UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

IN THE MATTER OF:	)	
	)	
SUPERIOR RESTORATION	)	
& CONSTRUCTION, LLC,	)	Docket No. TSCA-07-2016-0017
	)	
Respondent.	)	
	)	

INITIAL DECISION AND DEFAULT ORDER

I. Background and Statement of the Case

On August 16, 2016, pursuant to Sections 16(a) and 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2615(a) and 2689, the Chief of the Toxics and Pesticides Branch in the Water, Wetlands and Pesticides Division, United States Environmental Protection Agency, Region 7 ("Complainant" or "EPA"), initiated this proceeding by filing a nine (9) count Complaint and Notice of Opportunity for Hearing ("Complaint") under Section 16(a) of TSCA, 15 U.S.C. § 2615(a). The Complaint alleged that Superior Restoration & Construction, LLC, ("Respondent") violated Section 409 of TSCA, 15 U.S.C. § 2689, by failing to comply with the regulatory requirements of 40 C.F.R. Part 745, Subpart E, *Residential Property Renovation*, promulgated pursuant to 15 U.S.C. §§ 2682, 2686, and 2687.

No response to the Complaint was filed.[1] Consequently, on March 28, 2018, Complainant filed a Motion for Default Order ("Motion"), requesting that Respondent be found in default and that a default order be issued requiring Respondent to pay a civil administrative penalty in the amount of Forty-Four Thousand Six Hundred and Eighty Dollars ($44,680), for the violations alleged in the Complaint.

Based upon the record in this matter and for the reasons discussed below, Complainant's Motion for Default Order is **GRANTED**. Pursuant to Sections 22.17(a) and (c) 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 ("Consolidated Rules" or "Rules"), 40 C.F.R. Part 22, Respondent is found to be in default for failure to file an Answer to the Complaint and failing to respond to a Show Cause Order, and is assessed a civil penalty in the amount of $44,680 for its violations of TSCA as set forth in the Complaint.

[1] See Affidavit of Lisa Haugen, Regional Hearing Clerk, Exhibit L to Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order.

II. Standards for Default

This proceeding is governed by the Consolidated Rules, which provide that "A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing." 40 C.F.R. § 22.17(a).

A finding of default requires a showing that the party against which default is sought has been properly served. *Mid-Continent Wood Products, Inc. v. Harris*, 936 F.2d 297, 301 (7th Cir. 1991) (default judgment vacated where complaint not properly served; "actual knowledge of the existence of a lawsuit is insufficient to confer personal jurisdiction over a defendant in the absence of valid service of process.")

The Consolidated Rules provide that "[d]efault 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." 40 C.F.R. § 22.17(a). The consequences of default are as follows:

> When the Presiding Officer finds that default has occurred, [she] 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. . . . The relief proposed in the complaint or the motion for default 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).

As to a determination of whether good cause exists for not issuing a default order, the Environmental Appeals Board ("EAB" or "Board") "has traditionally applied a 'totality of circumstances' test to determine whether a default order should be . . . entered . . . ." *JHNY, Inc.*, 12 E.A.D. 372, 2005 WL 2902519, at *9 (EAB 2005). The Board considers several factors under this test, including the alleged procedural omission, namely whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there was a valid excuse or justification for not complying with the procedural requirement. *Id*.

If a respondent is found in default, it has waived the right to contest factual allegations, but nevertheless default "does not constitute a waiver of respondent's right to have [an administrative law judge] evaluate whether the facts as alleged establish liability or whether the relief sought is appropriate in light of the record." *Peace Industry Group (USA), Inc.*, 17 E.A.D. 348, 2016 WL 7441011, at * 6 (EAB 2016) (quoting *Mountain Village Parks, Inc.*, 15 E.A.D. 790, 798 (EAB 2013)). The judge "must ensure that in the pending case the [EPA] has applied the law and the Agency's policies consistently and fairly." *Id*., 2016 WL 7441011, *12 (quoting *Mountain Village Parks, Inc.*, 15 E.A.D. 790, 797 (EAB 2013)).

III. Findings, Conclusions and Analysis as to Service

On a motion for default, particularly in the situation where a respondent has not filed anything in the proceeding, the initial question is whether the respondent was properly served with the Complaint. *Las Delias Cmty.*, 14 E.A.D. 382, 387 (E.P.A.), 2009 WL 5326320, *5 (Aug. 17, 2009) (citing *Medzam, Ltd.*, 4 E.A.D. 87, 93 (EAB 1992). "Agencies are free to craft their own rules, reflecting requirements of due process, that determine whether service is proper, and they are not required to follow the Federal Rules of Civil Procedure." *Las Delias Cmty.*, 14 E.A.D. at 387-88, 2009 WL 5326320, *5 (citing *Katzson Bros., Inc. v. U.S. Envtl. Prot. Agency*, 839 F.2d 1396, 1399 (10th Cir. 1988)). Recognizing that the EPA "availed itself of this opportunity by establishing its Consolidated Rules of Practice," the United States Court of Appeals for the Tenth Circuit held that "[t]hese rules and the requirements of due process alone determine whether EPA's service is proper." *Katzson Bros., supra,* at 1399; *Katzson Bros., Inc.*, 2 E.A.D. 134, 135 n. 2 (EAB 1986) ("[S]ervice of process rules must comport with notions of fundamental fairness."). Together with its Motion for Default, Complainant also filed a Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order ("Memorandum in Support"), which details how Complainant served the Complaint on Respondent and includes exhibits as supporting documents.

Records of the Kansas Secretary of State show that Limited Liability Company Articles of Organization were filed by Respondent on December 5, 2013. Memorandum in Support at p. 9; Exhibit A to Memorandum in Support. The Articles of Organization show Cory W. Poulsen as the registered agent and the registered office and mailing address as 23625 W 92nd Terrace, Lenexa, Kansas 66227. *Id.* The same individual and mailing address for Respondent's registered agent were recertified in annual reports filed with the Kansas Secretary of State in 2015, 2016, and 2017. Memorandum in Support at p. 9; Exhibit B to Memorandum in Support. These annual reports list Cory Poulsen as the only member and an official mailing address of 23625 W 92nd Terrace, Lenexa, Kansas 66227. *Id.*

On February 16, 2016, the EPA sent a pre-filing letter concerning alleged TSCA violations by certified mail, return receipt requested, to Mr. Poulsen at Respondent's registered office on W 92nd Terrace in Lenexa, Kansas. Exhibit C to Memorandum in Support, Pre-Filing Negotiations Letter (Feb. 16, 2016). The letter was returned unclaimed in March 2016 and a second attempt was made to transmit the pre-filing negotiations letter to a listed business address, 9202 Nieman Road in Overland Park, Kansas, via certified mail on March 18, 2016. Exhibit D to Memorandum in Support, Pre-Filing Negotiations Letter (March 18, 2016). Delivery of this letter was also unsuccessful. *Id.* In order to verify a current mailing address for Respondent, representatives of the EPA called Mr. Poulsen on March 23, 2016. Memorandum in Support at p. 10. Mr. Poulsen answered the phone and confirmed that the address on West 92nd Terrace is his home as well as the address for the company. *Id.* With this information, the EPA transmitted another pre-filing negotiations letter via certified mail to Respondent's address of record on March 24, 2016. *Id*. This letter was returned to the Agency unclaimed in April 2016. Exhibit E to Memorandum in Support, Pre-Filing Negotiations Letter (March 24, 2016).

After the third failed attempt to deliver a pre-filing negotiations letter via certified mail, an inspector affiliated with Region 7's Toxics and Pesticides Branch attempted to deliver a copy

of the pre-filing negotiations letter via personal service to Mr. Poulsen at the registered office Lenexa address on June 10, 2016. Exhibit F to Memorandum in Support, Memorandum from John Leftwich to Candace Bednar (June 13, 2016). This attempt of personal service was unsuccessful. *Id*. The EPA inspector then made a second attempt to render personal service on Mr. Poulsen at Respondent's last known business address, 9202 Nieman Road in Overland Park, Kansas, the same address to which the Agency's second pre-filing letter was sent. *See* Exhibit D to Memorandum in Support, Pre-Filing Negotiations Letter (March 18, 2016). Personal service at this location was also unsuccessful. *See supra* Exhibit F. Finally, an internet search revealed a second location in Overland Park, Kansas that was associated with Respondent's business. Memorandum in Support at p. 11. The EPA's inspector personally visited this address, 7861 Mastin Drive, on June 13, 2016, where he encountered a woman who identified herself as Heather Stuart, office manager for Superior Restoration & Construction, LLC. Exhibit G to Memorandum in Support, Memorandum from John Leftwich to Candace Bednar (June 14, 2016). Ms. Stuart explained to the EPA's inspector that the company was in the process of moving to the new location on Mastin Drive and had not yet had time to erect signage.[2] *Id*. Ms. Stuart stated that Mr. Poulsen was not in, but she would be sure to give the letter to him. *Id*.; Exhibit H to Memorandum in Support, Affidavit of Delivery of Pre-Filing Negotiations Letter (June 15, 2016).

Respondent did not contact the EPA during the pre-filing negotiations period[3], and the Complaint in this matter was filed by Complainant and transmitted to Respondent on August 16, 2016. Exhibit I to Memorandum in Support, Transmittal of Complaint and Notice of Opportunity for Hearing (Aug. 16, 2016). Having previously failed to deliver the pre-filing negotiations letter by both certified mail and personal service at Respondent's registered office address, Complainant sent the Complaint via the U.S. Postal Service's (USPS) certified mail, return receipt requested service to 7861 Mastin Drive in Overland Park, Kansas, the address at which the EPA's inspector had successfully made contact with Respondent's office manager and which the office manager had identified as Respondent's new business location. Memorandum in Support at p. 11; *See supra*, Exhibit H. The Complaint was addressed to Mr. Cory Poulsen, Respondent's Registered Agent. Exhibit J to Memorandum in Support, Transmittal of Proof of Service of Complaint and Notice of Opportunity for Hearing (Aug. 29, 2016). The return receipt was signed, albeit not entirely legible, but not dated. However, the USPS written tracking record indicates the Complaint was delivered on August 19, 2016, at 10:23 am to the front desk/reception. The signed certified return receipt was returned to Complainant. *Id*. Complainant filed a copy of the return receipt and USPS tracking information with the Regional Hearing Clerk on August 29, 2016. *Id.*

Respondent is a limited liability company (LLC) organized under the laws of the State of Kansas. As noted by Complainant in its Memorandum in Support, as well as the Environmental Appeals Board, the Consolidated Rules do not specifically address service requirements on limited liability companies nor do the Consolidated Rules define "unincorporated association."

[2] A business entity search on July 18, 2022 of Superior Restoration & Construction LLC on the State of Kansas Secretary of State's Office shows the current mailing address and registered office as 7861 Mastin Drive, Overland Park, Kansas 66204.

[3] Prior to filing an administrative complaint, Region 7 ordinarily allows 10 days for a respondent to contact the Agency after it has received an invitation to engage in settlement negotiations. Memorandum in Support, p. 11, fn.2.

See Las Delias Cmty., *supra,* 14 E.A.D. 382, 389 (E.P.A. 2009), 2009 WL 5326320 *6 ("The CROP does not define the term "unincorporated association"). As a result of this omission, Complainant asserts that, for purposes of service of the complaint, limited liability companies are generally considered to be unincorporated associations. Memorandum in Support, p. 3, n.1.

The Consolidated Rules do, however, describe the service requirements for corporations and unincorporated associations. "Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process." 40 C.F.R. § 22.5(b)(1)(ii)(A). "Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint . . . . Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written notification of delivery." 40 C.F.R. § 22.5(b)(1)(i). "Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt . . . and shall be filed with the Regional Hearing Clerk immediately upon completion of service." 40 C.F.R. § 22.5(b)(1)(iii). Service of the complaint is complete when the return receipt is signed. 40 C.F.R. § 22.7(c).

40 C.F.R. § 22.5(b)(1)(ii)(A) discusses service on "an unincorporated association which is subject to suit under a common name." Thus, in addition to meeting the definition of "unincorporated association," the regulation also requires that the unincorporated association "is subject to suit under a common name." This plain reading is supported by Environmental Appeals Board precedent. In its analysis of whether service of the complaint was proper, the Board, in *Las Delias Cmty., supra,* first determined that the respondent Community was an unincorporated association and then addressed the issue of whether the unincorporated association, i.e., the Community, was subject to suit under a common name. *Id.*, 14 E.A.D. at 390-391; 2009 WL at *7. Complainant's assertion that limited liability companies are generally considered to be unincorporated associations was without much substantive legal and factual analyses. Additionally, nowhere in Complainant's Memorandum in Support did the Agency discuss the second part of the regulation's requirement that the unincorporated association "is subject to suit under a common name." On June 25, 2019, I issued a Third Order to Complainant to Supplement the Record to provide additional briefing to address the requirements of 40 C.F.R. § 22.5(b)(1)(ii)(A). Complainant filed its response to the Third Order to Supplement the Record on September 26, 2019.[4]

Unlike certain other states, Kansas's LLC statute does not provide a convenient statement defining a limited liability company as an unincorporated association. *Cf.* KAN. STAT. ANN. § 17-7663(f) (2019) (defining LLC as "a limited liability company formed under the laws of the state of Kansas and having one or more members") *with* 18 OKLA. STAT. tit.18 § 2001 (2017) (defining LLC as "an entity that is an unincorporated association or proprietorship having one or more members"); N.Y. LIMITED LIABILITY COMPANY LAW § 102(m) (McKinney 2006) (defining LLC as "an unincorporated organization of one or more persons having limited liability"); MICH.

[4] On July 12, 2019, Complainant filed a Motion for Extension of Time to File Response to Third Order to Supplement the Record. Respondent did not file a response to Complainant's motion. Complainant's Motion for Extension of Time to File Response to Third Order to Supplement the Record was granted on August 5, 2019.

COMP. LAWS § 450.4102(k) (2016) (defining LLC as "an entity that is an unincorporated membership organization formed under this act"); LA. R.S. 12:1301 (West 2014) (defining LLC as "an entity that is an unincorporated association having one or more members"); IND. CODE § 23-18-1-11 (defining LLC as "an unincorporated association organized under this article"); MD. CODE ANN. § 4A-101 (West 2012) (defining LLC as "a permitted form of unincorporated business organization"); OR. REV. STAT. ANN. § 60.001 (defining LLC as "an unincorporated association that has one or more members"); MISS. CODE ANN. § 79-29-105 (defining LLC as "an entity having one or more members that is an unincorporated company or unincorporated association").

However, Complainant contends that, in the context of the Kansas statutes, LLCs are impliedly treated as "unincorporated associations" through the legislature's use of that generic term to distinguish a corporation from other types of entities. *See, e.g.,* KAN. STAT. ANN. § 21-5111 (defining "person" in the Kansas Criminal Code as "an individual, public or private corporation, government, partnership, or unincorporated association"); § 21-6506 (criminalizing bribery of "an officer, director, partner, manager or other participant in the affairs of a corporation, partnership or unincorporated association"); § 32-701 ("'Person' means any individual or any unincorporated association, trust, partnership, public or private corporation or governmental entity . . . ."); § 40-3401(k) ("'Rating organization means a corporation, an unincorporated association, a partnership or an individual licensed pursuant to K.S.A. 40-956, and amendments thereto, to make rates for professional liability insurance."); § 75-2743 ("'Person' means an individual, unincorporated association, partnership, limited partnership, corporation or governmental entity"). *See* Complainant's Response to Third Order to Supplement the Record at p. 7. According to Complainant, Kansas law concerning service of process includes limited liability companies among other business organizations—partnerships, limited partnerships, and limited liability partnerships—in a list that concludes with the catch-all phrase "or other unincorporated association." KAN. STAT. ANN. § 60-304(e) (2019). Complainant's Response to Third Order to Supplement the Record at p. 7-8. Complainant contends that although the provision also refers to "domestic or foreign corporation," the illustrative effect of the list is reasonably limited to the enumerated non-corporate entities given the legislature's consistent distinction between corporations and other business organizations. *Yates v. U.S*, 574 U.S. 528, 135 S.Ct. 1074, 1086 (2015) ("Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (internal quotation marks omitted); *Trego WaKenney State Bank v. Maier*, 519 P.2d 743, 748 (Kan. 1974). Complainant's Response to Third Order to Supplement the Record at p. 8.

Although the Consolidated Rules do not specifically define or include limited liability companies in discussing service, the Administrative Law Judge, in *Polo Development, Inc. Aim Georgia, LLC, and Joseph Zdrilich*, 2015 WL 627637, * 22 (EPA Feb. 6, 2015), found that "A limited liability company is not a corporation, but rather is an "unincorporated association."" *Id. citing Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 705 (4th Cir. 2010) (to establish diversity jurisdiction within the meaning of 28 U.S.C. § 1332(d)(10)). In addition, in cases involving diversity jurisdiction, federal courts have concluded that a limited liability company is an unincorporated business association. S*ee Siloam Springs Hotel, LLC v. Century Surety Co.*, 781 F.3d 1233 (10th Cir. 2015) ("Like every other circuit to consider this question,

the court concludes an LLC, as an unincorporated association, takes the citizenship of all its members."); *Ambac Assurance Corp. v. Fort Leavenworth Frontier Heritage Communities, II, LLC*, 315 F.R.D. 601, 611 (D. Kan. 2016) ("In our Circuit, "an LLC, as an unincorporated association, takes the citizenship of all its members,"" *citing Siloam Springs Hotel, LLC v. Century Surety Co.*, 781 F.3d at 1234; *Yusef v. Stevens*, , No. 21-2313-SAC-JPO, 2021 WL 4772958, *2 (D. Kan. Oct. 13, 2021) ("A limited liability company is "an unincorporated association"), *citing Siloam Springs Hotel, LLC v. Century Surety Co.*, 781 F.3d at 1236-37; (*Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 419-20 (3rd Cir. 2010) ("every federal court of appeals to address the question has concluded that a limited liability company, as an unincorporated business entity. . ."); *Gen'l Technology Applications, Inc. v. Exro Ltda.*, 388 F.3d 114, 121 (4th Cir. 2004) ("a limited liability company . . . is an unincorporated association"); *Pramco, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 54 (1st Cir. 2006) ("[l]imited liability companies are unincorporated entities"). Finally, in *Geismann v. Aestheticare, LLC*, 622 F. Supp.2d 1091, 1098, n. 4 (D. Kan. 2008), the U.S. District Court stated, "Under Kansas law, however, the designation "LLC" denotes a limited liability company. . . Because limited liability corporations do not exist under Kansas law, Aestheticare is clearly an unincorporated association." Therefore, for purposes of service, I conclude that Respondent is an unincorporated association and service must therefore comport with the Consolidated Rules for unincorporated associations. *See* 40 C.F.R. § 22.5(b)(1)(ii)(A).

In addition to finding that Respondent is an unincorporated association, I must also determine whether it is subject to suit under a common name. 40 C.F.R. § 22.5(1)(ii)(A). As stated by the Board in *Las Delicias Cmty., supra,* at *7, "an unincorporated association's capacity to sue or be sued in its common name is determined by the law of the forum state," citing FED. R. CIV. P. 17(b); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 53 (2nd Cir. 1991); *Jaser v. New York Prop. Ins. Underwriting Ass'n*, 815 F.2d 240, 244 (2nd Cir. 1987). According to Complainant, in Kansas, the common law rule prevails that, "in the absence of a statute to the contrary, an unincorporated association is not a legal entity and can neither sue or be sued in the name of the association." *Kansas Private Club Ass'n v. Londerholm*, 408 P.2d 891, 893 (Kan. 1965); *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 405 (Kan. 2002). Complainant's Response to Third Order to Supplement the Record at p. 5-6. Nevertheless, Kansas enacted a limited liability company law that supersedes the state's common law capacity rule. Complainant's Response to Third Order to Supplement the Record at p. 6. Pursuant to Kansas law, "[a] limited liability company formed under this act shall be a separate legal entity . . . ." KAN. STAT. ANN. § 17-7673 (2019). Further, this LLC "may have and exercise all powers which may be exercised by a Kansas professional association or professional corporation under the professional corporation law of Kansas . . . ." KAN. STAT. ANN. § 17-7668(c) (2017). The professional corporation law of Kansas provides that "the Kansas general corporation code . . . shall apply to a professional corporation organized pursuant to this chapter." KAN. STAT. ANN. § 17-2708 (2017). Pursuant to the Kansas general corporation code, "[e]very corporation created under this code shall have the power to . . . sue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitrative or other proceeding, in its corporate name." KAN. STAT. ANN. § 17-6102(b)(2017). By derivation of state law, therefore, Kansas LLCs may sue and be sued under a common name. Complainant's Response to Third Order to Supplement the Record at p. 6. This conclusion is amply evidenced by lawsuits and appeals litigated against Kansas LLCs in both state and federal court. *See, e.g.,*

Kansas City Royalty Co., LLC v. Thoroughbred Associates, LLC, 215 F.R.D. 628 (D. Kan. 2003); *Miller v. Glacier Dev't Co., LLC*, 270 P.3d 1065 (Kan. 2011). Complainant's Response to Third Order to Supplement the Record at p. 6. Pursuant to the law of the forum state, Respondent is therefore subject to suit under a common name as an LLC formed in accordance with Kansas law.

Turning now to the method of service utilized in this instance, in *Las Delias Cmty., supra,* the Board stated, "Although the CROP [Consolidated Rules of Practice] allows for anyone authorized under state law to receive service of process on behalf of an unincorporated association, such service must also comport with the procedural rules of the state where service is made." *Las Delias Cmty.*, 14 E.A.D. 382, 392-393 (E.P.A. Aug. 17, 2009), 2009 WL 5326320, *8 (Aug. 17, 2009). In the State of Kansas, service of process is governed by KAN. STAT. ANN. § 60-304. KAN. STAT. ANN. §§ 60-304(e)(1)-(2) states that service of process on a domestic limited liability company or unincorporated association that is subject to suit in a common name must be made by serving "an officer, manager, partner or a resident, managing or general agent" or by "leaving a copy of the summons and petition or other document at any of its business offices with the person having charge thereof." KAN. STAT. ANN. § 60-304 also states that, "Service by return receipt delivery on an officer, partner or agent must be addressed to the person at the person's usual place of business." KAN. STAT. ANN. § 60-303 sets forth the methods of service of process in Kansas. Pursuant to KAN. STAT. ANN. 60-303(c)(1), "Service of process may be made by return receipt delivery, which is effected by certified mail, priority mail, commercial courier service, overnight delivery service or other reliable personal delivery service to the party addressed, in each instance evidenced by a written or electronic receipt showing to whom delivered, the date of the delivery, the address where delivered, and the person or entity effecting delivery."

As stated above, the Complaint was addressed and directed to the Respondent's registered agent, sent by certified mail, return receipt requested, to an address where Complainant knew Respondent conducted business. The return receipt was signed, albeit not entirely legible, but not dated. However, the USPS tracking information shows that the Complaint was delivered on August 19, 2016, to the front desk/reception. A copy of the signed return receipt and USPS tracking information was filed with the Regional Hearing Clerk on August 29, 2016. Upon review of the facts, state law and legal precedents, I conclude that service of the complaint complied with the Consolidated Rules and satisfies principles of due process.

Concurrent with Complainant's Response to my Third Order to Supplement the Record, Complainant filed a separate First Motion for Leave to Supplement the Record, which sought leave to advance an alternative basis for determining the effectiveness of service of the Complaint on Respondent.[5] Complainant's First Motion also sought leave to supplement the Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order, as well as the Proposed Findings of Fact, Conclusions of Law, Default Order, and Initial Decision, both of which Complainant filed concurrently with its Motion for Default. In its First Motion for Leave to Supplement the Record, Complainant states that since filing pleadings in

[5] Complainant's First Motion for Leave to Supplement the Record was filed on September 26, 2019. Respondent did not file a response to Complainant's Motion. Complainant's Motion for Leave to Supplement the Record was granted on November 4, 2019.

this matter, it learned that several prior administrative enforcement matters reached inconsistent determinations regarding the status of limited liability companies under the Consolidated Rules. According to Complainant, respondent limited liability companies have been considered both a corporation and unincorporated association in administrative enforcement cases. Despite inconsistent application, however, the same service of process rule applies to both corporations and unincorporated associations. *See* 40 C.F.R. § 22.5(b)(1)(ii)(A). As a result, Complainant states that service of the Complaint on Respondent was effective under the Consolidated Rules whether it is defined as an unincorporated association, as initially argued, or alternatively, a corporation.

In *Spartan Diesel Technologies, LLC*, 2018 WL 5314792, *6 (EPA 2018), the Administrative Law Judge concluded that the respondent limited liability company was "a *corporation* organized under the laws of North Carolina." The Initial Decision and Order on Default became a final order when neither party appealed and the Environmental Appeals Board declined to review the case on its own initiative. *Spartan Diesel Technologies, LLC*, CAA Appeal No. 18-(03). In addition to *Spartan Diesel*, the Acting Regional Judicial Officer in *Atkinson Developers, LLC and Francis M. Atkinson, Jr.,* Default Initial Decision and Order (RJO Decision), Docket No. CWA-04-2010-5515 (Aug. 9, 2016), issued a decision that treated respondent LLC as a corporation (granting Motion for Default and finding "[Respondent is] a limited liability *corporation* incorporated under the laws of the State of South Carolina."), CWA Appeal No. 16-03 (Oct. 16, 2016) (order vacating order electing to exercise *sua sponte* review)[6]. In one other matter, however, the Administrative Law Judge found that the respondent LLC was an unincorporated association, an initial decision that was also made final by the Board's election to not exercise review authority. *Polo Development, Inc., AIM Georgia, LLC, and Joseph Zdrilich*, 2015 WL 627637, *22 (EPA 2015) ("A limited liability company is not a corporation, but rather is an 'unincorporated association.") and email from Eurika Durr, Clerk to the Environmental Appeals Board, to LaDawn Whitehead, Regional Hearing Clerk, EPA Region 5 (May 11, 2016) (notifying region that the EAB declined *sua sponte* review.) None of the decisions provides an explanation or discussion of how the determination of whether an LLC is a corporation or unincorporated association was reached.

In either instance—whether Respondent is considered an unincorporated association or a corporation—Complainant contends that service of the complaint on Respondent was effective under 40 C.F.R. § 22.5 (b)(1)(ii)(A). If, in the alternative, Respondent is considered a corporation, Complainant states that the outcome is governed by prior Board decisions and the United States District Court for the Tenth Circuit. *Peace Industry Group (USA) Inc.*, 17 E.A.D. No. 16-01, 2016 EPA App. LEXIS 56, *36 (Dec. 22, 2106) ("[P]roper service on a corporation by certified mail does not require that the named addressee be the person who signs the return receipt . . . [I]n serving a corporation, if EPA properly addresses and mails the complaint by certified mail, and an individual at that address signs and returns the receipt, service is complete."); *Jonaway Motorcycle (USA) Co., Ltd.*, 2014 EPA App. LEXIS 45, *14 and n.13

[6] Complainant also cites to *Mardaph II LLC, Mardaph III LLC, and Vinnie Wilson*, Docket No. TSCA-05-2008-0019 (June 18, 2010) as an example of an administrative enforcement action that treated respondent LLCs as corporations. However, upon my review of the Initial Decision and Order on Penalty, as well as the Decision and Order on Penalty, Docket No. TSCA-05-2008-0019 (April 15, 2010), I do not see any discussion or statement to this effect in the Decisions.

(Nov. 14, 2014) ("[T]he designated agent's] signature on the return receipt . . . [is] not a necessary prerequisite to a finding of valid service on a corporation . . . [T]here is nothing in the rules that prevents EPA from serving [a corporation's] designated agent at an address where he can be found. . . To conclude otherwise would allow parties to avoid service by refusing to accept service at their official service addresses or by listing sham service addresses."); *In re Katzson Bros., Inc.*, 2 E.A.D. 134, 135 n. 2 (EAB 1986); 1986 WL 69010, *3 n. 2 ("[S]ervice of process in an administrative action must comport with notions of fundamental fairness."); *Katzson Bros., Inc. v. U.S. Envtl. Prot. Agency*, 839 F.2d 1396, 1399 (10th Cir. 1988) (upholding the Board's determination that service on a corporation by certified mail, return receipt requested, "need only be addressed, rather than actually delivered, to an officer, partner, agent, or other authorized individual.").

In this case, Complainant encountered repeated difficulties with trying to serve Respondent the pre-filing letter at the registered office address even after contacting Respondent to verify the address. As a result, Complainant served the Complaint by certified mail return receipt requested, addressed and directed to Cory Poulsen, Respondent's registered agent, at 7861 Mastin Drive in Overland Park, Kansas, the address at which the EPA's inspector had successfully made contact with Respondent's office manager and which was identified by the office manager as Respondent's new business location. The return receipt was signed. Complainant thus employed "a procedure reasonably calculated to achieve notice" to the Respondent of the commencement of this action. *See Katzson Bros., Inc. v. U.S. Envtl. Prot. Agency,* 839 F.2d 1397, 1400 (10th Cir. 1988). As discussed above, if Respondent is an unincorporated association, service was proper under the Consolidated Rules. Even assuming *arguendo* that Respondent should be considered a corporation, service was also proper and satisfies principles of due process.

IV. Findings of Fact and Conclusions of Law

Pursuant to 40 C.F.R. § 22.17(c) and 22.27(a), and based upon the entire record in this matter, I make the following findings of fact and conclusions of law:

1. Complainant is the Chief of the Toxics and Pesticides Branch, Water, Wetlands and Pesticides Division, United States Environmental Protection Agency, Region 7.

2. Respondent, at all times relevant to this matter, is Superior Restoration & Construction, LLC, a limited liability company operating under the laws of the State of Kansas.

3. On August 16, 2016, pursuant to Sections 16(a) and 409 of TSCA, 15 U.S.C. §§ 2615(a) and 2689, Complainant filed a nine (9) count Complaint and Notice of Opportunity for Hearing against Respondent in accordance with the Consolidated Rules of Practice, 40 C.F.R. Part 22.

4. The Complaint alleged violations by Respondent of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R. Part 745, Subpart E, in connection with a renovation performed at a property located at 3415 Charlotte Street in Kansas City, Missouri.

5. The Complaint proposed to assess a penalty of $44,680 for the alleged violations.

6. Congress enacted the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851 to 4856, to address the need to control exposure to lead-based paint hazards. One of the stated purposes of the Act is to implement a broad program to reduce lead-based paint hazards in the Nation's housing stock. 42 U.S.C. § 4851a(2). The Act amended TSCA by adding Subchapter IV – Lead Exposure Reduction, Sections 401 to 412, 15 U.S.C. §§ 2681 through 2692, which provided authority to the EPA Administrator to promulgate implementing regulations.

7. Section 402 of TSCA, 15 U.S.C. § 2682, requires the EPA Administrator to promulgate regulations governing the training and certification of individuals and contractors engaged in lead-based paint activities, including renovation of residences built prior to 1978.

8. Pursuant to Section 402(a) of TSCA, 15 U.S.C. § 2682(a), the EPA promulgated regulations at 40 C.F.R. Part 745, Subpart L, *Lead-Based Paint Activities*. *See* Lead; Requirements for Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities, 61 Fed. Reg. 45778, 45813 (Aug. 29, 1996). Pursuant to Section 406(b) and Section 407 of TSCA, 15 U.S.C. §§ 2686(b) and 2687, the EPA promulgated regulations at 40 C.F.R. Part 745, Subpart E, *Residential Property Renovation*. *See* Lead; Requirements for Hazard Education Before Renovation of Target Housing, 63 Fed. Reg. 29908, 29919 (June 1, 1998). Finally, pursuant to Section 402(c)(3) of TSCA, 15 U.S.C. § 2682(c)(3), the EPA amended and re-codified regulations at 40 C.F.R. Part 475, Subparts E and L, and added additional regulations at 40 C.F.R. Subpart L ("Renovation, Repair, and Painting Rule"). *See* Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692, 21758 (Mar. 31, 2008).

9. The Renovation, Repair and Painting Rule ("RRP Rule") establishes requirements and procedures for the education of owners and occupants of certain residential buildings, accreditation of training programs, certification of renovators, and work practice standards for renovation activities involving lead-based paint.

10. Pursuant to 40 C.F.R. §§ 745.80 and 745.82(a), the requirements of the RRP Rule apply to "all renovations performed for compensation in target housing and child-occupied facilities," except as described in 40 C.F.R. § 745.82(a)(1)-(3) and (b).

11. Pursuant to Section 409 of TSCA, 15 U.S.C. § 2689, it is unlawful for any person to fail or refuse to comply with a provision of TSCA Subchapter IV, or with any rule issued thereunder, including the requirements of 40 C.F.R. Part 745, Subpart E.

12. Pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a), any person who violates Section 409 of TSCA, 15 U.S.C. § 2689, shall be liable for a civil penalty.

13. Pursuant to 40 C.F.R. § 745.83, "*Person* means any natural or judicial person, including any individual, corporation, partnership, or association; any Indian Tribe, State, or

political subdivision thereof; any interstate body; and any department, agency, or instrumentality of the Federal Government."

14. Pursuant to 40 C.F.R. § 745.83, "*Firm* means a company, partnership, corporation, sole proprietorship or individual doing business, association, or other business entity; a Federal, State, Tribal, or local government agency; or a nonprofit organization."

15. Pursuant to 40 C.F.R. § 745.83, "*Renovation* means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement" as defined by 40 C.F.R. § 745.223. The term "renovation" includes (but is not limited to): the removal, modification or repair of painted surfaces or painted components; the removal of building components; weatherization projects; and interim controls that disturb painted surfaces. The term "renovation" does not include minor repair and maintenance activities."

16. Pursuant to Section 401(17) of TSCA, 15 U.S.C. § 2681(17) and 40 C.F.R. § 745.103, "*Target housing* means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than six years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling."

17. On or about September 17, 2015, and pursuant to Section 11 of TSCA, 15 U.S.C. § 2610, representatives of EPA conducted an inspection at the Property to evaluate Respondent's compliance with TSCA and the requirements of the RRP Rule ("EPA inspection").

18. Beginning on or about September 10, 2015, and continuing at least until September 17, 2015, Respondent was engaged in a renovation of the property located at 3415 Charlotte Street in Kansas City, Missouri ("the Property"), that included the removal of an 8-by-7 foot wall and the replacement of 13 windows.

19. At all times relevant to this proceeding, Respondent was a "person," firm," and "renovator" as those terms are defined by 40 C.F.R. § 745.83.

20. The Property was built in 1904.

21. The Property was unoccupied at the time of the renovation, and children less than six years of age neither occupied nor were present at the Property at the time of Respondent's renovation.

22. At all times relevant to this proceeding, a private party owned the Property and hired Respondent to perform the renovation activities described in paragraph 18, above.

23. At all times relevant to this proceeding, the Property was "target housing" as defined by Section 401(17) of TSCA, 15 U.S.C. § 2681(17).

24. Respondent's renovation activities at the Property were a "renovation[s] for compensation in target housing" and "renovation" within the meaning of 40 C.F.R.

§§ 745.82 and 745.83.

25. As a result of the EPA inspection and additional information obtained by the Agency, Complainant determined that violations of the RRP Rule and Section 409 of TSCA, 15 U.S.C. § 2689, occurred as a result of Respondent's renovation activities at the Property.

Count 1 – Failure to Obtain Initial Firm Certification

26. Pursuant to 40 C.F.R. § 745.81(a)(2)(ii), firms performing renovations for compensation on or after April 22, 2010, must be certified by the EPA and have obtained initial certification prior to performance of renovations, unless the renovation qualifies for one of the exceptions identified in 40 C.F.R. § 745.82.

27. Pursuant to 40 C.F.R. § 745.89(a)(1), firms that perform renovations for compensation must apply to EPA for certification to perform renovations or dust sampling.

28. The EPA inspection revealed that Respondent had not applied for or obtained certification from EPA to perform renovations or dust sampling prior to renovation on the Property. The renovation did not qualify for one of the exceptions identified in 40 C.F.R. § 745.82.

29. Respondent's failure to apply to the EPA for certification pursuant to 40 C.F.R. § 745.89(a)(1) prior to performance of the renovation on the Property is a violation of 40 C.F.R. § 745.81(a)(2)(ii). Respondent therefore violated Section 409 of TSCA, 15 U.S.C. § 2689.

Count 2 – Failure to Distribute Information

30. Pursuant to 40 C.F.R. § 745.84(a)(1), firms performing renovation activities in any residential dwelling unit of target housing must provide the owner of the unit with the EPA pamphlet entitled *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools* ("EPA Pamphlet") no more than 60 days before beginning the renovation.

31. The EPA inspection revealed that Respondent did not provide the owner of the Property with the EPA Pamphlet before beginning renovation activities on the Property.

32. Respondent's failure to provide the owner of the Property with the EPA Pamphlet prior to beginning renovation activities is a violation of 40 C.F.R. § 745.84(a)(1) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 3 – Failure to Ensure Certified Renovator Assigned to Renovation

33. Pursuant to 40 C.F.R. § 745.89(d)(2), firms performing renovations must ensure that a certified renovator is assigned to each renovation performed by the firm and discharges all of the certified renovator responsibilities identified in 40 C.F.R. § 745.90.

34. The EPA inspection revealed that Respondent did not assign a certified renovator to the renovation performed on the Property.

35. Respondent's failure to ensure that a certified renovator was assigned to the renovation of the Property is a violation of 40 C.F.R. § 745.89(d)(2) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 4 – Failure to Post Signs

36. Pursuant to 40 C.F.R. § 745.81(a)(4)(ii), all renovations must be performed in accordance with the work practice standards in 40 C.F.R. § 745.85. 40 C.F.R. § 745.85(a)(1) requires firms to post signs clearly defining the work area and warning occupants and other persons not involved in the renovation activities to remain outside of the work area.

37. The EPA inspection revealed that Respondent failed to post protective signs during the renovation. No caution tape and warning signs were posted around the yard, front porch, or interior living spaces of the Property where renovation and waste-collection activities were occurring.

38. Respondent's failure during the renovation of the Property to post signs clearly defining the work area and warning occupants and other persons not involved in renovation to remain outside of the work area is a violation of 40 C.F.R. § 745.85(a)(1) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 5 – Failure to Remove From or Cover Objects In Work Area

39. Pursuant to 40 C.F.R. § 745.81(a)(4)(ii), all renovations must be performed in accordance with the work standards in 40 C.F.R. § 745.85. 40 C.F.R. § 745.85(a)(2)(i)(A) requires firms to remove all objects from the work area, including furniture, rugs, and window coverings, or cover them with plastic sheeting or other impermeable material with all seams and edges taped or otherwise sealed.

40. The EPA inspection revealed that Respondent did not remove objects from the work area. There were drinking glasses, pots and pans, a microwave, window blinds, and other household items present and uncovered in the kitchen where renovation activities were ongoing. Additionally, where Respondent had covered certain objects left on kitchen cabinets and countertops with plastic sheeting, the edges of the plastic sheeting were not sealed to the floor.

41. Respondent's failure during the renovation of the Property to remove all objects from the work area or cover them with sealed plastic sheeting or other impermeable material is a violation of 40 C.F.R. § 745.85(a)(2)(i)(A) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 6 – Failure to Close All Windows and Doors

42. Pursuant to 40 C.F.R. § 745.81(a)(4)(ii), all renovations must be performed in accordance with the work standards in 40 C.F.R. § 745.85. 40 C.F.R. § 745.85(a)(2)(i)(C) requires firms to close windows and doors in the work area and cover doors with plastic sheeting or other impermeable material. Doors used as an entrance to the work area must be covered with plastic sheeting or other impermeable material in a manner that allows workers to pass through while confining dust and debris to the work area.

43. The EPA inspection revealed that Respondent did not cover doors with plastic sheeting or other impermeable material. Photographs obtained by the EPA inspector show building supplies and renovation waste on and around the front porch of the Property. Such photographs also show that the front porch entry door to the Property was not covered with plastic sheeting or other impermeable material.

44. Respondent's failure during the renovation of the Property to cover all doors in the work area with plastic sheeting or other impermeable material is a violation of 40 C.F.R. § 745.81(a)(4)(ii) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 7 – Failure to Cover Floor Surface

45. Pursuant to 40 C.F.R. § 745.81(a)(4)(ii), all renovations must be performed in accordance with the work standards in 40 C.F.R. § 745.85. 40 C.F.R. § 745.85(a)(2)(i)(D) requires firms to cover the floor surface, including installed carpet, with taped-down plastic sheeting or other impermeable material in the work area six feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to contain the dust, whichever is greater.

46. The EPA inspection revealed that Respondent did not cover the floor surface in the work area with taped-down plastic sheeting or other impermeable material. Photographs obtained by the EPA inspector show that the kitchen and adjoining dining room floors were not covered where renovation activities were ongoing.

47. Respondent's failure during the renovation of the Property to cover the floor surface in the work area with taped-down plastic sheeting or other impermeable material is a violation of 40 C.F.R. § 745.81(a)(2)(i)(D) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 8 – Failure to Contain Waste

48. Pursuant to 40 C.F.R. § 745.81(a)(4)(ii), all renovations must be performed in accordance with the work standards in 40 C.F.R. § 745.85. 40 C.F.R. § 745.85(a)(4)(i) requires firms

to contain waste from renovation activities to prevent releases of dust and debris before the waste is removed from the work area for storage or disposal.

49. The EPA inspection revealed that Respondent did not contain waste from renovation activities at the Property before the waste was removed from the work area for storage or disposal. Photographs obtained by the EPA inspector show a large pile of construction and renovation waste on the front lawn of the Property. Additionally, windows removed from the Property were lined up against a tree in the yard. The inspection photographs show dust and debris on the lawn and sidewalk leading to the front porch of the Property.

50. Respondent's failure during the renovation of the Property to contain waste from renovation activities in order to prevent releases of dust and debris before the waste was removed from the work area for storage or disposal is a violation of 40 C.F.R. § 745.85(a)(4)(i) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 9 – Failure to Ensure Waste is Stored Under Containment

51. Pursuant to 40 C.F.R. § 745.81(a)(4)(ii), all renovations must be performed in accordance with the work standards in 40 C.F.R. § 745.85. 40 C.F.R. § 745.85(a)(4)(ii) requires firms, at the conclusion of each workday and at the conclusion of the renovation, to ensure that waste that has been collected from renovation activities is stored under containment, in an enclosure, or behind a barrier that prevents release of dust and debris out of the work area and prevents access to dust and debris.

52. The EPA inspection revealed that Respondent did not ensure that waste collected from renovation activities was stored under containment at the conclusion of each workday. Photographs obtained by the EPA inspector show a large pile of construction and renovation waste on the front lawn of the Property, as well as old windows lined up against a tree. The EPA inspection revealed that the renovations commenced on September 10, 2015, and at the time of the EPA inspection on September 17, 2015, Respondent was engaged in finishing work on the interior of the Property.

53. Respondent's failure during the renovation of the Property to ensure that waste collected from renovation activities was stored under containment at the conclusion of each workday is a violation of 40 C.F.R. § 745.85(a)(4)(ii) and Section 409 of TSCA, 15 U.S.C. § 2689.

54. Based upon the foregoing, I find that Respondent violated Section 409 of TSCA, 15 U.S.C. § 2689, and the federal regulations at 40 C.F.R. Part 745, Subpart E, as set forth in Counts 1 through 9 of the Complaint, and that Respondent's violations provide the legal basis for the assessment against Respondent of a civil monetary penalty pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2651(a).

55. 40 C.F.R. § 22.15(c) of the Consolidated Rules of Practice provides that in order for a respondent to contest any material fact in a complaint, to contend that the proposed penalty, compliance order or Permit Action is inappropriate, or to contend that it is

entitled to judgment as a matter of law, Respondent must file a written answer to the complaint with the appropriate Regional Hearing Clerk within thirty (30) days after service of the complaint.

56. Respondent failed to file an Answer to the Complaint.[7]

57. 40 C.F.R. § 22.17(a) of the Consolidated Rules of Practice provides that a party may be found in default upon failure to file a timely answer to a complaint or comply with an order of the Presiding Officer and default by a respondent constitutes, for purposes of the pending action, an admission of all facts alleged in the complaint and a waiver of a respondent's right to contest such factual allegations. When a Presiding Officer finds that a default has occurred, he or she "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." 40 C.F.R. § 22.17(c). A default order shall constitute an Initial Decision under the Consolidated Rules of Practice if it resolves all outstanding issues and claims in the proceeding. *Id.* "The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act [particular statute authorizing the proceeding at issue.]" *Id.*

58. On March 28, 2018, Complainant filed a Motion for Default Order and Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order seeking issuance of a Default Order holding Respondent in default in this matter, finding that Respondent had violated TSCA as set forth in the nine (9) counts in the Complaint and requesting the assessment of a civil penalty of $44,680 as proposed in the Complaint.

59. On March 30, 2018, Complainant's Motion for Default Order and Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order was served upon Respondent. Said Motion for Default Order and Memorandum was delivered to Respondent's place of business located at 7861 Mastin Drive in Overland Park, Kansas via the USPS's certified mail, return receipt requested service. The return receipt was signed and the USPS tracking information shows delivery on March 30, 2018. These filings were also transmitted via certified mail, return receipt requested, to the address of record of Respondent's registered agent in Lenexa, Kansas. This transmittal was returned to EPA as unclaimed.

[7] The Complaint filed in this matter informed Respondent that "If, within thirty (30) days of receipt of a Complaint, Respondent fails to: (a) submit full payment of the proposed penalty; (b) submit a written statement to the Regional Hearing Clerk that Respondent agrees to pay the penalty within sixty (60) days of receipt of the Complaint; or (c) file a written answer to the Complaint, Respondent may be found in default. Default by Respondent constitutes, for the purposes of this proceeding, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalty proposed in the Complaint shall be assessed unless the Presiding Officer finds that the proposed penalty is clearly inconsistent with the record of the proceeding or TSCA." (Complaint at ¶ 70); See also Affidavit of Lisa Haugen, Regional Hearing Clerk, Exhibit L to Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order.

60. Service of a motion is complete, *inter alia*, upon mailing. 40 C.F.R. § 22.7(c).

61. Complainant's Motion for Default Order was lawfully and properly served on Respondent in accordance with the Consolidated Rules of Practice, 40 C.F.R. § 22.7(c).

62. Respondent was required to file any response to the Motion for Default Order within eighteen (18) days of service of the Motion.[8] 40 C.F.R. §§ 22.7(c) and 22.16(b).

63. Respondent did not file a response to the Motion for Default Order, and such failure is deemed to be a waiver of any objection to the granting of Complainant's Motion. 40 C.F.R. § 22.16(b).

64. On May 1, 2018, I issued an Order to Show Cause and Supplement the Record, requiring Complainant to: 1) explain whether the revised April 4, 2013 Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule (the "LBP Consolidated ERPP") applies in this matter and if it applies, Complainant shall explain if the penalty calculation differs in any way from the penalty calculation utilizing the August 2010 LBP Consolidated ERPP; 2) provide a detailed discussion of the legal and factual basis for the requested penalty, including an analysis in light of the statutory factors and the 2013 LBP Consolidated ERPP. If the April 4, 2013, LBP Consolidated ERPP does not apply, Complainant shall explain why it does not apply; 3) supplement the record by submitting a declaration or affidavit by the Agency representative responsible for calculation of the penalty that demonstrates compliance with the statutory factors and any applicable Agency policies that were used, including either the 2010 or 2013 LBP Consolidated ERPP.

65. On May 23, 2018, Complainant filed its Response to Order to Show Cause and Supplement the Record, clarifying that the LBP Consolidated ERPP, issued by EPA in August 2010, was revised only in part in April 2013 and the revisions pertained specifically to Appendix A, relating to the "Circumstance Level" assigned to provisions of the Renovation, Repair, and Painting Rule. The revisions to Appendix A included the correction of regulatory citations, adjustment of Circumstance Level assignments, and subdivision of certain regulatory provisions. Aside from these discrete revisions to Appendix A, the structure and substance of the LBP Consolidated ERPP was unrevised at this time, remaining as issued in August 2010. In its Response, Complainant states that the proposed civil penalty was calculated utilizing the LBP Consolidated ERRP, as revised in April 2013.[9] Complainant also included, as Exhibit O, the Declaration of Case

[8] 40 C.F.R. § 22.16(b) provides that a response to a written motion must be filed within fifteen (15) days after service of such motion. In 2017 the Consolidated Rules of Practice (CROP) were revised and 40 C.F.R. § 22.7(c) was amended to provide that three (3) days, as opposed to the previously delineated five (5) days, are to be added to the time allowed under the CROP for the filing of a responsive document when service is effectuated by the U.S. mail.

[9] Complainant's response states that the specific Circumstance Level assigned to each of the nine alleged violations was derived from updated, i.e., April 2013, Appendix A of the LBP Consolidated ERPP. The remaining components of Complainant's penalty calculation relied on the relevant portions of the LBP Consolidated ERPP, as issued in August 2010.

Review Officer Candace Bednar, certifying her responsibility for Complainant's penalty calculation and its compliance with applicable statutory penalty factors and civil penalty guidelines contained in the LBP Consolidated ERPP.

66. On June 26, 2018, I issued a Second Order to Supplement the Record, requiring Complainant to submit documentation to support the relief sought in the Motion for Default, such as an affidavit or declaration of the person calculating the proposed penalty, which will specify in detail the factual grounds for the proposed penalty.[10]

67. On July 18, 2018, Complainant filed a Response to Second Order to Supplement the Record, submitting a Second Declaration of Case Review Officer Candace Bednar, providing a detailed description of the civil penalty calculation proposed in Complainant's Motion for Default Order.

68. On July 24, 2018, I issued an Order to Respondent to Show Cause why it failed to file both its Answer to the Complaint and a Response to Complainant's Motion for Default Order and why it should not be found in default in this matter and ordered Respondent to file its response on or before August 6, 2018.

69. Service of an Order is complete, *inter alia*, upon mailing. 40 C.F.R. § 22.7(c).

70. The Order to Respondent to Show Cause was served on Respondent on July 24, 2018, via the USPS's certified mail/return receipt requested service in accordance with the Consolidated Rules of Practice, 40 C.F.R. § 22.6.

71. Respondent did not file a response to the Order to Respondent to Show Cause. A party may be found to be in default after failure to comply with an order of the Presiding Officer. *See* 40 C.F.R. § 22.17(a). Default by respondent constitutes, for purposes of the proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. *Id.*

72. On June 25, 2019, I issued a Third Order to Complainant to Supplement the Record, requiring Complainant to provide additional briefing to specify the legal and factual basis that the Respondent in this matter is an "unincorporated association which is subject to suit under a common name," as required by 40 C.F.R. § 22.5(b)(1)(ii)(A) to apply.[11]

[10] The declaration of case review officer Candace Bednar that Complainant included in its Response to Order to Show Cause and Supplement the Record makes a conclusory allegation that the penalty was calculated in accordance with the statutory penalty factors and penalty policy. However, 40 C.F.R. § 22.17(b) provides that when a motion for default requests the assessment of a penalty, the movant must state the legal and factual grounds for the penalty requested. Therefore, a conclusory allegation that the penalty was calculated in accordance with the statutory factors or penalty calculations is insufficient. These legal and factual grounds are necessary in order for the Presiding Officer to set forth her reasons for adopting the proposed penalty. *See Katzson Brothers, Inc. v. U.S. EPA*, 839 F.2d. 1396, 1400 (10th Cir. 1988); *Harborlite Corporation v. ICC*, 613 F.2d. 1088, 1092-1093 (D.C. Cir. 1979).

[11] Complainant was also required to address whether Respondent, as a limited liability company, is an unincorporated association and, if so, whether it is subject to suit under a common name. Such additional briefing was required to address both relevant Environmental Appeals Board case law and any other applicable or relevant legal authorities.

73. On July 12, 2019, Complainant filed a Motion for Extension of Time to File Response to Third Order to Supplement the Record as a result of Complainant becoming aware of additional relevant information upon researching its response to the Third Order to Supplement the Record. Respondent did not file a response to Complainant's motion. Complainant's Motion for Extension of Time to File Response to Third Order to Supplement the Record was granted on August 5, 2019.

74. On September 26, 2019, Complainant filed a Response to Third Order to Supplement the Record, including Complainant's First Motion for Leave to Supplement the Record. Complainant's Motion for Leave to Supplement the Record was granted on November 4, 2019.

75. Having failed to file an answer to the Complaint or respond to the Show Cause Order, I find Respondent to be in default. Based upon a review of the factual record and procedural history of this matter, I find that no "good cause" or basis exists as to why a default order should not be issued against Respondent.

V. Determination of Civil Penalty Amount

Pursuant to Section 409 of TSCA, 15 U.S.C. §2689, it is unlawful for any person to fail or refuse to comply with a provision of Subchapter IV, Sections 401 through 412 of TSCA, 15 U.S.C. §§ 2681 through 2692, or any rule issued thereunder. Section 16(a)(1) of TSCA, 15 U.S.C. § 1615(a)(1), provides that any person who violates Section 409 of TSCA, 15 U.S.C. § 2689, is liable to the United States for a civil penalty in an amount not to exceed $37,500 for each such violation that occurred on or after January 13, 2009.[12] In determining the amount of a civil penalty to be assessed for such a violation, EPA is required to take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require ("statutory factors"). Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B).

The EAB has held that, "as the proponent of an order seeking civil penalties in administrative proceedings", the EPA bears the burden of proof as to the appropriateness of a civil penalty." *In re: Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 320 (EAB 2000). The "appropriateness" of a civil penalty is to be determined in light of the statutory factors set forth in TSCA Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). *Id*., *citing In re: New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994). However, although the EPA bears the burden of proof as to the appropriateness of a civil penalty, "it does not bear a separate burden with regard to each of the statutory factors." *Spitzer Great Lakes*, 9 E.A.D. at 320. Rather, in order to meet its burden and establish a *prima facie* case, the burden then shifts to the Respondent to rebut the EPA's case by

[12] In 2008, EPA promulgated a Civil Monetary Penalty Inflation Adjustment Rule pursuant to the Debt Collection Improvement Act of 1996, increasing the statutory maximum penalty under Section 16 of TSCA. 73 Fed.Reg. 75340-75346 (Dec. 11, 2008). On June 22, 2016, TSCA's statutory maximum was amended to $37,500 by Section 12 of the *Frank R. Lautenberg Chemical Safety for the 21st Century Act* (Public L. No. 114-182).

showing that the proposed penalty is not appropriate either because the EPA "failed to consider a statutory factor or because the evidence shows that the recommended calculation is not supported." *Id*., *citing New Waterbury*, 5 E.A.D. at 538-39, and *In re: Chempace Corp.*, 9 E.A.D. 119 (EAB 2000).

With regard to the issuance of a default order, "[t]he relief proposed in the complaint or the motion for default 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). 40 C.F.R. § 22.17(c) also provides that, if a default order resolves all outstanding issues and claims in the proceeding, it shall constitute an initial decision. For purposes of calculating a civil penalty to be assessed in an initial decision, a Presiding Officer is required to determine the penalty based on the evidence in the record of the case and in accordance with any penalty criteria set forth in the underlying statute. 40 C.F.R. § 22.27(b). A Presiding Officer is also required to consider any applicable civil penalty guidelines. *Id.*

For purposes of calculating penalties for cases involving violations of TSCA's RRP Rule, EPA issued guidance entitled the "*Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule* ("ERPP") (August 2010 and revised April 2013).[13] The ERPP sets forth EPA's analysis of the TSCA statutory factors as they apply to, *inter alia*, violations of the RRP Rule and provides a calculation methodology for applying the statutory factors to particular cases. ERPP at 8. Under the ERPP, there are two components of a penalty calculation, namely (1) determination of a gravity-based penalty based on the nature, circumstances, extent, and gravity of a respondent's violations, and (2) upward or downward adjustments of the gravity based penalty component in light of a respondent's ability to pay the penalty, effect of the

[13] On May 1, 2018, I issued an Order to Show Cause and Supplement the Record, requiring Complainant to: 1) explain whether the revised April 4, 2013 Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule (the "LBP Consolidated ERPP") applies in this matter and if it applies, Complainant shall explain if the penalty calculation differs in any way from the penalty calculation utilizing the August 2010 LBP Consolidated ERPP; 2) provide a detailed discussion of the legal and factual basis for the requested penalty, including an analysis in light of the statutory factors and the 2013 LBP Consolidated ERPP. If the April 4, 2013 LBP Consolidated ERPP does not apply, Complainant shall explain why it does not apply; 3) supplement the record by submitting a declaration or affidavit by the Agency representative responsible for calculation of the penalty that demonstrates compliance with the statutory factors and any applicable Agency policies that were used, including either the 2010 or 2013 LBP Consolidated ERPP.

On May 23, 2018, Complainant filed its Response to Order to Show Cause and Supplement the Record, clarifying that the LBP Consolidated ERPP, issued by EPA in August 2010, was revised only in part in April 2013 and the revisions pertained specifically to Appendix A, relating to the "Circumstance Level" assigned to provisions of the Renovation, Repair, and Painting Rule. The revisions to Appendix A included the correction of regulatory citations, adjustment of Circumstance Level assignments, and subdivision of certain regulatory provisions. Aside from these discrete revisions to Appendix A, the structure and substance of the LBP Consolidated ERPP was unrevised at this time, remaining as issued in August 2010. In its Response, Complainant states that the proposed civil penalty was calculated utilizing the LBP Consolidated ERRP, as revised in April 2013. Complainant's response states that the specific Circumstance Level assigned to each of the nine alleged violations was derived from updated, i.e., April 2013, Appendix A of the LBP Consolidated ERPP. The remaining components of Complainant's penalty calculation relied on the relevant portions of the LBP Consolidated ERPP, as issued in August 2010.

penalty on a respondent's ability to continue to do business, any history of prior such violations, the degree of a respondent's culpability, and such other matters as justice may require. ERRP at 9.

The gravity-based penalty component is determined by considering the nature and circumstances of a violation and the extent of harm that may result from a violation. The essential character of a violation is characterized as being of a "chemical control," "control-associated data gathering," or "hazard assessment" nature. ERPP at 14. A chemical control requirement is one which is "aimed at limiting exposure and risk presented by lead-based paint by controlling how lead-based paint is handled by renovators and abatement contractors." *Id.* A hazard assessment requirement is designed to provide owners and occupants of target housing, among others, with information that will allow them to weigh and assess the risks presented by renovations and to take proper precautions to avoid the hazards. *Id.* The classification of the nature of a violation has a direct impact on the measures used to determine the circumstance and extent of harm classifications of a violation under the ERPP. ERPP at 14-15.

The circumstance level reflects the probability that an owner or occupant of target housing will suffer harm based on a particular violation. "[T]he greater the deviation from the regulations, the greater the likelihood that people will be uninformed about the hazards associated with lead-based paint and any renovations, that exposure will be inadequately controlled during renovations, or that residual hazards and exposures will persist after the renovation/abatement work is completed." ERRP at 15. Under the ERPP, circumstance levels range from a 1 to 6, with Levels 1 and 2 having the highest probability of harm, Levels 3 and 4 posing a medium probability of harm, and Levels 5 and 6 posing a low probability of harm. ERPP at 15-16. Appendix A of the ERPP sets forth the circumstance levels for particular violations. ERPP at A-1 to A-10.

The extent of harm level of a violation may be characterized as either major, significant, or minor, depending on the degree, range and scope of a violation's potential for childhood lead poisoning. ERPP at 16-17. Major violations pose the potential for serious damage to human health and the environment. Significant violations have the potential for significant damage to human health and the environment. Finally, minor violations pose the potential for lesser damage to human health and the environment. ERRP at 16. For housing units occupied by a pregnant woman and/or a child of less than six years of age, a major classification is deemed appropriate. ERPP at 17. For housing units occupied by a child between six years of age and eighteen years of age, the extent of harm for violations under the ERPP is significant. *Id.* For housing units that are not occupied by children less than eighteen years of age, the appropriate extent of harm is minor. *Id.* The ERPP provides that a significant extent factor may be used when the age of the youngest individual is not known. *Id.*

A. Complainant's Penalty Calculation

In the Complaint and Motion for Default Order, Complainant proposed the assessment of a civil penalty in the amount of $44,680 against Respondent for its violations of TSCA.

In support of its Motion for Default, Complainant included the Second Declaration of Case Review Officer Candace Bednar, a compliance officer and credentialed inspector with the Toxics and Pesticides Branch of the Water, Wetlands & Pesticides Division of U.S. EPA Region 7 since 2011. Bednar Second Declaration at ¶ 1.[14] As part of her job responsibilities, Ms. Bednar calculated the proposed penalty for each of the violations alleged in the Complaint, taking into account the TSCA statutory factors by utilizing the penalty calculation methodology as set forth in the ERPP. Bednar Second Declaration at ¶ 5. Utilizing the ERPP, Complainant calculated the proposed penalty of $44,680 as follows:

Count 1 – Failure to Obtain Initial Firm Certification - 40 C.F.R. § 745.81(a)(2)(ii)
Nature: Chemical Control
Circumstance: Level 3a (medium probability of impact to human health/environment)
Extent: Minor (no individual younger than 18 resided in Property at time of renovation)
GBP Penalty Matrix: $4,500

Count 2 – Failure to Distribute Information - 40 C.F.R. § 745.84(a)(1)
Nature: Hazard Assessment
Circumstance: Level 1b (high probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $2,840

Count 3 – Failure to Ensure Certified Renovator Assigned to Renovation - 40 C.F.R. § 745.89(d)(2)
Nature: Chemical Control
Circumstance: Level 3a (medium probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $4,500

Count 4 – Failure to Post Caution Tape and Warning Signs - 40 C.F.R. § 745.85(a)(1)
Nature: Hazard Assessment
Circumstance: Level 1b (high probability of impacting human health/environment)

[14] The declaration of case review officer Candace Bednar that Complainant included in its Response to Order to Show Cause and Supplement the Record makes a conclusory allegation that the penalty was calculated in accordance with the statutory penalty factors and penalty policy. However, 40 C.F.R. § 22.17(b) provides that when a motion for default requests the assessment of a penalty, the movant must state the legal and factual grounds for the penalty requested. Therefore, a conclusory allegation that the penalty was calculated in accordance with the statutory factors or penalty calculations is insufficient. These legal and factual grounds are necessary in order for the Presiding Officer to set forth her reasons for adopting the proposed penalty. *See Katzon Brothers, Inc. v. U.S. EPA*, 839 F.2d. 1396, 1400 (10th Cir. 1988); *Harborlite Corporation v. ICC*, 613 F.2d. 1088, 1092-1093 (D.C. Cir. 1979). As a result, on June 26, 2018, I issued a Second Order to Supplement the Record, requiring Complainant to submit documentation to support the relief sought in the Motion for Default, such as an affidavit or declaration of the person calculating the proposed penalty, which will specify in detail the factual grounds for the proposed penalty. On July 18, 2018, Complainant filed a Response to Second Order to Supplement the Record, submitting a Second Declaration of Case Review Officer Candace Bednar, providing a detailed description of the civil penalty calculation proposed in Complainant's Motion for Default Order.

Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $2,840

Count 5 – Failure to Remove or Cover Objects From Work Area - 40 C.F.R. § 745.85(a)(2)(i)(A)
Nature: Chemical Control
Circumstance: Level 2a (high probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $6,000

Count 6 – Failure to Close All Windows and Doors - 40 C.F.R. § 745.85(a)(2(i)(C)
Nature: Chemical Control
Circumstance: Level 2a (high probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $6,000

Count 7 – Failure to Cover Floor Surface -40 C.F.R. § 745.85(a)(2)(i)(D)
Nature: Chemical Control
Circumstance: Level 2a (high probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $6,000

Count 8 – Failure to Contain Waste -40 C.F.R. § 745.85(a)(4)(i)
Nature: Chemical Control
Circumstance: Level 2a (high probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $6,000

Count 9 – Failure to Ensure Waste is Stored Under Containment -40 C.F.R. § 745.85(a)(4)(ii)
Nature: Chemical Control
Circumstance: Level 2 (high probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $6,000

Bednar Second Declaration at ¶¶ 13-48. Additionally, Complainant took into consideration, but did not increase or decrease, the proposed penalty in light of Respondent's ability to pay the penalty/ability to continue in business, any history of prior such violations by Respondent, the degree of Respondent's culpability, and such other matters as justice may require, including the Respondent's voluntary disclosure of violations, attitude during negotiations, and any other case-

specific facts that justify further reduction of the penalty. *Bednar Second Declaration* at ¶ 49. More specifically, as part of her Second Declaration, Ms. Bednar stated that Respondent had no history of such prior violations or an enhanced degree of culpability so no upward or downward adjustment was made to the penalty. *Id.* at ¶ 51. Additionally, Ms. Bednar considered, consistent with TSCA and the LBP Consolidated ERPP, whether an economic benefit component should be added to the proposed civil penalty and because she determined that the economic benefit to Respondent was not significant, an economic benefit component was not added to the proposed penalty. *Id*. at ¶ 52. Finally, Ms. Bednar stated that because Respondent did not engage the EPA in pre-filing negotiations prior to or after the filing of the Complaint, she had inadequate information to determine whether the penalty warranted a downward adjustment to reflect Respondent's ability to pay or continue in business. *Id*. at ¶ 50.

B. Analysis of Penalty Calculation

Rule 22.17(c) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(c), provides that, upon a finding of default by a Respondent, the relief proposed in a complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of proceeding or the statute authorizing the proceeding. Based upon the record of this case, an evaluation of the TSCA statutory factors with regard to Respondent and Respondent's violations, and in consideration of the ERPP, I have determined that the $44,680 penalty amount requested and as calculated by Complainant is appropriate and is not clearly inconsistent with regard to TSCA, the Residential Lead-Based Paint Hazard Reduction Act, or the RRP Rule.

The following sets forth my analysis of the penalty calculation for this case. This analysis is based upon a consideration of the statutory factors in light of the facts of this matter and the ERPP, which I find provides a rational, consistent and equitable methodology for applying the TSCA statutory factors to the facts and circumstances of a specific case.

1. Gravity-Based Penalty (Nature, Circumstance, Extent)

Count 1 – Failure to Obtain Initial Firm Certification - 40 C.F.R. § 745.81(a)(2)(ii)

Nature of Violation – I conclude that it is appropriate to characterize this requirement as chemical control in nature in that an initial certification is aimed at limiting exposure to and the risk presented by lead-based paint by ensuring that only certified firms perform renovations utilizing appropriate work practices. Lead in residential housing and child-occupied facilities remains the most important source of lead exposure for young children and pregnant women and providing information about the dangers from lead exposures and controlling exposures to lead is the focus of the *ERRP* at 14.

Circumstance Level – The record supports a finding that Respondent's failure to obtain an initial certification from EPA resulted in a medium probability of harm or impact to human health and the environment. As stated in the preamble for the Final RRP Rule:

> The Agency believes that firm certification is necessary for several reasons. First, certification is an important tool for the Agency's enforcement program. To become certified, a firm acknowledges their responsibility to use appropriately trained and

> certified employees and follow the work practice standards set forth in the final rule. This is especially important under this final rule, since the certified renovator is not required to perform or be present during all of the renovation activities. Under these circumstances, it is important for the firm to acknowledge its legal responsibility for compliance with all of the final rule requirements, since the firm both hires and exercises supervisory control over all of its employees. Should the firm be found to violate any requirements, its certification can be revoked, giving the firm a strong incentive to ensure compliance by all employees.

73 Fed. Reg. 21692, 21725-21726 (April 22, 2008).

Extent of Violation – Due to the fact that at the time of the renovation of the Property, it was unoccupied and no individual less than 18 years of age occupied or were present, I conclude that Respondent's violation posed a low potential for harm and find it appropriate to classify Respondent's violation of 40 C.F.R. § 745.81(a)(2)(ii) as an extent level of minor.

GBP for Count 1 – Based upon the above analysis, I conclude that a gravity-based penalty in the amount of $4,500 is appropriate for Respondent's violation of 40 C.F.R. §745.81(a)(2)(ii), failure to obtain an initial certification from EPA.

Count 2 – Failure to Distribute Information - 40 C.F.R. § 745.84(a)(1)

Nature of Violation – Regarding Respondent's violation of 40 C.F.R. § 745.84(a)(1), failure to provide EPA's Pamphlet prior to commencing renovations at the Property, I conclude that it is appropriate to characterize this requirement as hazard assessment in nature in that distribution of the EPA Pamphlet is directly intended to provide owners and occupants of target housing, among others, with information that will allow them to assess the risks presented by renovations and to take proper precautions to avoid exposure and hazards.

Circumstance Level – The record supports a finding that Respondent's failure to distribute the EPA Pamphlet to the owners prior to beginning the renovation activities resulted in a high probability of harm or impact to human health and the environment. The EPA Pamphlet "will better inform families about the risks of exposure to lead-based paint hazards created during renovations and promote the use of works practices and other health and safety measures during renovation activities . . . pamphlet gives information on lead-based paint hazards, lead testing, how to select a contractor, what precautions to take during the renovation, and proper cleanup activities. . ." 73 Fed. Reg. at 21715. By not providing such information to the owners of the Property, Respondent created a situation that posed a high probability of harm to human health.

Extent of Violation – Due to the fact that at the time of the renovation of the Property, it was unoccupied and no individual less than 18 years of age occupied or were present, I conclude that Respondent's violation posed a low potential for harm and find it appropriate to classify Respondent's violation of 40 C.F.R. § 745.84(a)(1) as an extent level of minor.

GBP for Count 2 – Based on the above analysis, I conclude that a gravity-based penalty in the amount of $2,840 is appropriate for Respondent's violation of 40 C.F.R. § 745.84(a)(1), failure to distribute the EPA Pamphlet prior to performance of a renovation.

Count 3 – Failure to Ensure Certified Renovator Assigned to Renovation - 40 C.F.R. § 745.89(d)(2)

Nature of Violation – Regarding Respondent's violation of 40 C.F.R. § 745.89(d)(2), failure of Respondent to ensure that a certified renovator was assigned to the renovation of the Property, I conclude that it is appropriate to characterize this requirement as chemical control in nature in that use of a certified renovator ensures that appropriate work practices are utilized during the course of a renovation, thereby limiting the exposure to and the risk presented by lead-based renovation activities.

Circumstance Level – The record supports a finding that Respondent's failure to utilize a certified renovator resulted in a medium probability of harm or impact to human health and the environment of the owners/occupants of the Property. In its rulemaking for the RRP Rule, EPA determined that "renovation, repair, and painting activities disturb lead-based paint [and] create lead-based paint hazards." 73 Fed. Reg. 21692, 21700. As a result, EPA required that certain work practice standards be utilized in connection with renovations of homes containing lead-based paint to minimize the potential for the creation of lead-based paint hazards. To ensure that these work-based practice standards are utilized on such renovations, EPA required in the RRP that firms utilize certified renovators.

> The certified renovator is responsible for ensuring compliance with the work practice standards of this final regulation. The certified renovator must perform or direct certain critical tasks during the renovation, such as posting warning signs, establishing containment of the work area, and cleaning the work area after the renovation. These and other renovation activities may be performed by workers who have been provided on-the-job training in these activities by a certified renovator. However, the certified renovator must be physically present at the work site while signs are being posted, containment is being established, and the work area is being cleaned after the renovation to ensure that these tasks are performed correctly.

73 Fed Reg. 21692, 21703 (2008). By failing to have a certified renovator present during the renovation of the Property, Respondent failed to ensure that appropriate work-practices were utilized during the course of the renovation and, thereby, created a medium probability of harm to human health and the environment.

Extent of Violation - Due to the fact that at the time of the renovation of the Property, it was unoccupied and no individual less than 18 years of age occupied or were present, I conclude that Respondent's violation posed a low potential for harm and find it appropriate to classify Respondent's violation of 40 C.F.R. § 745.89(d)(2) as an extent level of minor.

GBP for Count 3 – Based upon the above analysis, I conclude that a gravity-based penalty in the amount of $4,500 is appropriate for Respondent's violation of 40 C.F.R. § 745.89(d)(2), failure to utilize a certified renovator.

Count 4 - Failure to Post Signs - 40 C.F.R. § 745.85(a)(1)

Nature of Violation – Regarding Respondent's violation of 40 C.F.R. § 745.85(a)(1), failure to post warning signs and caution tape, I conclude that it is appropriate to characterize this requirement as hazard assessment in nature because these signs must be posted prior to

beginning the renovation and must remain in place until the renovation and post-renovation cleaning verification have been completed. ERRP at A-1 and fn. 48. The signs are intended to provide information clearly defining the work area and warning owners, occupants and other persons not involved in renovation activities to remain outside the work area.

Circumstance Level – The record supports a finding that Respondent's failure to post warning signs prior to beginning the renovation activities resulted in a high probability of harm or impact to human health and the environment. Posting warning signs allows individuals to make educated decisions about whether to enter the premises and to adequately evaluate the risks of such activity.

Extent of violation – Due to the fact that at the time of the renovation of the Property, it was unoccupied and no individual less than 18 years of age occupied or were present, I conclude that Respondent's violation posed a low potential for harm and find it appropriate to classify Respondent's violation of 40 C.F.R. § 745.85(a)(1) as an extent level of minor.

GBP for Count 4 – Based upon the above analysis, I conclude that a gravity-based penalty in the amount of $2,840 is appropriate for Respondent's violation of 40 C.F.R. § 745.85(a)(1), failure to post warning signs.

Counts 5 through 9 – Work Practice Violations

Counts 5 through 9 of the Complaint address Respondent's violations of certain work practice requirements regarding the renovation performed at the Property. Specifically, the Counts are:

Count 5 – Failure to Remove From or Cover Objects From Work Area - 40 C.F.R. § 745.85(a)(2)(i)(A)
Count 6 – Failure to Close All Windows and Doors - 40 C.F.R. § 745.85(a)(2(i)(C)
Count 7 – Failure to Cover Floor Surface - 40 C.F.R. § 745.85(a)(2)(i)(D)
Count 8 – Failure to Contain Waste - 40 C.F.R. § 745.85(a)(4)(i)
Count 9 – Failure to Waste is Stored Under Containment - 40 C.F.R. § 745.85(a)(4)(ii)

Nature of Violation – Regarding Respondent's violations of Counts 5 through 9, I conclude that it is appropriate to characterize these requirements as chemical control in nature because they require renovators, like Respondent, to utilize work practices that are designed to limit exposure and risk presented by lead-based paint by controlling how lead-based paint is handled by renovators.

Circumstance Level – The record supports a finding that Respondent's failure to comply with the work-practice standards as set forth in Counts 5 through 9 of the Complaint posed a high probability of impact or harm to human health and the environment. EPA determined that renovation, repair, and painting activities that disturb lead-based paint create lead-based paint hazards. 73 Fed. Reg. at 21699 and 21700. As a result, the Agency concluded "that the training, containment, cleaning, and cleaning verification requirements" were necessary to "achieve the goal of minimizing exposure to lead-based paint hazards created during renovation, remodeling and painting activities." 73 Fed. Reg. at 21700.

Extent of Violation - Due to the fact that at the time of the renovation of the Property, it was unoccupied and no individual less than 18 years of age occupied or were present, I conclude that Respondent's violations warrant an extent level of minor.

GBP for Counts 5 through 9 – Based upon the above analysis, I conclude that the following gravity-based penalties are appropriate for Respondent's violations:

Count 5	$6,000
Count 6	$6,000
Count 7	$6,000
Count 8	$6,000
Count 9	$6,000

The total Gravity-Based Penalty for Counts 1 through 9 is $44,680.

2. Upward or Downward Adjustments

Complainant does not seek and I find that the record does not warrant any upward or downward adjustment to the gravity-based penalty with respect to the factors of Respondent's history of prior violations, Respondent's culpability or such other matters as justice may require. As represented by the Complainant, no upward adjustment to the penalty was appropriate because Respondent had no history of prior such violations or an enhanced degree of culpability. Bednar Second Declaration at ¶ 51. Complainant also concluded as part of its penalty calculation that Respondent did not incur any significant economic benefit as a result of its non-compliance with TSCA. *Id*. at ¶ 52. I find no evidence in the record to warrant either an upward or downward adjustment to the proposed penalty based upon the factor "other matters as justice may require."

Complainant stated that because Respondent did not engage the Agency in pre-filing negotiations prior to or after the filing of the Complaint, it had inadequate information to determine whether the penalty warranted a downward adjustment to reflect Respondent's ability to pay or continue in business. *Bednar Second Declaration* at ¶ 50. It has been consistently held that a respondent's ability to pay a proposed penalty may be presumed until it is put at issue by respondent. *See In re James Ikegwu and Martha Ikegwu*, Docket TSCA-03-2011-0217 (RJO Decision), April 2014; *In re Spitzer Great Lakes*, 9 E.A.D. 302, 319-321 (EAB 2000); *In re: New Waterbury, Ltd*., 5 E.A.D. 529, 541 (EAB 1994). This stems from the premise that since the complainant's ability to obtain financial information about a respondent is limited at the outset of the case, a respondent's ability to pay is presumed until respondent puts it at issue. Furthermore, where a respondent does not raise its ability to pay as an issue in its answer or does not produce any evidence to support such a claim, a complainant may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived. *In re Spitzer Great Lakes*, 9 E.A.D. 302, 319-321 (EAB 2000). Here, Respondent neither filed an answer nor submitted any financial documents for consideration of an inability to pay claim. As a result, I find that a downward adjustment to the gravity-based penalty component is not warranted.

CONCLUSION

As noted above, the Consolidated Rules provide that upon issuing a default order, "[t]he relief proposed in the complaint or the motion for default order shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or [the statute authorizing the proceeding]." 40 C.F.R. § 22.17(c). I find that Complainant's rationale for the penalty calculation is neither clearly inconsistent with the record nor clearly inconsistent with TSCA. Accordingly, for the foregoing reasons, and pursuant to 40 C.F.R. § 40.17(c), I will assess the $44,680 penalty requested in the Complaint and Motion for Default.

ORDER

Pursuant to the Consolidated Rules of Practice, 40 C.F.R. Part 22, including §§ 22.17 and 22.27, Complainant's Motion for Default is **GRANTED** and Respondent is **ORDERED** as follows:

1. Respondent, Superior Restoration & Construction, LLC, is assessed a civil penalty in the amount of $44,680 and ordered to pay the civil penalty as directed in this Order.

2. Respondent shall pay the civil penalty to the "United States Treasury" within thirty (30) days after this Default Order has become final. Payment by Respondent shall reference Respondent's name and address and the EPA Docket Number of this matter. Respondent may use any of the following methods for purposes of paying the penalty:

   a. All payments made by check and sent by regular U.S. Postal Service Mail shall be addressed and mailed to:
      United States Environmental Protection Agency
      Fines and Penalties
      Cincinnati Finance Center
      P.O. Box 979077
      St. Louis, MO 63197-9000
      Contact: Customer Service (513) 487-2091

   b. All payments made by check and sent by private commercial overnight delivery service shall be addressed and sent to:
      U.S. Bank
      1005 Convention Plaza
      Mail Station SL-MO-C2GL
      ATTN Box 979076
      St. Louis, MO 63101
      Contact: Natalie Pearson
      (314) 418-4087

c. All payments made by electronic wire transfer shall be directed to:
Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

d. All electronic payments made through the Automated Clearinghouse (ACH), also known as REX or Remittance Express), shall be directed to:
PNC Bank
808 17th Street, NW
Washington, DC 20074
ABA = 051036706
Transaction Code 22 – checking
Environmental Protection Agency
Account 310006
CTX Format
Contact: Jesse White (301) 887-6548

e. On-Line Payment Option: WWW.PAY.GOV
Enter "SFO 1.1" in the search field. Open form and complete required fields. The pay.gov system allows credit card payments up to $24,999.99 or ACH payments of any amount.

3. At the time payment is made, Respondent shall mail copies of any check or written notification confirming electronic fund transfer or online payment to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, KS 66219

and

Jared Pessetto
Office of Regional Counsel
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, KS 66219

4. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

5. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order forty-five (45) days after it is served upon the Complainant and Respondent and without further proceedings unless: (1) a party moves to reopen a hearing; (2) a party appeals this Initial Decision to the EPA Environmental Appeals Board within thirty (30) days of service of the Initial Decision, in accordance with 40 C.F.R. § 22.30; (3) a party moves to set aside the Default Order that constitutes this Initial Decision; or (4) the Environmental Appeals Board elects to review the Initial Decision on its own initiative. See 40 C.F.R. § 22.27(c).

6. Under 40 C.F.R. § 22.30(c), any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within thirty (30) days after this Initial Decision is served upon the parties.

IT IS SO ORDERED.

KARINA BORROMEO

Digitally signed by KARINA BORROMEO
Date: 2022.09.19 08:29:24 -05'00'

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Date

Karina Borromeo
Regional Judicial Officer/Presiding Officer