.

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[5] In directing the parties to participate in a prehearing exchange of information, the Prehearing Order afforded Respondent the opportunity to provide an explanation as to any general or affirmative defense he might have and, importantly, identify evidence in support. It also described an alternative method for properly raising defenses, such as a purported lack of jurisdiction, by motion. Respondent chose not to avail himself of those opportunities, however, thereby precluding a determination as to whether he has any meritorious defenses. Additionally, the Prehearing Order expressly advised Respondent that any document not included in the prehearing exchange "shall not" be admitted into evidence and that any witness whose name and summary of expected testimony were not included in the prehearing exchange "shall not" be allowed to testify. Thus, by refusing to file a prehearing exchange, Respondent has placed himself in the position of being unable to introduce evidence at a hearing to counter Complainant's case.

[6] Arguably, entry of default is also warranted by Respondent's failure to comply with the April 20, 2023 Order to Respondent to Show Cause. While it is unclear who signed the return receipt for the copy sent to Respondent by certified mail, and Respondent claimed not to have received the Order to Show Cause when asked by the Headquarters Hearing Clerk, it is difficult to credit any claim that service was defective given that copies were sent to both his mailing address and email address of record – where he had unquestionably received orders and other communications from this Tribunal and from which he had served this Tribunal and Complainant and otherwise communicated just weeks earlier – without any copies being returned as undeliverable. Nevertheless, I need not decide that point, as I consider entry of default based solely on Respondent's refusal to file a prehearing exchange to be appropriate.

A. Statutory and Regulatory Background

Congress enacted the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("Act") after finding that low-level lead poisoning was afflicting as many as three million American children under age six and causing "intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems." Pub. L. No. 102-550, § 1002(1)-(2), 106 Stat. 3672, 3897. Through the Act, Congress sought to develop a national strategy "to eliminate lead-based paint hazards in all housing as expeditiously as possible," particularly by targeting homes built before 1980. Pub. L. No. 102-550, §§ 1002(3), 1003(1), 106 Stat. 3672, 3897.

To carry out this strategy, Subtitle B of the Act amended TSCA to add Subchapter IV, entitled Lead Exposure Reduction, or Sections 401 through 412 of TSCA. Pub. L. No. 102-550, § 1021, 106 Stat. 3672, 3912–3924 (codified at 15 U.S.C. §§ 2681-2692). These provisions charge the Agency with promulgating regulations that set "standards for performing lead-based paint activities, taking into account reliability, effectiveness, and safety" and "ensur[ing] that individuals engaged in such activities are properly trained; that training programs are accredited; and that contractors engaged in such activities are certified." 15 U.S.C. § 2682(a)(1). The Agency was directed to apply the regulations specifically to renovation or remodeling activities in target housing, 15 U.S.C. § 2682(c)(3); with the term "target housing" defined, in pertinent part, as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities or any 0-bedroom dwelling (unless any child who is less than 6 years of age resides or is expected to reside in such housing)," 15 U.S.C. § 2681(17).

Pursuant to this authority, the Agency promulgated its Lead-Based Paint Renovation, Repair and Painting Rule ("RRP Rule"), codified at 40 C.F.R. Part 745, Subpart E, "to address lead-based paint hazards created by renovation, repair, and painting activities . . . that disturb lead-based paint in target housing and child-occupied facilities." Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21,692, 21,693 (April 22, 2008). With certain exceptions, the RRP Rule "applies to all renovations performed for compensation in target housing and child-occupied facilities." 40 C.F.R. § 745.82(a). As defined by the RRP Rule, a "renovation" is "the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces," including:

> [t]he removal, modification or repair of painted surfaces or painted components (e.g., modification of painted doors, surface restoration, window repair, surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust)); the removal of building components (e.g., walls, ceilings, plumbing, windows); weatherization projects (e.g., cutting holes in painted surfaces to install blown-in insulation or to gain access to attics, planing thresholds to install weather-stripping), and interim controls that disturb painted surfaces.

40 C.F.R. § 745.83. Conversely, the term "renovation" does not include "minor repair and maintenance activities," such as:

> activities, including minor heating, ventilation or air conditioning work, electrical work, and plumbing, that disrupt 6 square feet or less of painted surface per room for interior activities or 20 square feet or less of painted surface for exterior activities where none of the work practices prohibited or restricted by § 745.85(a)(3) are used and where the work does not involve window replacement or demolition of painted surface areas. When removing painted components, or portions of painted components, the entire surface area removed is the amount of painted surface disturbed.

40 C.F.R. § 745.83.

The RRP Rule imposes certification requirements on both "firms" and "renovators" who renovate target housing and sets forth various work practice standards with which renovations must comply. *See* 40 C.F.R. §§ 745.85, 745.89, 745.90. A "firm" is defined, in pertinent part, as "a company, partnership, corporation, sole proprietorship or individual doing business, association, or other business entity." 40 C.F.R. § 745.83. A "renovator," in turn, is defined as "an individual who either performs or directs workers who perform renovations," while "[a] certified renovator is a renovator who has successfully completed a renovator course accredited by EPA or an EPA-authorized State or Tribal program." *Id.*

"Firms that perform renovations for compensation must apply to EPA for certification to perform renovations or dust sampling," 40 C.F.R. § 745.89(a)(1); and "no firm may perform, offer, or claim to perform renovations without certification from EPA . . . in target housing or child-occupied facilities" unless a particular exception applies, 40 C.F.R. §§ 745.81(a)(2)(ii). Further, when a firm is renovating target housing, the renovation must be directed by a certified renovator and performed by certified renovators or workers trained by a certified renovator. 40 C.F.R. § 745.81(a)(3). Firms must ensure that all individuals performing renovation activities on the firm's behalf "are either certified renovators or have been trained by a certified renovator" and that "[a] certified renovator is assigned to each renovation performed by the firm and discharges all of the certified renovator responsibilities" required by the regulations. 40 C.F.R. § 745.89(d)(1)-(2).

Firms must also ensure that all renovations they perform "are performed in accordance with the work practice standards" set forth in the regulations. 40 C.F.R. § 745.89(d)(3). Those work practice standards include the requirement that firms "post signs clearly defining the work area and warning occupants and other persons not involved in renovation activities to remain outside of the work area." 40 C.F.R. § 745.85(a)(1). The signs must be posted before the renovation begins and remain in place and readable until after the renovation and post-renovation cleaning verification are complete. *Id.* The work practice standards also provide that "[b]efore beginning the renovation, the firm must isolate the work area so that no dust or debris leaves the work area while the renovation is being performed." 40 C.F.R. § 745.85(a)(2). For exterior renovations, this means that the firm must "[c]over the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to collect falling paint debris, whichever is greater, unless the property line prevents 10 feet of such ground covering." 40 C.F.R. § 745.85(a)(2)(ii)(C).

Additionally, firms must fulfill certain recordkeeping requirements. 40 C.F.R.

§ 745.89(d)(5). In particular, "[f]irms performing renovations must retain and, if requested, make available to EPA all records necessary to demonstrate compliance with [the RRP Rule] for a period of 3 years following completion of the renovation." 40 C.F.R. § 745.86(a). Such records include documentation demonstrating that firms complied with the work practice standards for renovation activities and post-renovation cleaning verification set forth in the regulations. 40 C.F.R. § 745.86(b)(6). Finally, no more than 60 days before beginning a renovation of a residential dwelling unit of target housing, the firm performing the renovation must provide the owner of the unit with a copy of EPA's "The Lead-Safe Certified Guide to Renovate Right" pamphlet ("Renovate Right pamphlet") and either obtain from the owner a written acknowledgment of the owner's receipt of the pamphlet or obtain a certificate of mailing at least seven days prior to the renovation. 40 C.F.R. § 745.84(a)(1).

Under Section 409 of TSCA, it is unlawful for any person[7] to fail or refuse to comply with a provision of Subchapter IV of TSCA or any regulation issued thereunder. 15 U.S.C. § 2689. Likewise, the RRP Rule provides that failure or refusal to comply with the Rule is a violation of Section 409 of TSCA, 15 U.S.C. § 2689. 40 C.F.R. § 745.87(a). The RRP Rule further provides that failure or refusal to establish and maintain records or to make available or permit access to or copying of records, as required by the Rule, is a violation of Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689. 40 C.F.R. § 745.87(b). It then goes on to state that violators may be subject to civil sanctions pursuant to Section 16 of TSCA, 15 U.S.C. § 2615, for each violation. 40 C.F.R. § 745.87(d). Section 15 of TSCA provides that it is unlawful for any person to fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information, or (C) permit access to or copying of records, as required by TSCA or a rule promulgated thereunder. 15 U.S.C. § 2614. Section 16(a) of TSCA, in turn, provides that any person who violates Section 15 or 409 of TSCA, 15 U.S.C. §§ 2614 or 2689, shall be liable for a civil penalty of up to $46,989 for each such violation.[8] [9] 15 U.S.C. § 2615(a)(1); 40 C.F.R. § 19.4.

B. Findings of Fact and Conclusions of Law

The following Findings of Fact and Conclusions of Law are based upon the allegations of fact set forth in the Complaint and deemed admitted by Respondent by virtue of entry of default.

At all times relevant to the violations alleged in the Complaint:

[7] For purposes of the RRP Rule, the term "person" means, in pertinent part, "any natural or judicial person including any individual, corporation, partnership, or association." 40 C.F.R. § 745.83.

[8] When enacted, Section 16(a) of TSCA specified a civil penalty of up to $25,000 per violation. That amount has since been increased under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

[9] Section 16(a) of TSCA further states that the civil penalty for violations of Section 15 or 409 of TSCA, 15 U.S.C. §§ 2614 or 2689, "shall be assessed by the Administrator by an order made on the record after opportunity (provided in accordance with this subparagraph) for a hearing in accordance with section 554 of Title 5." 15 U.S.C. § 2615(a)(2)(A). Section 554 of Title 5 is part of the Administrative Procedure Act and provides for adjudications conducted before an administrative law judge. 5 U.S.C. § 554. It is this provision that establishes this Tribunal's jurisdiction over this matter.

1. Respondent Robert Lauter was an individual who performed painting and paint removal contracting services and who was registered to do business in the Commonwealth of Virginia under the trade name Prime Cut Paint. Compl. ¶ 15.

2. As an individual, Respondent was a "person," as that term is defined by 40 C.F.R. § 745.83.

3. Respondent was the sole proprietor of Prime Cut Paint and had a principal place of business located at 1414 Baychester Avenue, Norfolk, Virginia 23503. Compl. ¶¶ 16, 17.

4. As an individual doing business, Respondent was a "firm," as that term is defined by 40 C.F.R § 745.83.

5. On July 20, 2019, Respondent entered into a contract to perform activities, including pressure washing of the exterior and scraping of loose paint, for compensation at 114 South Broad Street, Suffolk, Virginia 23434 ("Broad Street Property"). Compl. ¶¶ 2, 23. At the time, Daniel Gillis, a co-owner of the Broad Street Property, lived there with his wife and eight-year-old child. Compl. ¶ 24. The Broad Street Property was originally built in 1906. Compl. ¶ 25.

6. As housing constructed prior to 1978, the Broad Street Property was "target housing," as that term is defined by 15 U.S.C. § 2681(17).

7. On August 22, 2019, Mr. Gillis contacted EPA concerning the activities being performed by Respondent at the Broad Street Property, stating that Respondent had refused to show him firm and renovator certificates upon his request; that Respondent failed to take proper precautions in containing the debris generated by his activities; and that Respondent refused to clean up the site. Compl. ¶¶ 22, 26. Mr. Gillis provided photographic evidence of the debris on the ground adjacent to the property. Compl. ¶ 26.

8. On September 4, 2019, the property owner allowed a duly authorized inspector from EPA to access the Broad Street Property, and the inspector conducted an on-site inspection to observe the ongoing activities of Respondent for purposes of determining Respondent's level of compliance with the RRP Rule. Compl. ¶¶ 27, 28.

9. During the on-site inspection, the inspector observed the following: (1) paint chips from the scraping of loose paint on the ground all around the foundation of the house; (2) areas where the paint had been sanded to the point that the wood siding was exposed; and (3) certain areas that had been painted over with a white primer paint, including some areas where the painted surface had not been scraped and the paint was peeling underneath the primer. Compl. ¶ 29. The inspector documented these observations with photographic evidence of the disturbed exterior paint. Compl. ¶ 30.

10. By pressure washing, scraping, and sanding the exterior of the home at the Broad Street Property, Respondent modified an existing structure in ways that resulted in the disturbance of painted surfaces. The disturbance of painted surfaces occurred all around the exterior of the home, such that the activities performed by Respondent did not

constitute "minor repair and maintenance activities," as that term is defined by 40 C.F.R. § 745.83. Accordingly, Respondent performed a "renovation," as that term is defined by 40 C.F.R. § 745.83.

11. The work performed by Respondent at the Broad Street Property was a "renovation performed for compensation at target housing," as described in 40 C.F.R. § 745.82.

12. None of the circumstances described in 40 C.F.R. § 745.82(a) and (b) as exceptions to the applicability of the RRP Rule apply to the Broad Street Property. Compl. ¶ 45.

13. During the on-site inspection, the inspector did not observe any signage warning persons not involved in the activities being performed to remain outside of the work area at the Broad Street Property, as required for renovation activities by 40 C.F.R. § 745.85(a)(1). Compl. ¶ 31.

14. During the on-site inspection, the inspector did not observe any plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation, as required by 40 C.F.R. § 745.85(a)(2)(ii)(C). Compl. ¶ 32.

15. At the time of the renovation at the Broad Street Property, Respondent had not provided to the owners a copy of EPA's Renovate Right pamphlet, obtained a written acknowledgement of receipt of the pamphlet from the owners, or maintained a certificate of mailing at least seven days prior to the renovation, as required by 40 C.F.R § 745.84(a)(1). Compl. ¶¶ 55-57.

16. Subsequently, on September 5, 2019, the inspector conducted a records inspection at Respondent's principal place of business for purposes of determining his level of compliance with the RRP Rule. Compl. ¶ 34. During the records inspection, the inspector collected four contracts for further review, namely, the contract relating to the Broad Street Property and contracts relating to the following three properties: 238 Mt. Vernon Avenue, Portsmouth, Virginia 23707 ("Mt. Vernon Avenue Property"); 3716 Northmoor Court, Virginia Beach, Virginia 23452 ("Northmoor Court Property"); and 3403 Broadway Street, Portsmouth, Virginia 23703 ("Broadway Street Property"). Compl. ¶¶ 2, 35.

17. During the records inspection, Respondent stated that he was familiar with the RRP Rule, that his business was not an EPA-certified firm, and that it did not employ an EPA-certified renovator. Compl. ¶ 38.

18. With respect to the Broad Street Property, Respondent did not make available to EPA all records demonstrating his performance of all relevant lead-safe practices described in 40 C.F.R. § 745.85(a) and the post-renovation cleaning described in 40 C.F.R. § 745.85(b). Compl. ¶ 61.

C. Discussion and Conclusion as to Liability

The Complaint charges Respondent with 15 counts of violation of the RRP Rule and TSCA in connection with work he performed at the Broad Street, Mt. Vernon Avenue, Northmoor Court, and Broadway Street Properties (collectively, "Properties"). Compl. ¶¶ 46-72. As discussed above, the RRP Rule applies, with certain exceptions, "to all renovations performed for compensation in target housing and child-occupied facilities." 40 C.F.R. § 745.82(a). Thus, the first question is whether the facts alleged in the Complaint and deemed admitted by Respondent support a finding that Respondent's activities at the Properties were subject to the RRP Rule. I will then consider Respondent's liability for the charged violations.

1. Applicability of the RRP Rule

With regard to the Mt. Vernon Avenue, Northmoor Court, and Broadway Street Properties, I find that the facts alleged in the Complaint and deemed admitted by Respondent do not establish the applicability of the RRP Rule. First, while the Complaint does allege that each of those properties was constructed prior to 1978, Compl. ¶¶ 36, 40, 41, 44, the Complaint does not contain any allegations of fact regarding whether any structures on those properties were used as residential dwellings. Such a fact must be proven in order to reach the conclusion of law that the properties were "target housing," as that term is defined by 15 U.S.C. § 2681(17).

Likewise, the Complaint lacks any allegations of fact from which I could conclude that Respondent modified existing structures on the Mt. Vernon Avenue, Northmoor Court, and Broadway Street Properties in ways that disturbed painted surfaces, such that the work could constitute a "renovation," as that term is defined by 40 C.F.R. § 745.83. Put another way, given that the term "renovation" is a term of art with a distinct meaning for purposes of the RRP Rule, certain facts must be proven to establish as a conclusion of law that a "renovation" occurred. No such facts have been alleged with respect to those three properties. Rather, the Complaint merely alleges at various points that Respondent performed renovations at the Mt. Vernon Avenue, Northmoor Court, and Broadway Street Properties, without identifying the specific activities in which he engaged. *See, e.g.*, Compl. ¶ 35 ("During the September 5, 2019, inspection, the duly authorized EPA inspector identified and collected four renovation contracts for further review, including [those related to the Mt. Vernon Avenue Property, Northmoor Court Property, and Broadway Street Property]."); ¶ 39 ("Respondent entered a contract with the property owner of [the Broadway Street Property] on September 12, 2018 to perform a 'renovation' as such term is defined by 40 C.F.R. § 745.83. The renovation took place on or around that same time."). In the absence of factual allegations in the Complaint demonstrating that the activities conducted by Respondent at the Mt. Vernon Avenue, Northmoor Court, and Broadway Street Properties constituted "renovations performed for compensation in target housing," as described by 40 C.F.R. § 745.82(a), I am unable to find that the RRP Rule applies to Respondent's work at those properties.

On the other hand, as set forth above, the facts alleged in the Complaint and deemed admitted by Respondent do support a finding that the RRP Rule applies to the work he performed at the Broad Street Property. In particular, the Complaint alleges that Daniel Gillis, his wife, and his eight-year-old child resided at the Broad Street Property at the time work was being performed there, Compl. ¶ 24; and that the property was originally built in 1906, Compl. ¶ 25. Those facts support the conclusion of law that the Broad Street Property was "target housing," as that term is defined by 15 U.S.C. § 2681(17).

The Complaint further alleges that on July 20, 2019, Respondent entered into a contract to perform certain activities, including pressure washing of the exterior and scraping of loose paint, for compensation at the Broad Street Property. Compl. ¶ 23. Scraping of loose paint is identified in the definition of the term "renovation" as a "surface preparation activity," which, in turn, is listed among other activities qualifying as a "renovation" for purposes of the RRP Rule. *See* 40 C.F.R. § 745.83 ("The term renovation includes (but is not limited to): The removal, modification or repair of paint surfaces or painted components (e.g., modification of painted doors, surface restoration, window repair, surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust)) . . . ."). To the extent that it strips paint from surfaces, pressure washing can also be considered a "surface preparation activity" that "results in the disturbance of painted surfaces," thus falling within the definition of the term "renovation." Indeed, as alleged in the Complaint, the EPA inspector observed during the inspection on September 4, 2019, evidence of the exterior paint at the Broad Street Property having been disturbed, including "paint chips from the scraping on the ground all around the foundation of the house" and "areas where the paint had been sanded to the point that the wood siding was exposed." Compl. ¶ 29. Thus, I am able to find that Respondent modified the exterior of the Broad Street Property in ways that disturbed paint surfaces. Given the description of paint chips "all around the foundation of the house," Respondent appears to have disrupted an area of painted surface greater than 20 square feet on the exterior of the property, such that his work was not a "minor repair and maintenance activity," as that term is defined by 40 C.F.R. § 745.83. Accordingly, the factual allegations set forth in the Complaint establish that Respondent's activities at the Broad Street Property amounted to "renovations" for purposes of the RRP Rule and, moreover, "renovations performed for compensation in target housing," as described by 40 C.F.R. § 745.82(a). Thus, as alleged in the Complaint, the RRP Rule applies to Respondent's work there.

2. Liability for Alleged Violations of the RRP Rule and TSCA

With Respondent's work at the Broad Street Property subject to the RRP Rule, the next question is whether Respondent failed to comply with the Rule while renovating the property as charged, such that he can be found liable for violations of the Rule and TSCA. The Complaint charges Respondent with the following violations in the context of the Broad Street Property:

> (1) Failing to have a firm certification from EPA under 40 C.F.R. § 745.89(b)[10] prior to and while performing the renovation for compensation at the Broad Street Property, in violation of 40 C.F.R. §§ 745.81(a)(2)(ii) and 745.89 and Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689, Compl. ¶ 49;

[10] In charging this violation, the Complaint refers to 40 C.F.R. § 745.89(b) as imposing the requirement for firms that perform renovations for compensation to obtain certification from EPA to perform such renovations. However, that provision relates to re-certification, while subsection (a) refers to initial certification. Thus, the reference to subsection (b) appears to be a scrivener's error. This is further evidenced by the Complaint's reference to subsection (a) in a preceding paragraph.

(2) Failing to have a certified renovator assigned to the renovation performed at the Broad Street Property as required by 40 C.F.R. § 745.89(d)(2), in violation of that provision and Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689, Compl. ¶ 53;

(3) Failing to distribute to the owners of the Broad Street Property a copy of EPA's Renovate Right pamphlet and failing to obtain a written acknowledgement of receipt from the owners or maintain a certificate of mailing at least seven days prior to undertaking the renovation at the property as required by 40 C.F.R. § 745.84(a), in violation of 40 C.F.R. § 745.84(a)(1) and Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689, Compl. ¶ 58;

(4) Failing to make available to EPA all records necessary to demonstrate that the renovator performed all relevant lead-safe work practices described in 40 C.F.R. § 745.85(a) and that the renovator performed the post-renovation cleaning described in 40 C.F.R. § 745.85(b) at the Broad Street Property, in violation of 40 C.F.R. § 745.86(b)(6) and "Section 409 of TSCA, 15 U.S.C. §§ 2614 and 2689,"[11] Compl. ¶ 62;

(5) Failing to post signs at the Broad Street Property on or around September 4, 2019, clearly defining the work area and warning occupants and other persons not involved in the renovation activities to remain outside the work area, in violation of 40 C.F.R. §§ 745.85(a)(1) and 745.89(d)(3) and "Section 409 of TSCA, 15 U.S.C. §§ 2614 and 2689,"[12] Compl. ¶ 67; and

(6) Failing to cover the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of the surfaces undergoing renovation at the Broad Street Property, in violation of 40 C.F.R. §§ 745.85(a)(2)(ii)(C) and 745.89(d)(3) and Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689, Compl ¶ 72.

The Findings of Fact and Conclusions of Law set forth above establish that Respondent failed to comply with the RRP Rule with respect to the Broad Street Property as charged in the Complaint. The Complaint alleges that those failures constitute violations of the relevant provisions of the Rule and both Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689. However, I note that in relevant part, Section 15 pertains to the maintenance and submission of records, prohibiting any person to fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information, or (C) permit access to or copying of records, as required by TSCA or a rule promulgated thereunder. 15 U.S.C. § 2614. As only one of the alleged violations – (4) listed above – addresses a failure to maintain and provide EPA access to records, the Findings of Fact and Conclusions of Law establish Respondent's liability for only one

[11] In identifying the provisions of the RRP Rule and TSCA that Respondent allegedly violated by failing to make certain records available to EPA, the Complaint lists 15 U.S.C. § 2614 but omits the corresponding section of TSCA, Section 15, from its recitation. That omission appears to be a scrivener's error.

[12] In identifying the provisions of the RRP Rule and TSCA that Respondent allegedly violated by failing to post appropriate signs at the Broad Street Property, the Complaint lists 15 U.S.C. § 2614 but again omits the corresponding section of TSCA, Section 15, from its recitation. That omission appears to be another scrivener's error.

violation of Section 15 of TSCA. With that qualification, I find Respondent liable for the six violations alleged in the Complaint as those violations pertain to the Broad Street Property.

V. Assessment of Penalty

Having found Respondent liable for violating the RRP Rule and TSCA, I turn now to the appropriate relief to award. As noted above, under the Rules of Practice, "[t]he relief proposed in the complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of this proceeding or the Act." 40 C.F.R. § 22.17(c). In making that determination, I must "evaluate . . . whether the relief sought is appropriate in light of the record" and "ensure that the proposed penalty is based upon a reasoned application of the statutory penalty factors." *Mountain Village Parks*, 15 E.A.D. at 798. In other words, even in the case of a respondent's default, my "role 'is not to accept without question [a complainant's] view of the case, but rather to determine an appropriate penalty as required by 40 C.F.R. § 22.27. As part of [my] evaluation, [I] must ensure that in the pending case [a complainant] has applied the law and Agency's policies consistently and fairly.'" *Id.* at 797 (quoting *John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 782 (EAB 2013)).

A. Penalty Criteria under TSCA

As previously discussed, Section 16(a) of TSCA provides that any person who violates Section 15 or 409 of TSCA, 15 U.S.C. §§ 2614 or 2689, shall be liable for a civil penalty. 15 U.S.C. § 2615(a). "In 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).

B. Complainant's Penalty Calculation with Respect to the Broad Street Property

As detailed in Complainant's Initial Prehearing Exchange, including such proposed exhibits ("CX") as CX 61, which consists of a "Penalty Calculation Worksheet,"[13] Complainant has proposed a civil monetary penalty in the amount of $68,288 for the violations occurring at the Broad Street Property.[14] According to Complainant, it based its proposed penalty on its consideration of the statutory penalty factors set forth in Section 16(a)(2)(B) of TSCA; EPA's "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation and Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule" ("ERPP"),

[13] Complainant states in the Complaint that "Appendix A to this Complaint [also] sets out how EPA calculated a penalty for each of the violations alleged in Counts I through X and [that] the Appendix is incorporated by reference into this Complaint." Compl. ¶ 76. However, Appendix A is not, in fact, attached to the copy of the Complaint appearing in the record of this proceeding and, thus, is not before the Tribunal.

[14] The Complaint proposes a total civil monetary penalty in the amount of $117,250 for the total number of violations alleged to have occurred at the four Properties addressed therein. However, as liability has been found only with respect to the Broad Street Property, I am considering only the portion of the proposed penalty relating to that property.

dated August 2010 and last revised on April 5, 2013 (CX 63)[15]; EPA's January 11, 2018 memorandum addressing amendments to EPA's civil penalty policies to account for inflation in the calculation of penalties ("2018 Penalty Policy Inflation Memo") (CX 64); and EPA's June 29, 2015 memorandum providing guidance on evaluating a violator's ability to pay a civil penalty in an administrative enforcement action ("ATP Guidance") (CX 65).[16] Compl. ¶¶ 74-75; Initial PHE at 21.

Complainant explains that consistent with the ERPP, it first determined the number of independently assessable violations, noting that each requirement of the RRP Rule is considered "a separate and distinct requirement" and that the failure to comply with any such requirement is considered "an independently assessable violation." Initial PHE at 21 (citing CX 63). Complainant then explains that it calculated an appropriate penalty as visually represented by the following formula:

> Penalty = Economic Benefit + Gravity +/- Gravity Adjustment Factors – Litigation Considerations – Ability to Pay – Supplemental Environmental Projects

Id.

Starting with the economic benefit resulting from Respondent's failure to comply, Complainant points to the ERPP's guidance to "remove any significant economic benefit resulting from failure to comply with the law." Initial PHE at 22. Complainant then asserts that as the costs for Respondent to come into compliance were "relatively small" (according to Complainant, those costs amounted to approximately $600, consisting of $300 for firm certification and $250-300 for renovator certification), it did not include an economic benefit component in the proposed penalty. *Id.*

Turning to the gravity component of the proposed penalty, Complainant asserts that it considered the relevant "Circumstance Level" and "Extent Category" assigned to each violation by the ERPP, the former reflecting the probability of harm to human health and the environment resulting from a particular type of violation (with Levels 1 and 2 representing the highest probability of harm and Levels 5 and 6 representing the lowest probability of harm) and the latter representing the degree, range, or scope of a violation's potential for harm (with the primary consideration being whether the violation could have a serious, significant, or minor impact on human health). Initial PHE at 22. Complainant maintains that it relied on Appendix A to the ERPP to determine the Circumstance Level, and Appendix B to the ERPP to determine the Extent Category, for each violation occuring at the Broad Street Property, as shown in the table below. Initial PHE at 22-23. Complainant further explains that based on the guidance of Appendix B that the Extent Category should be classified as "Major" if a child under the age of six or a pregnant woman is affected, "Significant" if a child between six and 18 years of age is affected, and "Minor" if no child is affected, the violations relating to the Broad Street Property were classified as Significant in Extent given that a child between six and 18 years of age resided

[15] This document is publicly available at https://www.epa.gov/sites/default/files/2020-06/documents/revisedlbpconsolidatederpp.pdf.

[16] This document is publicly available at https://www.epa.gov/sites/default/files/2015-06/documents/atp-penalty-evaluate-2015.pdf.

there. *Id.* at 22 (citing CX 63, Appendix B). That said, with respect to the charged violation of performing a renovation without the required firm certification, Complainant avers that the violation was "[n]ot property specific," Initial PHE at 22; and that the Extent Category assigned to it was only "Minor," CX 61 at 2. Complainant then asserts that it applied the Circumstance Level and Extent Category for each violation to the matrix appearing in Appendix B to reach the penalty figures below, as adjusted per the 2018 Penalty Policy Inflation Memo. *Id.* at 23 (citing CX 61, 63, 64).

Violation	Circumstance Level, Extent Category	Proposed Penalty
Renovating without firm certification	Circumstance Level 3a, Minor Extent	$4,667
Renovating without a certified renovator assigned to the renovation	Circumstance Level 3a, Significant Extent	$15,868
Failure to distribute to property owners a copy of EPA's Renovate Right pamphlet	Circumstance Level 1b, Significant Extent	$12,240
Failure to make available all records demonstrating the performance of all lead-safe work practices	Circumstance Level 6a, Significant Extent	$2,116
Failure to post signs clearly defining work area and warning persons not involved in the renovation to remain outside the work area	Circumstance Level 1b, Significant Extent	$12,240
Failure to cover ground with plastic sheeting or other impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation	Circumstance Level 2a, Significant Extent	$21,157

Initial PHE at 22-23, 25-26.

Complainant explains that after determining the appropriate gravity-based penalties as adjusted for inflation, it then considered whether any factors warranted an adjustment of those figures. Concerning Respondent's ability to pay the proposed penalty or continue in business if a penalty was assessed, Complainant notes that the ERPP advises that "[a]bsent proof to the contrary, EPA can establish a respondent's ability to pay with circumstantial evidence relating to a company's size and annual revenue. Once this is done, the burden is on the respondent to demonstrate an inability to pay all or a portion of the calculated civil penalty." Initial PHE at 23 (quoting CX 63). Here, Complainant avers that it analyzed "all information available to it in order to determine whether Respondent has the ability to pay a civil penalty," citing specifically to the Penalty Calculation Worksheet (CX 61), a Dun & Bradstreet report pertaining to Prime

Cut Paint (CX 62), and the "Testimony of Craig Yussen" (who Complainant identified in its prehearing exchange as having calculated the proposed penalty), and concluded that "Respondent would be able to pay such a penalty." *Id.* at 24. Complainant then argues that Respondent has not met his burden to demonstrate otherwise, noting that Respondent did not claim in his Answer or by other means that he lacked the ability to pay the proposed penalty or that assessment of the proposed penalty would affect his ability to continue in business, and that he did not produce any documentation to support such a claim. *Id.* (citing CX 63, CX 65). Thus, Complainant asserts, it did not adjust the proposed penalty based on this factor.

Complainant explains that it also did not adjust the proposed penalty because of a history of prior violations, as it is unaware of any violations of the RRP Rule committed by Respondent in the preceding five years. Initial PHE at 24. As for Respondent's degree of culpability, Complainant notes that according to the ERPP, this factor may merit an adjustment of the gravity-based penalty where a violator knowingly or willingly committed the violation, reflecting an increased responsibility on the part of the violator. *Id.* (citing CX 63). Here, Complainant asserts, it determined that "there was no reason" to propose such an adjustment. *Id.* Likewise, Complainant did not adjust the gravity-based penalties based on Respondent's attitude. *Id.* Complainant explains that the ERPP allows for the gravity-based penalty to be reduced by up to 30 percent to account for a violator's cooperation during the compliance evaluation and enforcement process; the violator's good-faith efforts to come into compliance; and early settlement. *Id.* (citing CX 63). Complainant asserts that it did not believe such an adjustment was warranted here, as Respondent was uncooperative, has yet to apply for firm or individual renovator certification, and did not agree to early settlement. *Id.* Finally, with respect to other factors as justice may require, Complainant explains that the ERPP allows for an additional 25 percent reduction for compelling factors that have otherwise not been considered under the ERPP or unusual circumstances that suggest application of the ERPP is inappropriate. *Id.* at 25 (citing CX 63). Complainant asserts that it is unaware of any such factors in this matter and that it therefore did not adjust the gravity-based penalty on this basis. *Id.*

C. Discussion and Conclusion as to Penalty

Under the Rules of Practice, the proposed relief – namely, a penalty of $68,288 for the charged violations pertaining to the Broad Street Property – "shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c). After reviewing the record before me, I find that there are certain deficiencies that preclude me from ordering the proposed penalty at this time. In particular, as discussed above, Complainant explains in its prehearing exchange that it classified the Extent of the violations occurring at the Broad Street Property as "Significant" based on the ERPP's guidance. Initial PHE at 22. That assessment appears to be correct. According to the ERPP, the categorization of the Extent of a violation is based upon three determinable facts, including, in relevant part, the age of any children who occupy the target housing in question. CX 63 at 18. The ERPP goes on to state that where "the youngest individual residing in the target housing at the time of the violation was at least 6 years of age and less than eighteen, then a Significant extent factor should be used." *Id.* at 19. The Complaint alleges that an eight-year-old child resided at the Broad Street Property at the time Respondent performed the renovations. Thus, it is appropriate per the ERPP to classify the Extent of the violations occurring there as "Significant." With little explanation, however, Complainant classified the Extent of the charged violation of performing a

renovation without the required firm certification as "Minor," stating only that that particular violation was "[n]ot property specific." Initial PHE at 22. The reasoning behind that determination is unclear.

Additionally, I note that the proposed penalties for two of the charged violations are inconsistent with the guidance of the ERPP. As set out in the table above, Complainant seeks a penalty of $12,240 for Respondent's failure to provide a copy of EPA's Renovate Right pamphlet to the owners of the Broad Street Property, as required by 40 C.F.R. § 745.84(a), as well as Respondent's failure to post signs clearly defining the work area and warning persons not involved in the renovation to remain outside of it, as required by 40 C.F.R. § 745.85(a)(1). As already noted, Complainant classified the Extent of those two violations as "Significant," which appears to be correct. As for the Circumstance Level of those violations, Complainant identified it as "1b" for both, which is consistent with Appendix A to the ERPP. *See* CX 63 at 30. According to the gravity-based penalty matrix appearing in Appendix B to the ERPP, that Circumstance Level and Extent correspond to a penalty of $8,500. CX 63 at 41. When I multiply that figure by the "inflation adjustment multiplier" of 1.03711 set forth in the 2018 Penalty Policy Inflation Memo, I arrive at $8,815 as the gravity-based penalty for each of those violations. How Complainant reached a figure more than $3,000 higher is unclear from the record.

Finally, I note that in determining that Respondent was able to pay the proposed penalty, Complainant asserts that it analyzed "all information available to it," citing specifically to the Penalty Calculation Worksheet (CX 61), a Dun & Bradstreet report pertaining to Prime Cut Paint (CX 62), and the "Testimony of Craig Yussen." Initial PHE at 24. The record lacks any affidavit, direct written testimony, or other documentation of the "Testimony of Craig Yussen," however.

In the absence of a sufficient explanation from Complainant regarding its determination that the Extent of Respondent's failure to perform a renovation without the required firm certification was "Minor" and how it arrived at the gravity-based penalty figure of $12,240 for Respondent's failure to distribute a copy of EPA's Renovate Right pamphlet to the owners of the Broad Street Property and to post appropriate signs at the work site, and with incomplete information in the record about the analysis that Complainant performed regarding Respondent's ability to pay the proposed penalty, I cannot fully evaluate whether the relief sought is appropriate in light of the record or whether Complainant properly applied the applicable policies to the facts of this case. Accordingly, I will not issue an order assessing a penalty at this time. Rather, I will direct Complainant to supplement the record with the necessary explanations and any supporting documentation, at which point a decision as to the penalty will be rendered.

ORDER

1. For failing to file a prehearing exchange, in contravention of the Prehearing Order and the requirements of Section 22.19(a) of the Rules of Practice, as concluded above, Respondent is hereby found to be in **DEFAULT**. Respondent is deemed to have admitted all facts alleged in the Complaint and, as found above, is liable for violations of 40 C.F.R §§ 745.81(a)(2)(ii), 745.89, 745.89(d)(2), 745.84(a), 745.86(b)(6), 745.85(a)(1),

745.89(d)(3), 745.85(a)(2)(ii)(C), and 745.89(d)(3), and Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689, for his activities related to the Broad Street Property.

2. Complainant is hereby **ORDERED** to file, on or before **December 29, 2023**,
   a. a statement, and any documents in support, explaining in detail its determination that the Extent of Respondent's failure to perform a renovation without the required firm certification was "Minor" and how it arrived at the gravity-based penalty figure of $12,240 for Respondent's failure to distribute a copy of EPA's Renovate Right pamphlet to the owners of the Broad Street Property and to post appropriate signs at the work site; and
   b. complete information about the analysis that Complainant performed regarding Respondent's ability to pay the proposed penalty.

3. Pursuant to Section 22.17(c) of the Rules of Practice, **Respondent may move for this Default Order to be set aside for good cause shown**. 40 C.F.R. § 22.17(c).

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: November 28, 2023
Washington, D.C.

In the Matter of *Robert Lauter d/b/a Prime Cut Paint*, Respondent.
Docket No. TSCA-03-2023-0034

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Default Order**, dated November 28, 2023, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original by OALJ E-Filing System to:
U.S. Environmental Protection Agency
Office of Administrative Law Judges
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

Copy by Electronic Mail to:
Patrick J. Foley
Conner Kingsley
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 3
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Email: kingsley.conner@epa.gov
Counsel for Complainant

Copy by Electronic, Regular, and Certified Mail to:
Robert Lauter
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1414 Baychester Avenue
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Email: primecutpaint@gmail.com
Certified Return Receipt No. 7020-0090-0002-1746-3373
Respondent

Dated: November 28, 2023
Washington, D.C.